

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2000 - 13**

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In the Matter of the Petition for Extension of Time  
of the City of San Luis Obispo  
Permit 5882 (Application 10216)

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SOURCE: Salinas River

COUNTY: San Luis Obispo

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**ORDER CONDITIONALLY GRANTING AN EXTENSION OF TIME**

**1.0 INTRODUCTION**

The City of San Luis Obispo (San Luis Obispo) has filed a petition for extension of time to complete beneficial use of water and construction work under Permit 5882. After considering the evidence in the hearing record and the arguments of the parties, the State Water Resources Control Board (SWRCB) finds that there is good cause to approve San Luis Obispo's petition and to grant a 10-year extension of time to complete beneficial use of water and construction of the Salinas Reservoir expansion project.

**2.0 FACTUAL AND PROCEDURAL BACKGROUND**

The Salinas Reservoir is located on the Salinas River approximately 10 miles upstream from the Highway 58 bridge near the town of Santa Margarita and 33 miles upstream from the City of El Paso de Robles (Paso Robles).<sup>1</sup> (Figure 1 (attached).) The Salinas Reservoir project began on October 9, 1941, when the SWRCB's predecessor issued Permit 5881 to the United States Army Corps of Engineers (Corps) for the domestic use of water at Camp San Luis Obispo and

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<sup>1</sup> The Salinas Dam is located 155 miles above the mouth of the Salinas River. All mileages, unless otherwise noted, were calculated using the topographic maps in the SWRCB's exhibit 2.

municipal use of any surplus in San Luis Obispo. On the same day, San Luis Obispo received Permit 5882, which was identical to Permit 5881 in its terms except for the place of use. Both Permit 5881 and 5882 authorized direct diversion of 12.4 cubic feet per second (cfs) from January 1 to December 31 of each year and collection to storage of 45,000 acre-feet per annum (AFA) in the Salinas Reservoir from November 1 of each year to June 30 of the following year. These permit terms were duplicative, not additive. Because the Corps needs only limited quantities of water for Camp San Luis Obispo, it has contracted with San Luis Obispo for the full yield of the reservoir since the completion of the reservoir in 1942. (R.T. pp. 73-75; Paso Robles 10, p. 17; San Luis Obispo 11, p. 2.)<sup>2</sup> The Corps, however, retains ownership of the facility. The County of San Luis Obispo (County) operates the reservoir to deliver water to San Luis Obispo, and San Luis Obispo pays all costs associated with the reservoir's operation for water delivery. (San Luis Obispo 11(G), p. 6-2.)

The Corps designed and built the Salinas Reservoir to hold 45,000 acre-feet (AF) of water.<sup>3</sup> Due to seismic concerns, however, the Corps did not install the spillway drum gate needed to store the fully permitted capacity of the reservoir, which effectively limited storage in the reservoir to 23,843 AF. (San Luis Obispo 11, p. 2; San Luis Obispo 10, p. 2.) No additional storage can occur until the spillway drum gate or other similar structure is installed.

In 1972 the SWRCB amended Permit 5882 to require releases from the Salinas Reservoir to supply downstream surface water diversions or groundwater extractions under vested prior water rights. Under the terms of the permit, there is a conclusive presumption that the prior vested downstream rights will be met when either a visible surface flow (commonly referred to as a "live stream") exists in the Salinas River between the reservoir and the confluence of the

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<sup>2</sup> Exhibits are identified by the name or abbreviation for the party submitting the exhibit, the exhibit number, and the page number or other location of the referenced material within the exhibit.

<sup>3</sup> Based on recent surveys, maximum storage would be 41,792 AF with a spillway gate in place. (San Luis Obispo 10, p. 6.)

Nacimiento River<sup>4</sup> or when the total inflow to the reservoir is released below the dam.<sup>5</sup> Seven observation points above the confluence are used to verify that streamflow exists throughout this stream reach.<sup>6</sup> (San Luis Obispo 18, p. 3-2.)

The SWRCB previously has granted San Luis Obispo extensions of time to complete construction work and make full beneficial use of water. Most recently, in 1972 the SWRCB issued an order approving an extension of time to make full beneficial use of water, but it did not extend the time to complete construction. (Paso Robles 12, pp. 8-9.) In 1981 San Luis Obispo petitioned the SWRCB for a 10-year extension of time to complete construction work and to apply the water to the proposed use. By letter dated February 26, 1987, the Division of Water Rights (Division) informed San Luis Obispo that the petition was still pending before the SWRCB due to the uncertainty of the ultimate ownership of the Salinas Reservoir under the Corps's duplicate Permit 5881. (San Luis Obispo 11(B), p. 1.) The Division also noted that the SWRCB could not act on the petition until San Luis Obispo complied with the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et seq. To resolve the issue of the duplicate permits belonging to the Corps and to San Luis Obispo, in 1995 the SWRCB revoked the Corps's Permit 5881 and listed the Corps as a co-permittee on San Luis Obispo's Permit 5882.

Permit 5882 currently requires San Luis Obispo and the Corps to complete construction work by September 30, 1970, and to apply water to the authorized use by December 1, 1981. On February 11, 1991, San Luis Obispo filed a petition for extension of time to complete beneficial use of water and to complete construction. By letter dated March 25, 1991, CSPA submitted a

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<sup>4</sup> The confluence of the Nacimiento and Salinas Rivers is located approximately 58 miles downstream from the dam. (SWRCB 2.)

<sup>5</sup> Accordingly, inflow may not be stored in the Salinas Reservoir unless there is a live stream in the Salinas River between the dam and the confluence of the Nacimiento River. If there is no inflow to the reservoir, there is no obligation to release stored water or to maintain a live stream. (R.T. pp. 170-171.)

<sup>6</sup> These observation points are the Highway 58 Bridge, the Highway 41 Bridge, upstream of Graves Creek confluence with Salinas River, the Templeton Bridge, Paso Robles's 13<sup>th</sup> Street Bridge, Wellsona Crossing (a river ford), and San Miguel Bridge.

timely protest against the petition, alleging that the existing diversion and storage of water under Permit 5882 and the proposed additional storage of water may result in adverse impacts on fish and wildlife resources. CSPA also asserted that San Luis Obispo has not put the permitted water to full beneficial use since 1941 and that Permit 5882 should be limited to the amount of water that has been put to beneficial use. CSPA requested the SWRCB to require San Luis Obispo to file a new water right application for the enlargement of the reservoir. These protest issues were not resolved.

On September 15, 1999, the SWRCB gave notice of a public hearing on the unresolved protest issues, and on October 12, 13, and 18, 1999, the SWRCB held the hearing and received evidence from the parties on the key issues identified in the hearing notice. The SWRCB held the record open after the hearing solely to receive the parties' written closing and reply briefs, which were submitted on December 20, 1999, and January 10, 2000, respectively.

### **3.0 HEARING ISSUES**

The Notice of Hearing contained the following issues:

- "1. Should the SWRCB approve [San Luis Obispo's] petition for extension of time?
- "2. Has [San Luis Obispo] demonstrated good cause for an extension of time?
  - a. Has [San Luis Obispo] demonstrated that it has exercised due diligence?
  - b. Has [San Luis Obispo] demonstrated that its failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided?
  - c. Has [San Luis Obispo] demonstrated that satisfactory progress will be made if an extension of time is granted?
  - d. Has [San Luis Obispo] demonstrated conditions that are incident to the project and not to [San Luis Obispo] itself as cause for delay?
  - e. How does [San Luis Obispo's] status as a municipal appropriator affect the determination whether an extension should be approved?
- "3. As a responsible agency, what actions should the SWRCB take to review [San Luis Obispo's] petition consistent with the requirements of CEQA?
- "4. If the SWRCB grants an extension of time to [San Luis Obispo], what period of time is appropriate?

- “5. If the SWRCB grants an extension of time to [San Luis Obispo], what conditions, if any, would be in the public interest? Should the permit be modified to reflect the 42,000 [AF] size of [San Luis Obispo’s] proposed project? Should there be a limit on the quantity beneficially used each year under the permit?
- “6. If the SWRCB does not grant an extension of time, should the SWRCB find that there is cause to partially revoke San Luis Obispo’s permit?
- “7. Will approval of the petition result in adverse impacts on public trust resources? What conditions, if any, should the SWRCB adopt to avoid or mitigate any adverse impacts on public trust resources that would otherwise occur as a result of approval of the petition?”

The hearing notice stated that because San Luis Obispo had not filed a change petition seeking authorization to modify the existing live stream condition of Permit 5882, the SWRCB would not entertain any requests to modify the live stream condition of Permit 5882 as applied to the continuation of San Luis Obispo’s existing diversions. The scope of the hearing was limited to consideration of San Luis Obispo’s time extension petition, including consideration of any bypass flow conditions that may be necessary to avoid or mitigate any adverse impacts resulting from changes that would result from approval of the time extension.

#### **4.0 PARTIES TO THE HEARING**

In addition to San Luis Obispo and CSPA, Paso Robles was designated a party to the hearing pursuant to California Code of Regulations, title 23, section 648.1, subdivision (b).<sup>7</sup> Paso Robles contends, in part, that neither the Corps nor San Luis Obispo exercised diligence to raise the dam following its construction, and that the proposed project is a new water project requiring a new permit. Paso Robles also asserts that the SWRCB cannot approve the project and fulfill its obligations under CEQA as a responsible agency. Moreover, Paso Robles alleges, the project will have significant adverse impacts on downstream surface water and groundwater resources.

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<sup>7</sup> Section 648.1, subdivision (b) states: “(b) In a water right proceeding, the party or parties shall include the water right applicant or petitioner, persons who have filed unresolved protests, . . . and any other persons who are designated as parties in accordance with the procedure specified in the hearing notice.”

The Hearing Officer also allowed Mr. Patrick Maloney to submit a legal brief to the SWRCB concerning the adequacy of notice in the time extension proceeding and added Mr. Maloney to the list of parties to exchange information. (R.T. p. 379.) Mr. Maloney represents clients who allegedly have riparian, overlying groundwater, and pre-1914 rights to water in the Salinas River and its underflow in Monterey County. He did not file a timely protest against San Luis Obispo's petition for extension of time or submit a Notice of Intent to Appear at the hearing. The Hearing Officer did not expressly recognize Mr. Maloney as an interested party or allow Mr. Maloney to cross-examine the witnesses. (R.T. pp. 379-380.)

## **5.0 NOTICE AND DUE PROCESS ISSUES**

### **5.1 Adequacy of the Notice in the Time Extension Proceedings**

CSPA asserts that the SWRCB violated the due process rights of riparian and downstream water rights holders by failing to provide them with notice and a meaningful opportunity to be heard when the SWRCB issued its 1972 and 1978 orders,<sup>8</sup> the notice of the petition for extension of time in 1991, and the notice of the subsequent hearing in 1999. (CSPA's Closing Brief<sup>9</sup>, pp. 7-8, 11-12.) Similarly, Mr. Maloney contends that his clients were not notified of the current proceedings as well as the prior extensions of time, and that the SWRCB must provide notice pursuant to Government Code section 11425.10(a)(1). (Brief of Interested Party After Hearing (hereinafter Mr. Maloney's Brief), pp. 7-8.)

CSPA and Mr. Maloney provide little factual and legal support for their assertions that the SWRCB's 1991 notice of the petition for extension of time was inadequate. Indeed, in his initial comments during the hearing, CSPA's representative admitted that CSPA had no evidence that the SWRCB failed to give proper notice of the petition in 1991. (R.T. pp. 12-13.)

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<sup>8</sup> This proceeding solely concerns San Luis Obispo's 1991 petition for extension of time, and accordingly, the SWRCB's 1972 and 1978 orders will not be addressed herein.

<sup>9</sup> Although the cover page on the CSPA's brief identifies the document as "Protestant's Opening Brief," CSPA submitted the brief as a closing brief, and thus, the SWRCB will refer to the brief with the proof of service date of December 20, 1999, as "CSPA's Closing Brief."

