
State Water Resources Control Board

August 27, 2021

VIA CERTIFIED MAIL AND EMAIL

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Dear Mr. Diaz,

After careful consideration, it is concluded that the petition in this matter fails to raise substantial issues that are appropriate for review by the State Water Resources Control Board (Board). (See Health & Saf. Code, § 116701, subd. (d).) Accordingly, the petition is dismissed as of this date.

On October 27, 2020, the Board issued Order No. 03_24_20R_002 (the Order) to Orosi Public Utility District (Orosi PUD) and Order No. 03_24_20R_011 to East Orosi Community Service District (East Orosi CSD), mandating consolidation of the two districts' water systems.¹ The Board ordered consolidation based on East Orosi CSD's history of exceeding the maximum contaminant level (MCL) for nitrate set pursuant to California's Safe Drinking Water Act, and designated Orosi PUD as the receiving, or surviving, system. The Board followed the process required by statute before ordering consolidation. The process lasted several years and involved voluntary consolidation negotiations facilitated by the Board, public meetings, consideration of comments, and consultations.

On November 30, 2020, Orosi PUD timely filed a petition for reconsideration of the Order, pursuant to Health and Safety Code section 116701. The petition challenges the validity of the Order and the process followed by the Board. Orosi PUD claims that East Orosi CSD's history of nitrate exceedances did not meet the statutory criteria for mandatory consolidation; that the process violated constitutional and statutory requirements; that the Board violated statute by not providing funding for consolidation at the time it issued the Order; and that the Order amounted to an unconstitutional taking without just compensation. Orosi PUD also raised several other claims.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

APPLICABLE LAW

Health and Safety Code² section 116682 provides the Board authority to mandate consolidation of water systems serving disadvantaged communities that “consistently fail[] to provide an adequate supply of safe and affordable drinking water.” Subdivisions (b) and (c) of section 116682 prescribe the process the Board must follow before ordering consolidation. Steps include the following: notification of the affected systems of the potential that the Board may order mandatory consolidation; provision of a period of at least six months for systems to negotiate voluntary consolidation; Board facilitation of voluntary consultation; consultations with various entities with authority related to the service of drinking water; public meetings; and consideration of comments. Subdivision (d) enumerates the findings the Board must make upon ordering mandatory consolidation, including findings that consolidation is feasible and appropriate and that no obstacles stand in the way of consolidation. Subdivision (e) addresses the Board’s responsibilities after ordering consolidation, requiring it to provide reasonable financial assistance to effect consolidation and to compensate systems for property interests lost as a result of consolidation. Section 116701 provides that an aggrieved person may petition the Board for reconsideration of certain drinking water orders issued under the Board’s authority, including orders issued under section 116682. Subdivision (d) of section 116701 provides that the Board may “refuse to reconsider the order or decision if the petition fails to raise substantial issues that are appropriate for review.”

DISCUSSION

A. THE ORDER’S FINDING THAT EAST OROSI CSD CONSISTENTLY FAILED TO PROVIDE AN ADEQUATE SUPPLY OF SAFE DRINKING WATER WAS CONSISTENT WITH STATUTE

Orosi PUD claims the Order’s finding that consolidation is appropriate is not supported by substantial evidence because it relied on an engineering study of solutions to nitrate contamination of East Orosi CSD’s water supply that no longer existed when the Order was issued. Orosi PUD observes that of the two wells that supply East Orosi CSD’s water, at the time the Order was issued Well 01 had last exceeded the MCL for nitrate in the third quarter of 2018 and Well 02 had not exceeded the MCL for over a year. Orosi PUD concludes that the Order should therefore be invalidated.

