State Water Resources Control Board

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Linda S. Adams
Secretary for
Environmental Protection

Arnold Schwarzenegger
Governor

FEB 2 6 2008

FIRST CLASS MAIL AND EMAIL

To: Enclosed Mailing List

DRAFT ORDER PARTIALLY SETTING ASIDE ORDER WR 2006-0018-DWR AND CONDITIONALLY APPROVING AN EXTENSION OF TIME: WATER RIGHT PERMIT 10477 (APPLICATION 12842) -- NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT, MOKELUMNE RIVER, SAN JOAQUIN COUNTY

The enclosed draft order regarding the Petition for Reconsideration by the North San Joaquin Water Conservation District of State Water Resources Control Board Order WR 2006-0018-DWR Denying an Extension of Time for Permit 10477 (Application 12842) is tentatively scheduled for consideration at the State Water Resources Control Board (State Water Board) meeting on Tuesday, March 18, 2008. The State Water Board will notify you of the location and time of this meeting approximately ten days prior to the meeting. This information will also be posted on the State Water Board's website at http://www.waterboards.ca.gov/board_info/calendar/2008.html#march or go to www.waterboards.ca.gov. Click on "Board Business" and then on "2008" under the bulleted heading "Board/Workshop Meeting Schedule."

All interested persons and parties to the proceeding will have the opportunity to comment on the proposed order at the State Water Board meeting. All presentations should be limited to five (5) minutes. Comments should be limited to the general acceptability of the order or possible technical corrections. Parties may not introduce evidence at the State Water Board meeting.

Parties should submit in writing any comments or changes to the proposed order they would like the State Water Board to consider at the meeting. All written comments must be received by the State Water Board by **12 noon on Tuesday, March 11, 2008**. Written comments are to be addressed and submitted to:

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

You may also submit written comments to Ms. Townsend by fax at (916) 341-5620, by email at commentletters@waterboards.ca.gov, or by delivery to the following address:

Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828

FEB 2 6 2008

Couriers delivering comments must check in with lobby security and have them contact the Executive Office on the 24th floor at 916-341-5600.

Please include in the subject line, "COMMENT LETTER – 03/18/08 BOARD MEETING ITEM: NSJWCD TIME EXTENSION ORDER." Any faxed or emailed items must be followed by a mailed or delivered hard copy with an original signature.

If you have any questions regarding this notice, please contact Erin Mahaney, Senior Staff Counsel, at (916) 341-5187 or Jean McCue, Water Resource Control Engineer, at (916) 341-5351.

Sincerely,

Leslie F. Grober, Manager
Hearings and Special Programs Section

Enclosures: Mailing List
Draft Order

Mailing List

DRAFT ORDER RE NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT'S PETITION FOR RECONSIDERATION OF ORDER WR 2006-0018-DWR DENYING ITS REQUEST FOR EXTENSION OF TIME (PERMIT 10477/APPLICATION 12842)

North San Joaquin Water Conservation District
c/o Karna Harrigfeld, Esq.
Herum Crabtree Brown
2291 West March Lane, Suite B100
Stockton, CA 95207
kharrigfeld@herumcrabtree.com

County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority
c/o DeeAnne Gillick
Neumiller & Beardslee
Post Office Box 20
Stockton, CA 95201
dgillick@neumiller.com
mbrown@neumiller.com

Nancee Murray
Department of Fish & Game
Office of the General Counsel
1416 9th Street, 12th Floor
Sacramento, CA 95814
nmurray@dfg.ca.gov

South Delta Water Agency
c/o John Herrick, Esq.
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Jherrlaw@aol.com

City of Stockton
c/o Arthur F. Godwin
700 Loughborough Drive, Suite D
Merced, CA 95348
afg@mrgb.org

Stockton East Water District
c/o Jeanne Zolezzi, Esq.
Herum Crabtree Brown
2291 West March Lane, Suite B100
Stockton, CA 95207
jzolezzi@herumcrabtree.com

Central Delta Water Agency
c/o Dante J. Nomellini, Esq.
P.O. Box 1461
Stockton, CA 95201
Ngmplcs@pacbell.net

EBMUD
c/o Anne J. Schneider
2015 H Street
Sacramento, CA 95814
AJS@eslawfirm.com

Bill Fuhs
11360 E. Jahant Road
Acampo, CA 95220

Bryan Pilkington
13100 Victor Road
Lockeford, CA 95237
victoriafarms@frys.com

Assemblyman Alan Nakanishi
Assembly District 10
State Capitol, Room 5175
Sacramento, CA 95814

