

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009 – 0057 - EXEC

In the Matter of the Petitions of Templeton Community Services District for
Reconsideration of Division of Water Rights Order of June 19, 2009 regarding
Petition for Change of Water Right Permits 8964 and 20785
(Applications 12526 and 30299, respectively)

TEMPLETON COMMUNITY SERVICES DISTRICT
Petitioner and Permittee

SOURCE: Salinas River
COUNTY: San Luis Obispo

**ORDER GRANTING RECONSIDERATION AND MODIFYING JUNE 19, 2009
DIVISION OF WATER RIGHTS ORDER AND AMENDED PERMITS**

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

Templeton Community Services District (District) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) Order that approved the District's Change in Point of Diversion, corrected coordinates of an existing point of diversion and amended Permit 8964 and Permit 20785.

The State Water Board Executive Director finds that the petition raises substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768 and grants the District's petition for reconsideration. This order modifies the June 19 Order and directs the Division to issue amended permits consistent with this order.

2.0 APPLICABLE LAW

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

- (a) irregularity in the proceedings or abuse of discretion;
- (b) the decision or order is not supported by substantial evidence;
- (c) there is relevant evidence, which in the exercise of reasonable diligence, could not have been produced; or
- (d) an error 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. (Cal. Code Regs., tit. 23, § 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. 2007-0057 delegates to the Executive Director the authority to supervise the activities of the State Water Board. The Executive Director's consideration of a petition for reconsideration falls within the scope of authority delegated under Resolution No. 2007-0057. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the order, or take other appropriate action.

3.0 FACTUAL BACKGROUND

On February 14, 2008, the District petitioned to add a new point of diversion (the "Creekside" well) to License 4829, Permit 8964 and Permit 20785.¹ The District completed environmental review for the project in 2006 pursuant to the California Environmental Quality Act. The District concluded there were no adverse water resource related effects associated with the project because the project would involve adding a new point of diversion 2,100 feet from an existing point of diversion and the diversion would be from the Salinas River underflow. The District circulated a Mitigated Negative Declaration, and the State Water Board and Department of Fish and Game (DFG) submitted comments. The District certified the Mitigated Negative Declaration on February 7, 2006.

The State Water Board publicly noticed the change petition on May 15, 2008. The Board received a timely protest to the petition from Defenders of Wildlife (Defenders). The protest was

¹ The District's petition for reconsideration concerns only Permits 8964 and 20785.

dismissed, and on August 15, 2008, Defenders submitted a timely petition for reconsideration of the Division's decision not to accept the protest. In an order issued April 24, 2009, the Executive Director denied the request for reconsideration.

On June 19, 2009, the Division issued an Order approving the District's change petition and issued Amended Permits 8964 and 20785. On July 15, 2009, the State Water Board received a petition from the District requesting reconsideration of the Order.

At issue are several new permit terms and conditions that were included in the amended permits. The District claims: 1) substantial evidence does not support the inclusion of the terms; 2) the State Water Board committed an error in law by including the terms; and 3) there is relevant evidence that the District could not have produced prior to issuance of the order because it had no notice the terms would be included in its permits.

The District requests that the State Water Board take the following actions:

1. Revise Term 1 of the June 19 Order and restore the District's pre-existing "Platz" well point of diversion and reinstate that point of diversion in Permits 8964 and 20785.
2. Delete Term 6 of the June 19 Order requiring preparation of an Urban Water Management Plan, and delete related Term 8 in Amended Permit 8964 and Term 7 in Amended Permit 20785. The District claims it is not large enough to require an Urban Water Management Plan.
3. Delete Term 9 in Amended Permit 8964. This term requires measurable flow in the Salinas River at United States Geological Survey (USGS) Gage No. 11147500 prior to and during diversion.
4. Delete Term H from Amended Permits 8964 and 20785. Term H requires Permittee to consult with DFG and obtain a Streambed Alteration Agreement or waiver thereof for work in the waterway. The District claims that the new Creekside point of diversion is not in the Salinas River streambed, and that DFG did not indicate that a Streambed Alteration Agreement was necessary when it commented on the District's Mitigated Negative Declaration.

In support of its petition, the District included: 1) a copy of a 1972 State Water Board Order that discusses Permit 8964; 2) USGS surface water data for Gage No. 11147500; 3) the District's

June 2009 "Water and Sewer Report"; 4) the District's annual Water Quality Report; and 5) a declaration from the District's General Services Manager.

