

original
to file

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0013-EXEC

In the Matter of Petition for Reconsideration of

DAVID SCHWINDT

Regarding Order Canceling Application 29744

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On April 14, 2009, the State Water Resources Control Board's (State Water Board) Division of Water Rights (Division) issued an order canceling Application 29744 held by David Schwindt, Liv Schwindt, Riendo Arroyo and Paulette Arroyo. The application was cancelled for failure to submit information requested by the Division of Water Rights (Division) pursuant to Water Code section 1334 and for non-diligence. David Schwindt (Petitioner) filed a petition for reconsideration on May 27, 2009. Petitioner requests that the State Water Board reinstate Application 29744, and change the names on the application to reflect only David P. Schwindt and Liv E. Schwindt, as the sole owners of the property.

2.0 GROUND FOR RECONSIDERATION

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs.,

¹ 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 petitions for reconsideration of an order canceling an application 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, or set aside or modify the order.

tit. 23, § 768.)² The legal bases for reconsideration are: (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; or (d) error in law.

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 may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 LEGAL AND FACTUAL BACKGROUND

David Schwindt, Liv Schwindt, Riendo Arroyo and Paulette Arroyo (Applicants) filed Application 29744 with the Division on August 10, 1989, for the right to store 60 acre-feet per annum (afa). The application was accepted on May 14, 1990.

Applicants currently hold Permit 18138 (Application 25546), which authorizes storage of 15 afa in a 26 acre-foot (af) capacity reservoir. Since the capacity of the reservoir exceeds the amount Applicants are authorized to divert to storage under Permit 18138, the Division recommended that Applicants pursue an additional application to cover the unauthorized storage capacity.

On August 2, 1989, the Division issued Preliminary Cease and Desist Order No. 8P (Order) for violation of Permit 18138 for storing more water than authorized by the permit. The Order required Applicants to either reduce the size of the reservoir, or file an application to cover the unauthorized storage. The Order also required Applicants to reduce the size of the dam to a size not subject to the Division of Safety of Dams' (DSOD) jurisdiction, or prove that DSOD had issued a certificate of safety for the dam.

² 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.

Application 29744 requests the right to store 60 afa, to cover Applicants' existing unpermitted storage capacity, and the excess to be stored after completion of Applicants' enlargement of their existing 26 af capacity reservoir.

On August 30, 1989, the Division advised Applicants that the Environmental Information form (environmental form) portion of the application had not been received. Applicants requested the Division hold the application in abeyance until the issues regarding dam safety were resolved with DSOD. On March 1, 1991, the Division advised Applicants that the environmental form had not been received, and that the application could not be noticed until the form was completed.

By letter dated March 4, 1991, the Division requested submittal of the environmental form and site photographs and indicated that failure to submit the information within 60 days might result in cancellation of the application pursuant to Water Code section 1271. On April 4, 1991, Division staff contacted DSOD to determine whether Applicants had complied with the requirement to either reduce the dam size or obtain DSOD certification. DSOD had no record of either action having occurred.

On May 11, 1993, the Attorney General's office (AG) advised Applicants that DSOD had referred the matter of compliance with DSOD's requirements to the AG. Unless immediate action was taken to correct the situation, the AG intended to file a petition in superior court to enforce this matter. Since an application had been filed and the AG was handling the DSOD issue, the Division determined that it would not take additional action at that time. On June 7, 1993, the AG reiterated the need to comply with DSOD's dam safety criteria.

On June 16, 1993, the Division reiterated the need for Applicants to submit a completed environmental form and photographs. Applicants were requested to submit the information by July 31, 1993. The Division repeated this request on June 18, 1996 and again on December 16, 1996, and advised Applicants that Application 29744 might be subject to cancellation.

On December 11, 2000, the Division again advised Applicants that the environmental form was required and must be submitted. Division staff sent Applicants a copy of the environmental form on December 27, 2000 and requested the form be returned by January 26, 2001 pursuant to

California Code of Regulations, title 23, section 683. On March 8, 2001, the Division requested that the environmental form be submitted by April 7, 2001.

On May 23, 2002, the Division advised Applicants that the application must be diligently pursued or it would be cancelled. The Division requested Applicants submit the environmental form and photographs by July 22, 2002. On December 7, 2007, the Division again requested Applicants submit the environmental form, and reminded Applicants that immediate attention to this item was required or the application might be cancelled.