Ken Vogel
San Joaquin County
Board of Supervisors
Courthouse, Room 701
222 East Weber Avenue
Stockton, CA 95202

John Woodling
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001

Senator Michael Machado
State Capitol, Room 5066
Sacramento, CA 95814

Senator Dave Cogdill
14th Senate District
State Capitol, Room 3048
Sacramento, CA 95814

Assemblyman Greg Aghazarian
26th Assembly District
State Capitol Room 4167
Sacramento, CA 95814

Congressman Jerry McNerney
11th District
2222 Grand Canal Blvd #7
Stockton, CA 95207

D R A F T

February 25, 2008

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008 - 00XX

In the Matter of the Petition for Reconsideration by the
NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT OF
STATE WATER RESOURCES CONTROL BOARD ORDER
WR 2006-0018-DWR DENYING AN EXTENSION OF TIME
Permit 10477 (Application 12842)

SOURCE: Mokelumne River

COUNTY: San Joaquin

ORDER PARTIALLY SETTING ASIDE WR 2006-0018-DWR AND CONDITIONALLY APPROVING AN EXTENSION OF TIME

BY THE BOARD:

1.0 INTRODUCTION[1]

The North San Joaquin Water Conservation District (District) holds Permit 10477 (Application 12842) for the diversion of water from the Mokelumne River in San Joaquin County. On November 30, 2006, the Deputy Director for Water Rights (Deputy Director)[2] issued Order WR 2006-0018-DWR denying the District's petition for extension of time to complete beneficial use under Permit 10477. The District petitioned for reconsideration of the Deputy Director's order. On February 20, 2007, the State Water Resources Control Board (State Water Board or Board) granted reconsideration, subject to further action of the Board after an evidentiary hearing. Based on the evidence in the record, and as discussed below, the State Water Board sets aside

[1] This order is not a precedent decision and may not be expressly relied on as precedent. (Gov. Code § 11425.60, subd. (a); State Water Resources Control Board Order WR 96-1 at 17, fn. 11.)

[2] In November 2006, the Deputy Director for Water Rights was referred to as the Chief of the Division of Water Rights. For ease of reference, the title "Deputy Director" will be used irrespective of the date of the change in title.

the portion of Order WR 2006-0018-DWR denying the time extension.[3] The State Water Board conditionally approves the District's petition to extend the time to complete construction and put water to full beneficial use under Permit 10477 to December 31, 2010.

2.0 FACTUAL AND PROCEDURAL BACKGROUND

In 1948 the District filed Application 12842 to appropriate water from the Mokelumne River in San Joaquin County. On July 3, 1956, after a hearing on competing water right applications, the State Engineer (the State Water Board's predecessor) issued Decision 858 granting the East Bay Municipal Utility District's (EBMUD) application priority over the District's application. Pursuant to Water Code section 1462, the State Engineer issued Permit 10477 to the District for the temporary appropriation of water that is surplus to EBMUD's needs.[4] The District currently is authorized to directly divert and divert to storage a combined total of 20,000 acre-feet per annum (afa).

Permit 10477 initially required the District to complete construction and put water to beneficial use by December 1, 1960, and December 1, 1970, respectively. The District has requested, and the State Water Board has previously granted, three extensions of time to complete the full beneficial use of water. The permit currently requires the District to apply water to full beneficial use by December 31, 2000. On December 29, 2000, the District filed a fourth petition for an extension of time, requesting an extension until 2010 to complete both construction and use of the water under Permit 10477. The State Water Board noticed the time extension petition on July 14, 2004. On November 30, 2006, the Deputy Director denied the District's petition in Order WR 2006-0018-DWR.

The District timely filed a petition for reconsideration of the Deputy Director's order denying the time extension, and requested a hearing. The District alleges that Order WR 2006-0018-DWR is not supported by substantial evidence and is based on error in law. The District also

[3] In Order WR 2006-0018-DWR, the Deputy Director also conditionally approved changes in point of diversion and place of storage sought by the District. The District did not petition for reconsideration of the Deputy Director's conditional approval of those changes and those approvals are not considered in this order.

[4] Under Water Code section 1462, when the State Water Board issues a permit to a municipality for a quantity of water exceeding existing municipal needs, the Board may also issue a permit for the temporary appropriation of water that is in excess of those existing needs.

contends that the State Water Board should consider additional relevant evidence that could not have been produced when the District filed its petition for extension of time in 2000.

