STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
DECEMBER 1, 2009

ITEM 6

SUBJECT

CONSIDERATION OF A PROPOSED ORDER ON RECONSIDERATION OF DIVISION OF WATER RIGHTS DISMISSAL OF A CAMP PENDLETON PROTEST TO CITY OF SANTA CRUZ PETITIONS FOR CHANGE IN ITS WATER RIGHTS ON SAN LORENZO RIVER AND NEWELL CREEK IN SANTA CRUZ COUNTY

DISCUSSION

The City of Santa Cruz (Santa Cruz) holds License 9847 and Permits 16123 and 16601, which allow for diversion to storage from San Lorenzo River and Newell Creek into Loch Lomond Reservoir. During the winter months, Santa Cruz uses water from Loch Lomond Reservoir at the same time that it is filling the reservoir. This constitutes a direct diversion. The water rights authorize diversion to storage, but do not allow for direct diversion.

On December 28, 2006, Santa Cruz petitioned the State Water Board to change its water rights to authorize direct diversion from the two streams. On November 7, 2008, the United States Marine Corps, Camp Pendleton (Camp Pendleton) protested Santa Cruz's change petitions on the grounds that the proposed changes are contrary to law and against the public interest. Camp Pendleton stated that its concerns relate to the legal issues involved with the Santa Cruz petitions and potential future consequences for its own water rights on the Santa Margarita River, rather than to the actual effects of the diversions by Santa Cruz. On April 29, 2009, the Division of Water Rights issued a letter in which it refused to accept the allegation that the petitioned-for changes would be contrary to law. The letter also stated that Camp Pendleton's allegations that the changes would not serve the public interest were insufficient as stated. On June 1, 2009, Camp Pendleton filed a request for reconsideration of the Division's refusal to accept its protest.

The proposed Order on Reconsideration upholds the Division's refusal and clarifies State Water Board precedent on such changes.

POLICY ISSUE

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

Staff recommends adoption of the proposed order.

State Water Board action on this item will assist the Water Boards in reaching Goal 5 of the Strategic Plan Update. Approval of this item will assist in fulfilling Objective 5.1 to improve the current Water Board systems, programs, functions, and core business process to enhance effective and consistent implementation of Water Board plans and policies, and State and federal laws and regulations, and to reduce processing time and costs.

D R A F T November 2, 2009

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-00XX

In the Matter of Petition for Reconsideration of
Division of Water Rights Refusal to Accept Protest by
United States Marine Corps Base, Camp Pendleton
against

CITY OF SANTA CRUZ

Regarding Petitions for Change under License 9847 (Application 17913) and
Permits 16123 and 16601 (Applications 22318 and 23710, respectively)

SOURCES: San Lorenzo River and Newell Creek

COUNTY: Santa Cruz

ORDER DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

This order denies the request for reconsideration by the United States Marine Corps Base, Camp Pendleton (Camp Pendleton) of the State Water Resources Control Board (State Water Board or Board), Division of Water Rights' (Division) order (by letter of April 29, 2009) refusing to accept Camp Pendleton's protest against the City of Santa Cruz' (Santa Cruz) Petitions for Change under License 9847 (Application 17913) and Permits 16123 and 16601 (Applications 22318 and 23710, respectively). Camp Pendleton's protest and petition for reconsideration raise the legal issue of whether a water right holder or applicant may petition to the State Water Board to change an application, permit or license to allow for direct diversion when the current application, permit or license is for diversion to storage. This order resolves conflicting language in prior decisions and finds that the State Water Board has authority to approve such

a change. Therefore, the petition for reconsideration is denied. (Cal. Code Regs., tit. 23 § 770.)[1]

2.0 BACKGROUND

The City of Santa Cruz holds License 9847 and Permits 16123 and 16601, which allow for diversion to storage from San Lorenzo River and Newell Creek into Loch Lomond Reservoir. During the winter months, Santa Cruz uses water from Loch Lomond Reservoir at the same time that it is filling the reservoir. This constitutes a direct diversion. Santa Cruz' water rights authorize diversion to storage, and do not allow for direct diversion.

On December 28, 2006, Santa Cruz petitioned the State Water Board to change its rights to include the ability to directly divert from the stream.[2] On November 7, 2008, Camp Pendleton protested Santa Cruz's petitions on the grounds that the proposed change is contrary to law and against the public interest. Camp Pendleton expressed in the cover letter for the protest that its concerns are related to the legal issues involved with the Santa Cruz petitions, and the potential future consequences for its own water rights on the Santa Margarita River, rather than to the effects of the diversions by City of Santa Cruz. On April 29, 2009, the Division issued a letter from Victoria Whitney, State Water Board Deputy Director for Water Rights (Deputy Director), to Ralph E. Pearcy II of the United States Marine Corps (Division Letter). The Division Letter refused to accept the allegation that the petitioned-for changes would be contrary to law. It also stated that the allegation that the changes would not serve the public interest were insufficient as stated. The letter permitted Camp Pendleton to provide supplemental information to support its public interest allegation within 30 days, and stated that the protest would not be accepted on this ground if no further information were submitted. Camp Pendleton did not submit additional information within 30 days, and has acknowledged that it does not intend to supplement its

[1] The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (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, 1147-48, 1150-51 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

[2] At the same time, Santa Cruz petitioned for an extension of time to put the water to use under Permits 16123 and 16601; Camp Pendleton did not protest that petition.

allegation that Santa Cruz' change petition is contrary to the public interest.[3] On June 1, 2009, Camp Pendleton filed a request for reconsideration of the Division Letter.