To date, Applicants have not submitted the required environmental form and photographs. Accordingly, the application has not been noticed.

On April 14, 2009, the Division issued an order canceling Application 29744. Petitioner filed a petition for reconsideration on May 27, 2009.³

4.0 DISCUSSION

A copy of the Division's April 14, 2009 order canceling Application 29744 was sent to Applicants under cover of letter dated April 15, 2009. That letter advised Applicants that if they disagreed with the order, they could file a petition with the State Water Board for reconsideration within 30 days from the date of the order. The 30-day time limit is established by statute, at Water Code section 1122, which provides, in part:

The board may order a reconsideration of all or part of a decision or order on the board's own motion or on the filing of a petition of any interested person or entity. The petition shall be filed not later than 30 days from the date on which the board adopts a decision or order. The authority of the board to order a reconsideration on its own motion shall expire 30 days after it has adopted a decision or order.

Under section 1122, any petition for reconsideration of the Division's April 14, 2009 order was due no later than May 14, 2009. Petitioner contacted Division staff on May 15, 2009 to

³ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (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, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

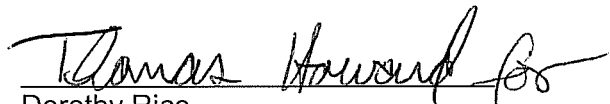
determine how to file a petition for reconsideration. Petitioner filed a petition for reconsideration on May 27, 2009. Because the petition was submitted late, Petitioner's petition for reconsideration cannot be considered. As set forth above, Water Code section 1122 requires that petitions for reconsideration be filed no later than 30 days from the date of the decision. Further, section 1122 provides that the State Water Board's authority to order reconsideration on its own motion expires after 30 days. There is no provision that allows an extension of time to file a petition for reconsideration.

Furthermore, Petitioner has failed to allege any of the legal bases for reconsideration pursuant to section 768. The record shows that Applicants have been repeatedly advised of the need to submit the required environmental form and photographs, and have failed to do so. Based on the above record, the Division's decision to cancel Application 29744 for failure of diligence was correct.

ORDER

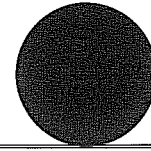
IT IS HEREBY ORDERED THAT because Petitioner failed to submit a timely petition for reconsideration of the Division's order canceling Application 29744, the State Water Board cannot provide Petitioner with the relief requested. The State Water Board also finds that the decision to cancel Application 29744 was appropriate and proper. To the extent that this order does not address all of the issues in the petition for reconsideration, the State Water Board finds that either these issues are insubstantial or that Petitioner has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. Accordingly, David Schwandt's petition for reconsideration is denied.

Dated: 3/16/10


Dorothy Rice
Executive Director

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

DIVISION OF WATER RIGHTS



In the Matter of Application 29744

David Schwindt, Liv Schwindt, Riendo Arroyo, and Paulette Arroyo

ORDER CANCELING APPLICATION

SOURCE: UNNAMED STREAM TRIBUTARY TO BURNS CREEK
COUNTY: MENDOCINO

WHEREAS:

1. David Schwindt, Liv Schwindt, Riendo Arroyo, and Paulette Arroyo (Applicants) filed Water Right Application 29744 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), on August 10, 1989, requesting the right to store 60 acre-feet per annum (afa) from unnamed stream in an existing reservoir. The application was accepted for filing on May 14, 1990.
2. Applicants currently hold Permit 18138 (Application 25546), which authorizes storage of 15 afa in a 26 af capacity reservoir. (May 10, 1986 Division Inspection.) Since the reservoir capacity exceeds the permitted capacity, the Division recommended that Applicants pursue an additional application to cover the unauthorized storage. (April 14, 1989 Division letter.)
3. On August 2, 1989, the Division issued Preliminary Cease and Desist Order No. 8P (Order) for violation of Permit 18138 of Schwindt, et al. for storing more water than authorized by the permit. The Order requires that the reservoir be reduced in size, or another application filed to cover the unauthorized storage. The Order also requires reduction of the dam to a size not subject to the Division of Dam Safety's jurisdiction, or proof that the Division of Safety of Dams has issued a certificate of safety for the dam.
4. The application requests a right to store 60 afa to cover Applicant's existing unpermitted storage capacity, and the excess to be stored after completion of Applicant's planned enlargement of their existing 26 af reservoir.
5. On August 30, 1989, the Division advised the Applicants that the Environmental Information form (environmental form) portion of the application had not been received. The Applicants requested the Division hold the application in abeyance until the issues regarding dam safety were resolved with the Division of Safety of Dams. (August 30, 1989 Contact Report.)
6. On March 1, 1991, the Division advised the Applicants that the environmental form had not been received. The application could not be noticed until the form was completed.
7. By letter dated March 4, 1991, the Division requested submittal of the environmental form and site photographs and indicated that failure to submit the information within 60 days may result in cancellation of the application. (Wat. Code, § 1271.)

