

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 - 24

In the Matter of Permit 17528A and 17528B (Application 24576A and 24576B)
EVA JOHNSON

SOURCE: Robinson Creek Tributary to Navarro River
COUNTY: Mendocino

ORDER REVOKING PERMITS 17528A AND 17528B

1.0 INTRODUCTION

In March 2000 the State Water Resources Control Board's (SWRCB) Division of Water Rights (Division) initiated revocation proceedings for Permits 17528A and 17528B pursuant to Water Code section 1410 et seq. The SWRCB has considered all of the information in the administrative record and finds that there is cause to revoke Permits 17528A and 17528B.

2.0 APPLICABLE LAW

The Water Code requires a permittee to pursue diligently the construction of a water project and the application of water to beneficial use, in accordance with the statute, the SWRCB's regulations, and the terms of the permit. (Wat. Code, §§1396, 1397.) Water Code section 1410, subdivision (a) provides: "There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the board." (See also Cal. Code Regs., tit. 23, § 850 (providing for permit revocation).)

3.0 FACTUAL AND PROCEDURAL BACKGROUND

The Division issued Permit 17528 (Application 24576) to B.J. Carney and Company on February 6, 1979. In 1981 the permit was assigned to Mr. Floyd Johnson; Ms. Eva Johnson currently asserts ownership of the water rights at issue.¹

In 1984 the Division separated Permit 17528 into Permits 17528A and 17528B (Applications 24576A and 24576B), but the essential terms and conditions of the two permits remained relatively unchanged from the original permit. Permit 17528A allows the direct diversion of 0.78 cubic feet per second (cfs) for frost protection purposes from of time. Permits 17528A and 17528B currently require the Permittee to complete construction by December 31, 1991, and to complete application of water to the proposed use by December 31, 1993.

The Permittee submitted Progress Reports to the Division in 1980, 1982, 1983, 1984, and 1987. Many of the reports indicate that the Permittee had not begun project construction for financial reasons. The Division has not received any Progress Reports since it received the 1987 report in 1988.

On July 2, 1999, the Division notified Ms. Johnson that she could request an extension of time if she believed that she would diligently develop her water rights in the future. The notification further stated that if she did not respond within 60 days, the Division would initiate the permit revocation process. The Division did not receive a response. On March 15, 2000, the Division issued a Notice of Proposed Revocation for Permits 17528A and 17528B based on the fact that (i) terms 8 and 9 of the permits required the Permittee to complete construction by 1991 and application of water to beneficial use by 1993, (ii) the Permittee had not filed Progress Reports between 1988 and 1998 as required by permit term 10, and (iii) the Permittee failed to respond when the Division advised her that she had 60 days to file a petition for extension of time and that otherwise the permits would be subject to revocation.

¹ In general, Floyd Johnson and Eva Johnson each will be referred to herein as "Permittee."

Ms. Johnson submitted a timely request for a hearing and on August 1, 2001, the SWRCB issued a Notice of Public Hearing scheduling a formal hearing for August 21, 2001. Ms. Johnson subsequently withdrew her request for a formal hearing subject to her opportunity to present a statement to the SWRCB at its September 5, 2001 workshop. By letter dated August 10, 2001, the Division's counsel confirmed that Ms. Johnson was withdrawing her request for a formal hearing.² The counsel also stated that she assumed Ms. Johnson agreed "that the facts in the Notice of Proposed Revocation [were] true and correct, therefore there are no disputed facts at issue." Ms. Johnson has not responded to the contrary.

4.0 REVOCATION OF PERMITS

The administrative record in this proceeding consists of the Division's files for Permits 17528, 17528A, and 17528B. There is no disputed issue of material fact in this proceeding.