3.0 GROUNDS FOR RECONSIDERATION

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.)

4.0 CAMP PENDLETON'S PROTEST AND PETITION FOR RECONSIDERATION

Camp Pendleton's petition asserts that approving Santa Cruz's change petitions would be contrary to law. Camp Pendleton reads Water Code section 1700 et seq., which addresses changes to water rights, to limit the petitions for change that the State Water Board may entertain to petitions for changes in point of diversion, place of use, or purpose of use. It acknowledges that the State Water Board maintains broad authority to change existing water rights, but argues that this authority stems from, and is limited by, the duty to prevent waste and to protect the environment and the public interest. It asserts that the Board cannot change the "substantive features" of the water right, like the method of diversion, for the convenience of the permittee or in order to conform the permit to actual conditions as opposed to for the purpose of preventing waste. Camp Pendleton argues that the reference to petitions for changes "other than changes in point of diversion, place of use, and purpose of use" in California Code of Regulations, title 23, section 791, subdivision (e) therefore relates solely to the State Water

[3] As the protest raised only legal and public interest grounds, the Division's April 2009 letter effectively refused to accept the entire protest. Because the letter was a final determination of Camp Pendleton's rights with respect to the proceedings on the change petition, it is appropriately treated as an order or decision subject to review under section 1122 of the Water Code. (See Gov. Code, 11405.50, subd. (a); cf. *People ex rel. State Lands Commission v. City of Long Beach* (1960) *183 Cal.App.2d 271, 273* [An order denying leave to intervene is appealable].)

Board's authority to change terms and conditions imposed in an existing license, rather than to the "substantive features" of a water right.

Additionally, Camp Pendleton asserts that, because direct diversion and storage rights are so different, adding direct diversion to a water right that allows only diversion for storage initiates a new water right, contrary to California Code of Regulations, title 23, section 791 and to the public interest. The petition also argues that the Division Letter did not provide a principled explanation for allegedly departing from State Water Board precedent in State Water Board Order WR 85-4 and State Water Board Decision 1380 (1971). Camp Pendleton asserts that such a departure contravenes the public interest in consistency and predictability in agency decision-making.

Finally, Camp Pendleton requests that, if the petition for reconsideration is denied, the State Water Board confirm the determination in the Division Letter, in order to provide clarity on the issue of whether direct diversion may be added to an existing water right permit or license for diversion to storage.

To the extent that Camp Pendleton's petition and protest may be read to include other arguments not addressed in this order, these arguments fail to raise substantial issues related to the causes for reconsideration set out in California Code of Regulations, title 23, section 768, and are hereby dismissed.

5.0 APPLICABLE STATUTE AND REGULATIONS

Water Code sections 1700 through 1705 govern the process by which changes in the place of use, purpose of use, or point of diversion, of an appropriative water right may be made.[4] The sections outline the application, notice, protest, investigation and hearing requirements for change petitions. (Wat. Code, §§ 1700-1701.4, 1703-1705; see also Cal. Code Regs., tit. 23, §§ 791-816.) Before the State Water Board can grant a change petition, the petitioner must also demonstrate that the change will not injure any legal user of water and will not effectively initiate a new right. (Wat. Code, § 1702; Cal. Code Regs., tit. 23, § 791, subd. (a).)

[4] These sections apply to appropriations under the Water Code or the Water Commission Act. Section 1706 of the Water Code applies to changes to pre-1914 rights. Section 1707, which addresses changes for the protection of instream beneficial uses, applies to all types of water rights.

The same procedures are to be followed insofar as is possible for processing change petitions for changes other than place of use, purpose of use or point of diversion. (Cal. Code Regs., tit 23, § 791, subd. (e).)

6.0 DISCUSSION

6.1 Initiation of New Right

Camp Pendleton asserts that water rights for direct diversion and for storage are so fundamentally different that adding direct diversion to a storage right necessarily initiates a new water right. To support this contention, Camp Pendleton points out that the purpose of storage is to collect water in high flow times for use during low flow times, while direct diversions put water to immediate beneficial use. Camp Pendleton also notes that the limitation inherent in direct diversion rights, namely the amount that can be applied to beneficial use, is not present in storage rights, and that this can lead to increasing the amount of water diverted, creating a new right.