Water Code section 5100 et seq. generally requires a person with riparian or pre-1914 rights who diverts water after 1965 to file a statement of diversion and use with the SWRCB. CSPA introduced two witnesses who each testified that they owned land along the Salinas River and that they had not received the 1991 notice. (R.T. pp. 431, 444.) Both witnesses also testified that they never have filed a statement of diversion and use on the Salinas River. (R.T. pp. 485, 488-489.) Mr. Maloney did not identify any clients who had statements of diversion and use on file with the SWRCB in 1991, and who did not receive the 1991 notice. (Maloney 2, attachment.) The SWRCB's Water Right Information Management System database for all water rights on file with the SWRCB on the mainstem of the Salinas River, as of September 16, 1999, contains no record of the persons identified in Mr. Maloney's exhibit as having filed statements of diversion and use with the SWRCB in, or prior to, 1991. (CSPA H.) The Water Code establishes a procedure for notifying the SWRCB of surface water diversions. Not having received any notice by persons represented by either CSPA<sup>10</sup> or Mr. Maloney of any diversions pursuant to the statute, or any other notification, the SWRCB cannot be expected to notify such water diverters of pending actions before the SWRCB.

Moreover, California Code of Regulations, title 23, section 843, subdivision (b) allows any person to request special notice of filing of a petition for extension of time. No one has claimed that they requested, but did not receive, special notice under section 843.

Mr. Maloney and CSPA both argue that the SWRCB's actions in the October 1999 hearing are directed against riparian and downstream water right holders and that the SWRCB must give these persons notice and an opportunity to be heard. Adjudicative proceedings before the SWRCB, such as this one, are governed by the SWRCB's regulations and by chapter 4.5 of the Administrative Procedure Act (APA), Government Code section 11400 et seq. Government

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<sup>10</sup> It is unclear whether CSPA, which filed a protest based solely on environmental issues, has standing to raise the notice issue. CSPA does not purport to represent any riparian or downstream water right holders, and it does not explain why it is entitled to raise due process issues on their behalf. In fact, one witness introduced by CSPA testified that he was appearing at the hearing on his own behalf and not on behalf of CSPA. (R.T. p. 487.) In light of the conclusions herein, however, the SWRCB need not address this issue further.

Code section 11425.10, subdivision (a)(1) requires the SWRCB to give the "person to which the agency action is directed" notice and an opportunity to be heard. The SWRCB's regulations require that the party or parties to an adjudicative proceeding "shall include the person or persons to whom the agency action is directed and any other person whom the SWRCB determines should be designated as a party." (Cal. Code Regs., tit. 23, § 648.1, subd. (a).) If a hearing on a petition for extension of time is held, notice must be given to the permittee and "other such parties as the board may prescribe." (*Id.*, § 844.)

San Luis Obispo is properly considered the person to whom the SWRCB's actions are directed. San Luis Obispo initiated these proceedings when it submitted the 1991 petition for extension of time. If the SWRCB denies the requested extension, the denial would be directed to San Luis Obispo, and if the SWRCB grants the petition, any conditions of the extension will be directed to San Luis Obispo.<sup>11</sup> The SWRCB limited the scope of the October 1999 hearing to the issues associated with San Luis Obispo's petition for extension of time, and this proceeding is not an adjudication of the rights of other water users on the Salinas River. The evidence in the record shows that the SWRCB provided notice of the hearing to San Luis Obispo, CSPA, and other interested parties as required by the APA and the SWRCB's own regulations. (See SWRCB 1 (Notice of Public Hearing dated Sept. 15, 1999).)

## **5.2 Adequacy of the Time Allowed for Hearing Preparation**

CSPA argues that the notice of hearing did not give interested persons sufficient time to respond and participate in the hearing. (CSPA's Closing Brief, p. 11.) CSPA, however, does not contend that the SWRCB violated any statutory notice period and it has not identified any injury that it has suffered. Although the SWRCB's governing statute and regulations do not establish a minimum notification period for a petition for extension of time, Water Code section 1340 requires a 20-day notice period for a hearing on a protested application. The issues involved in considering a petition for extension of time are no more complex than those raised by an initial

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<sup>11</sup> The Corps, as co-permittee, may also be subject to any conditions added to the permit as part of an order amending the permit to grant the extension.



application. The SWRCB mailed out the formal notice of hearing on September 16, 1999—twenty-six days before the hearing. Division staff then faxed the hearing notice to the parties on September 17, 1999. Additionally, the Division had informed the parties of the tentative October 12 hearing date on or about August 17, 1999. Thus, the SWRCB provided sufficient time to prepare for the hearing.

## **6.0 POST-HEARING SUBMITTAL OF EVIDENCE**

Mr. Maloney submitted a brief after the hearing generally asserting that the SWRCB should deny the petition for extension of time because San Luis Obispo has failed to provide appropriate notice, failed to consider downstream water rights, and failed to assess the cumulative impacts of existing projects on the Salinas River. (Mr. Maloney's Brief, p. 9.) With his brief, Mr. Maloney submitted seven proposed exhibits. (Mr. Maloney's Brief, proposed exhibits 1-7.)

For the following reasons, the SWRCB will not accept the seven proposed exhibits into the hearing record. At the hearing, Mr. Maloney offered, and the Hearing Officer accepted, two exhibits into evidence that were labeled exhibit 1 and exhibit 2. (R.T. pp. 687-689<sup>12</sup>; SWRCB 1 (Letter from John Brown to Mailing List (Nov. 11, 1999).) Mr. Maloney then submitted a proposed exhibit 1 with his brief. This proposed exhibit, however, had already been accepted into evidence during the hearing as the attachment to exhibit 2, and therefore it is duplicative. Mr. Maloney's proposed exhibits 3 through 7 are not relevant to the notice issue that the Hearing Officer permitted Mr. Maloney to address in a closing brief. Moreover, although the hearing record remained open until the parties filed the reply briefs, the Hearing Officer did not extend the time to submit additional evidence beyond the last day of the hearing, and Mr. Maloney has not provided cause for a late submission. Finally, contrary to Mr. Maloney's belief expressed in his rebuttal brief, the SWRCB is not required to treat a legal brief as an evidentiary statement.

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<sup>12</sup> The reporter's transcript contains a page numbering error—the page numbers 687-690 (but not the text) are repeated. This reference is to the second set of pages numbered 687-689.

Without citation to authority, Mr. Maloney also claims that San Luis Obispo failed to give notice of its petition for extension of time. (Mr. Maloney's Brief, pp. 7-8.) Presuming that Mr. Maloney may have intended to address San Luis Obispo's notice obligations under CEQA, San Luis Obispo offered into evidence, together with its reply to closing arguments, additional exhibits numbered 19 through 24 to demonstrate that it satisfied the notice requirements of CEQA. (San Luis Obispo's Reply to Closing Arguments, p. 39, fn. 22.) The issue of San Luis Obispo's compliance with CEQA's notice requirements is not within the scope of the SWRCB's review and the SWRCB declines to make any findings on this issue. Accordingly, the SWRCB will not accept these proposed exhibits into evidence.

On January 5, 2000, counsel for Paso Robles requested the SWRCB to take administrative notice of the SWRCB's Notice of Cancelled Public Hearing on the City of San Luis Obispo's Petition for Change in Point of Discharge, Place of Use, and Purpose of Use of Treated Wastewater WW#12, which Paso Robles has identified as its Exhibit A. (Request for Administrative Notice by Paso Robles (Jan. 5, 2000).) There were no objections to Paso Robles's request. Because the Division has since approved the wastewater change petition, the SWRCB will deny Paso Robles's request and instead will take official notice of the fact that on June 21, 2000, the Division issued Division Order 2000-07 approving Wastewater Change Petition #12 (WW-12). (Cal. Code Regs., tit. 23, § 648.2.)

By letter dated August 15, 2000, Paso Robles requested the SWRCB to reopen the hearing record to admit documents containing information about the seismic and dam safety impacts of the reservoir expansion project that was not available at the hearing. (Letter from Virginia Cahill, Attorney for Paso Robles, to John Brown, Member, SWRCB (Aug. 15, 2000); see also letters dated August 21 and 22, 2000 from Scott Slater, Attorney for San Luis Obispo, to Craig M. Wilson, Chief Counsel, SWRCB (objecting to motion to augment the record).) Paso Robles asserts that this information confirms that the Final EIR is legally inadequate to support the SWRCB's approval of the petition. As discussed in section 8.4.1, however, the SWRCB does not have the authority to make a determination concerning the legal adequacy of San Luis Obispo's EIR. (See also SWRCB 1 (letter from John Brown to Virginia Cahill (Oct. 8, 1999) (denying motion to conduct the hearing in two phases).) Moreover, the SWRCB already has

considered the seismic safety concerns raised by Paso Robles (section 8.4.6), and it has reserved jurisdiction to review any changes to the Final EIR and to act accordingly. Paso Robles's request to reopen the hearing record is denied.

## 7.0 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 SWRCB's regulations, and the terms specified in the permit. The SWRCB may approve a request for an extension of time if the SWRCB finds that there is good cause for the extension. (Wat. Code § 1398, subd. (a).) The SWRCB's regulations allow an extension of time to be granted only on such conditions as the SWRCB determines to be in the public interest, and on a showing to the SWRCB'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 SWRCB generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (*Ibid.*) After a hearing on a petition for an extension of time, the SWRCB may revoke the permit. (Wat. Code § 1398, subd. (b); §§ 1410-1410.2.)

Paso Robles and CSPA contend that an extension cannot be granted, and a new permit is required, under the circumstances presented here, where a permittee completes construction of facilities that are not capable of diverting the entire amount authorized under a permit and later seeks to expand that facility or add new facilities to use additional water as would have been authorized under the original permit. They point out that San Luis Obispo and the Corps completed construction and put into operation the existing reservoir facilities decades ago, and that the full amount of water under the permit cannot be used with these facilities. So long as the conditions for granting an extension are satisfied, however, including the exercise of due diligence, there is nothing in Water Code section 1398 or the SWRCB's regulations that would preclude the granting of an extension to allow construction of a project consistent with what was authorized under the original permit, simply because the applicant first built and operated a project on a smaller scale.

Paso Robles and CSPA rely on *California Trout, Inc. v. State Water Resources Control Board (California Trout)* (1989) 207 Cal.App.3d 585 [255 Cal.Rptr. 184]. In *California Trout*, the Los Angeles Department of Water and Power (LADWP) had completed the construction of its water development works, but could not complete the full appropriation of water without constructing additional facilities. The SWRCB subsequently authorized extensions of time to construct the additional works—additional works that were not contemplated as part of the original permit. The SWRCB’s authority to approve the extensions was not directly involved in the case, which concerned the applicability of Fish and Game Code section 5946 to water right licensing proceedings conducted after section 5946 was enacted. The appellate court discussed the extensions as part of its analysis rejecting LADWP’s argument that applying section 5946 would involve a retroactive application of the law because the licenses were based on permits issued before the statute’s effective date. The court determined that where an extension is issued after the effective date of legislation, and the project approved by the extension entails a new or different scheme of appropriation from that contemplated by the original permit, applying a statute enacted after the original permit was enacted does not raise an issue of retroactivity. (*Id.* at pp. 617-620 [255 Cal.Rptr. at pp. 203-205].) The court did not void the extensions, require LADWP to file an application for a new permit, or direct any change in LADWP’s water right priority as would be the result if a new permit, instead of an extension, was required. The court simply held that Water Code section 5946 was being applied retroactively. In contrast to LADWP’s retroactivity argument, San Luis Obispo does not claim that CEQA or any other statute that would otherwise apply to these proceedings is inapplicable because it was enacted after the original permit was issued; in fact, San Luis Obispo concedes that it has an obligation to comply with the public trust doctrine and all applicable laws. (San Luis Obispo’s Reply Brief, p. 16.) Also unlike LADWP, San Luis Obispo is not requesting an extension of time to construct facilities that were not contemplated under the terms of the original permit.