By Order WR 2007-0005, dated February 20, 2007, the State Water Board granted the District's petition for reconsideration of Order WR 2006-0018-DWR, without deciding the merits of the District's petition, subject to a public hearing to receive evidence on whether the Division's order should be set aside, modified, upheld, or other appropriate action should be taken. The State Water Board suspended the portion of Order WR 2006-0018-DWR that denies an extension of time pending the Board's issuance of an order after the hearing.

On April 16, 2007, the State Water Board issued a Notice of Public Hearing to receive evidence relevant to its determination on the District's petition for reconsideration and to what action, if any, the Board should take with respect to Order WR 2006-0018-DWR. The Notice identified key issues regarding the actions the State Water Board should take in response to the District's reconsideration petition, the requirements for approval of an extension of time, compliance with the California Environmental Quality Act (CEQA), and the environmental impacts associated with any approval of the time extension. On May 23, 2007, and June 21, 2007, the State Water Board conducted a pre-hearing conference and hearing, respectively, on the matter. The hearing was an adjudicative proceeding governed by certain provisions regarding administrative adjudication in the Administrative Procedure Act (Gov. Code, §§ 11400-11470.50 & 11513) and other statutory provisions, as specified in the State Water Board's regulations at California Code of Regulations, title 23, section 648.

3.0 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. The State Water Board may approve a request for an extension of time if the Board finds that there is good cause for the extension. (Wat. Code, § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the Board determines to be in the public interest, and on a showing to the Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which 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 conditions incident to the person and not to the enterprise as good cause for delay. (*Ibid.*)

An interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds: (1) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (2) the decision or order is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; (4) error in law. (Cal. Code Regs., tit. 23, § 768.)[5]

After review of the record, the State Water Board 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); see also subd. (a)(1) [providing that State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues].) Before taking final action, the State Water Board has the discretion to hold a hearing for the purpose of oral argument, the receipt of additional evidence, or both. (*Id.,* § 770; Wat. Code, § 1123.)

4.0 PARTICIPATION IN THE HEARING

The parties to the hearing are the District, California Department of Fish and Game (DFG), County of San Joaquin, San Joaquin County Flood Control and Water Conservation District and Mokelumne River Water and Power Authority (collectively referred to herein as County of San Joaquin, et al.), City of Stockton, Stockton East Water District, Central Delta Water Agency and South Delta Water Agency. Only the District and DFG presented cases-in-chief.[6] The District, County of San Joaquin, et al., and Stockton East Water District submitted closing briefs on August 7, 2007.

---

[5] Unless otherwise indicated, all further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations.

[6] The County of San Joaquin, et al., City of Stockton, Stockton East Water District, and Central Delta Water Agency and South Delta Water Agency submitted Notices of Intent to participate in cross-examination and rebuttal, but did not participate accordingly at the hearing. All of these entities, except the City of Stockton, presented policy or opening statements at the hearing.

A number of persons and entities presented policy statements in support of the District or in support of ongoing regional water planning efforts. Two people presented policy statements against the approval of a time extension.

5.0 DETERMINATION OF HEARING ISSUES

5.1 Requests for Action on Order WR 2006-0018-DWR

The District requests that the State Water Board overturn Order WR 2006-0018-DWR denying the District's requested extension of time, and grant the District an additional 10 years from the date of this order to complete construction and put the water to beneficial use. For the reasons set forth below, the State Water Board hereby sets aside[7] the portion of the Deputy Director's order denying the time extension and grants an extension of time until December 31, 2010.[8]

DFG urges the State Water Board to adopt Order WR 2006-0018-DWR in its entirety. The agency suggests changes to condition 3 of the order, which governs construction of fish screens, that DFG believes will make the construction and operation of the fish screen more efficient. (CDFG-2.)[9] DFG also recommends that the State Water Board modify the order to require the District to install additional measuring devices and to require the District to install devices capable of measuring the direct diversion amount and rate at each point of diversion, as well as bypass flows. (CDFG-3.) The District objects to the introduction of DFG's exhibits (CDFG-1 through CDFG-4), arguing that the testimony is irrelevant because DFG's witnesses' testimony relates to the District's change petition on the conjunctive use pilot project, which was not the subject of the District's petition for reconsideration and was specifically excluded from reconsideration in State Water Board Order WR 2007-0005.

---

[7] The District also requests the State Water Board modify Order WR 2006-0018-DWR to delete or revise certain sections of that order relating to the time extension and compliance with its permit terms. Because the State Water Board hereby sets aside the portion of the Deputy Director's order denying the time extension, the Board will not modify specific provisions of Order WR 2006-0018-DWR.

