

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WRO 2003 - 0006 - EXEC**

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In the Matter of  
Petition for Reconsideration of Issuance of  
Certificates for Small Domestic Use  
Registration Nos. D031326R, D031332R,  
D031333R and D031334R,  
**DEPARTMENT OF FISH AND GAME,**  
PETITIONER.

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SOURCE: Russian River.  
COUNTY: Sonoma.

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**ORDER GRANTING THE PETITION FOR RECONSIDERATION**

**BY THE EXECUTIVE DIRECTOR**

**1.0 INTRODUCTION**

By this order, the Executive Director of the State Water Resources Control Board (SWRCB) grants the Department of Fish and Game's (DFG) petition for reconsideration of the approval of four small domestic use registrations on the Russian River: Registration Numbers D031326R, D031332R, D031333R and D031334R. The registrations were filed by Barbara Lannin; Cliff M. Palefsky and Michelle Pepitone; Steven V. Owen and Robin Froman; and J. Roberts and Marcia R. Fosberg, respectively. The issue presented by DFG's petition is whether the four registrations exceed the statutory limitation of one registration per facility because the registrants seek to distribute water to four residences using a common pump, pipeline and storage tank.

For the reasons set forth below, the Executive Director concludes that the pump, pipeline and storage tank that would be shared by the four registrants constitutes a single facility within the meaning of the statute and therefore the approval of four separate registrations was improper. Accordingly, the approval of the registrations is set aside and the registrants are directed either to file a single registration that complies with the Water Rights Permitting Reform Act of 1988 or to obtain water right permits before diverting water as contemplated in the registrations.

## **2.0 FACTUAL AND PROCEDURAL BACKGROUND**

The SWRCB received Registration Numbers D031326R, D031332R, D031333R and D031334R on May 8, 2002, May 2, 2002, May 20, 2002, and April 29, 2002, respectively. The four registrations seek to divert water from the Russian River in Sonoma County and convey it through a pipeline to a common storage tank. From there, the water would be distributed to four separate properties that belong to the four registrants. Each registration covers a separate property. Each registration seeks to divert 1,800 gallons per day with a total annual limit of two acre-feet. The quantity of water sought in each registration is based on the need to serve one residence and one-half acre of domestic lawns and gardens.

Acting pursuant to authority delegated by the SWRCB (SWRCB Resolution 2002-0106, par. 2.6.20), the Chief of the Division of Water Rights issued a certificate of registration for Registration D031334R on December 23, 2002. The Division Chief issued certificates of registration for Registrations D031326R, D031332R, D031333R on December 24, 2002. On December 30, 2002, DFG filed a petition for reconsideration of the issuance of the certificates. The petition was styled as a "request for remedy" and did not satisfy the requirements of SWRCB regulations governing the contents of a petition for reconsideration. DFG corrected the deficiencies in its initial filing by submitting a complete petition for reconsideration on January 24, 2003. On February 25, 2003, the SWRCB received Mr. Palefsky's response to the petition, which he submitted on behalf of the four registrants.

## **3.0 GROUNDS FOR RECONSIDERATION**

Within 30 days of adoption of an order or decision made by an officer or employee of the SWRCB pursuant to authority delegated by the SWRCB, any interested person may file a petition for reconsideration of the order or decision. (Wat. Code, § 1122; Cal. Code Regs., tit. 23, §§ 768-770.) Section 768 of the SWRCB's regulations provides that an interested person may petition for reconsideration upon any of the following causes:

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- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

Petitions for reconsideration must contain the following:

- (1) Name and address of the petitioner.
- (2) The specific board action of which petitioner requests reconsideration.
- (3) The date on which the order or decision was made by the board.
- (4) The reason the action was inappropriate or improper.
- (5) The specific action which petitioner requests.
- (6) A statement that copies of the petition and any accompanying materials have been sent to all interested parties.

(Cal. Code Regs., tit. 23, § 769, subd. (a).) Section 769, subdivision (c) of the regulations provides further that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

On reconsideration, the SWRCB may:

- (1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration; or
- ...
- (A) Deny the petition upon a finding that the decision or order was appropriate and proper; or
- (B) Set aside or modify the decision or order; or
- (C) Take other appropriate action.

(Cal. Code Regs., tit. 23, § 770.) With certain exceptions that do not apply in this case, the SWRCB has delegated to the Executive Director of the SWRCB the authority to take action on petitions for reconsideration of orders or decisions made by an officer or employee of the SWRCB. (SWRCB Resolution 2002-0104, par. 1.)

#### **4.0 DFG'S PETITION**

DFG's December 30, 2002 petition, or "request for remedy," did not fully comply with the SWRCB's regulations. The petition did not include a statement that a copy of the petition had been sent to all interested parties. In addition, the petition requested that the registrations be reviewed and "made to comply" with Water Code section 1228, but did not otherwise specify what action was requested of the SWRCB. But DFG cured these defects in its January 24, 2002 petition.

In its January 24, 2002 petition, DFG argues that issuance of the four certificates constituted error in law because the four registrants would use a single diversion and storage facility in violation of the statutory limitation of one registration per facility and the registrants' collective diversions would exceed the 4,500 gallon per day limitation for a small domestic use registration. DFG requests the SWRCB to cancel the four certificates and reissue a single certificate that restricts the diversion amount to 4,500 gallons per day and eight acre-feet per annum.