## **8.0 DETERMINATION OF HEARING ISSUES**

### **8.1 Extension of Time to Make Full Beneficial Use of Water**

The evidence in the record supports a finding that there is good cause to extend the time for San Luis Obispo to make full beneficial use of water. A municipality, such as San Luis Obispo,

is to be afforded some latitude in putting water to beneficial use, because the municipality must be able to plan for, and meet, the needs of its existing and future citizens. (Wat. Code §§ 106.5, 1203.) The Annual Progress Reports for Permit 5882 indicate that San Luis Obispo's water use has steadily increased, as the population has increased. Water use increased from 2,400 AF in 1949 to 6,019 AF in 1998. (SWRCB 1; San Luis Obispo 10, pp. 2-3; San Luis Obispo 10(D), p. 7.) San Luis Obispo has planned for additional population growth and estimates its future demand to be approximately 9,000 AF. (San Luis Obispo 12, p. 5). Thus, San Luis Obispo has exercised diligence in putting the water available in the existing reservoir to beneficial use. Additional beneficial use, however, is contingent on increasing the capacity of the reservoir, discussed in the section below.

CSPA claims that San Luis Obispo has failed to put the water to full beneficial use for nearly 58 years, and that this failure compels the application of Water Code section 1241, which provides for the reversion of unused water to the public. Section 1241 addresses the possible loss of a water right, after it has been perfected by putting the water to beneficial use, due to a subsequent failure to put the water to beneficial use for five years or more. The five-year period specified in section 1241 is not a limitation on the amount of time that may be set by the permit, in accordance with section 1397, for completing work and putting the water to beneficial use. Nor is the five-year period a limit on the granting of extensions under section 1398. Section 1241, if invoked, would involve issues concerning whether the San Luis Obispo has lost some portion of its right to use water within the already constructed capacity of the reservoir, not whether additional time should be granted to complete construction of the reservoir to its originally designed capacity. Any reversion under section 1241 may occur only after the SWRCB makes a finding following notice to the permittee. CSPA did not specifically raise this issue in its 1991 protest, and the SWRCB did not notice the applicability of section 1241 as a hearing issue. Accordingly, the SWRCB will not consider this claim further.

## **8.2 Extension of Time to Complete Construction**

### **8.2.1 Due Diligence**

In determining whether there is good cause to approve San Luis Obispo's request for an extension of time, the SWRCB must consider whether San Luis Obispo has exercised diligence

over the past nearly 60 years in completing construction of the reservoir to its originally designed capacity of 45,000 AF, and putting water to beneficial use. Due diligence requires a demonstrable effort to complete construction and to put water to beneficial use within the periods specified in the permit, and involves more than merely repeatedly filing petitions for extension of time. The question of diligence ultimately must be determined on the facts of each case and on what is practicable under the circumstances. (25 Ops.Cal.Atty.Gen. 32, 40 (1955).) In this case, the issue of whether San Luis Obispo has acted diligently and whether there is good cause to grant an extension of time is complicated by the circumstances peculiar to this proceeding, namely, the wartime purposes and construction of the reservoir, the Corps' ownership and control of the reservoir, and the state's issuance of duplicate permits to the Corps and San Luis Obispo.

Paso Robles contends that there is nothing in the SWRCB's records to indicate that, at any time between 1943 and 1972, the Corps or San Luis Obispo exercised diligence to expand the Salinas Reservoir. (Paso Robles's Closing Brief, p. 5.) A review of the record indicates that, until the 1980's, San Luis Obispo made relatively little progress towards completing construction of the reservoir. (San Luis Obispo 11, p. 3; San Luis Obispo 11(D), p. 5-4.) In the nearly 60 years since San Luis Obispo and the Corps received their duplicate permits, the reservoir has not been expanded to hold the full 45,000 AF allowed under Permit 5882. There is some indication that, for a number of years, the Corps and San Luis Obispo may have considered construction of the reservoir to be complete at the constructed capacity of approximately 24,000 AF. (SWRCB 1; Paso Robles 7, 17.) In 1972 the SWRCB granted San Luis Obispo an extension of time to complete beneficial use of water, but did not extend the time to complete construction. (Paso Robles 12, pp. 8-10.) Additionally, San Luis Obispo's own witnesses testified that although the city has filed numerous petitions for extension of time over the years, San Luis Obispo has been seriously pursuing the expansion project only since the late 1980's. (San Luis Obispo 11, p. 3; San Luis Obispo 11(D), p. 5-4.)

Although the issue is a close one, the SWRCB concludes that San Luis Obispo has been diligent and merits a time extension in light of the obstacles the city has faced in the past (see section 8.2.2), and the progress it has made more recently (see section 8.2.3). The evidence before the

SWRCB indicates that since filing the 1981 petition for extension of time, San Luis Obispo has diligently pursued the reservoir expansion by taking actions to facilitate a property transfer between the Corps and a local entity,<sup>13</sup> to resolve the issue of the duplicate permits, to identify project funding, and to comply with CEQA. Witnesses for San Luis Obispo testified that there were a number of meetings between the Corps and San Luis Obispo, and at times, the County, between 1971 and 1999 to resolve the issue of which local entity should acquire the facilities. (R.T. pp. 91-92; San Luis Obispo 11, pp. 2, 5; San Luis Obispo 11(J); see also San Luis Obispo 11(G) (1992 San Luis Obispo Council Agenda Report discussing reservoir ownership transfer alternatives).) Moreover, San Luis Obispo's environmental consultants have worked to coordinate the property transfer with Corps since 1992. The consultants submitted a work plan to the Corps regarding NEPA compliance in 1994, and have received tentative approval and feedback from the Corps. (R.T. p. 227.)

To resolve the issue of the duplicate permits, in 1995 the Corps and San Luis Obispo negotiated and stipulated to the revocation of Permit 5881 and addition of the Corps as a co-permittee to Permit 5882. (San Luis Obispo 11(A).) The stipulated agreement gave San Luis Obispo the primary authorization to continue appropriation, diversion and use under Permit 5882 under the terms of any license.

With respect to San Luis Obispo's pursuit of the project and compliance with CEQA, the city has identified and approved funding for the proposed project in financial plans for the years between 1993 and 2001. (San Luis Obispo 10, p. 8.) San Luis Obispo has expended nearly \$930,000 on preliminary feasibility studies and preparation of an EIR for the proposed expansion, and is nearing the end of the project's study phases. (R.T. pp. 60, 62; San Luis Obispo 10, pp. 8-9.) On July 20, 1999, San Luis Obispo committed an additional \$826,610 for work involving CEQA mitigation, the transfer of the dam's ownership, NEPA compliance, and other activities. (San Luis Obispo 10, pp. 8-9; San Luis Obispo 10(J), p. 4.)

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<sup>13</sup> The Corps has indicated its desire to transfer ownership of the facilities to a local agency. (San Luis Obispo 11(D), p. 5-10.)

Paso Robles also argues that since the June 1, 1972 Order extended the time to complete use of water, but did not extend the time to complete construction, the SWRCB effectively revoked the construction term by failing to expressly extend the time. Once issued, however, a permit remains in force until revoked in the manner prescribed by section 1410 of the Water Code. (*Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, [340 P.2d 722].) Even if the SWRCB in 1972 did not extend the time for construction, the SWRCB has not expressly revoked the City's permit, or specific terms of the permit relating to construction, in accordance with section 1410.

### **8.2.2. Obstacles Not Reasonably Avoided**

The SWRCB must also consider whether San Luis Obispo's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Evidence in the record indicates that San Luis Obispo's failure to comply with previous time-requirements for construction of the project stemmed, in part, from the Corps' ownership of the dam and reservoir facilities. The Corps did not make the dam eligible for disposal until 1966. (San Luis Obispo 11(F).) The Corps has indicated that because the Salinas Dam does not have a flood control function, there has been no federal interest in modifying the dam for water supply development. (San Luis Obispo 11(F); San Luis Obispo 11(D), p. 5-10.) Absent ownership of the facilities or an agreement to modify the dam, San Luis Obispo has been unable to complete construction.

Paso Robles argues that San Luis Obispo's lack of control over any expanded facilities is grounds for denying the petition for extension of time, and that San Luis Obispo has failed to provide evidence that the Corps will, in fact, transfer the reservoir facilities and thereby allow San Luis Obispo to carry out the expansion project.<sup>14</sup> (Paso Robles's Reply Brief, pp. 13-16.)

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<sup>14</sup> In its June 1, 1972, Order, the SWRCB revoked Paso Robles's permit for storage in the Salinas Reservoir because Paso Robles did not have an agreement with the Corps for delivery of water and none was contemplated. (Paso Robles 12, p. 7.) Paso Robles argues that the SWCB must be consistent and apply the same standard to San Luis Obispo, which does not have the control over the reservoir facilities to store the fully permitted amount of water. (Paso Robles's Closing Brief, p. 14.) Unlike Paso Robles, however, San Luis Obispo has had a contract for storage [footnote continues on next page]



Nonetheless, as discussed above, in recent years San Luis Obispo has acted to remove this obstacle by negotiating for the transfer of the facilities to a local entity and initiating the environmental processes required for the transfer and construction of the project. Although there is no guarantee that San Luis Obispo will be able to reach an agreement for access to the reservoir, the evidence in the record indicates that there is a reasonable likelihood such an agreement will be reached (see section 8.2.1).

The duplicate permits of San Luis Obispo and the Corps also created an obstacle that could not reasonably be avoided. As a junior appropriator to the Corps, San Luis Obispo faced the possibility that the Corps might contract with another water user for the water in the reservoir, thus jeopardizing San Luis Obispo's ability to exercise its water right. (R.T. pp. 76-78, 86-87, 91; Paso Robles 12, p. 6.) As noted herein, this issue was resolved in 1995 with the revocation of Permit 5881 and the addition of the Corps as a co-permittee to Permit 5882. (San Luis Obispo 11(A).)

### **8.2.3 SATISFACTORY PROGRESS**

Evidence in the record before the SWRCB indicates that San Luis Obispo has adequate motivation to make satisfactory progress if the SWRCB grants an extension of time to complete construction. Witnesses for San Luis Obispo testified that, based on an analysis of existing supplies and a 1 percent growth rate, San Luis Obispo would run out of water for development around 2009 and that the city does not have additional water supplies to fall back on at this point. (R.T. pp. 54, 90; San Luis Obispo 10, p. 4.) A water reuse project approved by the SWRCB would take San Luis Obispo to 2017.<sup>15</sup> (R.T. p. 170.) Thus, even with growth limitations and water conservation measures, San Luis Obispo has an impending need for water.

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in the existing reservoir with the Corps for nearly six decades. More importantly, as discussed herein, San Luis Obispo has demonstrated that it is negotiating with the Corps for access to the reservoir in order to store the full amount of water, and that San Luis Obispo has a reasonable likelihood of obtaining access pursuant to those negotiations.

<sup>15</sup> Because San Luis Obispo is developing additional supplies through water reuse, it will not put water to beneficial use pursuant to its permitted rights as soon as would otherwise be the case. We do not believe, however, that San Luis Obispo's pursuit of water reuse is an indication that it will not make satisfactory progress. In keeping with the *[footnote continues on next page]*

Moreover, the record indicates that San Luis Obispo can make satisfactory progress on the project. The Project Manager for the EIR testified that the remaining CEQA work, including developing site-specific mitigation, completing the CEQA findings, approving the project, and issuing a notice of determination could be completed in approximately a year from the date of the hearing. (R.T. p. 226.) Phase II of the project, which includes design work and property transfer activities, will take place between May 2000 and October 2001. (San Luis Obispo 10, p. 9; San Luis Obispo 10(K), p. 7-1.) Phase III, which includes bidding and construction of the project and a five-year biological mitigation monitoring program, is anticipated to begin after October 2001. (San Luis Obispo 10, p. 9; San Luis Obispo 10(K), pp. [7-1]-[7-2].)

