

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 24788 )  
to Appropriate from Pescadero Creek )  
in San Mateo County )

DECISION 1565

SAN MATEO COUNTY BOARD OF EDUCATION, )

Source: Pescadero Creek

Applicant, )

County: San Mateo

and )

SAN MATEO COUNTY BOARD OF SUPERVISORS, )  
et al. )

Protestants. )

DECISION APPROVING APPLICATION 24788

BY THE BOARD:

San Mateo County Board of Education, having filed Application 24788 for a permit to appropriate unappropriated water; protests having been received; a public hearing having been held before the State Water Resources Control Board (Board) on November 19, 1976, January 17 and 18, 1977, and February 4, 1977; applicant, protestants and interested parties having appeared and presented evidence and having filed briefs subsequent to the hearing; the evidence received at the hearing and the briefs having been duly considered, the Board finds as follows:

Substance of the Application

1. Application 24788 is for a permit to divert 10 acre-feet per annum to off-stream underground storage at a rate not to

exceed 0.33 cubic feet per second (cfs) from November 1 of each year to August 15 of the succeeding year. The source of supply is Pescadero Creek; the diversion point is to be located within the SE 1/4 of SW 1/4, Section 33, T7S, R4W, MDB&M, in the County of San Mateo. The water is to be used for domestic and fire protection purposes on 176 acres within Sections 32 and 33, T7S, R4W and Section 4, T8S, R4W, MDB&M.

#### Applicant's Project

2. The applicant proposes a diversion system on Pescadero Creek consisting of a pumping plant capable of diverting 200 gallons per minute (gpm) discharging into a five-inch pipeline which will convey the water 2,200 feet to two release points on a 250-foot section of Dudfield Creek. This section of Dudfield Creek is to serve as the spreading ground from which water will percolate to an underground storage basin. (A schematic diagram of the project is attached to this decision.) The storage basin has a surface area of 7.74 acres with an estimated storage capacity of 6.5 acre-feet (af). Water will be withdrawn from the underground basin through a well located near the center of the basin with a capacity of 30 gpm. Seepage from the storage basin into Dudfield Creek will be measured and rediverted. There will be a pipeline to convey the water from the well to a 100,000 gallons storage tank located at a higher elevation on the property.

### Background

3. The San Mateo County Board of Education proposes to construct and operate an outdoor education center in which the students live in and study the natural environment of the California coastal region. The initial facilities would include accommodations for 250 persons and these facilities would operate 32 weeks throughout the school year. A planned expansion of the basic facilities would include the addition of 44 motel-type accommodations for college students or adults, plus a family residence.

4. The San Francisco Bay Regional Water Quality Control Board has approved the project's sewage disposal system plan.

### Protests

5. Eleven protests against approval of Application 24788 were filed. The protestants may be divided into three groups: (a) environmental and public interest (County of San Mateo Board of Supervisors), (b) fish and wildlife concern (California Department of Fish and Game (DFG) and Northern California Council of Fly Fishing Clubs (Council), and (c) water users.

6. The County Board of Supervisors asserts in its public interest protest that the project is not consistent with the adopted County General Plan. The Board of Supervisors has adopted a finding that

the applicant's project is not in conformance with the County's General Plan based upon the overall environmental impacts of the project, the intensity of the use proposed and "possible incompatibility of the project with the stated goals and policies of the conservation and open space element of the County General Plan." (Protestant's Exhibit 11.)

The applicant has taken the position that it is not subject to the County's General Plan under Section 53094 of the Government Code which permits the governing boards of school districts to exempt themselves from zoning ordinances and Government Code Section 65402 which allows a local or state agency to proceed with a project in spite of a determination by a local planning authority that the project is not in conformity with the applicable general plan.

At the time of the Board's hearing, the Attorney for the Board of Supervisors indicated that litigation had been filed and would be pursued regarding, among other things, the right of the Board of Education to pursue a project that was inconsistent with the County's General Plan (Protestant's Opening Brief at page 3 and pages 16-18 and Protestant's Closing Brief at pages 16-17). The only documents relating to this litigation which were put into evidence at the Board's hearing were two Memoranda of Decisions. The most recent Memorandum, dated November 26, 1976, indicated that the judge would grant a summary judgment in favor of the Board of Education and the Superintendent of Schools. This Board could take official notice of any pleadings which were filed in this litigation subsequent to the Board's hearings and any later rulings by the courts regarding this

litigation. However, no further rulings have been sought by the Board of Supervisors since the granting of the summary judgment by the trial court. Of course, a judicial decision against the Board of Supervisors on the issue of the legal authority of the Board of Education to proceed with the project in spite of the Supervisors' objections does not resolve the policy issue facing the Board as to whether it is in the public interest to grant the water right applied for in the face of the alleged non-conformity with local general planning.