Section 116682, subdivision (a)(1) provides that the Board may only order a water system to consolidate if it “consistently fails to provide an adequate supply of safe drinking water.”³ Exceeding the nitrate MCL qualifies as a failure to provide safe

¹ The petition suggests that the Order mandates consolidation of the two districts, rather than the districts’ water systems. The first page of the Order imprecisely states that it is mandating consolidation of districts; however, the Order’s directives, which set forth the actions Orosi PUD and East Orosi CSD must undertake pursuant to the Order, specify that the districts must consolidate their water systems.

² All subsequent statutory references are to the Health and Safety Code unless otherwise noted.

³ Orosi PUD’s claim is based on the assertion that East Orosi CSD was not in violation of the nitrate MCL at the time the Order was issued. Although Orosi PUD challenges the Board’s finding that consolidation was appropriate on this basis, section 116682 distinguishes between the appropriateness of consolidation

drinking water within the meaning of subdivision (a)(1). Section 116681, subdivision (l) defines “safe drinking water” to mean “water that meets all primary and secondary drinking water standards.” California Code of Regulations, title 22, sections 64431 and 64432, subdivision (i), establish the primary drinking water standard for nitrate in the form of an MCL of 10 mg/L. If the nitrate concentration of a water system’s monitoring samples does not exceed 10 mg/L, the system meets the primary drinking water standard for nitrate.

The Order documents that East Orosi CSD’s monitoring samples exceeded the nitrate MCL numerous times. A chart shows that of 43 samples of Well 02 taken between February 2010 and July 2020, 29 exceeded the nitrate MCL.⁴ According to Attachment H to the Order and results reported on the Water Board’s drinking water database, 8 samples taken from Well 01 during the same period exceeded the nitrate MCL.⁵ East Orosi CSD did not meet the primary drinking water standard for nitrate on these occasions, and therefore failed to provide safe drinking water within the meaning of subdivision (a)(1).

Orosi CSD’s petition raises the issue whether such failures must be current to satisfy subdivision (a)(1). Subdivision (a)(1) provides that the Board may only order consolidation if a system “consistently fails” to meet drinking water standards. It may be argued that the “consistently” means that failure must be continuous, in which case a system that currently meets drinking water standards cannot satisfy subdivision (a)(1), even if it has repeatedly failed to meet them in the past and is likely to fail again. But the term “consistently fails” is defined by statute. Section 116681, subdivision (c), defines it to mean “a failure to provide an adequate supply of safe drinking water.” This definition militates against an interpretation of the word “consistently” that would bar the Board from ordering consolidation simply because the system to be subsumed in the consolidation is meeting drinking water standards at the time the consolidation order is issued. Similarly, the use of the present-tense “fails” cannot be read to exclude ordering consolidation based on a history of failures if the system is meeting standards when the consolidation order is issued. Section 11 of the Health and Safety Code provides that usage of the present tense in the code includes the past tense. Therefore, “fails” as used in subdivision (a)(1) may refer to past failures.

Furthermore, consideration of past failures is consistent with the consolidation statute’s purpose of protecting customers of water systems that have provided unsafe water from the risk of future harm. A history of failing to provide safe drinking water may indicate that a system will likely fail to provide safe drinking water in the future, even if it is not currently failing to do so. The more frequently failures have occurred the more likely

as a remedy and whether a system provides unsafe water that subjects it to the Board’s consolidation authority. Subdivision (d)(3) addresses the former; subdivision (a)(1) addresses the latter. Orosi PUD’s claim is properly viewed as denying that East Orosi CSD was providing unsafe water within the meaning of subdivision (a)(1).

⁴ As the Order observes, in 2015 California changed the reporting unit for nitrate from N₃ to N; consequently, the MCL changed from 45 mg/L as N₃ to 10 mg/L as N. [Order at 6.]

⁵ It appears that fewer samples were taken of Well 01 than Well 02 at least in part because Well 01 was offline for repairs in 2017. [See Order at 4.]

they will occur in the future. Of course, current compliance with drinking water standards may indicate the opposite, and the longer a system has been in compliance, the less likely it will fail to meet drinking water standards in the future.

