

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2006-0015-EXEC

In the Matter of the Petition for Reconsideration of
Irish Beach Water District

(Permit 16622 Pursuant To Application 24364)

Regarding Order Denying Petition for Extension of Time

SOURCE: Mallo Pass Creek tributary to Pacific Ocean

COUNTY: Mendocino

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

Irish Beach Water District (District) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) order denying an extension of time for water right Permit 16622 (Application 24364). The District requests the State Water Board to approve an extension of time for Permit 16622. The State Water Board finds that the Division Chief's order denying the time extension was appropriate and proper and denies the District's petition for reconsideration.

2.0 RECONSIDERATION OF A DECISION OR ORDER

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

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) [e]rror in law. (Cal. Code Regs., tit. 23, § 768.)¹

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. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

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

3.0 FACTUAL BACKGROUND

On February 27, 1974, the State Water Board issued Permit 16622 to Moores Associates for the direct diversion of water for municipal use from Mallo Pass Creek, tributary to the Pacific Ocean, in Mendocino County. After receiving partial assignment of the permit from Moores Associates in 1974, the District became the sole permit holder in 1988. The permit currently authorizes the year round diversion of 150 gallons per minute (gpm), with a maximum diversion not to exceed 220 acre-feet per annum for use in the District.

The State Water Board has granted two extensions of time since Permit 16622 was issued in 1974. The State Water Board last granted a time extension on June 13, 1988, requiring the

¹ 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.

completion of construction by December 31, 1995, and the complete application of water to beneficial use by December 31, 1997.

On July 28, 2000, the District requested a 10-year extension of time, estimating that construction would begin in two to five years or more, and that beneficial use of water would be completed in approximately 40 to 50 years. The time extension petition stated that no water had been used under the permit. The Division did not receive any protests against approval of the time extension.

By letter dated October 20, 2004, the Division asked the District to document the basis for granting a time extension and to explain when the District, as lead agency, would provide the Division with the environmental documentation required under the California Environmental Quality Act (CEQA). On December 21, 2004, the District responded, explaining that it had not made beneficial use of water under the permit and that it did not expect to divert water in the next five years. The District expected to begin using water under the permit in approximately 15 years, depending on the rate of new home construction. It further explained that there were currently 180 homes in the subdivision and that the District ultimately would be responsible for providing water to the equivalent of 477 homes. According to the District, it can provide water to 336 homes from its existing water diversions from Irish Creek and a groundwater well, but it needs the Mallo Pass Creek diversion to serve the remaining 141 homes when they are constructed. Ultimately, when buildout of the Irish Beach subdivision is complete, the District expects to divert 29 gpm from Mallo Pass Creek, which is less than the 150 gpm currently authorized under its permit. The District could not identify when it would provide the Division with the required CEQA documentation.

By order dated July 20, 2006, the Division Chief denied the District's petition for extension of time, citing the District's failure to show that (1) due diligence has been exercised, (2) its failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted.² The District timely submitted its petition for reconsideration to the State Water Board.

² The State Water Board has authorized the Division Chief to act on requests for extension of time. (Board Res. No. 2002-0106, attachment, par. 2.6.11.)

4.0 DISCUSSION

The District requests the State Water Board to conduct a hearing on reconsideration of the Division's denial of the time extension petition and "to reverse the proposed revocation" of its permit. The District seeks reconsideration on the grounds that there is relevant evidence that could not have been produced prior to the Division's decision. (§ 768, subd. (c).) The District's petition, however, does not provide cause for reconsideration.