San Luis Obispo also presented evidence regarding its ability to finance the reservoir expansion. The total cost estimate for the reservoir expansion project is \$20 million, with \$10 million of the total budgeted for biological mitigation. (R.T. p. 90; San Luis Obispo 10, pp. 9-10.) San Luis Obispo does not anticipate problems with its ability to finance all phases of the project. (San Luis Obispo 10, p. 11.) San Luis Obispo's water rate structure and schedules have been calculated in order to support the project's debt service requirements, and full construction and completion of the project. (R.T. p. 61; San Luis Obispo 10, p.10.) More specifically, the city has budgeted and committed Phase I, and Phases II and III have been incorporated into San Luis Obispo's five-year fund analysis. (San Luis Obispo 10, p. 10.)

Finally, witnesses for San Luis Obispo testified that, despite the hurdles with the transfer of ownership, the city is committed to the project and that the project can be completed within the 10-year time extension requested. The city's Water Manager testified that the San Luis

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policy underlying Water Code section 1010, a permittee should not be discouraged from using reclaimed water out of fear that it would lose its right to make beneficial use of water from other sources, such as permitted diversions that have not yet been perfected. San Luis Obispo's development of its water reuse project would constitute good cause under Water Code section 1398 to further extend the time to put water to beneficial use, to the extent the city can show that its use of reclaimed water delays the city's need for water from other permitted sources. (Wat. Code § 1010, subd. (a)(3).) So too, in determining whether the amount of time likely to be taken before the permittee puts water to beneficial uses is consistent with satisfactory progress, the SWRCB should avoid penalizing a permittee simply because the permittee is reusing water, and as a result will take longer before it needs to use all of the water authorized to be diverted under its permit.

Obispo City Council “is committed to moving forward with this project in a timely manner.” (R.T. p. 90.) San Luis Obispo’s Utilities Director stressed the city’s willingness to take any action necessary to effect the property transfer with the Corps, including seeking legislative relief or litigating the issue with the County. (R.T. p. 62.) He also testified about the feasibility of completing the project within the 10-year extension: “We know and are very familiar with how long it takes to complete these projects . . . .” (R.T. p. 62.) The Project Manager for the EIR testified that, to his knowledge, nothing would make the project infeasible. (R.T. p. 228.)

Thus, the evidence in the record indicates that San Luis Obispo can make satisfactory progress if the SWRCB approves an extension of time. Nonetheless, it is of some concern to the SWRCB that approximately twelve years after the Division informed San Luis Obispo that it must comply with CEQA, San Luis Obispo has neither approved the project nor issued a Notice of Determination under CEQA. Accordingly, to ensure that San Luis Obispo will make satisfactory progress if the SWRCB grants the extension of time, the SWRCB will impose a condition that San Luis Obispo must issue a Notice of Determination within twenty-five days from the adoption of this order or the extension of time for project construction shall be deemed denied. The provisions of this order extending the time for construction shall not become effective until the Notice of Determination is issued.

### **8.3 Public Interest**

Finally, the SWRCB finds that it is in the public interest to approve the petition for extension of time. San Luis Obispo has demonstrated that it has a need for the water to provide for the needs of a growing population and that if the reservoir project is completed, it can put the water to beneficial use. Accordingly, an extension of time to put water to complete construction and put the water to beneficial use is in the public interest. (See Wat. Code § 106.5 (establishing policy of protecting municipal rights to water to the fullest extent possible).)

The SWRCB also finds that it would be premature to consider modifying Permit 5882 to reflect the 42,000 AF maximum storage size of the proposed project or to limit the quantity beneficially used each year. Such determinations are more appropriately made at the time of licensing.

Paso Robles contends that if the SWRCB grants an extension of time to San Luis Obispo, then fairness and the public interest require that the additional storage be given a lower priority than established uses in the Salinas River watershed between the Salinas Dam and the Nacimiento River where downstream users have developed a reasonable expectation that the Salinas Reservoir was at its permanent size. Paso Robles also asserts that if the SWRCB grants an extension of time, then the SWRCB should protect existing and ultimate uses in the watershed of origin. Paso Robles did not present evidence to support either argument, and the SWRCB will not consider these contentions.

#### **8.4 Environmental and Public Trust Issues**

In evaluating the environmental and public trust issues regarding the proposed project, the SWRCB considered the information presented in San Luis Obispo's environmental documents prepared pursuant to the provisions of CEQA and other evidence presented at the hearing.

##### **8.4.1 CEQA and the Public Trust Doctrine**

Under CEQA, San Luis Obispo is the lead agency for the preparation of environmental documentation for the proposed Salinas Reservoir expansion project. Because the SWRCB's approval of a time extension and subsequent amendment of Permit 5882 would authorize San Luis Obispo to complete its project and apply water to beneficial use, the SWRCB's approval constitutes an approval of San Luis Obispo's project. Thus, the SWRCB is a responsible agency for purposes of considering whether to approve San Luis Obispo's petition. As a responsible agency, the SWRCB has a more limited role than San Luis Obispo. The SWRCB must review and consider the environmental effects of the project identified in the Final EIR, 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 SWRCB is responsible for mitigating or avoiding only the significant environmental effects of those parts of the project that it decides to approve. (Cal. Code Regs., tit. 14, § 15096, subd. (g).) When an EIR has been prepared for a project, the SWRCB may not approve the proposed project if it finds "any feasible alternative or feasible mitigation measures within its

powers that would substantially lessen or avoid any significant effect the project would have on the environment.” (*Id.* § 15096, subd. (g)(2).) The SWRCB must make findings of overriding consideration for the environmental effects that it cannot avoid or mitigate. (*Id.* § 15096, subd. (h).)

Regardless of any obligation San Luis Obispo or the SWRCB may have under CEQA, the SWRCB 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].)

On June 2, 1998, San Luis Obispo certified a Final EIR (State Clearinghouse No. 92071018) for the proposed reservoir expansion project. San Luis Obispo has not yet approved the project or filed a Notice of Determination. Paso Robles contends that the SWRCB cannot approve the project or make its mandatory CEQA findings until San Luis Obispo approves the project. CEQA, however, does not require the SWRCB to await San Luis Obispo’s approval of the project and filing of a Notice of Determination before considering the certified Final EIR as part of the SWRCB’s review of San Luis Obispo’s petition. (See Cal. Code Regs., tit. 14, § 15096, subd. (a).)<sup>16</sup>

Paso Robles also contends that the SWRCB should not approve the project because the EIR on which the SWRCB must rely is inadequate and does not comply with CEQA. The SWRCB, however, does not have the authority to make a determination concerning the legal adequacy of San Luis Obispo’s EIR. That determination is left to the courts. In general, unless a court rules

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<sup>16</sup> The CEQA guidelines make clear that a responsible agency cannot approve a project until the lead agency has completed the environmental documentation for the project, and that the responsible agency must file its own Notice of Determination, without any suggestion that after the final EIR has been certified by the lead agency a responsible agency still cannot act until the lead agency has approved the project and filed a Notice of Determination. (Cal. Code Regs., tit. 14, § 15096, subs. (f)–(i).) One of the criteria for identifying the lead agency under CEQA is which agency will act first on the project. (*Id.*, § 15051, subd. (c).) But this is only one of the criteria, and it is not given as much weight as other criteria, indicating that the lead agency may not necessarily be the first to act on the project. (See *id.*, § 15051, subs. (a), (b), (d).)

otherwise, a responsible agency must presume that the EIR complies with CEQA. (Pub. Resources Code §§ 21167.2, 21167.3.)

## **8.4.2 Downstream Hydrological Impacts**

### *8.4.2.1 Summary of the Final EIR's Analysis of Downstream Hydrologic Impacts*

In analyzing the hydrologic impacts of the reservoir expansion project, the Final EIR considered impacts to water supply to be potentially significant if the project would result in a substantial change in the quantity of water supply to San Luis Obispo or downstream water users.

(SWRCB 3, p. 3.4-13.) The expanded reservoir would reduce the frequency and magnitude of reservoir spills and consequently would reduce the peak flows in the Salinas River, particularly in the reach between the dam and the confluence with the Nacimiento River. (SWRCB 3, p. 3.4-29; San Luis Obispo 12, pp. 5-6.) Based on modeling studies, the Final EIR states that the project would reduce spills at the dam by 6.7 percent as compared to historical flows.

(SWRCB 3, p. 3.4-46, table 3.4-13.) The annual average flow reduction due to the project is estimated to be 2,041 AFA. (*Id.* at p. 3.4-19.) The greatest reduction in downstream flows would occur in wet years following drought periods when the reservoir had below-average storage. (*Id.* at p. 3.4-19.) The project would have no impact downstream during dry years or dry seasons because the dam would continue to be operated under the live stream condition, which would ensure that any inflow would be released. (San Luis Obispo 12, p. 6; SWRCB 3, p. 3.4-29.)

The Final EIR considered impacts to groundwater resources to be significant, in part, if the project would measurably affect the amount of recharge occurring in a groundwater basin or adversely affect the depth of water in existing wells. (SWRCB 3, p. 3.4-21.) The Final EIR identified the primary operational impact of the project on groundwater as the potential reduction in recharge to downstream areas. (*Id.* at p. 3.4-22.) The Final EIR did not identify significant project-related impacts on groundwater recharge and pumping in the Atascadero Sub-Basin. Impacts to groundwater levels would only occur in wet years when the water levels are relatively high, and there would be no impairment of the ability to pump. (*Id.* at pp. [3.4-23]-[3.4-24]; San Luis Obispo 12, p. 9.) Additionally, the Atascadero Sub-Basin is depleted and fully recharged annually, except during periods of sustained, severe drought (*id.* at p. 3.4-7); and consequently, any project-related impacts would not carry over from one year to the next.

(San Luis Obispo 12, p. 9.) The Final EIR also concluded that the operation of the project would not significantly affect groundwater levels downstream of Atascadero. (SWRCB 3, pp. [3.4-24]-[3.4-25].)

Although the Final EIR concluded that operation of the project is not expected to significantly affect downstream surface water or groundwater resources (SWRCB 3, p. 3.4-29), the cumulative effects of the project together with the overall water diversions and groundwater withdrawals by all downstream users could be considered to be potentially significant. (*Id.* at p. 3.4-29; see also p. 3.4-25 (concluding that the project would potentially contribute a minor amount to the existing overdraft situation).) The Final EIR did not identify any feasible mitigation measures for this potentially significant cumulative impact. (*Id.* at p. ES-18, table ES-1; see also pp. [3.4-30]-[3.4-31].)

#### *8.4.2.2 Contentions Regarding Downstream Hydrologic Impacts*

CSPA and Paso Robles contend that the proposed project will have a significant adverse impact on downstream surface water and groundwater resources. The project's effects on recharge to the Paso Robles Groundwater Basin are of particular concern to Paso Robles. The groundwater basin underlies between 860 and 886 square miles of the upper Salinas River Valley, and is replenished by runoff from the Salinas River and its tributaries, and from rainfall infiltration. (SWRCB 3, p. 3.4-7.) Overdraft in the groundwater basin was estimated to be 57,621 AFA in 1993. (*Id.* at p. 3.4-29.) A Department of Water Resources report estimates that the Salinas River provides an estimated annual recharge of 11,000 AF out of the total groundwater basin recharge of 47,000 AF. (Paso Robles 30, p. 45; R.T. pp. 407-408.)

During the hearing, San Luis Obispo, CSPA, and Paso Robles each provided testimony regarding the impacts of the reservoir expansion project. All three parties' testimony regarding streamflow changes was based on data contained in San Luis Obispo's Final EIR; however, CSPA and Paso Robles evaluated the data independently.

San Luis Obispo's modeling study assumes a demand of 10,000 AFA, with 9,000 AFA of this amount attributable to population growth that will occur regardless of whether the reservoir is

expanded. (R.T. p. 354.) Using the 1972-1995 hydrologic period (during which the live stream requirement was in place) as the baseline period for its environmental analysis, the city modeled reservoir operations at both the existing and expanded reservoir levels of 23,843 AF and 41,792 AF, respectively. (San Luis Obispo 12, pp. 4-5; SWRCB 3, p. 3.4-2.) San Luis Obispo calculated that, over the hydrologic period, enlarging the reservoir would reduce the average flows in the river reach below the dam by 2,041 AFA (or 6.7 percent) as compared to historic flows. (SWRCB 3, pp. 3.4-19, p. 3.4-46 (table 3.4-13); San Luis Obispo 12, p. 9.) Assuming that 100 percent of the average flow reduction of 2,041 AFA was allocated to overdraft in the Paso Robles Groundwater Basin on an acre-foot for acre-foot basis, this would be less than 4 percent of the total overdraft (57,621 AFA) of the basin. (SWRCB 3, p. 3.4-29; San Luis Obispo 12, p. 9.)