We would normally be very concerned about granting a water right that would facilitate a development not consistent with local planning. However, we find that there are special circumstances in this case which lead us to approve the application. These special circumstances include the policy decision which has apparently already been made by the Legislature (see Government Code Sections 53094 and 65402, discussed above) that in certain circumstances local general planning decisions should give way to decisions of other public agencies regarding what is in the public interest.

In addition, the evidence in this case indicates that the inconsistency with the County's general plan complained of is not major. The project does not, for example, involve a type of use inconsistent with the applicable plan. The area involved contains numerous other camp facilities (Testimony of the County Planning Director, Reporter's Transcript Volume III, page 9, lines 2 through 5). Further, the County's testimony

that the proposed project would exceed the permissible density for this type of project pursuant to the County's plan by about one third (Reporter's Transcript, Volume III, pages 4-5) is not based upon explicit provisions of the plan itself. Since the County's plan and the related zoning ordinance for the area in question do not contain explicit density figures for camp facilities, the allowable density in this case was determined by the County planning staff through application of an unwritten "rule of thumb". This rule of thumb has never been formally adopted by the Planning Commission or the Board of Supervisors. It was developed by the planning staff to permit translation between permissible residential densities which are explicitly set forth in the applicable zoning ordinance and permissible densities for camping facilities (Reporter's Transcript, Volume III, page 10, line 23 to page 11, line 26).

In summary, we find that the evidence of violation of the local general plan is not strong, the violation complained of is not major and the Legislature has previously made a determination that there are valid public policy reasons for allowing public projects to proceed in spite of inconsistency with local general planning. Under these circumstances, we do not feel it is appropriate to exercise our public interest jurisdiction to deny the application in question.

Protestant San Mateo County Board of Supervisors also contends that the applicant's project is inconsistent with a comprehensive solution to water supply problems in south coastal San Mateo County. In response, the applicant has indicated that it will seek to obtain water from a comprehensive county project if one is developed to serve the area of the applicant's facilities. As a result, a term will be included in the permit indicating that the State Board will consider revocation of the permit when and if a local comprehensive water system is developed.

7. Protestants DFG and the Council originally claimed that the proposed appropriation would injure an important anadromous fishery resource (silver salmon and steelhead trout). The DFG now believes that operation of the facility as described in the Environmental Impact Report (EIR) will not have a significant adverse impact on the fishery resources and habitat of Pescadero Creek. The DFG withdrew its protest when the applicant agreed to inclusion of the proposed special permit terms listed as 1, 2, and 3 on page 10 of this decision..

In response to additional concerns regarding fish and wildlife expressed at the Board's hearings, the applicant agreed to several additional terms over and above the bypass terms to which it had previously agreed with DFG. These terms are as follows:

- (1) That 1.5 cfs must be flowing in lower Pescadero Creek above Butano-Pescadero Marsh before any diversions are made.

(2) That applicant will not reduce the flows of Pescadero Creek under this permit, under its riparian rights, or otherwise, when the base flow described in (1) above is not being met.

(3) That the Board may reserve jurisdiction to order more elaborate monitoring devices than planned if it is determined that this is necessary.

At the Board's hearing the applicant committed itself not to reduce the natural flow of Pescadero Creek when the flow into the marsh was less than 1.5 cfs. However, it was understood that the applicant would be allowed to divert any water which it could demonstrate was outflow (seepage) from water stored in the underground basin as a result of its project. Condition Number 4 included in this decision reflects that understanding. The condition requires the applicant to install a network of measuring devices (gauges 1 through 6 on the attached diagram of the project) to ensure that only project water is diverted.