[8] The State Water Board will not grant an extension beyond December 31, 2010, because the Board has not provided public notice of a request for an extension of time beyond 2010. The State Water Board generally provides public notice of petitions for extension of time, as it has done in this matter. Although the State Water Board's regulations provide for an exemption to the noticing requirements if certain criteria apply, those criteria have not been met here. (Cal. Code Regs., tit. 23, § 843, subd. (a)(1)(A)-(C).) In this case, the public should have an opportunity to be apprised of any additional extension of time through the State Water Board's routine noticing procedures.

[9] DFG's exhibits are designated with the prefix "CDFG" and the District's exhibits are designated with the prefix "NSJ."

In Order WR 2007-0005, page 1, footnote 1 and in the April 16, 2007 Notice of Public Hearing, page 1, footnote 1, the State Water Board expressly excluded the Deputy Director's conditional approval of the District's requested changes in the place of use and place of storage from the Board's reconsideration of Order WR 2006-0018-DWR. Therefore, proposed changes to Permit 10477 that are not related to the District's time extension petition, including DFG's recommendations regarding the fish screen condition 3 of Order WR 2006-0018-DWR and devices to measure bypass flows,[10] are outside the scope of this proceeding. As discussed below, however, as part of the State Water Board's approval of the District's time extension petition, it is reasonable to require the District to measure, monitor, and report its water use so that the State Water Board can monitor the District's progress in putting water to beneficial use. This order contains terms regarding measuring devices that have the same effect as those requested by DFG.

5.2 Extension of Time to Complete Construction and to Make Full Beneficial Use of Water

Based on evidence received in the hearing, and in consideration of the public interest, the State Water Board hereby sets aside the portion of Order WR 2007-0005 denying an extension of time and grants the District's request for an extension to complete construction and put water to beneficial use under Permit 10477 until December 31, 2010.[11] The State Water Board finds that the District may make satisfactory progress in putting water to beneficial use in the future and that there is good cause to grant the time extension.

5.2.1 Due Diligence

In determining whether to modify the Deputy Director's order, the State Water Board must consider whether the evidence at the hearing supports a finding that the District has exercised diligence 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 permit, and involves more than

[10] The District currently does not bypass flows for the protection of fishlife. If bypass flows are required in the future, then it would be appropriate to require the District to design and install devices capable of measuring the flows.

[11] At the hearing, the District asked the State Water Board to grant the District an additional 10 years to complete construction and to put water to beneficial use under Permit 10477. On July 14, 2004, however, the State Water Board provided public notice of District's 2000 petition for extension of time until December 31, 2010. The State Water Board, therefore, cannot grant an extension beyond December 31, 2010 because the State Water Board has not publicly noticed any such request.

merely repeatedly filing petitions for extension of time. The question of diligence ultimately must be determined on the facts of each case.

In recent years, the District has taken steps to develop conjunctive use projects using water under its water right permit. Since 2000, the District has implemented or identified pilot conjunctive use projects to determine the best area for conjunctive use of water for larger scale projects. (NSJ-1, ¶ 15.) The District has also participated in various groups addressing groundwater overdraft and water supply reliability in San Joaquin County. (NSJ-1, ¶¶ 21-23.) While this information, by itself, does not necessarily support a finding of diligence, the District also has taken specific actions to develop the use of water under its water right.

In 2004 the District annexed an additional 100,000 acres to provide an opportunity for additional irrigation and groundwater recharge with surface water pumped from the Mokelumne River. To implement this project, in June 2007 the District filed a petition with the State Water Board to change the place of use, purpose of use, and add underground storage under Permit 10477.[12] (NSJ-1, ¶ 20; NSJ-60.)

Additionally, the District has begun assessing revenues to be used in implementing projects that will put water to full beneficial use. (NSJ-1, ¶¶ 11-14.) In 2001, the District sought legislation in the 2001-2002 Legislative Session that would allow it to assess an acreage charge. Enacted in 2002, Assembly Bill No. 2955 (Stats. 2002, ch. 318) authorizes the District to impose a per-acre assessment ranging from $1 per acre to $5 per acre depending upon the year and the amount of water collected by the District in the previous year. (NSJ-26; Wat. Code, §§ 75480-75481.5.) The revenue must be used for groundwater recharge purposes, the delivery of surface water, and any related expenses incurred by the District. (Wat. Code, § 75480.5, subd. (c).) Since 2003, the District has levied a $1 per-acre charge generating approximately $45,000 annually. (NSJ-1, ¶ 14.)

