

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2006-0019-EXEC**

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In the Matter of Petition for Reconsideration of  
**Gregory Canyon Ltd., LLC**  
Regarding Order Canceling Application 30038

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SOURCE: San Luis Rey River (Subterranean Stream)  
COUNTY: San Diego

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**ORDER DENYING RECONSIDERATION**

**BY THE EXECUTIVE DIRECTOR:**

**1.0 INTRODUCTION**

On August 14, 2006, Gregory Canyon Ltd., LLC (Petitioner) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of the Division of Water Rights' (Division) order canceling water right Application 30038 (Application). The application was canceled for failure to submit information requested by Division staff to show that the application was being diligently pursued. The Petitioner requests the State Water Board to reinstate the application. The basis for reconsideration claimed by the Petitioner is that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced.

**2.0 GROUND FOR RECONSIDERATION**

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) [e]rror in law. (Cal. Code Regs., tit. 23, § 768.)<sup>1</sup>

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration falls within the scope of the authority delegated under Resolution No. 2002 - 0104.<sup>2</sup>

Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedures Act. (WR Order 96-1, at p. 17, fn. 11.)

### **3.0 BACKGROUND**

On November 12, 1991, Waste Management of California, Inc. (Applicant and predecessor to Petitioner) filed a water right application with the State Water Board for the direct diversion of 0.19 cubic foot per second (cfs), with an annual limit of 137.5 acre-feet, for industrial purposes from San Luis Rey River Subterranean Stream. The application requests water to serve a Class 3 sanitary landfill in Gregory Canyon.

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<sup>1</sup> All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

<sup>2</sup> This delegation is not affected by *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 [20 Cal.Rptr.3d 898]. In that case, the court held that the State Water Board, after a hearing, could not defer making findings that were prerequisite to issuing water right permits by delegating the remaining findings to its staff for subsequent determinations by the staff.

In 1991, the Applicant withdrew its application to the County of San Diego (County) for a General Plan Amendment for the landfill site. A Draft Environmental Impact Report (Draft EIR) prepared by the Applicant was not approved or certified by the County.

The Division provided notice of the application on April 16, 1993 and protests were filed. The Applicant did not post the notice of application. Therefore, the Division again provided notice of the application on April 1, 1994. The application was posted. Nine protests were accepted. The protests are unresolved.

By letter dated June 14, 1993, the Division requested information on how the Applicant intended to obtain the County's approval of an environmental document for this project. A response was due by July 14, 1993. The Applicant sent a response letter dated July 15, 1996 in which the Applicant stated that a new Draft EIR was being prepared and also informed the Division that Gregory Canyon, Ltd. had an option to buy the property.

The State Water Board held a hearing in October of 1997 to determine whether the subsurface flow of San Luis Rey River in the Pala and Pauma Basins should be classified as a subterranean stream. Decision WR 1645, adopted October 17, 2002, found that the subsurface flow in the Pala Basin is a subterranean stream subject to the permitting authority of the State Water Board.

Gregory Canyon is located in the Pala Basin. The water that it proposes to divert is from the subterranean stream of the San Luis Rey River and is subject to the permitting authority of the State Water Board.

A Draft EIR was prepared by the County of San Diego for the Gregory Canyon Landfill and Recycling Collection Center and was released for public review and comment on January 28, 1999.

On March 26, 2003, the Division transferred the water right application to Gregory Canyon, Ltd. (Petitioner), as stated in the Division's March 26 letter to Wesley Peltzer, legal counsel for the Petitioner. The March 26 letter requested that the Petitioner advise the Division by May 25, 2003 whether it intended to pursue the application. The Petitioner's May 21, 2003

letter advised the Division that it was evaluating the adequacy of riparian rights for the project, instead of relying upon Application 30038.

During July of 2003, Division staff discussed the status of Application 30038 with the Petitioner's project manager Richard Chase and also with the Petitioner's consultant, Sarah Battelle with Geologic Associates, and was advised that the Petitioner would be canceling the application and using a different basis of right for the project. The Division's July 25, 2003 letter relayed this information to the Petitioner and requested written confirmation by September 23, 2003 stating whether the Petitioner intended to pursue Application 30038. The Division's July 23, 2003 letter also informed the Petitioner that Application 30038 would be canceled in accordance with Water Code section 1276 if a timely response was not received. No response was received.

Division staff left a telephone message with the Petitioner on November 5, 2003, stating that the Division had not received a response to the July 25 letter. The Petitioner was requested to respond to the July 25 letter. No response was received.

The Division has not received any correspondence from the Petitioner since the May 21, 2003 letter indicating that the Petitioner was pursuing its claimed riparian water right instead of the water right application.

On July 14, 2006, the Division canceled Application 30038 for failure to submit information requested pursuant to section 1275 of the Water Code or failure to show good cause why additional time should be allowed to submit the requested information. (Wat. Code, § 1276.)

On August 14, 2006, the Petitioner filed a petition for reconsideration of the Division order canceling Application 30038.

#### **4.0 DISCUSSION**

##### **4.1 Petition for Reconsideration**

The Petitioner requests the State Water Board reconsider the Division's cancellation of the application on the grounds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced within the time specified.

#### **4.2 Failure to Provide Requested Information**

In its Petition for Reconsideration, the Petitioner claims that the court order in the legal challenge brought by project opponents, Petitioner's decision to use recycled water for its project, and the interest and willingness of San Luis Rey Municipal Water District (SLRMWD) to pursue the application as part of its efforts to provide water service within its boundaries constitute relevant evidence which could not have been produced. The Petition for Reconsideration also states that treated wastewater will be used to serve the project, not water appropriated pursuant to Application 30038.

None of the three claims offered by Petitioner constitute new evidence which, in the exercise of reasonable diligence, could not have been produced. The court order and SLRMWD's interest in pursuing the application happened after the cancellation and are not relevant to the lack of diligence of the Petitioner in pursuing Application 30038. The Petitioner's decision to use recycled water instead of water appropriated pursuant to Application 30038 supports cancellation of the application, not reinstating it. If SLRMWD wants a new water source for its customers, it may file an application to do so.

#### **5.0 CONCLUSION**

For the reasons discussed above, the State Water Board finds that the Division's order canceling Application 30038 was appropriate and proper and that the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that these issues are insubstantial. The petition for reconsideration is denied.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the petition for reconsideration is denied.

Dated: December 15, 2006

*ORIGINAL SIGNED BY*  
Tom Howard  
Acting Executive Director