East Orosi CSD exceeded the nitrate MCL in both wells numerous times between 2010 and 2020. Orosi PUD correctly asserts that when the Board issued the Order, Well 01 had not exceeded the nitrate MCL for over two years and Well 02 had not done so for over a year. This must be weighed against East Orosi CSD's history of exceedances, however. Those exceedances date back over a decade. As the Order shows, Well 02 exceeded the nitrate MCL continuously between the second quarter of 2014 and third quarter of 2019, except for one sample that tested at the MCL in 2016.

Furthermore, East Orosi CSD was barely in compliance when the Order was issued. The Board's drinking water database reports that in each of the last three quarters for which data were submitted before the Order was issued, both Well 01 and Well 02 tested at the nitrate MCL of 10 mg/L. Given East Orosi CSD's history of exceedances, this minimal compliance does not indicate that the problem has been rectified, and Orosi PUD does not offer any other reason to conclude otherwise.⁶

In conclusion, East Orosi CSD's compliance with the nitrate MCL at the time the Order was issued did not bar the Board from exercising its consolidation authority pursuant to section 116682, subdivision (a)(1), and given East Orosi CSD's history of exceeding the nitrate MCL and minimal compliance when the Order was issued, it is reasonable to conclude that it "consistently fail[ed] to provide an adequate supply of safe drinking water" within the meaning of subdivision (a)(1).

Orosi's petition for reconsideration of this claim fails to raise substantial issues appropriate for review by the Board and is dismissed.

B. THE BOARD DID NOT VIOLATE CONSTITUTIONAL OR STATUTORY PROCEDURAL REQUIREMENTS APPLICABLE TO MANDATORY CONSOLIDATIONS

Orosi PUD claims the Board committed several violations of constitutional due process and the procedural requirements set forth in section 116682. As an initial matter, Orosi PUD does not have standing to bring constitutional due-process claims. Public utility districts are "quasi-municipal corporations" authorized by the state of California to carry out public purposes, and therefore constitute political subdivisions analogous to cities and counties. (*In re Orosi Pub. Util. Dist.* (1925) 196 Cal. 43, 56-57; *Glenbrook Dev. Co. v. City of Brea* (1967) 253 Cal.App.2d 2567, 276.) Both the California Supreme Court and the federal Ninth Circuit Court of Appeals have held that a state's political subdivisions cannot bring federal due-process claims against the state. (*City of S. Lake Tahoe v. Cal. Tahoe Regional Planning Agency* (9th Cir. 1980) 625 F.2d 231, 233-34;

⁶ The Water Board's drinking water database reports that both wells were out of compliance in the second quarter of 2021, testing at 11 mg/L, further indicating that East Orosi CSD's period of compliance did not reflect a trend toward long-term compliance.

Star-Kist Foods, Inc. v. Cty. of Los Angeles (1986) 42 Cal.3d 1, 5.) Regardless, Orosi PUD fails to allege facts establishing that the Board's actions violated constitutional or statutory procedural requirements.

Orosi PUD claims the Board ordered consolidation on grounds in addition to nitrate contamination, but did not provide notice and opportunity to comment on these grounds, in violation of due process and subdivisions (b)(6), (b)(9), (c)(2), and (c)(3) of section 116682, which respectively require the Board to consult with water systems "in the chain of distribution of the potentially receiving water system," hold duly noticed public meetings to discuss the grounds for consolidation, and keep systems informed of progress in the consolidation process. As discussed above, however, the Board ordered consolidation based on nitrate contamination. And the public was duly notified that the Board was proceeding on that basis. The Board held the two public meetings required by subdivisions (b)(9) and (c)(2); the meeting notices focused on East Orosi CSD's exceedances of the nitrate MCL. And as the Order documents, the Board met several times throughout the process with Orosi PUD to address its concerns; the Board kept both systems informed on the progress of consolidation.