In May 2007, the District authorized a groundwater charge to generate revenue to begin correcting the groundwater overdraft. (NSJ-38 (Resolution Setting Groundwater Charges for

[12] The State Water Board did not consider the merits of the 2007 change petition in this proceeding.

2007-2008, dated May 14, 2007).) The District anticipates that the groundwater charge will generate approximately $820,000 per year in additional revenue. (NSJ-1, ¶ 28; NSJ-36.)

Accordingly, the State Water Board finds the District has exercised due diligence in recent years in taking actions to develop the use of water under Permit 10477.

5.2.2 Obstacles Not Reasonably Avoided

The State Water Board must also consider whether the permittee'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. (Cal. Code Regs., tit. 23, § 844.)

The District asserts that its inability to use water under Permit 10477 has been occasioned by a number of obstacles that could not reasonably be avoided. In particular, due to the lack of a reliable water supply during drought years, many of the District's customers turned to groundwater as an alternative source of water. Many of those customers did not return to surface water use, in part, due to the expense of operating dual (groundwater and surface water) supply systems or updating their surface water systems. (NSJ-4, ¶¶ 4-8; NSJ-5, ¶ 18; NSJ-6 ¶ 4; NSJ-8, ¶ 2.) The District's General Manager also testified that Permit 10477 involves a temporary, unreliable water supply that has made it difficult to maintain water users and impossible to recruit new water users. (R.T. pp. 86-87.)

Accordingly, in large part, the variability of the District's water supply in drought years and the temporary nature of Permit 10477 have impaired the District's ability to retain and attract customers, which in turn has caused delays in complying with previous time requirements. Even in years when water has been available, the District has been able to only use a small portion of the water under Permit 10477. While lack of finances, or an inability to invest in infrastructure due to concerns regarding the reliability of a water supply that is unrelated to hydrologic conditions, will not generally be accepted as good cause for delay, the State Water Board finds in this case that the District has committed to actions that will avoid these obstacles in the future.

5.2.3 Satisfactory Progress

Evidence in the record indicates that the District could make satisfactory progress if the State Water Board grants an extension of time to complete construction and put water to full beneficial use, provided that the extension is conditioned to address the problems that have hampered progress to date. The District's witnesses testified that if the State Water Board grants the District's petition for extension of time, the District has the plans, finances, and water users in place to make full beneficial use of the water authorized under Permit 10477. (R.T., pp. 80, 93-94.) As discussed above in section 5.2.1, the District has implemented a new groundwater charge. The District also has prepared a 10-year budget identifying projects that the District intends to pursue each year. (NSJ-36.) The District's witness testified that this 10-year budget demonstrates how the District intends to put the full 20,000 acre-feet per year of water authorized under Permit 10477 to full beneficial use. (NSJ-1, ¶ 28; NSJ-36.) The District will use the revenue to begin repairing the existing distribution system, to provide incentives such as loans and grants to farmers to build dual systems for using surface water in water years and groundwater in dry years, and to build recharge basins and pumping facilities. (R.T., pp. 93-94; NSJ-7, ¶ 7.) Additionally, a portion of the revenue will be used to eliminate the current surface water charge for existing agriculture, thereby encouraging people to begin using surface water again. (R.T., p. 93.) Moreover, as discussed above, the District has annexed an adjoining 100,000 acres to its existing 50,000 acres to allow additional irrigation and groundwater recharge activities, and it has filed a petition with the State Water Board seeking the necessary approvals to implement this project. (NSJ-1, ¶ 20.)

According to the District, in the past, the District has not had sufficient infrastructure to convey surface water to landowners in the District. (NSJ-7, ¶ 4.) With revenues from the groundwater charge, the District can improve its infrastructure and provide a more dependable surface supply. (NSJ-7, ¶ 7; NSJ-8, ¶¶ 5-7.) The District's witnesses testified that if surface water could be made available on a consistent, reliable, basis, then the farmers would use the water. (NSJ-7, ¶ 4; NSJ-8, ¶ 3; NSJ-9, ¶¶ 4-7.) In addition, representatives from the City of Stockton and City of Lodi testified on behalf of the District in support of the District's petition for extension of time and stated that the Cities were interested in utilizing surface water from the District in the future. (NSJ-12, NSJ-13; R.T. pp. 109, 111-113.)