An appropriative water right has several basic elements, including priority, source of water, season of diversion, amount of diversion, point of diversion, place of use, and purpose of use. (See, e.g., Wat. Code, § 1260 et seq [defining the contents of a water right application]; Hutchins, The California Law of Water Rights (1956) "Elements of the Appropriative Right," pp. 130-154 (hereinafter Hutchins); *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245, 253, 257 [ordering State Water Board to set aside permits where application lacked sufficient specificity as to actual uses, amounts and places of use].) Some of these defining elements may be changed by the appropriator, so long as the change does not injure other water users. (See Hutchins, *supra.*, p. 175 ["It has long been settled in California that an appropriator may change the point of diversion, place of use, or character of the use of water … provided that the rights of others are not thereby impaired"]; Wat. Code, § 1701; Cal. Code Regs., tit. 23, § 791; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 28-29 [allowing change in the place of use, character of use, and point of diversion so long as no others are injured]; *Hand v. Cleese* (1927) 202 Cal. 36, 45 [allowing diverter to change the means of diversion of waters from a specific ditch to a different "natural depression" as the change did not cause injury].) A fundamental principle of water right law, however, is that a right cannot be so changed that it in essence constitutes a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).) For example, an appropriator cannot expand an existing right to

appropriate a greater amount of water, to increase the season of diversion, or to use a different source of water. (Cal. Code Regs., tit. 23, § 699; *Johnson Rancho County Water District v. State Water Rights Board* (1965) 235 Cal.App.2d 863, 879.)

The common feature among the changes that have been found to constitute the creation of a new right, as opposed to a change in an existing right, is that the changes that initiate a new right increase the amount of water taken from a water source at a given time. (See *Johnson Rancho County Water District v. State Water Rights Board, supra*, 235 Cal.App.2d at 879 [approving as "commonsense" the granting of a change in a water right application that did not increase the amount of water appropriated or its source]; State Water Board Order WR 79-24 at 4 [approving only the part of a proposed change in place of use which would not increase the season or amount of water diverted]; State Water Board Decision 940 (1959) ["a direct diversion right can be converted to a storage right only to the extent there is no change in rate of diversion from the stream …"]; George A. Gould, Water Rights Transfers and Third-Party Effects, 23 Land and Water Law Review 1 (1988) p. 9 ["To paraphrase Mead, 'the later comers had an equal claim to protection from the enlargement of prior uses which reduced the flow available to satisfy their appropriations' … consequently, a rate of diversion … limits the 'flow' to which each appropriator may claim a priority…. Some states later added a volume ("quantity") limitation."] *referencing* E. Mead, Irrigation Institutions 66, 67 (1903).) Other elements of a water right can be changed, as they are secondary to the fundamental right to use the water. (*City of San Bernardino v. City of Riverside, supra*, 186 Cal. at 29 ["The reasons for the right to make the above changes are that, by his taking and devoting water to a beneficial use, the appropriator has acquired the right to take the quantity which he beneficially uses, as against others having no superior rights in the source, and that neither the particular place of use, the character of the use, nor the place of taking is a necessary factor in such acquisition."].)

A change from a storage right to direct diversion (or vice-versa) is a change in what is done with water after it is diverted from the natural streamflow. As Camp Pendleton points out, stored water is saved for later use, while directly diverted water is used immediately (or after a short period of regulatory storage). This change in what happens to water after diversion does not necessarily affect the rate of diversion, and therefore does not per se result in an expansion of a water right.

Any approval of a change to allow storage or direct diversion must be appropriately conditioned to ensure that the change does not, in fact, result in increased diversions over the amount to which the petitioner would otherwise have been legally entitled and as a practical matter would otherwise have been able to divert, were the permit to have remained unchanged. This includes ensuring that the current diversion limits imposed, e.g., by hydrology, the petitioner's physical facilities and the current permit, remain in effect; that any growth still allowed during the development period is also within current limits of what would have occurred in the absence of the change; and that the petitioner can demonstrate to the satisfaction of the State Water Board that the current limits will not be exceeded in any water year. Camp Pendleton notes that direct diversions are limited by the amount of water that can currently be applied to beneficial use, while a storage right does not contain this inherent limitation. However, a limitation may be imposed as part of the process of approving a change to allow storage, thereby ensuring that the right is not enlarged. (See Cal. Code Regs., tit. 23, § 792, subds. (b), (c) [describing conditioning authority for change petition approvals].) The requirements in a permit that limit the amount of a diversion can, and must, remain in place when change petitions are approved, regardless of whether the water is diverted for storage or immediate use. The situation presented is no different than when a water right holder requests a change to a new point of diversion that has a larger capacity either due to the physical limitations of the diversion facilities or due to the amount of water physically available at the diversion point: while the capacity of the old point of diversion is no longer a limit on the diversion amount, it is possible to change to a new point of diversion and still maintain the prior limit on diversions as a result of conditions imposed on the approval of the change.

