



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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November 13, 2009

Ms. Karna Harrigfeld
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kharrigfeld@herumcrabtree.com
(via e-mail and first class mail)

RE: California Sportfishing Protection Alliance response to September 14, 2009 letter from Karna E. Harrigfeld regarding CSPA's protest of Petition for Extension of Time and Petition to Change Water Right Permit 10477 (Application 12842)

Dear Ms. Harrigfeld:

Thank you for your letter of September 14, 2009 in response to CSPA's protest of North San Joaquin Water Conservation District's Petition for Extension of Time and Petition to Change Water Right Permit 10477 (Application 12842).

CSPA has reviewed your letter and the documents related to this matter, including the petition and supporting documentation, Water Rights Order 2008-0016-DWR, and North San Joaquin's responses to various requirements of that order. CSPA is unable to resolve its protest at this time.

On the appended document, I have elaborated three major areas in which CSPA believes that the District's petitions are deficient or problematic. Beneath discussion of each area, I have provided dismissal terms. Broadly, these areas relate to financing, diversion of surface water to an overdrafted groundwater basin with no apparent prospect of overdraft correction, and protection of public trust fisheries resources.

Please feel free to contact me if you have any questions. Thank you.

Sincerely,

Chris Shutes
FERC Projects Director
California Sportfishing Protection Alliance

cc: Kathy Mrowka, SWRCB
Ed Steffani

**California Sportfishing Protection Alliance response to September 14, 2009 letter
from Karna E. Harrigfeld regarding CSPA's protest of Petition for Extension of
Time and Petition to Change Water Right Permit 10477 (Application 12842):
Statement of unresolved issues and terms for dismissal of protest.
November 13, 2009**

Financing

Petitioner states in point 1 of its response to CSPA that it has spent money on pilot projects. Water Rights Order 2008-0016 DWR stated, at point 2, that the District "must submit to the Deputy Director ... a 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 also include a detailed description of how the District will finance implementation of the plan." However, petitioner has produced no substantive plan to fund its project. The District cites, rather, that it has spent \$2.4 million in the last ten years on a pilot project and on development of the construction and operations plan. After 10 years on the first extension of time, on top of a permit that was already forty years old when that extension was granted, funding a pilot project and providing a project description of is not a reasonable demonstration of diligence.

Dismissal terms:

Petitioner must produce a substantive plan to finance proposed project works and administration (including a signed agreement to provide funding, or at minimum to provide funding contingent of defined and specified circumstances). Petitioner must provide a copy of a substantially complete "construction and operations plan" that is referenced on page 1 of its September 14 reply to CSPA.

Failure to address groundwater overdraft

Petitioner states in point 2 of its response to CSPA that it has limited authority over groundwater, and that its ability to impose a groundwater charge on pumping defines the extent of its authority. Petitioner states that it "lacks the authority to impose pumping limitations on these facilities."

CSPA disagrees, and maintains that the Board, in WRO 2008-0016 also set forth a different interpretation. CSPA maintains that the Board retains authority over surface water that is diverted underground for future use.

WRO 2008-0016 required at Section 3 development of a conjunctive use plan that provides demonstration and quantification of the use of surface water diverted to underground storage and thereafter withdrawn from underground storage. It further required: "The plan must also address whether and how placing the 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.”

WRO 2008-0016 required at Section 4 that “the District must submit a plan to the Deputy Director to avoid the waste and unreasonable use of water under Permit 10477 and identify possible conservation measures.”

Taken together, these two measures require that, if surface water is diverted underground, measures be taken by the District to limit groundwater overdraft.

While the District may not be able to require limits on groundwater pumping within its service area in general, it can require, *as a condition of using surface water to replenish overdrafted groundwater*, agreement by the beneficiaries of this replenishment to control their pumping.

The matter goes to a fundamental question of the Board’s authority. The Board retains and must retain jurisdiction over diverted surface water. Any other interpretation would allow any surface diverter to avoid permit or license conditions simply by storing water underground at some point in the exercise of its water right.

Petitioner states in point 2 of its reply to CSPA: “Despite North San Joaquin’s repeated requests for guidance and clarification on this issue, the State Board has not provided North San Joaquin with information on any “additional tools” that may be available to the District to limit pumping.” This completely misreads the intent of WRO 2008-0016-DWR. The Board cannot tell North San Joaquin *how* to limit overdraft. It can only tell North San Joaquin, as a condition of diverting surface water, that it must. It is up to North San Joaquin to develop a plan to achieve that.