These measures provide some evidence that progress will be made, but do not fully address the obstacles that have resulted in the District's failure to comply with previous time limits. The variability of the District's water supply in drought years and the temporary nature of Permit 10477 will continue to make it difficult to retain and attract customers. Moreover, in the absence of pumping restrictions or pumping charges adequate to limit the use of groundwater as an alternative to surface water supplied by the District, it is questionable whether the District will make satisfactory progress. Accordingly, and as discussed further in the following section, this order is conditioned on a showing of progress towards effective groundwater management in the Eastern San Joaquin groundwater basin.

5.2.4 Public Interest

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. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 618-619 [255 Cal.Rptr. 184].) Accordingly, the State Water Board takes seriously the requirement for a permittee to exercise due diligence in pursuing a water right project. This case is a close one. In the fifty years since Permit 10477 was issued in 1956, the District has not put the full 20,000 afa of water under Permit 10477 to beneficial use. The maximum amount put to beneficial use was 9,487 afa in 1973, and its recent diversions have been much lower. Since the 1970s, many of the District's significant efforts, or proposed efforts, to complete the beneficial use of water under its permit have taken place since 2000. It is debatable whether recent diligence will suffice for the purposes of due diligence in putting water to beneficial use, and the State Water Board will make its determination on the unique facts of each case.

The State Water Board's decision in this proceeding principally rests on the public interest in addressing the critical overdraft condition in the Eastern San Joaquin groundwater basin.[13] The record indicates that the groundwater basin is critically overdrafted by approximately 150,000 afa and that this amount is projected to increase to 175,000 afa. (NSJ-2, p. 1; NSJ-14.) Moreover, as a result of pumping in excess of recharge, chloride levels are increasing in water

[13] This order is nonprecedential, in part, due to the State Water Board's public interest finding, which is limited to the unique circumstances of this case. The State Water Board will continue to rigorously apply the applicable law governing diligence, time extensions, and revocations in all other similar proceedings.

from wells in the subbasin. (NSJ-1, ¶ 29; NSJ-18.) The District asserts that the continued use of water under Permit 10477 is in the public interest because it is needed to remedy the critically overdrafted groundwater basin. (NSJ-1, ¶ 29.)

The State Water Board supports coordinated use of surface and groundwater supplies as a logical vehicle for meeting the Constitution's requirements that the waters of the State be put to their fullest beneficial use and not wasted or unreasonably used. (Cal. Const., art. X, § 2.) Accordingly, the State Water Board finds that the public interest in addressing the groundwater overdraft problem provides good cause for granting the District an extension of time to construct additional facilities and put additional water to beneficial use. While it is unclear to what extent the District's water right permit—a permit for the temporary appropriation of water under Water Code section 1462—can be part of a long-term solution to resolving the groundwater basin's critical overdraft, the District should be given an opportunity to reduce demands on the groundwater basin.

The State Water Board, however, must ensure its approval of the time extension will not lead to the exacerbation of critical overdraft or water quality conditions in the Eastern San Joaquin groundwater basin. Permit 10477 currently requires the District, prior to diverting water, to measure the quantity of water placed into underground storage and to measure (or document the method of measurement) the amount of water recovered from underground storage and put to beneficial use. This standard term is amended to clarify that the District must take these actions prior to diverting water to underground storage, and to require the District to report the amounts of water placed into, and recovered from, underground storage with its annual progress reports.

In addition, prior to diverting water under Permit 10477 for conjunctive use purposes, the District must submit a conjunctive use plan to the Deputy Director. The plan shall identify the proposed recharge areas and the location of pumping. To avoid any contribution to groundwater overdraft due to water users' reliance on the increased groundwater recharge, the plan also must address whether and how placing water to underground storage, and subsequently withdrawing the water, under Permit 10477 will prevent additional overdraft in the Eastern San Joaquin groundwater basin and include measures to avoid any such impacts. Upon approval of the plan by the Deputy Director, the District shall implement the plan.

The District must submit an annual report to the Deputy Director, regarding progress on groundwater management by the District in the Eastern San Joaquin groundwater basin and any existing or proposed measures to address overpumping within the District's boundaries. The first report is due within a year from the date of this order. Because the District intends to use water under Permit 10477, in part, to limit additional overdraft in a groundwater basin already affected by overdraft, this order also prohibits the transfer of water diverted to underground storage under Permit 10477 outside the Eastern San Joaquin groundwater basin, as defined in the Department of Water Resources Bulletin 118.