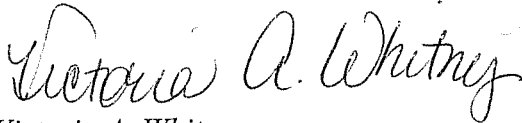
8. On April 4, 1991, Division staff contacted Dam Safety to determine whether the Applicants had complied with the requirement to either reduce the dam size or obtain Dam Safety certification. Dam Safety had no record of either action having occurred.
9. On May 11, 1993, the Attorney General's Office advised the Applicants that Dam Safety had referred the matter of compliance with dam safety requirements to the Attorney General's Office. Unless immediate action was taken to correct the situation, the Attorney General intended to file a petition in Superior Court to enforce this matter. Since this matter had already been referred to the Attorney General's Office and an application had been filed, the Division determined that it would not take any additional action at that time. (May 25, 1993 memorandum to Dam Safety.)
10. The Attorney General's Office reiterated the need to comply with dam safety criteria on June 7, 1993.
11. On June 16, 1993, the Division reiterated the need to submit a completed environmental form and photographs. The information was requested to be submitted by July 31, 1993.
12. On June 18, 1996 and December 16, 1996, the Division reiterated the need for the environmental form and photographs and advised the Applicants that Application 29744 may be subject to cancellation.
13. On December 11, 2000, Division staff advised the Applicants that the environmental form was still required and must be submitted. (Contact Report dated August 7, 2000 to December 11, 2000.)
14. Division staff provided the environmental form to the Applicants on December 27, 2000 and requested that the form be returned by January 26, 2001. The request was made pursuant to California Code of Regulations, title 23, section 683.
15. On March 8, 2001, the Division again requested that the environmental form be submitted by April 7, 2001. (Cal. Code Regs. Titl. 23, § 683.)
16. On May 23, 2002, the Division advised the Applicants that the application must be diligently pursued or it would be cancelled. The environmental form and photographs were required to be submitted by July 22, 2002.
17. On December 7, 2007, the Division requested submittal of the environmental form and reminded the Applicants that immediate attention to this item is required or the application may be cancelled.
18. To date, the Applicants have not submitted the required environmental form and photographs.
19. The application has not been noticed.
20. The Applicants, after due notice, have failed to submit a perfected application or information requested pursuant to California Code of Regulations, title 23, section 683, or to show good cause why additional time should be allowed. (Wat. Code, § 1271.)
21. The State Water Board has delegated the authority to cancel applications to the Deputy Director of the Division pursuant to Resolution No. 2007-0057. The Deputy Director has redelegated this authority to the Assistant Deputy Director in the absence of the Deputy Director, pursuant to redelegation order dated October 4, 2007.

THEREFORE, IT IS ORDERED THAT APPLICATION 29744 IS HEREBY CANCELED.

It is Applicants' responsibility to remove or modify any diversion works or impoundments to ensure that water is no longer diverted in excess of the quantity authorized by Permit 18138. Applicants should consult with the Department of Fish and Game and the Regional Water Quality Control Board in order to ensure that removal or modification of project facilities does not adversely affect a fishery or result in unregulated sediment discharge to a waterway. Applicants must also consult the Department of Water Resources, Division of Safety of Dams if a jurisdictional size dam will be modified, removed or breached (dam height 25 feet or more, or reservoir volume 50 acre-feet or more). These agencies may require a permit or other approval prior to any construction activity.

Applicants are hereby put on notice that any diversion of water from the point(s) of diversion proposed under this application, other than as authorized by Permit 18138, may be subject to administrative civil liability of up to \$500 per day without further notice, pursuant to Water Code section 1052. The State Water Board also may issue a cease and desist order in response to an unauthorized diversion or threatened unauthorized diversion pursuant to Water Code section 1831.

STATE WATER RESOURCES CONTROL BOARD



Victoria A. Whitney

Deputy Director for Water Rights

Dated: **APR 14 2009**