At the hearing, a witness for San Luis Obispo testified that the maximum estimated reduction in recharge to the Paso Robles Groundwater Basin would be less than 300 AFA. (R.T. pp. 408-409.) This conclusion was based on a modeled average annual flow reduction at Paso Robles of 1,968 AFA (SWRCB 3, p. 3.4-48, table 3.4-15), and San Luis Obispo's calculation that 14.7 percent of the surface flow (11,000 AF of the 74,762 AF average annual Salinas River flow at Paso Robles) enters the groundwater basin. (R.T. pp. 406, 408-409.)

CSPA provided two analyses of the proposed project's impacts on flow. In one analysis, CSPA assumes that all of San Luis Obispo's municipal needs are met solely from the Salinas Reservoir (CSPA 22, tables 1, 4, 5, 6) even though San Luis Obispo operates the Whale Rock and Salinas Reservoirs on a conjunctive use basis. (SWRCB 3, p. 3.4-18.) Consequently, CSPA overstates municipal diversions from the Salinas Reservoir, which in turn results in an overestimate of both the decrease in reservoir levels and the increase in collection to storage. This analysis provides an unrealistic analysis of changes in spill from the dam. CSPA's other analysis provides a single value obtained by averaging 52 years of data. (CSPA BB.) This does not provide the level of specificity needed to analyze impacts.

Paso Robles argues that the proposed project will significantly reduce downstream flow into the Salinas River and that this reduction will, in turn, have a significant adverse impact on recharge



of the water into the Paso Robles Groundwater Basin. In evaluating the flow data from the Final EIR, Paso Robles's witnesses compared the flow reduction due to the difference in dam heights with all other conditions constant, and determined that reservoir spills would be reduced by 4,453 AF (31 percent) on average. (Paso Robles 1, pp. 2-3.)

According to Paso Robles, because the Salinas River contributes 58 percent of the recharge to the Paso Robles Groundwater Basin, any reduction in flow would significantly affect recharge and increase overdraft in the groundwater basin. (Paso Robles 1, p. 3.) In estimating the 58 percent recharge from the Salinas River, Paso Robles used only the flows from the Salinas River and the tributaries, and disregarded the inflow from the other sources. (R.T. pp. 764-766.)

#### *8.4.2.3 The SWRCB's Analysis of Downstream Hydrologic Impacts*

In calculating the reduction in flows below the Salinas Dam, the SWRCB finds that comparison of spills with and without the reservoir expansion, with all other conditions constant, provides a more accurate analysis of the project's impacts on flows than an analysis based on actual historic flows below the dam. Thus, the SWRCB concurs with Paso Robles that in years in which there are flow reductions, the proposed project would reduce reservoir spills on average by 4,453 AF. (Paso Robles 1, table 3.) If 100 percent of this average flow reduction is allocated to overdraft in the Paso Robles Groundwater Basin on an acre-foot for acre-foot basis, this would amount to 7.7 percent of the total 57,621 AFA overdraft of the basin. The SWRCB recognizes that in reality, however, flow reductions would not be allocated to overdraft on an acre-foot for acre-foot basis. Furthermore, the assumption that the river contributes 58 percent of the recharge disregards other factors such as return flows and thus overstates the contribution of the river to recharge in the deep basin. (See Paso Robles 30, p. 45 (identifying sources of recharge to the groundwater basin).)

The SWRCB, however, need not determine the precise extent to which groundwater recharge would be reduced in order to conclude any overall reductions in groundwater recharge should be avoided or fully mitigated. San Luis Obispo has admitted that the reservoir expansion would reduce recharge to the overdrafted Paso Robles Groundwater Basin. It is not in the public interest to allow additional overdraft of an impacted basin in a water-short area. Nor would it be

consistent with the protection of prior rights to allow surface water diversions that, by reducing groundwater recharge, have the effect of increasing the long term groundwater overdraft.<sup>17</sup> In these circumstances, any contribution to overdraft, even if it is only 300 AF as compared to the 1993 overdraft of 57,621 AF, is unacceptable. To ensure that the proposed project will not have an adverse affect on downstream water users, and to mitigate the cumulative impact of the project on the Paso Robles Groundwater Basin, as a condition of this order, the SWRCB will prohibit operation of the reservoir in a manner that contributes to increased overdraft of the basin. San Luis Obispo is required to develop a project operations plan to this effect for approval by the Chief of the Division of Water Rights. This permit condition will also serve the public interest by avoiding any project-specific impacts.

#### **8.4.3 Impacts on Downstream Public Trust Resources in the Salinas River**

The primary downstream public trust concern associated with the enlargement of the Salinas Dam is the protection of steelhead located in the Salinas River downstream of the dam. In this reach, adequate streamflows for adult passage, spawning, and juvenile rearing must be addressed. The National Marine Fisheries Service (NMFS) has listed steelhead as a threatened species under the federal Endangered Species Act (ESA). (62 Fed.Reg. 43937 (Aug. 18, 1997); R.T. p. 630). The SWRCB takes official notice of the fact that on February 16, 2000, NMFS designated the watershed below the Salinas Dam that has anadromous access as critical habitat for the steelhead under the federal ESA.<sup>18</sup> (65 Fed.Reg. 7764 (Feb. 16, 2000).)

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<sup>17</sup> Sawyer, *State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow* (1988) 19 Pacific L.J. 1267, 1292 ("where surface water diversions would reduce groundwater supplies, a surface water appropriator cannot obtain a right to divert those surface waters if the effect would be to impair the rights of overlying users or prior groundwater appropriators dependent on the affected groundwater supply.").

<sup>18</sup> Critical habitat is defined as the specific areas within the geographic area occupied by the species on which are found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. (16 U.S.C. § 1532(5)(A)(i); see R.T. p. 641 (describing components of critical habitat designation).)

#### *8.4.3.1 Background on Steelhead in the Salinas River*

The size of the present or historic steelhead populations in the Salinas River is unknown. Steelhead historically have used the headwaters of the Salinas River and the tributaries draining from the western side of the basin for spawning and rearing. The mainstem of the river serves as a migratory corridor when sufficient runoff provides a connection to the Pacific Ocean. (SWRCB 3, append. L, p. L-1-3.) Adult steelhead enter the Salinas River and its tributaries during the months of January through May. (R.T. p. 539; SWRCB 3, append. I, p. 5-12.) Young steelhead over-summer from one to four years with outmigration of young steelhead occurring annually from the middle of December to late March. (R.T. pp. 544-546, 620.) Before the Salinas Reservoir was completed in 1942, adult steelhead migrated above the present dam site as far upstream as Pozo Creek (about 165 miles from the mouth of the Salinas River), and occasionally farther during winters of exceptionally high rainfall. (SWRCB 3, append. L, pp. [L-1-2]-[L-1-3].) Impoundment and diversion of streamflow, groundwater pumping, shallow water, high water temperatures, alteration of the natural streambed, and construction of the Salinas Dam in 1942, which blocked upstream passage of adult steelhead, have caused the decline of Salinas River steelhead. (R.T. pp. 250-251; SWRCB 3, append. L, p. L-1-3.)

#### *8.4.3.2 Summary of the Final EIR's Analysis Regarding Impacts on Steelhead and Aquatic Resources*

Initially, San Luis Obispo analyzed the hydrologic impacts of the proposed expansion and concluded that project would have no significant adverse impacts on downstream aquatic resources. (San Luis Obispo 13, pp. 6-7.) Based on the proposed listing of steelhead under the ESA, and on the receipt of comment letters citing recent observations of steelhead in the tributaries<sup>19</sup> and describing the presence of spawning and rearing habitat in the Salinas River downstream of the dam, San Luis Obispo subsequently specifically addressed the occurrence of steelhead below the dam and assessed the impacts of reduced spills on the steelhead. (San Luis Obispo 13, p. 7; SWRCB 3, append. L, pp. [L-1-1]-[L-2-1].)

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<sup>19</sup> There have been unconfirmed observations of steelhead upstream of Atascadero, including in the Salinas River mainstem between Atascadero and Las Pilitas Road. (SWRCB 3, p. 3.7-10; *id.*, append. L, p. L-1-4.)

In December 1997 San Luis Obispo's consultant conducted a one-day field investigation in the 13-mile reach below the Salinas Dam to characterize the suitability of habitat for steelhead migration and spawning, and to identify any possible migration barriers. (R.T. p. 251; SWRCB 3, append. L, pp. [L-1-1]-[L-1-2].) The survey extended from the dam downstream 3 miles, and included portions of the river near Highway 58 at the aggregate plant, about 11 miles downstream of the dam. (R.T. p. 251; SWRCB, 3, append. L, p. L-1-2.) The Salinas River between the dam and Las Pilitas Road (which is located approximately 2-3 miles downstream) traverses a cattle ranch and then enters a narrow steep canyon. (SWRCB 3, append. L, pp. [L-1-4]-[L-1-5].) This canyon reach extends approximately 15 miles below the dam. (SWRCB 2.) The consultant was not able to gain access over private property to survey approximately 5.5 miles of the canyon reach upstream of the aggregate plant. (R.T. p. 252; SWRCB 13, p. 9.)

The city's consultant identified suitable steelhead spawning and rearing habitat downstream of Las Pilitas Road, but concluded that certain factors significantly reduced the probability of steelhead successfully spawning. (R.T. p. 252; SWRCB 3, append. L, pp. [L-1-5]-[L-1-6].) These factors include the poor condition of the habitat in portions of the 13-mile reach, warm summer water temperatures, the presence of five man-made dams<sup>20</sup> with heights up to 15 feet that form significant passage barriers for fish, and the presence of predators (bass and bullfrogs) to steelhead eggs and smolts in the lakes created by the dams. (San Luis Obispo 13, p. 9; SWRCB 3, append. L, pp. [L-1-5]-[L-1-6].) The Final EIR concluded that steelhead spawning and rearing along the mainstem of the Salinas River between the dam and Highway 58 would be rare to non-existent. (SWRCB 3, append. L, pp. [L-1-5]- [L-1-6]; San Luis Obispo 13, pp. 8-9.)

The Final EIR also concluded that reduced spills from the expanded reservoir will not significantly affect steelhead habitat or migration, wildlife, or riparian vegetation in the river below the Salinas Dam and Highway 58. (R.T. pp. 248-249; San Luis Obispo 13, pp. 9-10; SWRCB 3, pp. 3.5-25, 3.6-11, [3.7-19]-[3.7-20].) During non-spill years and all summers,

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<sup>20</sup> The topographic maps indicate that there may be six possible barriers. (SWRCB 2.)

minimum flows downstream of the dam are governed by the live stream requirement.

San Luis Obispo states that the proposed project will have no impact on the current hydrologic regime below the dam, and there would be no effect on steelhead rearing during the late spring and summer months. (San Luis Obispo 13, p. 10.) Additionally, hydrological impacts would occur only during winter months when the reservoir spills, and impacts on the hydrologic regime will be rare. (R.T. p. 253; SWRCB 3, pp. [3.7-19]-[3.7-20].) The change in spill amount and velocity, and water depth below the dam during spill events would be negligible, and would not significantly alter habitat or passage for steelhead if the fish were present near the dam. (R.T. pp. 253-254; SWRCB 3, pp. [3.7-19]-[3.7-20].) Moreover, the negligible change in velocity would not significantly reduce scouring flows needed for the cleansing of spawning gravels, maintenance of aquatic habitats, and prevention of channel encroachment by riparian plants. (R.T. p. 254; SWRCB 3, append. L, pp. [L-2-4]-[L-2-5].)