The argument that storage and diversion are such fundamentally different purposes that they are per se different rights is further undermined by the accepted process of regulatory storage. Waters appropriated under direct diversion do not need to be instantaneously put to beneficial use; they may be subject to regulatory storage for short periods. (See Cal. Code Regs., tit. 23, §§ 657-8.) Even riparian users, who are not authorized to divert water to seasonal storage because of the right's correlative nature and link to the natural flow of a river, are permitted to regulate water in the short term. (See *Seneca Consolidated Gold Mines Co v. Great Western Power Co*. (1930) 209 Cal. 206, 215-216, 219.) Therefore, a change in an appropriative right to allow either direct diversion or storage, when such was not previously allowed, does not, by definition, result in the creation of a new right.

6.2 State Water Board Authority

Camp Pendleton also argues that there is no authority under which the State Water Board can change a water right from storage to direct diversion at the water right holder's request. Camp Pendleton reads Water Code provisions authorizing changes in point of diversion, place of use or purpose of use as limiting the State Water Board's authority to approve changes other than those listed.[5] (*Id*. § 1700, et seq.) Camp Pendleton points to the interpretive canon *expressio unius est exclusio alterius* to assert that the listing of these three potential changes means that these changes and no others are permitted under the Water Code. Camp Pendleton further points to the use of the term "method of diversion" in other areas of the Water Code to support the interpretation that the term's omission in Water Code section 1700 et seq. was intentional. Camp Pendleton cites two State Water Board orders or decisions that interpret the Water Code section as limiting change petitions to the three types of changes enumerated. (State Water Board Order WR 85-4 and State Water Board Decision 1308 (1968).) Camp Pendleton recognizes that the State Water Board exercises broad and continuing authority over existing water rights, including the ability to control and condition water use to protect the public interest and the public trust and to prevent waste. However, Camp Pendleton argues that the State Water Board's authority to approve changes in applications, permits and licenses can be exercised only to protect these state interests, and not for the convenience of the water right holder. Camp Pendleton argues that Water Code § 1700 et seq. is the only Water Code chapter that describes the changes that a *petitioner* may request,[6] and sets these in opposition to the broader State Water Board authority stemming from the principles of waste and reasonable use, and from the duty to protect the public trust.

6.2.1 State Water Board precedent

Camp Pendleton points to State Water Board Order WR 85-4 and Decision 1308 to support its argument that the Board may not accept a change petition involving change from storage to direct diversion or vice-versa. State Water Board Decision 1308 (1968) concerned an application for diversion to storage filed by the United States Bureau of Reclamation (Reclamation). Reclamation already had direct diversion permits authorizing a diversion of up

[5] Camp Pendleton's arguments concerning the captions of these statutes are dismissed, because such headings "do not in any manner affect the scope, meaning, or intent" of Water Code provisions. (Wat. Code, § 6.)

[6] A petitioner may also request changes under Water Code sections 1211, 1398 and 1435, but the existence of these additional sections does not change the argument.

to 350 cubic feet per second throughout the year, and this rate would not have been exceeded in diverting to storage. However, the right was also limited by the amount of water that could be beneficially used at any given point. As the decision noted: "applicant's right under these permits does not entitle it to divert more water than is beneficially used in the authorized manner, which means that these permits do not authorize diversion from Rock Slough into storage even though such diversion is within the authorized rate, quantity, and season." (*Id.* p. 4.) Therefore, the decision went on to evaluate whether unappropriated water was available for the new application, rather than relying on it being available under the existing permit. The decision emphasizes that it is not permissible to expand the amount of water that can be diverted under an existing right, and that the inherent limit of direct diversion rights to what can be applied to beneficial use at that time prevents an additional diversion to storage under the same permit. The decision does not concern a change petition. Nor does it address the situation in which water that would have been directly diverted under the existing right is diverted instead to storage; rather, the case addresses only an expansion of diversion and use.

State Water Board Order WR 85-4 (Order 85-4) addressed the State Water Board's authority to approve a change petition by Madera Irrigation District, which the irrigation district described as a change from direct diversion to diversion to storage. Order 85-4 states:

> If the change is a change in method of diversion, it is not a change which can be made under Water Code § 1700 et seq. However, the permitted direct diversion may be construed as a diversion to storage because of its characteristics.

(*Id.* p. 8.)

Thus Order 85-4 does not ultimately rely on the limited interpretation of potential changes under Water Code section 1700 et seq. The requested change was not actually a change from direct diversion to storage, because the underlying water right already allowed diversion to underground storage. (*Id.* pp. 8-9.) Therefore, the interpretation of Water Code section 1700 et seq. is *dictum*, not a direct holding. While the State Water Board ultimately denied Madera Irrigation District's petition for change, the denial was based on the conclusion that the change would injure another legal user of water. (*Id.* pp. 9-12.)

Neither Order 85-4 nor Decision 1308, however, articulates a rationale for its interpretation of Water Code section 1700 et seq. or addresses the State Water Board's contrary conclusions in

a prior State Water Board decision, Decision 940 (D-940), which was issued in 1959. While an administrative agency may change its precedential decisions and the interpretation of its statutes and regulations, its ability to significantly depart from precedent requires reasoned explanation and a "square confrontation" of the prior decision. (*Davida-Bardales v. INS* (1st Cir. 1994) 27 F.3d 1, 5; see also *California Trout v. FERC* (9th Cir. 2009) 572 F.2d 1003, 1023.)