4.0 DISCUSSION

4.1 Restoration of "Platz" Well Point of Diversion to Amended Permits 8964 and 20785

In issuing Amended Permits 8964 and 20785, the Division deleted a point of diversion known as the "Platz" well based on information obtained from the District that the well diverts percolating groundwater not under the water right permitting jurisdiction of the State Water Board. The District claims this was in error. In a Declaration from its General Services Manager, the District asserts that it has several wells designated as "Platz" wells.² According to the District, some of the "Platz" wells divert percolating groundwater, while at least one "Platz" well diverts Salinas River underflow. The District has reviewed its records and has concluded that the point of diversion that was removed from Permits 8964 and 20785 was not a percolating groundwater well but rather a well that diverts Salinas River underflow. The District claims that it did not intend to eliminate a point of diversion that diverts underflow.

There is not substantial evidence in the record showing that the deleted "Platz" well diverts percolating groundwater or that the District requested removal of a valid point of diversion that diverts Salinas River underflow. Accordingly, the June 19 Order should be modified to reinstate the "Platz" well that diverts Salinas River underflow, and Amended Permits 8964 and 20785 should be modified to include this well as an authorized point of diversion.

4.2 Requirement for an Urban Water Management Plan

To promote water conservation, the June 19 Order requires the District to develop an Urban Water Management Plan pursuant to Water Code section 10610 et seq. This is standard permit condition 29A. The District claims that the Urban Water Management Planning Act (Act) (Wat. Code, §§ 10610-10656) does not apply to the District.

The Act requires urban water suppliers with more than 3,000 customers, or that supply more than 3,000 acre-feet (af) of water annually, to develop an Urban Water Management Plan. (Wat. Code, § 10617.) Such a plan includes an analysis of water conservation, evaluations of

² According to the District Manager, wells are named based on property ownership. Because several wells may be located on the same property there may be several wells with the same name.

groundwater basins and future water supply projects, and projections of water use by lower-income households.

The District asserts it is not subject to the Act because it does not have 3,000 customers and does not supply more than 3,000 af of water annually. The District submitted a water and sewer report dated June 19, 2009, showing 2,592 water customers for the month of June 2009. The District also submitted a copy of its annual water quality report. That document shows that the District produced 570,000,000 gallons of water in 2008 equaling approximately 1,740 af of water. This evidence could not have been provided prior to the issuance of the June 19 Order because the District did not know that the Division was including a term in Permits 8964 and 20785 requiring the development of an Urban Water Management Plan.

The record does not contain substantial evidence showing that the District has over 3,000 customers or supplies over 3,000 af of water annually. The evidence submitted by the District shows that the District supplies water at amounts below the triggering thresholds established by the Act. The June 19 Order should be amended to delete term 6, and related terms 7 and 8 should be removed from Amended Permits 20785 and 8964.

It is apparent however, that the District is expanding its water use and it is likely that the District will supply water to more than 3,000 customers in the future. Given the critical state of water resources in the state and region, the District's permits should be amended to require an Urban Water Management Plan when and if the District reaches more than 3,000 customers or supplies over 3,000 af of water annually. Amended Permits 8964 and 20785 should be amended to require the District to notify the State Water Board when it exceeds 3,000 customers or supplies over 3,000 af of water annually. No later than 12 months from reaching this threshold, the District should consult with the Division of Water Rights and submit an Urban Water Management Plan to the State Water Board

Permit 20785 originally included standard condition 29B, which requires that entities supplying water for municipal purposes, or for domestic use within subdivisions, develop and implement a water conservation plan or actions. Condition 29B applies if these entities supply water to 3,000 or fewer customers or supply 3,000 or less acre-feet of water annually and seek an appropriation which, combined with any existing appropriative rights serving the same place of use, totals 200 or more acre-feet of water annually. The term was replaced with

condition 29A, which is described above. Condition 29B shall be restored to Permit 20785 and also added to Permit 8964.

4.3 "Live Stream" Requirement in Amended Permit 8964

Term 9 in Amended Permit 8964 states in relevant part, "Water shall be diverted under this permit only when there is measurable surface flow in the Salinas River at the United States Geological Survey streamflow gage at Paso Robles (Gage No. 11147500)." While Permit 20785 had previously contained this term, Permit 8964 did not contain the term.³

The District argues that the June 19 Order did not contain findings that would justify the inclusion of the term. The District claims the term will severely restrict its water supply because there is no measurable flow in the Salinas River at Gage No. 11147500 during a significant portion of the diversion season. In support of this claim, the District included streamflow records from 1940 to 2008 and a copy of a 1972 Board Order that discusses Permit 8964.

The 1972 Order concerned a series of permits held by the Army Corps of Engineers, City of San Luis Obispo, City of Paso Robles, San Luis Obispo County Water Works District No. 6 and San Luis Obispo County Water Works District No. 5. San Luis Obispo County Water Works District No. 5 was the predecessor to the District and at the time the holder of Permit 8964.