#### **5.0 DISCUSSION**

The Water Rights Permitting Reform Act of 1988 (Wat. Code, §§ 1228-1229.1) provides a streamlined process for acquiring rights to appropriate water for small domestic use or livestock ponds. A right is perfected by registering a qualifying use with the SWRCB and then applying water to reasonable and beneficial use with due diligence consistent with the registration. (Wat. Code, §§ 1228.2, subd. (a)(1), 1228.4.) Among other things, small domestic registrations are subject to prior rights, standard conditions established by the SWRCB, and any conditions lawfully required by DFG. (Wat. Code, § 1228.6; Cal. Code Regs., tit. 23, § 780.)

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In order to qualify for a small domestic use registration, the use must not exceed direct diversion of 4,500 gallons per day or diversion to storage of 10 acre-feet per annum. (*Id.*, §1228.1, subd. (b).) Domestic use is defined to include “the use of water in homes, resorts, motels, organization camps, camp grounds, etc. . . . and the irrigation of not to exceed one-half acre of lawn, ornamental shrubbery, or gardens at any single establishments[*sic*].” (*Ibid.*; Cal. Code Regs., tit. 23, § 660.) “With regard to an appropriation for small domestic use, not more than one registration shall be in effect at any time for any facility.” (Wat. Code, § 1228.2, subd. (a)(2).)

Both the language of Water Code section 1228.2, subdivision (a)(2) and the purpose of the Water Rights Permitting Reform Act of 1988 support the conclusion that the pump, pipeline, and storage tank that would be shared by the four registrants constitute a “facility” within the meaning of the statute. By approving the four registrations, the Division appears to have assumed that only the four residences and the separate distribution systems from the common storage tank to the residences constitute facilities, and the shared pump, pipeline, and storage tank do not constitute a facility. Similarly, the registrants argue that the separate distribution and treatment system that serves each residence is a facility but that the common pump and pipeline do not constitute a single facility because they do not constitute a complete water treatment and delivery system. Such constricted interpretations of the term “facility” are unsupported and would allow diverters to circumvent the statutory limitations on small domestic use registrations.

The plain meaning of the term “facility” supports the conclusion that the pump, pipeline and storage tank constitute a facility. “Facility” is a general term; its plain meaning is “something . . . . that is built, installed, or established to serve a particular purpose.” (Merriam - Webster’s Collegiate Dictionary (10th ed. 2000) p. 415.) Consistent with the general meaning of the term, the words “facility” and “facilities” are used throughout the Water Code to describe the physical structures necessary to divert and convey water to its intended place of use. (See, e.g., Wat. Code, §§ 481 [“facilities” to transfer water], 1022, subd. (b)(3) [water lease conveyance, distribution and development “facilities”], 1810 [water conveyance “facility”], 5951 [“facilities” for the measurement, diversion, storage and conveyance of water].) In addition, the

plain meaning of the term does not support the interpretation that only a complete diversion, conveyance and treatment system constitutes a “facility.”

The purpose of the Water Rights Permitting Reform Act also supports a broad interpretation of the term “facility.” The purpose of the Act is to allow for a streamlined process for small domestic uses and livestock ponds that are unlikely to adversely affect third party water right holders or the environment. (See Wat. Code, § 1228.1.) A diversion that exceeds 4,500 gallons per day or 10 acre-feet per annum should not be allowed to avoid the review process for water right applications simply because the diversion will serve multiple end-users. In this case, the four registrants collectively seek to divert 7,200 gallons per day, which exceeds the 4,500 gallon-per-day limitation by 2,700 gallons per day. Taken to an extreme, if a shared diversion and conveyance system were not treated as a facility, a subdivision with hundreds of houses could avoid the permitting process, provided that each house uses less than 4,500 gallons per day and 10 acre-feet per annum.<sup>1</sup>

## 6.0 CONCLUSION

For the reasons set forth above, the Division’s approval of the four small domestic use registrations filed by the members of the Toyon Road Homeowners Association was improper and should be set aside. Before diverting water as contemplated by the registrations, the registrants must either file a single registration that complies with the statutory limitations on small domestic use registrations or obtain water right permits. If the registrants do not choose to modify their proposed diversion to qualify for a small domestic use registration, then a separate water right permit must be obtained for each separately owned parcel, as required by California Code of Regulations, title 23, section 688.

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<sup>1</sup> Similarly, a project with multiple diversions that collectively delivers more than 4,500 gallons per day or 10 acre-feet per annum to a single residence should not be allowed to avoid the water right permitting process by filing separate small domestic use registrations for each diversion.

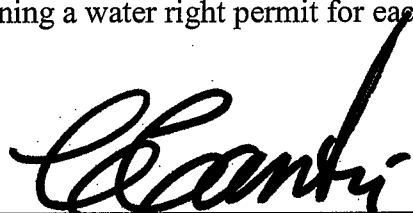
**7.0 ORDER**

**IT IS HEREBY ORDERED:**

1. The Division's issuance of certificates of registration for Registrations D031326R, D031332R, D031333R, and D031334R is set aside. The certificates of registration are invalidated.

2. Before diverting and using water as contemplated by the registrations, the registrants are directed to obtain a water right that authorizes the diversion and use by either (1) filing a single small domestic use registration that complies with the Water Rights Permitting Reform Act of 1988 (Wat. Code, §§ 1228-1229.1), or (2) obtaining a water right permit for each separately owned parcel.

Dated: MAR 11 2003



Celeste Cantu  
Executive Director