The following sections will first address the evidence and the SWRCB's findings regarding the presence of steelhead and the suitability of habitat below the dam, and next, the impacts of reduced spills on downstream aquatic and riparian resources.

#### *8.4.3.3 Additional Evidence Regarding the Occurrence of Steelhead and Suitability of Habitat Downstream of Salinas Reservoir*

Focusing primarily on steelhead, CSPA asserts that the project may have impacts on the public trust resources downstream of the Salinas Reservoir.<sup>21</sup> CSPA contends that adult and juvenile steelhead are present in the river below the dam and there is adequate habitat for the steelhead.

With regard to the occurrence of steelhead and the suitability of habitat, a CSPA witness who is a long-time resident and fisherman testified that he has caught juvenile and adult steelhead in the river adjacent to his property, which is located about three miles below the dam. (R.T.

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<sup>21</sup> CSPA contends that the Final EIR did not address the proposed project's impacts on sensitive species downstream of the dam such as the pond turtle, willow flycatcher, bells vireo, arroyo toad and red-legged frog, but the only information CSPA supplied concerning these species were two photos of an unidentified toad (CSPA CC). (R.T. pp. 575-576.)

pp. 451-454, 507.) Another CSPA witness testified that adequate habitat for steelhead spawning and rearing is present in the canyon reach not surveyed by San Luis Obispo. (R.T. pp. 581-584; CSPA BB, pp. 6-19, 21-22, 25.) This witness has theorized that due to the reduced winter flows below the dam since the dam's construction, and the corresponding change in habitat, steelhead may be spawning in the mainstem canyon below the dam instead of using the canyon solely for migratory passage. (SWRCB 3, append. J, comment 24-13.)

With respect to the five man-made barriers above Highway 58, a witness for San Luis Obispo testified that the five man-made impoundments with dam heights up to 15 feet represent significant upstream barriers to adult steelhead, but that steelhead can pass over the barriers if there are suitable flows. (R.T. p. 252.) A steelhead specialist with the Department of Fish and Game (DFG) testified that barrier height is but one factor to consider when assessing whether a structure may be a barrier to steelhead, and that if conditions are right, steelhead can surmount barriers 14 to 15 feet high. (R.T. pp. 643-646.) A CSPA witness testified that a 12-foot high dam in the lower canyon appears passable at 10 cfs (R.T. pp. 582-584).

#### *8.4.3.4 SWRCB Analysis of Steelhead Occurrence and Habitat below the Salinas Dam*

Based on the evidence in the record, the SWRCB cannot conclude that steelhead are not present below the Salinas Reservoir, or that the proposed project will not have a significant impact on any steelhead that may be present. Spawning and rearing of steelhead have been documented in Trout Creek, Santa Margarita Creek (15.2 miles below the dam), Atascadero Creek (21.1 miles), Paso Robles Creek (24.6 miles), and Jack Creek (31.9 miles). (R.T. p. 251; SWRCB 3, append. L, p. L-1-4.) The unconfirmed reports of steelhead in the mainstem of the Salinas River above Highway 58 raise a question as to whether steelhead may be present in the canyon reach below the dam. (R.T. pp. 583-584.) The evidence indicates that the man-made dams above Highway 58 are not insurmountable barriers for steelhead under appropriate hydrologic conditions.

Moreover, San Luis Obispo's conclusions regarding the suitability of habitat for steelhead spawning and rearing in the reach below the dam and above Highway 58 are not conclusive. During its survey, the city found that there was suitable habitat for steelhead in certain portions

of the river below the dam, but not in others. San Luis Obispo was not able to survey the canyon reach that purportedly has the best spawning and rearing habitat. Further, there are no actual water temperature data to support San Luis Obispo's conclusion that the water temperature in the river is inadequate for over-summer rearing. San Luis Obispo did not conduct steelhead population surveys (either electroshock or snorkel surveys) to detect the presence or absence of young steelhead. The presence or absence of multiple year classes of steelhead may have provided substantial evidence about the impassibility of the five dams, and how suitable the spawning and over-summer rearing habitat is for steelhead.

Additional studies are necessary to determine if steelhead are present in the canyon reach below the dam and if their spawning and rearing habitat is rare to non-existent. In light of the designation of steelhead as a threatened species and the Salinas River as critical habitat for steelhead, and pursuant to its continuing authority under the public trust doctrine, the SWRCB will require San Luis Obispo to conduct studies to determine the occurrence of steelhead and the suitability of steelhead habitat between Highway 58 and the Salinas Dam. This order contains this requirement. The SWRCB will also require compliance with all applicable provisions of the state and federal Endangered Species Acts.

#### *8.4.3.5 Evidence Regarding the Impact of Reduced Spills on Downstream Aquatic Resources*

CSPA contends that the reservoir expansion could affect the attraction and passage of adult steelhead, and that it could reduce spills and scouring necessary for maintenance of fish and wildlife habitat.<sup>22</sup> Specifically, CSPA contends that reduced spills will (1) increase the likelihood that the man-made dams in the canyon reach will become barriers to migrating adult steelhead, (2) decrease flows that periodically cleanse instream gravels used for spawning by steelhead and other native species, (3) reduce scouring flows that periodically remove riparian vegetation and maintain habitat diversity, and (4) affect downstream riparian and aquatic resources. (R.T. pp. 453-467, 576-580.)

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<sup>22</sup> CSPA also asserts that flows should be provided at all times below the dam to protect steelhead. The hearing, however, was limited to consideration of the impacts related to approval of the time extension petition, namely, impacts associated with the reservoir expansion project.

The SWRCB cannot conclude that reduced flows resulting from the reservoir expansion will not affect downstream public trust resources. San Luis Obispo used average flow data to conclude that impacts on the hydrologic regime would be rare, and consequently, any impacts on downstream resources would be insignificant. This approach, however, does not sufficiently consider the specific needs of migrating steelhead during the critical migration period between early January and late March.

Instead, an analysis of the periodic changes in monthly spills provides a more precise interpretation of probable impacts. SWRCB staff has prepared Table 1 (attached), which examines the project's impacts on a monthly basis, and which demonstrates that the project may indeed have an impact on steelhead if they are present. For example, the proposed project may delay spills by one month (see Table 1, data for December 1966/January 1967), and thus delay passage of adult steelhead over the man-made dams in the canyon reach by this time period. As another example, if the reservoir expansion project had been completed in 1952, there would have been a 100 percent reduction in January and February spills, and a 78 percent reduction in March spills. Therefore, it is possible that the expanded reservoir would not spill during the critical adult steelhead migration period.

The proposed project also would lengthen the period between years when spills occur. For example, under the existing project, spills occurred in 1945, 1952, and 1958. Under the proposed project, spills during critical adult steelhead migration (January through March) would be substantially diminished or eliminated for 14 years from 1945 through 1958. (Table 1.)

The SWRCB finds that if steelhead are present in the reach between the Salinas Dam and Highway 58, there is insufficient evidence to conclude whether and to what extent reduced flows will affect steelhead. If the study discussed in section 8.4.3.4 indicates that steelhead are present in that reach, a geomorphologic study would be necessary to identify what stream flows are required for maintenance of the river channel downstream of the Salinas Dam.



CSPA requests the SWRCB to amend Permit 5882 to require flows for steelhead and other aquatic resource pursuant to Fish and Game Code section 5937 and other provisions of law.<sup>23</sup> (CSPA's Closing Brief, p. 15.) Section 5937 requires an owner of a dam to bypass or release sufficient water to keep any fish that may exist below a dam in good condition, but it does not impose a nondiscretionary duty on the SWRCB to require a dam operator to release sufficient water to keep fish in good condition. Absent any nondiscretionary duty to apply section 5937, the SWRCB cannot require that flows be maintained for the protection of steelhead without first determining whether steelhead are present in the reach below the dam, and if they are, then obtaining information regarding the flows necessary to keep steelhead in good condition. (See SWRCB Order WR 95-2 at pp. 4-5 (discussing section 5937).) Similarly, for other aquatic resources, the SWRCB cannot revise San Luis Obispo's permit to impose additional instream flow requirements without first obtaining additional information to determine what flows would be appropriate. As discussed earlier, the SWRCB will require San Luis Obispo to submit this information.<sup>24</sup> Additionally, the SWRCB must provide notice to the dam owner and an opportunity for a hearing before setting instream flow requirements for fish. This hearing was limited to consideration of the impacts related to approval of the time extension petition, namely, the impacts associated with the reservoir expansion project and not those impacts associated with

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<sup>23</sup> CSPA also contends that Water Code sections 1243 and 1257.5, and California Code of Regulations, title 23, section 782, require the SWRCB to impose streamflow requirements in Permit 5882. Water Code section 1243 applies when the SWRCB is determining the availability of water for beneficial uses. Water Code section 1257.5 requires the SWRCB to consider streamflow requirements proposed by DFG when acting on an application to appropriate water. DFG has not proposed any streamflow requirements, and contrary to CSPA's assertions, the SWRCB has no authority to compel DFG to propose streamflow requirements. This proceeding does not involve an application to appropriate water or a determination of the availability of water, and accordingly, these statutory provisions are not applicable. Section 782 of the SWRCB's regulations requires the SWRCB to include a condition requiring compliance with Fish and Game Code section 5937 in any permit issued after 1975. The Attorney General has opined that this section does not apply to persons who already have been issued a water right permit. (57 Ops.Cal.Atty.Gen. 577, 580 (1974).) San Luis Obispo received its permit in 1941, which was well before the adoption of section 782. Nonetheless, in this order, the SWRCB requires additional studies to determine whether steelhead occur below the dam.

<sup>24</sup> Although the SWRCB is requiring San Luis Obispo to submit this information pursuant to the SWRCB's authority to review and condition the proposed reservoir expansion in the public interest and to protect public trust uses, obtaining this information will also be in furtherance of the SWRCB's continuing authority and duty of continuing supervision, under the public trust doctrine, over all Salinas Reservoir diversions.

operation of the existing reservoir. Accordingly, the SWRCB will not impose any permit terms or conditions related to the existing reservoir in this order.

#### **8.4.4 Upstream Water Resources Impacts and Mitigation Measures**

According to the FEIR, the maximum surface area of the Salinas Reservoir presently is approximately 730 acres (SWRCB 3, p. 3.4-16). With the reservoir enlargement project, the surface area will expand to a maximum of 1,125 acres (*Id.* at p. 3.4-17). The average width of shoreline that will be inundated is about 126 feet (ranging from 20 to 500 feet). The perimeter of the enlarged reservoir at full capacity will increase from the present 24 miles to 39 miles (*Id.* at p. 3.5-18).

##### *8.4.4.1 Potential Significant Impacts – Habitat Loss*

The Final EIR concludes that the project will have permanent, significant adverse impacts on chaparral, oak woodland and riparian habitats in the area of the reservoir. Inundation will result in an estimated loss of 73 acres of pine-oak woodland habitat, loss of 51.7 acres of wetland and riparian woodlands, and degradation of 22.1 acres of riparian woodland understory. (SWRCB 3, pp. [ES-18]-[ES-20], table ES-1.) Clearing and disturbance during the construction phase will result in significant adverse impacts to vegetation, including 11 acres of oak woodland and 0.5 acre of freshwater marsh. (*Id.* at p. ES-20, table ES-1.) Additionally, approximately 16,000 linear feet of intermittent streambed habitat will be converted to more regularly flooded stream or pool habitat. (*Id.* at pp. 3.7-18, 3.7-26, table 3.7-5.)