Orosi PUD claims the Board failed to provide information Orosi PUD requested that was necessary for it to negotiate voluntary consolidation, which Orosi PUD argues violated due process and subdivisions (b)(6), (b)(9), (c)(2), and (c)(3) of section 116682. Orosi PUD asserts that it sent the Board a list of 41 questions it needed answered to be able to negotiate voluntary consolidation, but that the Board failed to provide answers. As Orosi PUD acknowledges, the Board held a meeting October 16, 2019, with Orosi PUD, East Orosi CSD, and the Tulare County Local Agency Formation Commission to answer Orosi PUD's questions. The Board was represented by both DDW and the Division of Financial Assistance, and the meeting lasted for two hours. The Board provided oral answers to all of the questions for which it possessed information. Several of the 41 questions sought information about East Orosi CSD's finances, liabilities, and operations, however, and the Board did not possess this information. The Board attempted to facilitate disclosure of this information by emailing East Orosi CSD the unanswered questions.

Orosi PUD claims the Board unreasonably denied its request for an extension to negotiate voluntary consolidation, in violation of subdivisions (b)(7) and (d)(2) of section 116682, which respectively require the Board to set a "reasonable" deadline for systems to negotiate voluntary consolidation and find that "reasonable efforts to negotiate consolidation . . . were made." The Board did not unreasonably deny Orosi PUD's request for an extension to negotiate voluntary consolidation. The Order documents that on July 13, 2018, the Board sent letters to Orosi PUD and East Orosi CSD notifying them that they had six months to negotiate voluntary consolidation, and the Board denied the January 2019 extension request because East Orosi CSD was in violation of the nitrate MCL. Furthermore, the Board did not order consolidation until October 2020, over a year and nine months after denying the extension request, leaving Orosi PUD and East Orosi CSD ample opportunity to negotiate voluntary consolidation.

Orosi PUD claims the Board violated due process by “failing to provide sufficient notice of the details which each district must comply with and notice of which agreements are necessary to accomplish the consolidation.” The basis of this claim is not clear. Orosi PUD appears to object to the Board’s decision to issue the Order after Orosi PUD submitted milestones for voluntary consolidation that the Board requested in September 2020. Orosi PUD also appears to argue that voluntary consolidation depended on an agreement with the Board, but that the Board refused to negotiate such an agreement.

The gravamen of Orosi PUD’s claim—that the Board failed to provide notice that it would order consolidation if the systems failed to negotiate consolidation—is contradicted by the evidence. The Board notified Orosi PUD in July 2018 that it had six months to negotiate a voluntary consolidation with East Orosi CSD and that failure to do so could result in the Board issuing a mandatory consolidation order. In denying Orosi PUD’s January 2019 request for an extension of the negotiation period, the Board stated, “If a voluntary consolidation is not timely achieved, the State Water Board may take action . . . for consolidation.”

Although the Board refrained from ordering consolidation for over a year and nine months after it had met all requisite procedural requirements to do so, it would have been unreasonable for Orosi PUD to mistake the Board’s forbearance for an abandonment of its intention to effect a consolidation. Rather, the Board continued to encourage the systems to reach a voluntary consolidation while maintaining mandatory consolidation as a backstop, a position that the Board communicated to Orosi PUD. Minutes from a September 2020 meeting attended by the representatives of the Board and Orosi PUD record that one of the Board’s representatives “highlighted the need to be proactive, keep things moving and asked if [Orosi PUD] might prefer a mandatory consolidation order,” and stated that the Board “needs to be able to show progress.” Minutes from an October 7, 2020, meeting record that one of the Board’s representatives told Orosi PUD, “If [the Board] does not get [a] substantial timeline and letter of intent from O[rosi] PUD, they are going to do a mandatory consolidation. These steps are needed to move forward.” The representative also stated, “[T]his has been outstanding for a long time [The Board is] trying to give heads up about possible future steps.” Given the initial notice the Board provided that it might exercise this authority and its subsequent communications to Orosi PUD that it might mandate consolidation if Orosi PUD failed to demonstrate progress toward voluntary consolidation, Orosi PUD cannot reasonably claim not to have received notice that the Board would issue the Order.