D-940 involved an application for a storage right for two waterways in Madera County. Water users with a claimed pre-1914 appropriative water right protested the application. Originally, the water diverted under this claim had been used by direct diversion, but in 1950 the water right holders built a reservoir and began seasonal storage. The Board noted that there were no California cases directly on point, but reasoned that a change from direct diversion to storage is permissible so long as the rate and season of diversion did not change. (*Id.* pp. 4-5 ["A direct diversion right can be converted to a storage right only to the extent there is no change in the rate of diversion from the stream or in the period of the year during which water is diverted"].) D-940 specifically differentiates this situation from that in which the rate or season of diversion changes, constituting a new appropriation. (*Id.* p. 5.) D-940 found that the protestants had not provided satisfactory evidence of their prior appropriative right because they had changed the season and rate of diversion of their pre-1914 right, which constituted a new appropriation of water for which a water right permit was required. This analysis supported the holding that the protested application would not interfere with prior vested rights. (*Id.* pp. 5-6.)

Other more recent State Water Board decisions have allowed water right holders to petition for changes to direct diversion from storage and vice-versa. For example, State Water Board Decision 1632 (1995) (hereinafter D-1632) dismissed protests to a petition to change a water right application to include direct diversion. The protestants requested that the priority date for this change be set to the date of the requested amendment – in effect charging that such a change creates a new right to which the earlier priority date should not apply. (*Id.* pp. 40-41.) In determining that the protests were invalid, the Board looked to the fact that the new application did not increase the amount of water requested or the diversion season. (*Id.* p. 41.) The Board then issued a permit on the application that allowed both direct diversion and storage. (*Id.* p. 96.) Camp Pendleton argues that D-1632 is materially different from the current situation because the application at issue in D-1632 originally included direct diversion, but had been earlier amended to remove direct diversion. The fact that the original application included

direct diversion is immaterial: the application as it stood did not allow direct diversion, but the Board approved the change petition to add direct diversion. The Board did not rely on this history in allowing the change. Camp Pendleton in essence argues that there is an unwritten exception to the normal limits of the Board's authority where a water right holder originally claimed different rights. Taking this argument to its logical conclusion, the Board would be allowed to enlarge water rights, in essence creating new rights, if the amount or season of diversion originally applied for were higher or broader, even though these actions would, under other circumstances, create a new right.

State Water Board Order WR 95-3 approved a change in the rate at which licensee Merced Irrigation District was able to directly divert water for municipal uses. This change was permitted only upon a 1:1 reduction in the rate of diversion to storage under the same right, to ensure that the rate of diversion did not increase, and an analysis that other legal users and public trust uses would be protected. Camp Pendleton seeks to differentiate State Water Board Order WR 95-3 from the current situation, because the original application at issue there provided for both direct diversion and storage, while that at issue here did not. If a change in amount for direct diversion to storage (or vice versa) creates a new right, however, such a change would not be possible within an existing license.

Examining the Board decisions together indicates that none of the decisions after D-940 address prior Board Orders discussing the issue, and that only some of them articulate a rationale for their statements on whether allowing direct diversion or storage is a permissible change to an existing water right. D-940 articulated a principle by which to address whether a change was permissible, or would constitute a new appropriation: it looked to whether there was a change in the rate of diversion from the stream or the season of diversion. Also, the analysis in D-940 directly supported the decision's ultimate holding. The decisions Camp Pendleton cites, Order 85-4 and D-1308, do not mention D-940 or discuss the general principle articulated by D-940. Further, the language regarding changes to add direct diversion or storage to an existing water right is *dictum* in both cases. While well-reasoned *dicta* can be persuasive, the fact that the decisions do not squarely address either the language in or the logic of D-940 weakens the inference that these decisions overruled D-940.

Later, in Order WR 95-3 and D-1632, both issued after Order 85-4 and D-1308, the State Water Board approved changes from storage to direct diversion, provided the changes did not alter the season of diversion or amount of water requested. Both decisions relied on the same reasoning as D-940, and this reasoning was central to the decisions' holdings. However, the State Water Board again did not squarely confront its prior discussion on the issue. None of the State Water Board's decisions and orders on the issue should be regarded as having overruled, *sub silentio*, prior inconsistent precedent on this issue.

In evaluating these precedents, this order determines that the reasoning in D-940, and affirmed in D-1632, is correct: the State Water Board may make changes in water rights to the extent that these do not initiate a new right, including changes to add direct diversion or storage to a water right. As explained further in Sections 6.2.2, 6.2.3 and 6.3 of this order, this approach is consistent with the language of the Water Code and better promotes important public policies, including the efficient use of waters of the state and protection of public trust uses. The State Water Board disapproves the language in Order 85-4 and D-1308 that suggests a contrary result.