8. Protestant Council argued that a term should be put in the permit which would provide for a reconsideration of all fish bypass requirements if actual operation of the project resulted in adverse impacts on the fishery. A term will be included in the permit which will provide that the Board will retain continuing jurisdiction to modify the fish bypass provisions to conform to a comprehensive field study to be completed by the Department of Fish and Game or by the State Water Resources Control Board. This study should result in a definitive determination of the amount of flow necessary to maintain the fishery. The applicant should be aware



that the study may indicate that higher flows are necessary which could affect the viability of its project. However, as indicated in paragraph 6 of our Order on page 14 of this Decision, no modification of the bypass requirement will be imposed without notice and an opportunity for hearing.

9. The essence of the other protests is that the applicant's diversion would seriously reduce the available instream and groundwater supplies during periods when there is already a shortage of water and result in injury to prior vested rights. The water needs of eight downstream users on Pescadero Creek were considered. Five of these parties do not have permits, licenses, or statements of water diversion and use currently on file with the Board although they divert for irrigation purposes. Their properties border Pescadero Creek and their claims of riparian rights appear valid. The applicant's project will not deplete the flows in Pescadero Creek below those required by the historic uses of protestants' property, when such flows would exist in the absence of its project.

#### Availability of Unappropriated Water

10. Pescadero Creek rises in the Coast Range Mountains near the boundary between San Mateo and Santa Cruz Counties, flows northwesterly a distance of about nine miles and then westerly about six miles to the Pacific Ocean. A USGS gaging station is located about three miles below the applicant's proposed point of diversion and about 5.3 miles above the mouth of the Creek. This station was established in April 1951 and measures the flow from 45.9 square miles of drainage area.

11. Minimum and maximum flows for each month for the period of public record show that in 26 years of recordings by

the USGS, maximum flows exceeded the bypass requirements at the point of diversion (5 cfs flow) during the critical months of May, June, July, August, and November in as many as 24 years (during May) and in as few as 12 years (during August). In all other months of the requested diversion season, the maximum flows have exceeded the bypass flows in each of the 26 years of record.

13. Conversely, the minimum flows data indicate that the flow can drop below the bypass requirement during any month of the diversion season. As a result, caution must be exercised to ensure that diversions are terminated as the flow drops below the bypass requirement. August appears to be the most critical month for bypass requirements.

14. Rainfall in the area is highly seasonal, with about 90 percent of the rain experienced from November to April. The year-to-year variation in rainfall ranges from about 15 inches to 70 inches for the site. The average annual rainfall for the site is estimated to be about 36 inches.

15. Early decisions of the Board's predecessors in 1926 and 1928 found that there was no unappropriated water in Pescadero Creek from June 15 to October 31. In Decision 315, dated April 14, 1932, the Board came to the same conclusion and further limited the season by finding no unappropriated water from May 15 to November 30. These very early decisions were made on the basis of meager streamflow information which has now been supplemented with 26 years of accurate streamflow data from the USGS Gaging Station on Pescadero Creek. Thus, our conclusions with regard to the availability of unappropriated water will be based on the most current data. (See Engineering Staff Analysis of Record at pages 3-6 for a thorough discussion of the data and method used to determine the availability of unappropriated water).

16. There is one prior licensed application on file with the Board to divert from Pescadero Creek downstream from the applicant's point of diversion. This license allows the storage of 10.1 af from January 1 to April 30. There are two statements of water diversion and use filed downstream from this project. In one, the claimed extent of use is 4,800,000 gallons per year and the second involves irrigation of approximately 70 acres from April 1 to October 1. In addition there are five parties known to the Board by virtue of their protests that divert for irrigation purposes from April through October and in one case into November.

17. The streamflow record for the past 26 years clearly indicates that there is 10afa of unappropriated water existing in Pescadero Creek.

18. Applicant's intended use is beneficial, the requested quantities are reasonable, and unappropriated water is available.

19. While the record supports a finding that water is available to supply the applicant, availability of water from this source is marginal. Accordingly, it is in the public interest to require applicant to develop and obtain approval of a water conservation plan for implementation in the design, construction and operation of the proposed outdoor education facility.

#### Environmental Considerations

20. The applicant Board of Education, as lead agency, submitted a final EIR for the project in compliance with the California Environmental Quality Act (Public Resources Code, Section 21000 et seq.). The Board concludes that the applicant has mitigated or avoided the adverse environmental impacts to the extent feasible.

Conclusions

21. From the foregoing findings, the Board concludes that unappropriated water is available and, subject to suitable conditions, such water may be diverted and used in the manner proposed without causing substantial injury to any lawful water users and without causing significant adverse environmental effects. A permit should be issued to applicant subject to the limitations and conditions set forth in the following order.