4.1 Request for Hearing

The District's request for a hearing is based on Water Code section 1123, which provides that the State Water Board may hold a hearing on reconsideration "for the purpose of receiving such additional evidence as the board may, for cause, allow." (See also Cal. Code Regs., tit. 23, § 770 [allowing the State Water Board, in its discretion, to hold a hearing for the purpose of oral argument or receipt of additional evidence].) A person who petitions the State Water Board for reconsideration on the grounds that relevant new evidence is available must include in the petition "an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the board and the reason it was not presented." (§ 769, subd. (b).) The petition must also include a general statement regarding the nature of the new evidence and the facts to be proved. (*Ibid.*)

The District does not present any disputed issue of material fact or identify any evidence that it would offer that would require a hearing to be held. Although the District's petition summarizes the actions it has taken since May 2006, this information adds little probative value to the information already in the record. For the most part, the petition contests the Division's conclusions that are based on facts already in the record, rather than identifying new evidence. The District also failed to include the required affidavit or declaration with its petition. Accordingly, the District's request for a hearing is denied. The issues raised by the District will be resolved on the basis of the existing record as supplemented by the additional materials submitted with the petition. (See Board Orders WR 99-07 and WR 80-21 [finding evidence in the record was adequate to address issues raised without holding a hearing].)

Additionally, although the Division's order denying the time extension noted that the State Water Board will issue a Notice of Proposed Revocation for Permit 16622, the Board has not yet

issued a revocation notice.³ Accordingly, the statute governing revocations, which allows a permittee to request a hearing after receiving a notice of revocation, is inapplicable to this proceeding. (Wat. Code, § 1410.1.)

4.2 Request for Time Extension

4.2.1 Applicable Law

Water Code section 1396 requires a permittee to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the State Water Board's regulations, and the terms specified in the permit. (See also Wat. Code, §§ 1395, 1397 [requiring a water right permit to identify periods of time to begin construction, to complete construction, and to apply water to beneficial use].) The State Water Board may approve a request for an extension of time if the State Water Board finds that there is good cause for the extension. (*Id.*, § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the State Water Board determines to be in the public interest, and on a showing to the State Water Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The State Water Board generally will not accept as good cause for delay conditions incident to the person and not to the enterprise. (*Ibid.*)

4.2.2 Due Diligence

In determining whether there is good cause to approve the District's request for an extension of time to complete the beneficial use of water, the State Water Board must consider whether the District has exercised diligence in the past in putting water to beneficial use. Due diligence requires a demonstrable effort to put water to beneficial use within the time period specified in the permits. (But see 25 Ops.Cal.Atty.Gen. 32, 40 (1955) [noting that due diligence may require something more than simply complying with time limits in permits].)

The evidence in the record supports a finding that the District has not diligently pursued development of its water right project under Permit 16622. In the 32 years since the permit was

³ Once issued, a permit remains in force until revoked in the manner prescribed by section 1410 of the Water Code or a license is issued. (*Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 415-416 [340 P.2d 722].)

issued, the District has neither constructed the diversion facilities nor diverted water under the permit. The District has not needed to develop the Mallo Pass Creek water supply because it currently has sufficient water from other sources to serve the still-growing Irish Beach subdivision. The District asserts that it has acted reasonably and diligently under the circumstances, but that it has no control over the pace of development within the subdivision. Thus, it contends, the diligence expected by the Division was not possible.

Due diligence is not established simply because beneficial use may increase as demands increase. (*California Trout, Inc. v. State Water Resources Control Board (California Trout)* (1989) 207 Cal.App.3d 585 [255 Cal.Rptr. 184]; see, e.g., Board Orders WR 73-14, WR 82-5.) The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law intended to protect the public interest by preventing the “cold storage” of water rights. (See State Conservation Commission, Report of the Conservation Commission of the State of California to the Governor and Legislature of California (1913) at pp. 21, 39 [concluding that it is not sound public policy to allow an essential natural resource such as water to be kept in cold storage]; see also *Nevada County & Sacramento Canal Co. v. Kiddbut* (1869) 37 Cal. 282, 310-314 [noting that a water right is acquired by the actual appropriation and use of the water and not merely by an intent to take the water].) Thus, while the District claims its actions—and lack of actions—“have been in the public’s best interest in conserving precious natural resources,” the Legislature has determined that the public interest is served by ensuring that water is diligently put to beneficial use.⁴