The 1972 Order primarily concerned conditions that should be applied to water right permits associated with Salinas Dam and Reservoir. In the 1972 Order, the Board noted that downstream rights could be infringed if certain upstream rights, namely those rights under Permit 5881 and 5882 that authorized collection at Salinas Dam, were not regulated properly. The Board stated, "As evident from the method of operation of Salinas Reservoir, insufficient consideration has been given to downstream prior rights..." and "shortages of water have been experienced by downstream users during years when water was collected to storage in the Salinas Reservoir."

Because of downstream shortages, the Board imposed conditions on upstream permittees that would provide for sufficient supplies for downstream water users. The Board stated that operation of the Salinas Dam would be determined not to "reduce the natural recharge of water

³ Permit 20785 has a limited diversion season of April 1 to May 15 and a maximum diversion amount of 133.7 af, whereas Permit 8964 covers a longer diversion season (October 1- April 1) and has a maximum diversion amount of 500 af.

into the Salinas River when there exists a visible surface flow in the Salinas River between Salinas Reservoir and confluence of the Nacimiento River.”⁴

The Board did not specifically discuss the effect of upstream diversions on Permit 8964, but in rejecting the request by the District’s predecessor for an extension of time to develop a storage right the Board stated, “clarifying permit terms on the operation of the reservoir...should materially improve the water supply of [downstream] communities.”

The District argues that this discussion is evidence that the Board imposed a “live stream” requirement on upstream Salinas River permittees for the District’s benefit, and that the June 19, 2009 Order contradicts the Board’s intent in 1972. It may be true that the Board anticipated benefits to downstream users when it issued the 1972 Order, but that does not limit the Board’s ability to impose a similar “live stream” requirement on the District. Evidence in the record suggests that downstream diversions have a possible impact on public trust resources. The National Marine Fisheries Service has designated the Salinas River and its tributaries as critical habitat for Steelhead Trout (Steelhead) where spawning fish can still migrate upstream. DFG advised Templeton that the Salinas River supports federally listed species and state species of special concern.

At this point however, there is not substantial evidence in the record showing what amount of surface flow, if any, at Gage No. 11147500 will benefit Steelhead, other federally listed species, or state species of special concern.⁵ Accordingly, Term 7 in Permit 8964 that requires measurable surface flow at Gage No. 11147500 prior to diversions should be modified. Given the concern over public trust resources in the Salinas River, and the absence of data on the effect of the District’s diversions on public trust resources, it is appropriate to require the District to submit a study that examines the effects of its diversions on public trust resources.

The Division is directed to delete the requirement that there be measurable surface flow at Gage No. 11147500 prior to diversion under Permit 8964. Amended Permit 8964 should be modified to include a new term requiring the District to submit a study to the Division by June 1, 2011 that examines the effects of its diversions on public trust resources under Amended Permit 8964. The study should address whether a measurable flow at Gage No.

⁴ Gage No. 11147500 is located in this stretch of the Salinas River.

⁵ Surface flow data submitted by the District for Gage No. 11147500 show that surface flow varies considerably. For example, mean monthly surface flow during the month of December was zero cubic feet per second in years 1974 through 1981 but jumped to almost 600 cubic feet per second in December 1982.

11147500 between October 1 and April 1 will benefit Steelhead, other federally listed species, or state species of special concern. The study shall be developed after consultation with the Division and approved by the State Water Board Deputy Director for Water Rights, prior to implementation. Upon completion of the study, the State Water Board may exercise its continuing authority to require additional terms and conditions in Amended Permit 8964 to protect Steelhead or other public trust resources in the Salinas River.

4.4 Streambed Alteration Agreement

Term H in Amended Permits 8964 and 20785 requires the District to obtain a Streambed Alteration Agreement from DFG, or a waiver of such an agreement, before it diverts, stores, or uses water under the permits. Term H is a standard Division term that is included in all water rights permits. (Cal Code Regs., tit. 23, § 780.) The District contends the term is unnecessary because its Creekside well is 200 feet west of the Salinas River channel.

Fish and Game Code section 1602 requires an entity to notify DFG of any proposed activity that may substantially modify a river, lake or stream. Notification is required by any person, business, state or local entity if it proposes an activity that will:

- 1) substantially divert or obstruct the natural flow of any river, lake or stream;
- 2) substantially change or use any material from the bed, channel, or bank of any stream, or lake; or
- 3) deposit or dispose of debris, waste or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream or lake.

(Fish and Game Code, § 1602, subd. (a).)