Petitioner states in point 6 of its response to CSPA that CSPA has failed to submit “the required statement of facts to support the allegations made” concerning waste and unreasonable use and unreasonable method of diversion as prohibited by the water code.

On the contrary, CSPA holds that the Board itself, in WRO 2008-0016-DWR at point 4, has required North San Joaquin to show that it will *not* violate the Water Code as it relates to waste and unreasonable use of water. The Board itself has already made the presumption that diverting water to storage underground, if that water will simply perpetuate and exacerbate a general condition of overdraft, is waste and unreasonable use. If true, this would make the method of diversion unreasonable as well. The Board placed on North San Joaquin the onus of showing otherwise.

The facts germane to this issue are those that were presented by San Joaquin itself, in the hearing prior to the issuance of WRO 2008-0016-DWR, and those facts as they are restated in that order. CSPA has simply concluded that, on its face, it is not reasonable to put water into the ground to reduce overdraft if one does not take out less water than one puts in.

The fact is that North San Joaquin has not made the required showing that its diversion of water underground will avoid waste and unreasonable use of water. The fact is that North San Joaquin has asked the Board to perform a task beyond the Board's authority in order that the Board complete the requirement that the Board made of North San Joaquin, rather than North San Joaquin complying with the Order on its own. It is contrary to law for San Joaquin not to comply, and it is not in the public interest and would be contrary to law for the Board to do North San Joaquin's work for it.

Petitioner has effectively said, in its response to CSPA, that petitioner cannot comply: "Given the Basin's critical state and the inability of local agencies to control and restrict groundwater pumping, use of additional surface water is the only realistic method to remedy the overdraft" (response to CSPA at point 7). Petitioner continues at point 8 of its response to CSPA, in a moment of perhaps unintended candor, that "granting the extension would be in the public interest as it would allow North San Joaquin to continue to implement its conjunctive use projects thereby placing more water into the critically overdrafted groundwater basin."

There is no public interest in granting the petition for extension of time and for change of use if petitioner cannot show how exercising its permit will improve groundwater overdraft, even incrementally.

Moreover, as proposed, this change of use would not comply with its stated purpose of "groundwater recharge" or "diversion to underground storage." Groundwater is not recharged if it irresponsibly and continuously overdrafted. Water is not stored underground if it is removed faster than it is put into the ground.

Dismissal terms:

North San Joaquin must comply with conditions 3 and 4 of WRO-2008-0016-DWR. It must develop a plan that prevents additional groundwater overdraft. It must also develop a plan to avoid waste and unreasonable use that views the issue more expansively than simply preventing surface water from leaving the area before it sinks into the ground. It must present a serious plan to identify and implement conservation measures that reduce overdraft.

Impacts of granting petition on public trust fisheries resources

Petitioner states in point 4 of its response to CSPA that the State Board defers to fisheries agencies on matters regarding fisheries such as those in the Lower Mokelumne River downstream of Camanche Reservoir. Petitioner states that the State Board, in D-1641, determined that the flows prescribed in the Joint Settlement Agreement (JSA) between East Bay Municipal Utilities District, California Department of Fish and Game, and U.S. Fish and Wildlife Service were adequate to protect public trust fisheries resources in the Lower Mokelumne.

Petitioner states in point 5 of its response to CSPA that the State Board, in D-1641, wrote that “it would not be in the public interest to require more water from the Mokelumne River system that will be provided under the JSA.” Petitioner also says that modeling done for D-1641 included North San Joaquin’s full allotment of 20,000 afy when available. Petitioner concludes that, “North San Joaquin’s petitions will not reduce flow into and through the Delta and would not damage the public trust resources.”

Just because the full amount of water allowed under Permit 10477 was modeled, that does not mean that *actually diverting* the water will not have negative effects on public trust resources. Moreover, D-1641 has not protected fisheries resources, as is shown by the decline in the Lower Mokelumne River fishery over the last three years, by the pelagic organism decline in the Delta, and by the overall decline in salmonids in the Sacramento – San Joaquin system.

Dismissal terms:

The State Board must condition any disposition of the present petition on the protection of public trust resources in the Lower Mokelumne River and in the Delta. The Board should reopen and revise D-1641 in order to achieve these requirements. In the interim, the Board should make any finding regarding the present petition subject to future determinations it makes in future proceedings relating to public trust fisheries resources in the Lower Mokelumne River and the Delta.