

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0065-EXEC

In the Matter of Petition for Reconsideration of
Kenneth W. and Janet L. Rosenthal
Regarding Order Issuing Permits 21240 and 21241

ORDER GRANTING RECONSIDERATION AND AMENDING PERMITS

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On July 23, 2009, the Division of Water Rights (Division) issued Permits 21240 and 21241 (Applications 30495 and 30496, respectively) to Kenneth W. and Janet L. Rosenthal (Petitioners), along with an Order Approving Issuance of Permits (Order). By letter dated August 24, 2009, Petitioners filed a petition for reconsideration, which was received on August 24, 2009. Petitioners request that the State Water Resources Control Board (State Water Board or Board) modify the Order issued July 23, 2009, and Permits 21240 and 21241.²

With this order, the Executive Director amends Permits 21240 and 21241 and the Order issuing them.

¹ 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 petitions for reconsideration of an order issuing permits 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, or set aside or modify the order.

² The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

2.0

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs., tit. 23, § 768.)³ The legal bases for reconsideration are (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (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) error in law. (*Ibid.*)

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 may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0

Kenneth W. and Janet L. Rosenthal filed Applications 30495 and 30496 with the Division on November 27, 1995. Application 30495 requests direct diversion of 2.99 cubic feet per second (cfs) from two unnamed streams, and 1 cfs from Hoodoo Creek, with a combined diversion limit of 2.99 cfs. The annual diversion limit from all sources combined is 25 acre-feet per annum (afa), for frost protection of 47 acres of vineyard.

Application 30496 requests collection to storage of 42.6 afa in four existing reservoirs from the same sources as listed in Application 30495 for irrigation, frost protection, recreation and fire protection of 47 acres of vineyard.

The Division noticed Applications 30495 and 30496 on February 1, 2002. Protests were received from the United States Bureau of Reclamation (USBR); Solano County Water Agency

³ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

(SCWA); California Sportfishing Protection Alliance (CSPA); Luchetti Children's Trust (Luchetti); Dennis Reynolds; California Department of Fish and Game (DFG); and Don Strachan. The protest filed by Don Strachan was not accepted.

The protests filed by USBR and SCWA were conditionally dismissed on March 1, 2002, based on inclusion of a standard permit term required by Order WR 96-002 in any permits issued.

On May 13, 2009, the Division advised CSPA that its protest concerns appeared to be resolved based on the Mitigated Negative Declaration issued pursuant to the California Environmental Quality Act (CEQA). CSPA was required to submit information by June 12, 2009 demonstrating that the proposed mitigation measures are inadequate or the protest would be cancelled pursuant to Water Code section 1335. The Division did not receive a timely response, and the CSPA protest was therefore cancelled.

On May 13, 2009, the Division advised DFG that its protest concerns appeared to be resolved based on the Mitigated Negative Declaration issued pursuant to CEQA, and by incorporation of a reduced diversion season. DFG was required to submit information by June 12, 2009 demonstrating that the proposed mitigation measures are inadequate or the protest would be cancelled pursuant to Water Code section 1335. The Division did not receive a timely response, and the DFG protest was therefore cancelled.

On May 19, 2009, Luchetti advised the Division that its protest was resolved and should be dismissed, provided that terms are included in any permits which (a) recognize Luchetti's prior right pursuant to licensed Application 3797, and (b) require a bypass flow of 1.88 cfs on Hoodoo Creek. These terms have been included in Permits 21240 and 21241.