6.2.2 Interpretation of Water Code sections 1700 et seq

Camp Pendleton argues that, under the interpretive canon *expressio unius est exclusio alterius*, or "the express mention of one thing excludes others," the authority granted to the State Water Board to accept change petitions for place of use, purpose of use and point of diversion limits the State Water Board to accepting change petitions only for place of use, purpose of use and point of diversion.[7] Camp Pendleton further argues that the canon is strengthened here, because the Water Code explicitly mentions method of diversion in other sections, and does not include it on the list of changes for which a water right holder may petition. *Expressio unius est exclusio alterius* is a rule of interpretation which describes what an expression normally means, not a rule of law that prescribes how a written phrase must be interpreted, and the canon should be applied only where it makes sense in the context of the statute. (*Longview Fibre Co. v. Rasmussen* (9th Cir. 1992) 980 F.2d 1307, 1312-13.)

The *expressio unius* canon of interpretation is most applicable where a newly enacted act has two provisions, drafted with similar language, and one "conspicuously omits" a term. (*U.S.*

[7] Camp Pendleton's argument is limited to petitioner-initiated changes.

v. Councilman (1st Cir. 2005) 418 F.3d 67, 74 (citing *Field v. Mans* (1995) 516 U.S. 59, 75-76).) Where a statute mentions a term in one provision that is not included in another, however, the inference that the term's exclusion is purposeful weakens "with each difference in the formulation of the provisions under inspection." (*City of Columbus v. Ours Garage & Wrecker Serv., Inc.* (2002) 536 U.S. 424, 435-6.) Camp Pendleton notes that Water Code sections 100 and 275 mention "method of diversion," and argue that this demonstrates that if the Legislature had intended to include "method of diversion" among the changes the State Water Board may make upon petition of the water right holder, it would have done so. The statutory scheme that mentions "method of diversion" in the referenced Water Code sections, however, is quite different than scheme governing potential changes under Water Code section 1700 et seq. Pursuant to Water Code sections 100 and 275, the State Water Board has authority to prevent the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. The provisions refer to all water diversion and use, not only appropriations. (See, e.g., *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472 fn. 16 [Water Code section 275 applies to diversion and use under riparian right].) All references to "method of diversion" in the Water Code are in the context of reasonable use: the language is modeled after that in California Constitution article X section 2's prohibition against waste. (See *People ex rel SWRCB v. Forni* (1976) 54 Cal.App.3d 743, 749 fn. 3.) As such, the term "method of diversion" refers to not only whether water is directly diverted or put into storage, but also the point from which it is diverted, the rate at which the diversion occurs, and other features of the diversion facility or its operation. (See, e.g., Revised State Water Board Decision 1644 at p. 95 [fish losses at diversion structure amounted to unreasonable method of diversion]; State Water Board Order WR 90-5 [adopting time schedule for construction of temperature control device, based in part on authority to prevent unreasonable methods of diversion].) The provisions of the Water Code that discuss "method of diversion" do not mention changes in water rights, or use the terms "direct diversion," "storage," "point of diversion," "place of use," or "purpose of use" that are found in the provisions regarding changes to water rights. On the other hand, Water Code sections 1700 - 1705 discuss the specific method for requesting changes in appropriative water rights. The statutory language concerning change petitions uses different terminology than the sections referring to "method of diversion." Because the purposes of and language in these statutory provisions differ, one cannot apply the *expressio unius* canon of interpretation to infer that section 1701 was drafted to deliberately exclude "method of diversion"

from potential water right changes. The canon does not afford a reliable method of statutory interpretation in this context.

Moreover, the Water Code expressly recognizes that a petition may be filed to change permit and license conditions other than changes in point of diversion, place of use or purpose of use. Water Code section 1525, subdivision (b), which establishes fees for applications and petitions filed with the State Water Board, establishes fees for petitions "to change the point of diversion, place of use, or purpose of use, under a permit or license," and petitions "to change the conditions of a permit or license, requested by the permittee or licensee, not otherwise subject to [the fees for petitions for changes in point of diversion, place of use, or purpose of use]." (Wat. Code, § 1525, subds. (b)(4) & (5).) Similarly, State Water Board regulations recognize that the Board may consider and approve petitions to change permit or license conditions other than conditions establishing the point of diversion, place of use, or purpose of use. (Cal. Code Regs., tit. 23, § 791, subd. (e).)

State policy dictates that the water resources of the state should be put to beneficial use to the fullest extent possible. (Wat. Code, § 100; see *id.* §§ 104, 105.) Looking at the overall statutory scheme for water appropriation demonstrates that allowing an appropriator flexibility to make changes in water rights beyond those specifically listed in Water Code section 1700 et seq. can be important to the public interest in the waters of the state. While Camp Pendleton characterizes the petitioned-for changes as for the convenience of the permittee or licensee, these changes may further important state policies. Like voluntary transfers, voluntary changes in method of diversion may promote the more efficient or more productive use of the state's limited water resources, so long as adequate safeguards are in place to avoid injury to third party water right holders, unreasonable effects on instream beneficial uses, or interference with other important policies that the water right permit and license system is intended to promote. It may contravene the public interest to deny an appropriator the ability to make changes from storage to direct diversion. For example, it may be contrary to the public interest to deny a change that would allow an appropriator's ability to ensure reasonable continuity of water supply – including the ability to store water for later use or to divert it when needed – where such flexibility would not injure other right holders or the public trust. This is particularly important where, as here, the use is domestic, and the appropriator is a municipality, whose water rights "should be protected to the fullest extent necessary for existing and future uses."

