

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0028-EXEC

In the Matter of the Petition for Reconsideration of

City of Carlsbad

Permit 5228 (Application 8205)

SOURCE: San Luis Rey River Subterranean Stream

COUNTY: San Diego

**ORDER DENYING RECONSIDERATION OF ORDER DENYING
PETITION FOR EXTENSION OF TIME AND PETITION FOR CHANGE**

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

The City of Carlsbad (Permittee) petitions the State Water Resources Control Board (State Water Board) for reconsideration of the Division of Water Rights' (Division) order denying an extension of time and change petition for Permit 5228. Permittee asks the State Water Board to reconsider and instead approve an extension of time on Permit 5229 until December 31, 2019 and also approve the Petition for Change. Permittee also requests that the State Water Board hold a public hearing on the petition for reconsideration, as permitted by section 844 of title 23 of the California Code of Regulations. Following a review of the record, the Executive Director finds that the order was appropriate and proper and denies Permittee's petition for reconsideration.

2.0 RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;

- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law. (Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (*Id.*, § 770, subd. (a)(1).)

Alternatively, after review of the record, the State Water Board also may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration falls within the scope of the authority delegated under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedures Act. (Board Order WR 96-1, at p. 17, fn. 11.)

3.0 FACTUAL BACKGROUND

The State Water Board issued Permit 5228 to Permittee on October 7, 1938. The permit required that Permittee complete construction and put the water to beneficial use by December 1, 1948. Permittee subsequently received eight extensions of time. The most recent extension was approved on June 18, 1991.¹ It extended the date to complete full, beneficial use to December 31, 1999. On October 20, 1999, Permittee submitted a petition for another 5-year extension of time. The petition stated that no water had been used under the permit.

Division staff inspected the project on April 15, 2004 and reported that Permittee does not divert water under the permit since the water quality is too poor to be used for municipal purposes. The most recent record of use was in 1984, when 1.5 acre-feet of water were used for pump

¹ The order denying the time extension incorrectly listed the date of approval as October 25, 1999.

and casing maintenance. On April 10, 2008, the State Water Board denied Permittee's Petition for Extension of Time and Change Petition on Permit 5228.

4.0 DISCUSSION

Permittee argues for reconsideration under California Code of Regulations, title 23, sections 768(a) and (b), based on arguments that the denial was not supported by substantial evidence and that it denied Permittee its rights to due process and a fair hearing. (Permittee's Petition for Reconsideration, p.1 at 10-12.)

To the extent the petition is based on section 768(a), it fails to raise substantial issues related to the causes for reconsideration. The holding of a hearing on a petition for time extension is at the discretion of the State Water Board. (Cal. Code Regs., tit. 23, § 681.) Additionally, the State Water Board did not prevent Permittee from submitting evidence showing good cause for granting the petition, and the facts behind the denial are not in dispute. Permittee's submittals were reviewed and considered, as evidenced by reference to Permittee submittals throughout the denial order.

To the extent the petition is based on section 768(b), Permittee asserts that the order is not supported by substantial evidence because the denial order did not take into consideration

- a) the unique drought conditions in the Mission Basin of the San Luis Rey River (Mission Basin);
- b) the unique water quality conditions in the Mission Basin;
- c) the unique situation associated with the previous extensions of time;
- d) Permittee's involvement in regional efforts to develop a plan for the Mission Basin; and
- e) Permittee's leading involvement in the development of a crucial water supply project of statewide and regional significance.

Before granting a time extension, good cause must be shown. (Wat. Code § 1398(a).) Good cause requires a "satisfactory showing that a diligent effort has been made to complete the application within the time previously allowed and that failure to do so has been occasioned by obstacles which could not reasonably be avoided. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay." (Cal. Code Regs., tit. 23, § 681.)

Much of Permittee's argument, including its involvement in other projects during the last extension period, falls into the category described in section 681 as not accepted as good cause for delay, and as such is not applicable to the questions at issue in this reconsideration.

More importantly, Permittee does not challenge whether there was substantial evidence supporting denial of the time extension. Permittee merely avers that, "the Order does not take into consideration substantial evidence that would support granting the Petition." (p. 1 at 16-17.)

While it may or may not be true that there would have been substantial evidence to support granting the time extension order, that is not the burden Permittee must meet on reconsideration. California Code of Regulations, title 23, section 768(b) requires a showing that "the decision or order is not supported by substantial evidence." Arguing that the Board should have given greater weight to factors supporting an extension, as the Permittee does in its Memorandum of Points and Authorities, is not the same as showing that there was not substantial evidence supporting denial.

The order denying the time extension contains findings regarding the extended period of time that Permittee had to perfect its right and Permittee's failure to show that satisfactory progress would be made if an extension were granted. The petition for reconsideration does not dispute these findings, but instead demands that greater weight be given to other factors that may influence granting a time extension. Presenting evidence that would support a time extension is not adequate to show the order denying the extension "is not supported by substantial evidence."

5.0 CONCLUSION

The petition submitted by Permittee fails to raise substantial issues related to the causes for reconsideration. The State Water Board finds that the Division's order denying the petition was appropriate and proper.

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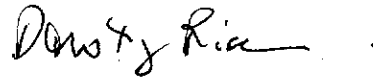
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ORDER

IT IS HEREBY ORDERED that the City of Carlsbad's petition for reconsideration is denied.

Dated: **JUN 20 2008**



Dorothy Rice
Executive Director