To increase its surface water use and reduce groundwater pumping, the District plans to provide surface water to its agricultural customers without charge. (R.T., p. 93.) In the State Water Board's experience, water is used less efficiently when it is provided at very low cost. (See, e.g., State Water Board Decision 1600 (1984) at p. 45; cf. State Water Board Revised Decision 1644 (2003) at p. 109 ["In view of the chronic water shortages in many areas of the state, we do not believe it is reasonable for a large water purveyor to deliver large quantities of water for irrigation under a pricing system that provides no economic incentive to conserve."].) To avoid the possibility of the waste or unreasonable use of water that is provided for free, the District must submit a plan to avoid such waste or unreasonable use, and identify possible conservation measures.

To help ensure that the District will exercise diligence and make satisfactory progress in putting the water under Permit 10477 to beneficial use, this order imposes measuring and reporting requirements to track the amount of water that the District diverts and uses. The District also is required to submit a plan, subject to the Deputy Director's approval, for completing construction and putting water to beneficial use by December 31, 2010. The plan shall include significant project milestones and a timeline for meeting those milestones, and provide a detailed description of how those milestones will be financed. The plan must identify the restrictions on groundwater pumping, pump charges or other measures necessary to address the problem of users relying on groundwater pumping instead of deliveries from the District, and identify how these requirements will be put in place. If the District seeks additional time beyond 2010 to complete its water right project, the District must file an extension of time within 180 days from the date of this order, and incorporate the proposed extended time schedule into the plan.

Standard permit terms regarding record keeping (standard permit term 15) and maps (standard permit term 30) are also imposed.

5.3 CEQA and the Public Trust Doctrine

Under the CEQA, the District is the lead agency for the preparation of environmental documentation for the project permitted under Permit 10477. Because the State Water Board's approval of a time extension and subsequent amendment of Permit 10477 would authorize the District to complete its project and apply water to beneficial use, the State Water Board's approval constitutes an approval of the District's project. Thus, the State Water Board is a responsible agency for purposes of considering whether to approve the District's petition. The State Water Board must review and consider the environmental effects of the project identified in any CEQA document prepared by the District, and any other relevant evidence in the hearing record, and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).)

The District has adopted a Negative Declaration for an extension of time to put 20,000 afa of water to beneficial use under Permit 10477. The District submitted a Notice of Determination (SCH# 2004102087), dated December 7, 2004, to the State Water Board on January 31, 2005. (SWRCB-1 [Notice of Determination (Dec. 7, 2004) and Notice of Negative Declaration (Oct. 15, 2004)].) The State Water Board has considered the Negative Declaration in deciding whether to approve the time extension petition.

Regardless of any obligation the District or the State Water Board may have under CEQA, the State Water Board 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].) There is no evidence that granting an extension of time until 2010 will have any adverse impacts on public trust resources.

6.0 CONCLUSION

The State Water Board finds that there is good cause and it is in the public interest to approve the District's petition for extension of time until December 31, 2010. We therefore set aside the portion of the Order WR 2006-0018-DWR denying the District's request for a time extension. We also find that it is in the public interest to condition our approval to prevent any additional

contribution by the District to the overdraft condition of the Eastern San Joaquin groundwater basin as a result of our approval, and to monitor the District's progress in putting water to full beneficial use.

ORDER

IT IS HEREBY ORDERED, that the portion of State Water Board Order WR 2006-0018-DWR denying the District's petition for reconsideration is set aside. The District's petition for extension of time is conditionally approved as follows:

1. Permit 10477 shall be amended to require the completion of construction and application of water to the authorized use by December 31, 2010.

2. The District must submit to the Deputy Director, for approval and modification, if necessary, a project construction and operations plan for putting the full amount of water authorized under Permit 10477 to beneficial use by December 31, 2010. The plan must identify significant project milestones and a timeline for meeting those milestones. The plan must describe how the District will diligently pursue its June 1, 2007, change petition or provide an alternative plan to put water authorized under Permit 10477 to full beneficial use. The plan must also include a detailed description of how the District will finance implementation of the plan. The plan must identify the restrictions on groundwater pumping, pump charges or other measures necessary to address the problem of users relying on groundwater pumping instead of deliveries from the District, and identify how these requirements will be put in place. The District must submit the plan within 180 days from the date of this order. If the Deputy Director determines that all or a portion of the plan is not acceptable, then the District must submit any modifications to the plan required by the Deputy Director within 60 days of being notified that the plan is not acceptable. On approval of the plan by the Deputy Director, the District shall implement the plan in accordance with the schedule approved by the Deputy Director.