##### *8.4.4.2 Potential Significant Impacts – Sensitive Species*

The Final EIR identifies potentially significant adverse impacts to two specimens of Hickman's checkerbloom. (SWRCB 3, p. 3.5-23.) Additionally, the FEIR identifies potentially significant impacts from loss or disturbance of habitat on various vertebrate species, including nesting bird species (*id.* at p. 3.6-13) and the red-legged frog (*id.* at p. 3.7-19.) Impacts to other sensitive species, such as the two-striped garter snake and the southwestern pond turtle, are considered to be adverse but not significant. (*Id.* at pp. [3.7-18]-[3.7-19]) Raising the level of the lake is not expected to significantly affect fish species in the reservoir. However, the increase of shallow, warm-water habitat at the upper end of the reservoir may provide preferential habitat for non-

native fish species, which could be considered a significant impact until the mitigation measures associated with the Habitat Management Plan (HMP) are implemented. (*Id.* at p. 3.7-18.)

#### 8.4.4.3 Proposed Mitigation Measures – Habitat Loss

San Luis Obispo proposes to mitigate significant adverse impacts in the area surrounding and upstream of the reservoir by implementing a HMP approach. (SWRCB 3, append. D.) The HMP approach is proposed instead of a specific plan because San Luis Obispo requires additional negotiations with landowners before finalizing HMP details. (*Id.* at p. D-3.) The Final EIR states that San Luis Obispo will not begin construction until detailed plans and agency approvals are in place. (*Id.* at p. D-8.) Accordingly, any project approval will include a condition that the project cannot be implemented without a final mitigation plan that contains landowner agreements, any agency approvals, monitoring requirements, performance guarantees, and monetary commitments. (*Ibid.*) If San Luis Obispo is unable to acquire the mitigation sites and obtain the required agency permits, it will consider alternative mitigation, including providing of monetary compensation funds to public or private agencies. (R.T. pp. 382-384; SWRCB 3, append. D, pp. [D-11]-[D-12].) San Luis Obispo will conduct any additional CEQA analysis if it determines that such an analysis is required. (R.T. pp. 383-384.)

Under the HMP approach, San Luis Obispo will purchase or obtain easements on land adjacent to, or in the vicinity of, the reservoir to provide restoration and enhancement of lost riparian and woodland habitats, both within and outside of the Santa Margarita Lake Natural Area (SWRCB 3, append. D, pp. [D-3]-[D-4]). In general, the city proposes to mitigate for lost habitat on either a 1:1 or a 2:1 acreage ratio, depending on the habitat type. (*Id.* at pp. [D-8]-[D-9]; see p. D-13, table D-1.) It proposes to replace lost oak trees only on a 1:1 basis, with additional plantings to allow for losses during development of the mitigation habitats. (*Id.* at pp. [D-8]-[D-9].) San Luis Obispo also proposes to establish an Oak Restoration Research Program to evaluate the effectiveness of its oak woodland restoration efforts. (*Id.* at p. D-6).

The Final EIR recognizes that the impacts to these habitats are significant until the various replacement habitats are established, become self-sustaining, and develop into functional habitat

elements. (R.T. pp. 385-386.) San Luis Obispo's witness testified that for some types of habitat that this may take 10 to 15 years or more. (R.T. p. 386.)

#### *8.4.4.4 Proposed Mitigation Measures – Sensitive Species*

San Luis Obispo proposes a series of mitigation efforts for sensitive species where the impact was considered to be significant. For the Hickman's checkerbloom, San Luis Obispo proposes to replant the two specimens to a safe location (SWRCB 3, p. 3.5-28). For nesting birds near the building relocation area, San Luis Obispo proposes to survey the area for the presence of nesting birds, and, if necessary, take appropriate action to minimize disturbance (noise, dust, traffic) in the area (*id.* at p. 3.6-13). For the red-legged frog, San Luis Obispo proposes to survey the Alamo Creek area for the presence of the frog. If specimens are found, San Luis Obispo proposes to develop, in consultation with DFG and the U.S. Fish and Wildlife Service, a long-term monitoring and management program, including possible removal of predators and development of suitable riparian habitat (*id.* at p. 3.7-21).

#### *8.4.4.5 Findings Regarding Upstream Impacts and Mitigation Measures*

The SWRCB finds that the HMP approach and other proposed mitigation measures will mitigate to insignificance any long-term adverse impacts to upstream habitats and sensitive species. It is necessary for the SWRCB to adopt findings of overriding considerations for unmitigated short-term significant impacts, discussed below in section 8.4.7. To meet its obligations under CEQA, and pursuant to its public trust and public interest authority, the SWRCB shall require detailed mitigation plans to be developed and presented to the Chief, Division of Water Rights for review and approval prior to construction of the project. In this order, the SWRCB will also require in San Luis Obispo to submit any alternative mitigation measures to the SWRCB for review and approval prior to construction.

Paso Robles contends that the Final EIR improperly defers the development of mitigation measures. (Paso Robles's Closing Brief, pp. 34-37.) Much of Paso Robles's concern stems from the fact that the SWRCB is reviewing the time extension petition before San Luis Obispo has formally approved the project and adopted mitigation measures.

Regardless of whether San Luis Obispo has formally adopted any mitigation measures, the SWRCB must make its own determination regarding the feasible alternative or mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment. (Cal. Code Regs., tit. 14, § 15096, subd. (g)(2).) Moreover, it is unnecessary for San Luis Obispo to identify every detail of its proposed mitigation before the SWRCB may act on the pending petition. Under the CEQA Guidelines, mitigation measures may specify performance standards that would mitigate the significant effects of a proposed project and that may be accomplished in more than one specified way. (Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1)(B).) The HMP approach and other mitigation measures specify such performance standards.

#### **8.4.5 Impacts on Water Quality and Mitigation Measures**

The Final EIR identifies temporary construction-related deterioration of surface water quality in the Salinas Reservoir and the Salinas River as a potential significant adverse impact. (SWRCB 3, p. ES-16, table ES-1; pp. [3.4-13]-[3.4-15].) Implementation of erosion control and stabilization procedures, construction of control structures, and post-construction revegetation will mitigate this impact to insignificance. (*Id.* at p. ES-16, table ES-1; p. 3.4-28.)

Additionally, according to the Final EIR, accidental spills of fuel, lubricants, or hazardous materials during the construction or operational phases may significantly affect surface water or groundwater quality. (SWRCB 3, ES-16, table ES-1; *id.* at p. 3.4-14.) The design, construction, and operation of all facilities in accordance with applicable regulations, the construction of dikes around equipment staging areas, development and implementation of spill contingency plans, and implementation of vehicle safety guidelines will mitigate these impacts to insignificance. (*Id.* at p. 3.4-28.)

To avoid significant adverse impacts on surface water and groundwater quality, this order requires San Luis Obispo to develop an erosion control plan and a plan to avoid accidental spills of fuel, lubricants, or hazardous materials during construction or operation, in accordance with any applicable requirements of the Regional Water Quality Control Board (Central Coast Region), DFG, or other appropriate agency.

#### **8.4.6 Dam Safety and Seismic Considerations**

Paso Robles contends that San Luis Obispo improperly certified the Final EIR before completing the necessary structural and seismic studies. (Paso Robles's Closing Brief, pp. 33-34.) The Salinas Dam is located in a seismically active region near the Rinconada fault (1 mile to the southwest), the Nacimiento fault (1.8 miles to the southwest), the La Panza fault (5.8 miles to the northeast), and the San Andreas fault (26 miles to the northeast). (SWRCB 3, p. 3.2-5.) The Final EIR states that, although the dam is currently subject to the Corps's safety standards, it is expected to be subject to the Division of Safety of Dams' (DSOD) design criteria prior to project implementation. (SWRCB 3, p. 3.2-14; R.T. pp. 60-61, 167-168, 225.) San Luis Obispo is undertaking additional dam engineering studies to ensure that the project can be certified by the DSOD. (R.T. pp. 167-168, 225.) As noted earlier, the SWRCB does not have the authority to make a determination about the legal adequacy of the Final EIR. Nonetheless, in keeping with the SWRCB's authority to condition approvals in the public interest, and to ensure the public safety, the SWRCB will include in this order a condition requiring that the final dam design be approved by the DSOD. The SWRCB will also require San Luis Obispo to inform the Division of any changes that are made to the Final EIR.

#### **8.4.7 Statement of Overriding Considerations**

The SWRCB approves San Luis Obispo's petition for extension of time subject to certain conditions to mitigate the potential significant environmental effects of the SWRCB's approval. Nonetheless, the following significant short-term adverse environmental effects of this decision are unavoidable:

- Loss of 73 acres of pine-oak woodland habitat due to inundation.
- Net loss of 51.7 acres of wetland and riparian woodland, and degradation of 22.1 acres of riparian woodland understory due to periodic inundation.
- Conversion of approximately 16,000 linear feet of intermittent streambed habitat to more regularly flooded stream or pool habitat.
- Construction-related clearing and disturbance of vegetation, including 11 acres of oak woodland and 0.5 acres of freshwater marsh.

The impacts to these resources are considered adverse until the HMP and any other mitigation measures take effect, which is expected to take at least 3 to 15 years depending on the vegetation type.

The Final EIR also identifies potential significant impacts to the red-legged frog, if present, due to increased predation associated with raised reservoir water levels. As discussed above in section 8.4.4, the SWRCB finds that the proposed mitigation measures will mitigate to insignificance any long-term adverse impacts. It is more probable than not that these mitigation measures will also mitigate any significant short-term adverse impacts to the red-legged frog. Nonetheless, to the extent that any significant short-term impacts to the red-legged frog are unavoidable, the SWRCB makes the findings below.

Based on substantial evidence in the record and on the findings set forth in this order, the SWRCB finds that San Luis Obispo has demonstrated a need for the water to provide for the requirements of its growing population. It is in the public interest and in keeping with established state policy concerning the protection of municipal water rights to approve the petition for extension of time. To the extent that this order does not fully mitigate the adverse effects of the SWRCB's approval of the petition for extension of time, the SWRCB finds that overriding considerations of the public interest outweigh any unavoidable short-term adverse environmental impacts of this project.

## **9.0 CONCLUSION**

The SWRCB finds that there is good cause and it is in the public interest to conditionally approve San Luis Obispo's petition for extension of time and to amend Permit 5882 to allow an additional ten years to complete beneficial use of water and construction work. San Luis Obispo must file a Notice of Determination under CEQA within twenty-five days from the adoption of this order or the request for an extension of time to complete construction shall be deemed denied. The provisions of this order extending the time for construction shall not become effective until the Notice of Determination is issued.

The SWRCB finds that it is in the public interest to prohibit any contribution to overdraft in the

Paso Robles Groundwater Basin. This prohibition will also avoid the proposed project's potentially significant adverse cumulative impact, and any project-specific impacts, on recharge in the groundwater basin. Accordingly, in this order, the SWRCB will require San Luis Obispo to develop a project operations plan that will not contribute to increased overdraft of the groundwater basin.

Pursuant to the SWRCB's authority to condition approvals in the public interest, in order to mitigate significant adverse impacts on upstream water resources, and in keeping with the SWRCB's continuing authority under the public trust doctrine, the SWRCB will require San Luis Obispo to implement the HMP approach and other mitigation measures proposed in the Final EIR. Also pursuant to the SWRCB's public interest and public trust authority, the SWRCB finds that additional study is need to determine whether steelhead occur in the canyon reach between the Salinas Dam and Highway 58, whether there is suitable habitat for spawning and rearing, and if so, what flows are necessary to maintain habitat diversity in the channel. The SWRCB will require such studies in this order.

Permit 5882 shall be amended to include the terms and conditions set forth below. In keeping with the limited scope of the hearing, items 2 through 5 are applicable to the reservoir expansion project and are not intended to affect existing reservoir operations.

### **ORDER**

IT IS HEREBY ORDERED,

1. San Luis Obispo's petition for extension of time to make beneficial use of water and to complete construction is approved subject to the conditions stated herein. Permit 5882 shall be amended to require application of water to the authorized use and completion of construction by December 31, 2010.

San Luis Obispo shall file a Notice of Determination under CEQA within 25 days of the adoption of this order. The extension of time for construction shall be deemed denied unless San Luis Obispo provides to the Chief, Division of Water Rights, documentation that it has issued a Notice of Determination within 25 days of the adoption of this order. The



provisions of this order extending the time for construction shall not become effective until the Notice of Determination is issued.