(Wat. Code, §§ 106, 106.5.) It would be unreasonable to construe the Water Code to prevent such flexibility merely because the petitioner requests the changes, rather than the Board initiating the process on its own motion.

Limiting potential petitioner-initiated changes to place of use, point of diversion and purpose of use would lead to absurd administrative and procedural results, as well. For example, ownership is a key component of a water right, but one that changes relatively frequently. Under Camp Pendleton's proposed reading, the State Water Board would be unable to change names and contact information for water right holders, because such a change is not specified in Water Code sections 1700 et seq. An inability to correctly identify a right holder would make the State Water Board unable to contact right holders to ensure that their rights are protected and to ensure that their rights are not exceeded. This would hinder the State Water Board's ability to protect existing water right holders and take enforcement against illegal diversions. (See, e.g., Wat. Code, §§ 1825-1845; 1321.)

Adopting Camp Pendleton's *expressio unius* argument would also lead to the conclusion that permittees and licensees cannot petition for changes in permit conditions that do not involve point of diversion, place of use or purposes of use, but instead set requirements based on water quality, the public trust, or the public interest.[8] The State Water Board has routinely considered these changes. (See, e.g., Corrected State Water Board Order WR 2008-0014 [approving changes in permit conditions setting instream flow requirements]; see also State Water Board Order WR 2009-0012, p. 5.) Given the need to respond to changing conditions and the increasing reliance on adaptive management, requiring that all changes to these conditions be initiated by the State Water Board, as Camp Pendleton suggests, would be unworkable. Not only would it create an unnecessary obstacle to voluntary compliance, but the State also would forego opportunities for increased water efficiency or improved protection of public trust resources in cases where the water right holder is willing to make beneficial changes but it is unclear whether the failure to make those changes would be unreasonable or in violation of the public trust. (See generally *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447 fn. 28 [recognizing but not resolving dispute whether the constitutional prohibition against

[8] While Camp Pendleton's petition expressly recognizes that the State Water Board has broad authority to change water rights to address public trust or waste and unreasonable use concerns, the logical extension of its statutory construction argument would deny petitioners the right to request such changes.

waste or unreasonable use merely prohibits wasteful or inordinate use, or prohibits any use less than the optimum allocation].)

Thus, an unnecessarily narrow limitation on the types of changes that a water right holder can request would interfere with the State Water Board's overarching responsibilities to administer water rights and to promote the reasonable and beneficial use of California's waters. Interpretations of statutes that contravene an overarching statutory intent, or would lead to absurd results, are to be avoided. (E.g., *People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

Along with priority, source of water, season of diversion, and amount of diversion, the point of diversion, place of use, and purpose of use are fundamental attributes of an appropriative water right. It is understandable that the Legislature would make express allowance for changes in point of diversion, place of use, and purpose of use, as without this authorization it might be inferred that these fundamental attributes cannot be changed. Moreover, the express authorization of changes to point of diversion, place of use, or purpose of use may be read to imply that the other fundamental attributes of an appropriative right -- the priority, source of water, season of diversion and amount of diversion -- cannot be changed, except where the change amounts to a limitation. Indeed, the principle that a change cannot enlarge the right or amount to initiation of a new right incorporates the view that a permit or license holder cannot petition for an earlier priority, new source, expanded season of diversion or increase in diversion.

It is another matter entirely, however, to read the Water Code's express allowance for changes in some of the fundamental features of an appropriative water right to impliedly exclude changes in other, less fundamental conditions of a water right permit or license. Camp Pendleton's suggestion that these less fundamental conditions may be changed in proceedings initiated by the State Water Board is not merely impractical under current conditions. It fails to explain why the provisions authorizing changes in point of diversion, place of use or purpose of use did not reference other permit and license conditions at the time those provisions were enacted as part of the original Water Commission Act. (Stats. 1913, ch. 586, §§ 12, 39, pp. 1021-1022, 1032.) Under the original Water Commission Act, and for many years thereafter, the State Water Board's predecessor lacked authority to reopen a permit or license on its own motion. (See generally *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447 [the role of the

State Water Board's predecessor was very limited].) If changes in permit and license conditions could not have been made at the request of permit or license holders, it is unlikely those changes could have been made at all. Nor would it make any sense, where the State Water Board has authority to make changes, to prohibit permit and license holders from petitioning the State Water Board to make those changes.