Twenty-two years have elapsed since the original permit was issued in 1979, and project construction and the application of water to beneficial use under Permits 17528A and 17528B have not yet commenced. According to the Permittee's 1987 Progress Report, which is the last report that the Division received from the Permittee, the Permittee had not yet begun project construction or applying the water to beneficial use.³ The Permittee has failed to submit the required Progress Reports since that time. The undisputed facts and information contained in the Division's Notice of Proposed Revocation indicate that the Permittee has failed to comply with the permit terms that currently require the Permittee to complete construction by 1991 and apply water to beneficial use by 1993. Moreover, Ms. Johnson failed to respond when the Division gave her the opportunity to

² The SWRCB has observed a separation of functions in this proceeding. (See Gov. Code, § 11425.10, subd. (a)(4).) Certain SWRCB staff are serving as the Division's prosecution team and other SWRCB staff are serving as advisors to the hearing officer and to the SWRCB.

³ According to the available Progress Reports, the Permittee could not afford to commence construction. Lack of finances, however, is not generally accepted as good cause for delay. (Cal. Code Regs., tit. 23, § 844.)

request an extension of time if she felt that she would diligently develop her water rights in the future. The undisputed administrative record supports a finding that the Permittee has failed to commence or complete construction of the project with due diligence, or to apply the water to beneficial use, as required by the Water Code, the SWRCB's regulations, and the terms of the permit. Therefore, the SWRCB finds that there is good cause to revoke Permits 17528A and 17528B.

5.0 CONCLUSION

The SWRCB finds that there is cause to revoke Permits 17528A and 17528B.

ORDER

IT IS HEREBY ORDERED that Permits 17528A and 17528B are revoked.

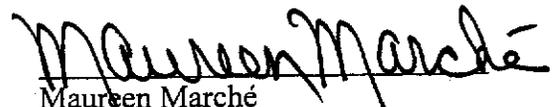
CERTIFICATION

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 September 20, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSTAIN: None


Maureen Marché
Clerk to the Board

STATE WATER RESOURCES CONTROL BOARD

Hearing for Eva Johnson
Applications 24576A and 24576B

Salmon Unilimited
P.O. Box 765
Ukiah CA 95482

D J Braden
1827 Tulip Place
Willits CA 95490-9093

Mendocino Environmental Center
106 West Standley Street
Ukiah CA 95482

Steve Cannata
Dept of Fish and Game
5629 Arapaho Way
Kelseyville CA 95451

Drew Aspegren
Napa Valley Vineyard Engineering
176 Main Street, Suite B
St Helena CA 94574

M Albert
CNPS San Hedrin Chapter
950 Lake Mendocino Drive
Ukiah CA 95482

CNPS Dorothy King Young Chapter
P.O. Box 577
Gualala CA 95445

Stan Griffin
Trout Unlimited of California
828 San Pablo Ave, No 208
Albany CA 94706-1603

Richard Roos-Collins
Natural Heritage Institute
2140 Shattuck Ave., 5th Floor
Berkeley, CA 94704

Dr. William Hearn
National Marine Fisheries Service
777 Sonoma Ave Room 325
Santa Rosa CA 95404

Roanne Withers
Sierra Club Mendocino/Lake Group
P.O. Box 2330
Fort Bragg, CA 95437

Tom Yarish
23 Nelson Avenue
Mill Valley CA 94941

Hillary Adams
1391 Cameron Road
Eureka CA 95432

B D Van Zandt
2914 Glenwood
Eureka CA 95501

Beverly & Marvin Dutra
P.O. Box 577
Philo CA 95466

Diane Paget
P.O. Box 223
Philo CA 95466

Dr. Hillary Adams
P.O. Box 1936
Mendocino CA 95460

Daniel Myers
P.O. Box 178
Philo CA 95466

Helen Libeu
4715 Guerneville Road
Santa Rosa CA 85401

Rex McClellan
P.O. Box 66
Philo CA 95466

Chairman
Navarro Watershed Protection Association
P.O. Box 1936
Mendocino CA 95460

John Waitheman
Dept of Fish and Game
P.O. Box 47
Yountville, CA 94599

John Love
P.O. Box 61
Philo CA 95466