ORDER

IT IS HEREBY ORDERED that Application 24788 be approved and that a permit be issued to the applicant subject to vested rights. The permit shall contain standard permit terms 5i, 6, 10, 11, 12, and 13.\*

In addition, the following conditions will be included:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 10 acre-feet per annum to be collected to underground storage at a maximum rate of 0.33 cubic foot per second from November 1 to August 15 of each year.

2. Permittee shall at all times bypass a minimum of 5.0 cubic feet per second or the total flow of the stream, whichever is less, at the point of diversion to maintain fish and wildlife resources.

3. In accordance with Section 1602 and/or 6100 of the Fish and Game Code, no water shall be diverted under this permit until the Department of Fish and Game has determined that measures necessary to protect fishlife have been incorporated into the plans and construction of such diversion. The construction, operation,

---

\*The Board maintains a list of standard permit terms. Copies are available upon request.

or maintenance costs of any facility required pursuant to this provision shall be borne by the permittee.

4. No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring the flow required by Condition 1 listed above. Said measuring device shall be properly maintained.

5. Permittee shall not deplete the flows of Pescadero Creek under this permit, its riparian rights, or otherwise, during any time when the flow of that creek into the Pescadero-Butano Marsh is 1.5 cfs or less. This limitation shall not preclude the rediversion of "project water", which is defined as the measured flows at Lower Dudfield Creek less the natural flows at that point based on flow measurements made at Upper Dudfield Creek using correlations between the flows at these points established under natural conditions, as shown in applicant's exhibit 21 introduced at the hearing on this application. Permittee shall install and maintain measuring devices satisfactory to the Board for the purpose of establishing the amount of water available from time to time for diversion or rediversion under this term at the following locations:

- a. Pescadero Creek above Dudfield Creek (Gauge 1).
- b. Lower Dudfield Creek above confluence of Dudfield Creek and Pescadero Creek (Gauge 2).
- c. Upper Dudfield Creek above upper release point for percolating water (Gauge 3).

d. Lower Pescadero Creek above upper end of Butano-Pescadero Marsh (Gauge 4).

e. Outlet of pump diverting water from Pescadero Creek which is being conveyed for percolation into groundwater basin (Gauge 5).

f. Outlet of well pump diverting water from groundwater basin for use. (Gauge 6).

The records of such measurement shall be furnished to the Board and shall be readily available at the permittees office for inspection by downstream diverters and riparian proprietors.

6. The State Water Resources Control Board reserves jurisdiction over this permit for the purpose of analyzing the effectiveness of the monitoring systems required in Terms 3 and 4 and making such modifications as it deems appropriate.

7. The State Water Resources Control Board reserves jurisdiction over this permit to change the fish bypass amounts to conform to the results of a comprehensive field study to be completed by the Department of Fish and Game or the staff of the State Water Resources Control Board to determine minimum streamflows required to protect fish-life. Action to change the bypass amounts will be taken only after notice to interested parties and opportunity for hearing.

8. When a local water system is established capable of furnishing water to satisfy the needs of the San Mateo County School for Outdoor Education, revocation of the right to divert under this permit shall be considered. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.

9. No water shall be diverted under this permit until permittee submits, and the Board approves, a water conservation plan for use of water under this permit and any license subsequently granted. Such water conservation plan shall be developed, and approval obtained, sufficiently in advance of facility design to allow implementation thereof in the design, construction and operation of the facility. Such implementation shall constitute a condition upon the continued use of water under this permit and any license subsequently granted.

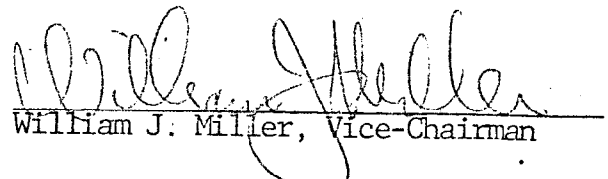
10. Actual construction work shall begin on or before two years from date of this permit and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.


11. Said construction work shall be completed on or before December 1, 1983.

12. Complete application of the water to the proposed use shall be made on or before December 1, 1985.

Dated: September 18, 1980

  
Carla M. Bard, Chairwoman

  
William J. Miller, Vice-Chairman

  
L. L. Mitchell, Member

  
Jill B. Dunlap, Member

**ABSENT**  
F. K. Aljibury, Member