4.0 DISCUSSION

Petitioners suggest that there are several inconsistencies in Permits 21240 and 21241 and the Order.⁴ First, Petitioners request the addition of language in paragraph 10 of Permit 21240 and

⁴ Because the corresponding paragraph numbers in the Order and the permits themselves are different, for ease of readability, the body of this order will reference only the paragraph numbers in the permits themselves. The changes made herein apply to the Order as well as the permits. For reference purposes, paragraph 10 of Permit 21240 and paragraph 13 of Permit 21241 correspond with paragraph 1 of the mitigation measures/permit terms section, beginning on page 2 of the Order.

paragraph 13 of Permit 21241 clarifying that no water shall be diverted “from Point of Diversion 4 (Hoodoo Creek)” (POD 4) under the permits until an approved measuring device is in place. Petitioners would like similar language added to clarify that the device and location must be satisfactory to the Deputy Director for Water Rights before any construction “at Point of Diversion 4 (Hoodoo Creek)” is undertaken. Petitioners request these changes because they state that bypass compliance is only applicable to POD 4. Petitioners also request this change with regard to the Compliance Plan requirement in paragraph 11 of Permit 21240 and paragraph 14 of Permit 21241.

As currently issued, the permits do not authorize Permittee to divert water “until Permittee has installed a device in Hoodoo Creek, satisfactory to the State Water Board, which is capable of measuring bypass flow required by the conditions of [the] permits.” Likewise, “Permittee shall submit a Compliance Plan for approval by the Deputy Director for Water Rights that will demonstrate compliance with the flow bypass terms specified in [the permits]. [¶]...[¶] Diversion and use of water prior to approval of the Compliance Plan and the installation of facilities specified in the Compliance Plan is not authorized.”

Petitioners assert that bypass compliance is only applicable to POD 4. This is not entirely accurate, however. The bypass flow required by the permits is identified in the first paragraph of the mitigation measures/permit terms section of the Order Approving Issuance of Permits, and requires that “For the protection of fisheries, wildlife, and other instream (and public trust) uses in Hoodoo Creek, diversions under these permits shall be subject to maintenance of minimum bypass flow in Hoodoo Creek of **1.88 cubic foot per second.**” (Emphasis in original.) Just because bypass compliance is determined by a single measuring device installed in Hoodoo Creek, it does not mean that the bypass requirement is only applicable to one point of diversion. Incorporation of Petitioners’ proposed language would have the effect of making only diversions from POD 4 subject to this bypass flow requirement, as opposed to all diversions under the permits. If the State Water Board were to allow Permittee to divert water from the other points of diversion identified in the permits prior to meeting these requirements, the Board would have no ability to determine whether Permittee was complying with its bypass requirement. So while the measuring device is only required on Hoodoo Creek, it is nonetheless true that Permittee must meet the bypass requirement and related requirements before it may divert water at any of the points of diversion authorized under the permits. For this reason, we decline to make Petitioners’ proposed change.

Petitioners further request that evidence substantiating installation of the above-referenced streamflow measuring device be due within one year of approval of the plans and specifications for such device, in recognition of the fact that streamflow conditions may preclude Permittee's installation of the device within the current timeframe in the permits, depending on the time of year approval is granted. This request is reasonable under the circumstances, and the permits will be revised to reflect this change.

Petitioners also request that paragraphs 24 and 25 of Permit 21240 and paragraphs 30 and 31 of Permit 21241 be limited to "development of undeveloped portions of the place of use." Petitioners propose this modification to "clarify that compliance with California Water Code section 13260 pertains only to future development of presently undeveloped portions of the permitted place of use...." These paragraphs currently read as follows:

In order to prevent degradation of the quality of water during and after construction of the project, prior to commencement of construction, Permittee shall file a report pursuant to Water Code section 13260 and shall comply with all waste discharge requirements imposed by the Central Valley Regional Water Quality Control Board (Regional Board), or by the State Water Board.

No water shall be used under this permit until permittee has filed a report of waste discharge with the Regional Board pursuant to Water Code section 13260, and the Regional Board or State Water Board has prescribed waste discharge requirements or has indicated that waste discharge requirements are not required.⁵

In order to clarify the intent of these paragraphs, the existing paragraphs are amended as follows:

In order to prevent degradation of water quality during and after construction of the project, prior to commencement of any construction undertaken after issuance of the permit, Permittee shall file a report pursuant to Water Code section 13260 and shall comply with all waste discharge requirements imposed

⁵ These paragraphs are paragraphs 15 and 16 in the Order.

the Regional Water Quality Control Board, Central Valley Region (Regional Board), or by the State Water Resources Control Board.