Orosi PUD’s argument that voluntary consolidation depended on an agreement with the Board that the Board refused to negotiate is likewise contradicted by the evidence. Orosi PUD relies on a statement, contained in the 2017 preliminary engineering report: “It is recommended that Alternatives C-2(a) or C-2(b) be implemented, and that Alternative C-2(b) [consolidation] be considered to be preferable from East Orosi’s standpoint if the parties in interest . . . can reach agreement.” This statement does not indicate that voluntary consolidation depended on an agreement with the Board, and even if it did it would not have been binding. The report was prepared by an engineering

firm to study the engineering and economic feasibility of options for addressing East Orosi PUD's nitrate contamination.

Orosi PUD's petition for reconsideration of its procedural claims fails to raise substantial issues appropriate for review by the Board and is dismissed.

C. THE BOARD DID NOT VIOLATE CONSTITUTIONAL OR STATUTORY REQUIREMENTS TO FUND MANDATORY CONSOLIDATION OR COMPENSATE OROSI PUD FOR TAKING OF PROPERTY

Orosi PUD claims that the Board violated statutory requirements to provide funding for mandatory consolidation and compensate it as a receiving system for capacity lost as a result of consolidation. Specifically, Orosi PUD claims that by not pledging to provide funding or compensation before issuing the Order the Board violated section 116682, subdivisions (b)(7)(B) and (e)(1), respectively. Orosi PUD claims that the Board's failure to compensate it for lost capacity is also an unconstitutional taking.

Section 116682 requires the Board to provide needed funding for consolidations, but it does not require the Board to provide funding at the same time it issues an order. Subdivision (b)(7)(B) applies during the period when the Board must allow water systems to negotiate voluntary consolidation; it provides that the Board "shall provide technical assistance and work with the potentially receiving water system and the potentially subsumed water system to develop a financing package that benefits both" systems. Although this provision directs the Board to develop a funding package that would facilitate a voluntary consolidation, it does not require the Board to issue funding before mandating consolidation. Subdivision (e)(1) provides that "[u]pon ordering consolidation . . . the state board shall . . . provide appropriate financial assistance." Before the Board provides financial assistance, however, Orosi PUD must submit an application for funding. Orosi PUD has yet to do so.

Orosi PUD argues that it would suffer hardship under the Order's directives because they require Orosi PUD to incur the costs of developing planning documents before the Board provides funding. Specifically, Orosi PUD refers to the cost of preparing a construction funding application. The Board provides technical assistance grants for preparation of construction funding applications. Again, Orosi PUD must submit an application to the Board to receive technical assistance funding. It has yet to do so.

Since consolidation has yet to take place, the Board has not required Orosi PUD to use any of its capacity to serve customers of East Orosi CSD and has not otherwise restricted Orosi PUD's water use. Therefore, Orosi PUD's statutory and constitutional claims seeking compensation for lost capacity are not ripe. As Orosi PUD notes, section 116682, subdivision (e)(1), requires the Board to compensate receiving water systems as necessary and appropriate for any capacity lost as a result of consolidation.

Orosi PUD's petition for reconsideration of its procedural claims is dismissed.

D. OROSI PUD'S OTHER CLAIMS FAIL TO RAISE SUBSTANTIAL ISSUES APPROPRIATE FOR REVIEW BY THE BOARD.

Orosi PUD raises several other claims challenging the validity of the Order and the Board's process. These claims fail to raise substantial issues appropriate for review by the Board and are dismissed.

CONCLUSION

The petition is dismissed for failure to raise substantial issues appropriate for review by the Board.

Sincerely,



Eileen Sobeck
Executive Director

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