2. San Luis Obispo's storage of more than the existing reservoir capacity of 23,842 acre-feet (AF) shall not contribute to overdraft conditions in the Paso Robles Groundwater Basin. Prior to proceeding with construction for the purpose of enlarging the capacity of the Salinas Reservoir, San Luis Obispo shall submit to the Chief, Division of Water Rights, for approval and modification, if necessary, a project operations plan specifying how the Salinas Reservoir will be operated to comply with this requirement. The plan shall be provided to the City of Paso Robles for comment.

The plan must include or identify the following: (1) an evaluation of the extent to which storage in excess of 23,843 AF has the potential to reduce groundwater recharge in the Paso Robles Groundwater Basin, (2) measures San Luis Obispo will take to avoid reducing, by any amount, the annual recharge of the Paso Robles Groundwater Basin attributable to Salinas River flow from the watershed area upstream of Salinas Reservoir whenever storage exceeds 23,843 AF, (3) the location and type of all measuring devices to be used, and (4) the frequency of measurement. The plan also must contain an analysis of how the proposed measures will avoid project-related reductions to average annual recharge of the groundwater basin. The plan must be based on water year data or modeling. A water year begins on October 1 of each year and ends on September 30 of the succeeding year.

The plan may include a physical solution. Any plan including a physical solution must provide at least as much protection against overdraft of the Paso Robles Groundwater Basin as would be provided by a plan that relies solely on measures to avoid reductions in recharge attributable to Salinas River flow from the watershed area upstream of the Salinas Reservoir.

On approval of the plan by the Chief, Division of Water Rights, the permittees shall implement the plan. San Luis Obispo shall submit annual compliance reports to the Division with the Progress Report by Permittee.

3. San Luis Obispo may not proceed with construction for the purpose of enlarging the capacity of Salinas Reservoir until San Luis Obispo completes the following actions:

- a. Provides to the Chief, Division of Water Rights, for review and approval, a final HMP, showing that the habitat mitigation sites will be acquired in the types, amounts, and mitigation ratios specified in the Final Environmental Impact Report, including contingencies for expected losses during development of these mitigation sites.

San Luis Obispo shall not divert to storage an amount exceeding 23,843 AF until habitat mitigation sites have been purchased in an amount sufficient to fulfill San Luis Obispo's obligations identified in the HMP.

If alternative habitat conservation measures will be utilized in lieu of the measures identified in the HMP, San Luis Obispo shall comply with CEQA as necessary. San Luis Obispo shall demonstrate that such alternate mitigation plans will provide the same or greater level of mitigation as proposed under the HMP, and that all required permits or other approvals have been obtained. San Luis Obispo shall submit the alternate mitigation plans to the Chief, Division of Water Rights, for review and approval. The Chief, Division of Water Rights, shall retain jurisdiction to modify the alternative measures or to propose other measures.

- b. Submits detailed monitoring plans, subject to the review and comment of the Department of Fish and Game, and the review and approval of the Chief, Division of Water Rights, for the purpose of determining compliance with the HMP and other required mitigation measures. The plans shall include descriptions of monitoring criteria to be used to determine when the mitigation habitats have achieved an established, healthy, and self-sustaining condition. Upon approval, San Luis Obispo shall implement the monitoring plan in accordance with the time schedule identified in the plan.
- c. Provides to the Chief, Division of Water Rights, for review and approval, a final action plan for establishment of the Oak Restoration Research Program, including purchase or easement acquisition of required land to conduct the program.

- d. Provides to the Chief, Division of Water Rights, for review and approval, detailed mitigation and monitoring plans to assure adequate mitigation for impacts to the Hickman's checkerbloom, nesting birds, and the red-legged frog.
- e. Provides to the Chief, Division of Water Rights (Division Chief), for review and approval, a plan for conducting (1) a population study to determine the occurrence of steelhead between the Salinas Dam and Highway 58, (2) a water temperature study to determine if there are temperatures adequate for summer rearing of steelhead between the Salinas Dam and Highway 58, and (3) if feasible, a stream habitat survey in the stretch of the Salinas River not previously surveyed between the Salinas Dam and Highway 58. On approval by the Division Chief, San Luis Obispo shall conduct the studies and submit the results to the Division for review.

Subject to the Division Chief's review of the studies and determination that additional study is warranted, San Luis Obispo shall provide to the Division Chief, for review and approval, a plan for geomorphologic studies to identify the stream flows necessary to maintain the habitat diversity of the river channel downstream of the Salinas Reservoir dam to the Highway 58 Bridge. On approval by the Division Chief, San Luis Obispo shall conduct the studies and submit the results to the Division for review. The SWRCB reserves jurisdiction to amend flows based on the Division's review of the results of the completed studies.

- f. Submits to the Chief, Division of Water Rights, for review and approval, (1) a detailed erosion control plan, and (2) a plan for avoiding and managing accidental spills, both of which must conform to the appropriate mitigation measures identified in part 3.4.3.1.1 (page 3.4-28) of San Luis Obispo's Final EIR. The two plans shall include other measures as required by the Regional Water Quality Control Board, Central Coast Region, to comply with the Central Coast Basin Water Quality Control Plan, or as required by any other agency. The SWRCB reserves jurisdiction to require any reasonable amendments to these plans necessary to ensure that they will accomplish the stated goal. Upon written approval of these plans, San Luis Obispo shall implement the plans.



6. Permit 5882 shall be amended to include the following endangered species term: This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the Endangered Species Act for the project authorized under this permit.

#### CERTIFICATION

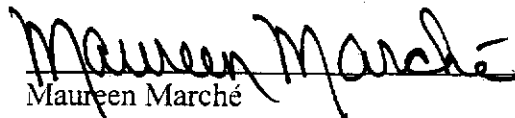
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 19, 2000.

AYE: Arthur G. Baggett, Jr.  
Mary Jane Forster  
John W. Brown  
Peter S. Silva

NO: None

ABSENT: None

ABSTAIN: None

  
Maureen Marché  
Administrative Assistant to the Board

Attachments (Table 1 and Figure 1)

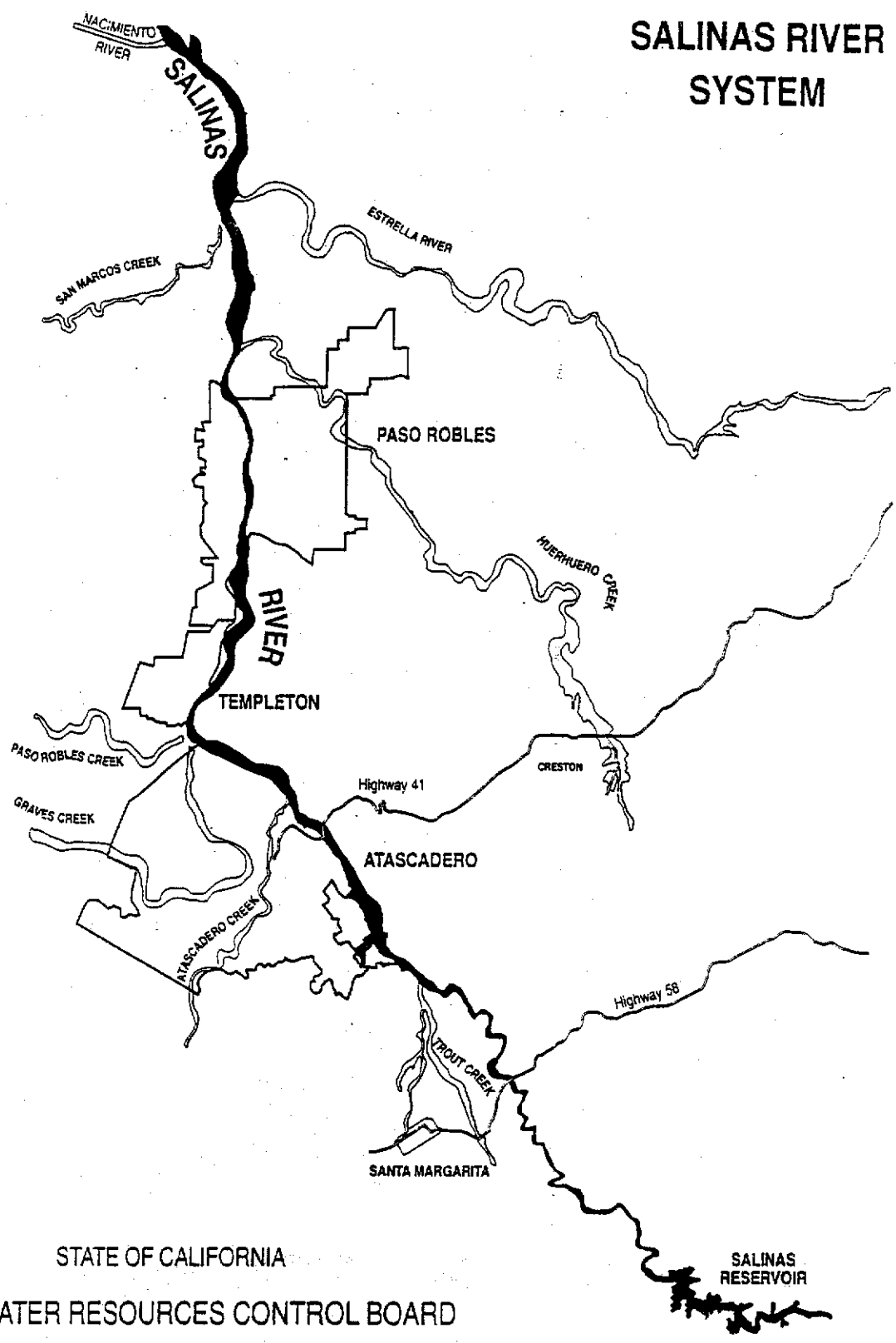
**Table 1:  
Salinas Reservoir, Monthly Comparison of Pre- and Post- Project Spills  
(no spills occur in other months)**

Year	Month	Pre-Project Spills (AF)	Post-Project Spills (AF)	Post-Project % Reduction in Spills
1944	Feb	6,942	7,178	-3
	March	3,913	3,745	4
1945	March	2,471	1,369	45
1952	Jan	6,349	0	100
	Feb	757	0	100
	March	13,856	3,058	78
	April	622	567	9
1958	March	5,428	0	100
	April	27,607	25,905	6
1962	March	1,830	0	100
1966	Dec	8,231	0	100
1967	Jan	8,716	1,346	85
	Feb	1,723	1,699	1
	March	10,476	10,644	-2
	April	18,300	18,487	-1
	May	933	759	19
1969	Jan	50,907	49,006	4
	Feb	53,564	54,105	-1
	March	8,870	8,814	1
	April	2,117	2,080	2
1973	Feb	2,975	0	100
	March	8,025	4,198	48
1974	Jan	367	0	100
	Feb	0	0	
	March	4,657	3,904	16
	April	315	214	32
1978	Feb	26,008	14,424	45
	March	26,864	27,099	-1
	April	5,564	5,581	0
1979	March	2,671	1,693	37
	April	1,067	936	12
1980	Feb	35,717	34,797	3
	March	11,954	12,011	0
	April	243	153	37
1982	April	10,807	8,668	20
	Dec	5,031	4,007	20

Year	Month	Pre-Project Spills (AF)	Post-Project Spills (AF)	Post-Project % Reduction in Spills
1983	Jan	24,274	24,553	-1
	Feb	18,443	18,450	0
	March	33,669	33,941	-1
	April	4,676	4,756	-2
	May	2,982	2,828	5
	Dec	161	0	100
1986	March	15,292	12,055	21
1993	Jan	3,667	0	100
	Feb	18,501	4,650	75
	March	7,332	7,319	0
	April	823	605	26
1995	Jan	2,835	0	100
	Feb	3,930	2,819	28
	March	43,828	44,214	-1
	April	708	544	23

Table I note: This information was taken from SWRCB 3, append. K-A.

**FIGURE 1  
SALINAS RIVER  
SYSTEM**



STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD  
DIVISION OF WATER RIGHTS