   If the District cannot put to beneficial use the full amount of water authorized under Permit 10477 by December 31, 2010, and it seeks additional time to complete construction and put the water to beneficial use prior to licensing, then the District

must file a petition for extension of time within 180 days from the date of this order and incorporate the proposed extended time schedule into the construction and operations plan described above. The District must comply promptly with any request from the Division of Water Rights for information reasonably necessary to clarify, correct, amplify or otherwise supplement the time extension petition or information provided in support of the petition, including information needed to evaluate the amount of water use projected to occur if the petition is granted or to evaluate impacts of increases in water use.

3. Prior to placing water into underground storage, the District must submit a conjunctive use plan to the Deputy Director. The plan shall identify the proposed groundwater recharge or storage areas, the location of pumps and other facilities used for injection or percolation to storage, and the location of pumps used for withdrawal of groundwater. The plan also must address whether and how placing water to underground storage, and subsequently withdrawing the water, under Permit 10477 will prevent additional overdraft in the Eastern San Joaquin groundwater basin and include measures to avoid any such impacts. If the Deputy Director determines that all or a portion of the plan is not acceptable, then the District must submit any modifications to the plan required by the Deputy Director within 60 days of being notified that the plan is not acceptable. Upon approval of the plan by the Deputy Director, the District shall implement the plan.

4. Within 180 days from the date of this order, the District must submit a plan to the Deputy Director to avoid the waste or unreasonable use of water under Permit 10477 and identify possible conservation measures. If the Deputy Director determines that all or a portion of the plan is not acceptable, then the District must submit any modifications to the plan required by the Deputy Director within 60 days of being notified that the plan is not acceptable. Upon approval of the plan by the Deputy Director, the District shall implement the plan.

5. The District must submit an annual report to the Deputy Director regarding progress on groundwater management by the District in the Eastern San Joaquin groundwater basin and any existing or proposed measures to address overpumping within the

District's boundaries. The first report is due one year from the date of this order, and subsequent reports are due annually thereafter.

6. The District may not transfer water diverted to underground storage under Permit 10477 outside the Eastern San Joaquin groundwater basin, as defined in the Department of Water Resources Bulletin 118.

7. Condition 7 of Order WR-2006-0018-DWR (modified standard permit term 117) is amended as follows (in underline):

> Prior to diversion of water <u>to underground storage</u> under this permit, permittee shall (1) install devices to measure the quantities of water placed into underground storage and (2) install devices to measure or provide documentation of the method to be used to determine the quantity of water recovered from underground storage and placed to beneficial use. All measuring devices and the method of determining the quantity of water recovered from underground storage shall be approved by the Deputy Director prior to diversion of water at the Mokelumne River point of diversion under this permit. All measuring devices shall be properly maintained.
>
> <u>The District shall report the quantity of water placed into, and recovered from, underground storage under Permit 10477 (Application 12842) to the State Water Board with the annual "Progress Report by Permittee."</u>

8. Permittee shall establish a method, and install and maintain appropriate devices, to measure the instantaneous rate of diversion and cumulative quantity of water diverted from each point of diversion, and the cumulative quantity of water applied to beneficial use under this permit. Permittee must obtain approval from the State Water Board of all devices, the method of determining the rate and amount of water diverted, and the method of determining the amount of water applied to beneficial use. Within three months of the date of this order, the Permittee shall submit a plan for approval by the Deputy Director that will demonstrate compliance with this term. The plan shall include as a minimum:

   a. A description of any gages and/or monitoring devices that will be installed or have been installed.

   b. A time schedule for the installation of these devices.

c. A description of activities that will be taken to ensure the continued maintenance and operation of the devices, including a schedule for inspection of the devices by the permittee.

d. A description of the frequency of data collection, the methods for recording data, the format for reporting data to the Division of Water Rights, and any calculations required to develop the records.

e. A description of the method to be used in reporting East Bay Municipal Utility District's diversion of water to storage for the District's benefit under Permit 10477, and the amount of that water actually applied to beneficial use by the District.

A record of such measurements shall be maintained by the permittee, and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Progress Report by Permittee."

9. Permittee shall maintain records of the amount of water diverted and used to enable State Water Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605. (0000015)

10. If it is determined after permit issuance that the as-built conditions of the project are not correctly represented by the map(s) prepared to accompany the application, permittee shall, at its expense have the subject map(s) updated or replaced with equivalent as-built map(s). The revision(s) or new map(s) shall be prepared by a civil engineer or land surveyor registered of licensed in the State of California and shall meet the requirements prescribed in section 715 and sections 717 through 723 of the California Code of Regulations, Title 23. The revision(s) or map(s) shall be furnished upon request of the Deputy Director. (0000030)

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 March 18. 2008.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board