The District claims that when it circulated a Negative Declaration for the project, DFG did not indicate that a Streambed Alteration Agreement was necessary. The fact that DFG did not state that it would require a Streambed Alteration Agreement when it commented on the District's Negative Declaration is not evidence that an agreement is unnecessary. Irrespective of whether the term is needed to cover installation of the new well, the term may be needed to cover streambed or rehabilitation work that the District may conduct in the future. A Streambed Alteration Agreement may also be necessary for well operations, even if it is not needed for installation. The new Creekside well is capable of diverting the District's entire water right. Adding the new point of diversion is an activity that may "substantially divert or obstruct" the natural flow of the river. Inclusion of the term in Amended Permits 8964 and 20785 is

appropriate. If DFG determines that the well does not require a Streambed Alteration Agreement, it may advise the District accordingly.

Because the District has been diverting water as authorized by its permits, however, it was inappropriate to include in amendments to those permits a term that effectively requires the District to cease diversions until it obtains a Streambed Alteration Permit or waiver, without providing a reasonable period in which to comply. The Division should modify Term H in Amended Permits 8964 and 20785 to allow the District 180 days from the date of issuance of this order to provide evidence to the Division that it has either obtained a Streambed Alteration Agreement from DFG or a waiver from DFG stating that an agreement is unnecessary.

5.0 CONCLUSION

The petition and all supplemental information submitted by the District raise substantial issues related to the causes for reconsideration. Accordingly, the State Water Board finds that the June 19, 2009 Order and Amended Permits 8964 and 20785 should be modified consistent with the findings made herein.

ORDER

IT IS HEREBY ORDERED that the District's petition for reconsideration is granted, and the June 19, 2009 Division Order Approving the Change in Point of Diversion and Correcting Coordinates of Existing Point of Diversion and Amending Permits shall be modified as follows:

1. The June 19, 2009 Order is amended to include the "Platz" well point of diversion. The point of diversion at SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 9 within T27S, R12E, MDB&M that diverts Salinas River underflow is added to the permitted points of diversion in Amended Permits 8964 and 20785.
2. Term 6 in the June 19 Order requiring the District to submit an Urban Water Management Plan is deleted. Related Term 8 from Amended Permit 8964 and Term 7 from Amended Permit 20785 are deleted. The Order is amended to require the District to notify the Division of Water Rights when it exceeds 3,000 customers or supplies over 3,000 acre-feet of water annually. No later than 12 months following reaching this threshold, the District shall consult with the Division of Water Rights and submit an Urban Water Management Plan.

Amended Permits 8964 and 20785 are modified to include the following term:

When and if the permittee exceeds 3,000 customers, or supplies more than 3,000 acre-feet of water annually, the permittee shall, after notification to the Division of Water Rights, develop an Urban Water Management Plan in accordance with the Urban Water Management Planning Act (Wat. Code, §§ 10610-10656.) After consultation with the Division of Water Rights, such plan shall be submitted to the State Water Board no later than 12 months from the time permittee exceeds 3,000 customers or supplies more than 3,000 acre-feet annually of water.

3. The June 19, 2009 Order is amended to include the following condition.

Permittee shall consult with the Division of Water Rights and develop and implement a water conservation plan or actions. The proposed plan or actions shall be presented to the State Water Resources Control Board for approval within one year from the date of this amended permit or such further time as, for good cause shown, may be allowed by the Board. A progress report on the development of a water conservation program may be required by the Board at any time within this period.

All cost-effective measures identified in the water conservation program shall be implemented in accordance with the schedule for implementation found therein.

(0000029B)

4. Term H in Amended Permits 8964 and 20785 is modified to state:

Effective 180 days of the issuance of this amended permit, no work shall commence and no water shall be diverted, stored or used under this permit until a copy of a stream or lake alteration agreement between the State Department of Fish and Game and Permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of this agreement is the responsibility of Permittee. If a stream or lake agreement is not necessary for this permitted project, Permittee shall provide the Division of Water Rights a copy of a waiver signed by the State Department of Fish and Game.

5. Term 9 in Amended Permit 8964 is deleted. The Division shall reissue Amended Permit 8964 with the following term:

By June 1, 2011, Permittee shall submit a study to the Division of Water Rights that examines whether its diversions under Amended Permit 8964 have an adverse impact on federally listed species or state species of special concern on the Salinas River. Specifically, the study shall address whether a measurable surface flow at United States Geological Service Gage No. 11147500 between October 1 and April 1 will benefit Steelhead Trout or any federally listed species or state species of special concern. The scope of the study shall be determined after consultation with the State Water Board Deputy Director for Water Rights and shall be approved by the Deputy Director prior to implementation. Any study should evaluate impacts to public trust resources during various water year types. The State Water Board reserves jurisdiction to impose additional terms and conditions in Amended Permit 8964 to protect Steelhead Trout or other federally listed species or state species of special concern.

9.17.09
Dated

Dorothy Rice
Dorothy Rice
Executive Director