In *California Trout*, the Court of Appeal observed that the statutory requirement of diligence does not allow the State Water Board “to countenance a scheme placing water rights in ‘cold storage’ for future use.” (*California Trout, supra*, at p. 619.) The permittee was a large and growing municipality, and there was no serious question about the potential for increased municipal demand adequate to make use of the diversions authorized in the permit. Nonetheless, the court concluded that the State Water Board had acted improperly when it granted an extension of time because the permittee did not have any immediate plan to

⁴ In considering appropriations of water, however, the State Water Board also has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].)

proceed promptly to put the water to full beneficial use.⁵ (*Id.* at pp. 618-619.) In particular, the Court held that a claim that beneficial use would be achieved “[w]hen required by municipal needs” was inconsistent with the due diligence requirement.⁶ (*Id.* at p. 619.) Thus, “a water right permit is not a proper instrument to reserve water for development at some future time.” (Board Order WR 82-5, at p. 7; see also Board Decision D 1083 (1963), at p. 5 [noting that every water right applicant bears the burden of providing information that the State Water Board can rely on when setting the time periods for completion of construction and application of water to beneficial use in the water right permit].)

Moreover, the District has not diligently pursued fulfilling its responsibilities under CEQA. The District, as the petitioner for an extension of time, is the lead agency for the preparation of environmental documentation for the proposed time extension and it must prepare the necessary documentation before the State Water Board, as responsible agency, will consider whether to approve a time extension. On August 29, 2000, the Division informed the District that it must comply with CEQA before the Division could act on the District’s time extension petition. In 2004 the Division again reminded the District of its CEQA responsibilities, but the District responded that it could not say when it would undertake the CEQA process. According to the District’s August 4, 2006, petition for reconsideration, the District initiated the CEQA process in May 2006 when it engaged the services of a CEQA consultant. The District’s recent action in the past five months, however, does not excuse its failure to diligently prepare the environmental documentation needed to consider the time extension it filed six years ago.

4.2.3 Failure to Comply With Previous Time Requirements

The State Water Board must also consider whether the District’s failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay. (§ 844.) The District contends that the slow

⁵ The discussion of extensions in *California Trout* was part of a retroactivity analysis, and the court did not invalidate the extensions. Nevertheless, the Court of Appeal’s discussion reinforces the conclusion that the State Water Board is required to implement the due diligence requirements of its regulations, and that the potential or even probability of increasing water use due to growth and development is insufficient to establish due diligence.

⁶ Accordingly, the State Water Board has since determined that although a municipality is to be afforded some latitude in putting water to beneficial use, it still must diligently apply water to beneficial use. (See, e.g., Board Order WR 2000-13, at p. 14 [finding the question of diligence by a municipality to be a “close one”].)

pace of development is beyond its control. As explained above, however, the State Water Board should not tolerate an attempt to reserve water for future use when a permittee has no plans to promptly apply the water to beneficial use. The record does not support a finding that the District's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. (See, e.g., In the Matter of Permit 5684 (May 6, 1971) 1971 WL 15184 [State Water Board order denying time extension where a permittee had difficulty completing a subdivision largely due to depressed economic conditions in the area].)

4.2.4 Satisfactory Progress

The information in the record does not support a finding that the District will make satisfactory progress if the State Water Board grants an extension of time. To the contrary, the District's plans to appropriate water under Permit 16622 are highly indefinite and uncertain. In 2004 the District anticipated that it would begin using water under the permit in approximately 15 years, depending on the rate of new home construction. The District's estimate of the pace of development and its future water use is speculative, however, and indicates that the District has no immediate plans to use water under Permit 16622. (See Board Order WR 73-14 [denying time extension when a permittee had not decided whether to proceed with project and there was no evidence that a water supply project would be constructed within a reasonable time in the future].) There is no cause for reconsideration.

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5.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that the Division's order denying an extension of time was appropriate and proper and that the District's petition for reconsideration fails to raise substantial issues related to the causes for reconsideration. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that these issues are insubstantial. The petition for reconsideration is denied.

ORDER

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

Dated: October 12, 2006

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director