No water shall be used on undeveloped portions of the place of use under this permit until Permittee has filed a report of waste discharge with the Regional Board pursuant to Water Code section 31260, and the Regional Board or State Water Board has prescribed waste discharge requirements or has indicated that waste discharge requirements are not required.

Finally, Petitioners request that the Board revise the "WHEREAS" section of the Order. Specifically, Petitioners suggest that there are a number of inconsistencies between Item 3 of the Order and documents in the record.

First, Petitioners point out that Item 3 of the Order refers to "Attachment 1" to the March 21, 2003 water availability analysis, when in fact there is no "Attachment 1" to the March 21, 2003 water availability analysis. Although Petitioners are correct that there is no document labeled "Attachment 1" included with the March 21, 2003 water availability analysis, it is fairly easy to determine that the "Attachment 1" referred to in Item 3 of the Division's order is in fact a document labeled "Attachment 1" included with the September 17, 2003 amendment to the water availability analysis. The correct document is, as expressed in Item 3 of the Order, a monthly precipitation record submitted as part of the water availability analysis, despite the incorrect date given in the Order. This clarification should set the record straight with regard to this issue.

Second, Petitioners contend that Exhibits C, D, and E of the October 18, 2004 analysis show water is available in some water year types during the month of April, in contrast to Item 3 of the Order. Item 3 says

[t]he monthly precipitation records (Attachment 1 to March 21, 2003 analysis) and Exhibits C, D and E of the October 18, 2004 analysis do not support a finding of unappropriated water after March 31 for the unnamed streams. The applicant did not supply any data for the unnamed streams showing that there is water, in excess of the quantities needed for prior rights and public trust resources, after March 31. (Order Approving Issuance of Permits, p. 1, Item 3.)

While Petitioners' point is well noted, there are two main flaws that militate against amending this portion of Item 3 of the Order. The first is that Exhibits C, D and E estimate unimpaired flow and use those flow estimates to conclude that some water is available in April in some water year types. The problem with this approach is that unimpaired flows are not the measure of available water, as those flows do not take into account diversions pursuant to prior rights, including Petitioners' own prior rights.⁶ The second flaw in Petitioners' point here is that it assumes the Division is obligated to give every drop of water in a stream to an applicant. Where, as here, there may be very small amounts of water left in a stream in certain months in certain water year types, the Division may determine when issuing a permit that the diversion season should be reduced commensurate with the low availability of additional water.

Petitioners' other concerns relate to prior rights and public trust resources downstream of Petitioners' POD 3. The previous discussion regarding available flows makes additional response to these points unnecessary. Petitioners have not shown "that there is water, in excess of the quantities needed for prior rights and public trust resources, after March 31," and the Division reasonably concluded that "the minimal flows in the unnamed streams existing after March 31 are needed to serve prior rights and for public trust resources." (Order Approving Issuance of Permits, p. 1, Item 3.)

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⁶ Petitioners hold License 12434 (A26260), which authorizes Petitioners to use up to 15.3 afa from two unnamed streams tributary to Hoodoo Creek from November 1 through May 20 of the succeeding year.

ORDER

The State Water Board finds that there are several points where clarification is needed in Permits 21240 and 21241 and the Order issuing those permits. To the extent that this order does not address all of the issues in the petition for reconsideration, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. Accordingly, Permits 21240 and 21241 and the Order issuing them are modified as described herein. Except to the extent that this order amends the permits or otherwise clarifies their meaning, the petition for reconsideration is denied.

Dated: 12/23/09

Thomas Howard
Dorothy Rice
Executive Director