For these reasons, the Water Code cannot reasonably be interpreted to prohibit petitions for changes permit and license conditions, or to prohibit changes from storage to direct diversion, simply because the changes are not changes in point of diversion, place of use or purpose of use.

6.2.3 Interpretation of California Code of Regulations, title 23, section 791, subdivision (e)

California Code of Regulations, title 23, section 791, subdivision (e) states:

> The procedures set forth in Articles 15, 16, 16.5 and 17 shall be followed as nearly as possible when filing and processing petitions for changes in permits and licenses other than changes in point of diversion, place of use and purpose of use.

The regulation anticipates that the State Water Board will accept and process change petitions for changes other than point of diversion, place of use, and purpose of use. Camp Pendleton reads this section to extend only to changes in the "terms and conditions" of water right permits, because regulations may not extend statutory authority and because the State Water Board has relied on this section to make changes to water right terms and conditions. Of course, the permission to store water or use it by direct diversion is a term or condition of a water right. Likewise, for example, a season of diversion, a fish screen requirement, a bypass flow requirement, a place of use or a rate of diversion are water right terms and conditions. It appears that when Camp Pendleton argues that the State Water Board's authority is limited to changes in terms and conditions, it means terms and conditions that do not involve the substantive features of the water right. Nothing in the language of the regulations suggests such an interpretation, and it is unclear how a limitation excluding "substantive features" would apply. Conditions protecting water quality, instream beneficial uses, or the public interest are also substantive. As discussed above, the State Water Board rejects Camp Pendleton's argument that the State Water Board's authority to consider petitions to change permit and license conditions must be interpreted narrowly to avoid conflict with an implied limitation to

changes in point of diversion, place of use or purpose of use. This, in turn, undermines Camp Pendleton's suggestion that the regulation exceeds the State Water Board's statutory authority if it extends beyond the non-substantive "terms and conditions" otherwise authorized under the Water Code. Because the regulation refers to processing change petitions, a more straightforward reading of the regulation is that it refers to any other changes that a petitioner may request, which includes a change to add direct diversion or storage.

6.3 Public Interest

Camp Pendleton asserts that allowing water right holders to add direct diversion or storage to their water rights would be against the public interest because it would create legal uncertainty and upset existing precedent. As discussed above, administrative precedents do not have the same binding effect as statutes or administrative regulations. The State Water Board ordinarily will follow its precedents, but may refine, reformulate or even reverse its precedents on a case-by-case basis in light of new insights or changed circumstances, so long as it squarely confronts inconsistent precedent and explains its reasons for changing. In this case, the State Water Board has no choice but to make changes from at least some of its prior orders and decisions, because those orders and decisions reflect inconsistent interpretations, and it is in the public interest to issue an order that clarifies the law on this issue.

Camp Pendleton further asserts that allowing a permittee to submit a change petition that conforms a water right to the permittee's actual practice will encourage illegal diversion of water. The State Water Board agrees that "actual conditions should reflect existing water rights." But neither the Water Code nor State Water Board practice establish a general rule that a change will not be permitted under circumstances where the change first occurred without prior authorization and the petitioner is seeking approval after the fact. The State Water Board frequently approves applications or petitions intended to bring existing diversions or uses into compliance. (See, e.g., Revised State Water Board Decision 1641 (2000) at pp. 115-122, 163-166 [approving expansion of the place of use under the water right permits for the Central Valley Project to include lands outside the permitted place of use where service was already being provided]. See also Cal. Code Regs., tit. 23, § 1065, subd. (b) [requiring payment of annual fees on a petition where the change is initiated before the change is approved].) The issue of the appropriate response to activities initiated without prior authorization is largely a question of enforcement, and issuance of an approval later does not immunize the violator from

penalties for violations that occurred before the approval. Moreover, the decision whether to take enforcement action is entirely discretionary. (See *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1242-1244; see also *Citizens for a Better Environment – Cal. v. Union Oil Co. of Cal*. (9th Cir. 1996) 83 F.3d 1111, 1119-1120.) In these circumstances, it would not be appropriate to adopt a general rule that amounts to a nondiscretionary punitive sanction, making those who initiate changes without first obtaining approval ineligible for approval even after they go through the approval process.

Absent such a general rule, the public interest in issuing a permit that conforms a water right to an existing use must be independently weighed in each individual case. Camp Pendleton provided no information specific to the City of Santa Cruz's water rights in this regard, and also provided no substantiation of the claim that approving individual petitions that conform a water right to an existing use would encourage future illegal diversions. The State Water Board requested that Camp Pendleton supplement its public interest assertions in the April 29, 2009, letter from Deputy Director Victoria Whitney to Ralph E. Pearcy, and Camp Pendleton declined to do so.

7.0 CONCLUSION

The State Water Board may receive and process change petitions that add direct diversion or storage to a water right, subject to the "no injury" rule and any conditions necessary to protect public trust uses and the public interest, provided there is no increase in the rate or season of diversion. Camp Pendleton's request for reconsideration is therefore denied.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration is denied.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 1, 2009.

_____
Jeanine Townsend
Clerk to the Board