

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2007-0025-DWR

In the Matter of Permit 20428 (Application 29351)
Kreuse Creek Premier Vineyard

**ORDER APPROVING PETITION FOR CHANGE OF POINT OF DIVERSION AND
FOR AN EXTENSION OF TIME AND ISSUANCE OF AMENDED PERMIT**

SOURCE: Kreuse Creek and Unnamed Stream both tributary to Tulucay Creek thence Napa River
COUNTY: Napa

WHEREAS:

1. The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permit 20428 to Kreuse Creek Premium Vineyard (Permittee) on February 26, 1990, pursuant to Application 29351. Permittee subsequently informed the Division of an error in the owner's name on the permit, which should correctly read "Kreuse Creek *Premier Vineyard*" (emphasis added).
2. The permit required that construction work be completed by December 31, 1993, and that the water be applied to the authorized uses by December 31, 1994.
3. On April 24, 1995, the Permittee filed a petition for an extension of time and on September 5, 1995, the Division granted an extension of time to commence or complete construction work or apply the water to full beneficial use. The time extension order required construction to be complete by December 31, 2000, and complete application of the water to the proposed use be made by December 31, 2005.
4. On June 24, 2004, Permittee filed petitions for change of the Point of Diversion (POD) and for an extension of time with the State Water Board. The petition for change in POD was filed, in substantial part, to address specific recommendations of the Department of Fish and Game (DFG). These recommendations were designed to limit the potential impacts of the permitted project on fisheries, and were a product of discussions and negotiations held between the Permittee and DFG in the context of Permittee's application for a Stream Alteration Agreement (SAA). Accordingly, Permittee petitioned the State Water Board to remove the onstream storage component of POD 1 and to instead use the point for diversion to offstream storage. To further avoid potential impacts to fisheries, the offstream reservoir proposed under Permit 20428 would be relocated. The petition for change included a request by the Permittee to eliminate recreational and frost protection uses, thereby limiting beneficial use of the water under Permit 20428 to irrigation only. Concurrent with the petition for change, the Permittee filed a petition for an extension of time, requesting an additional two years from the date of order issuance (4 years total) within which to develop the project and apply the water to the proposed use.

5. Public notice of the petitions for change of POD and extension of time was issued on March 25, 2005. Protests were received from DFG, National Marine Fisheries Service (NMFS) and Earth Defense for the Environment Now (EDEN). The Division accepted all three protests on May 10, 2005. The Protestants resolved their concerns by agreement with the Permittee dated September 30, 2005. The agreement required that any amended permit issued pursuant to the petitions include specific terms for the protection of fisheries and other public trust resources (see terms in amended permit).
6. The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use upon a showing of good cause. (Wat. Code, § 1398.) Permittee must show that (1) due diligence has been exercised; (2) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (3) satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.
7. Permittee has shown that due diligence has been exercised. Since the date of permit issuance, Permittee has timely filed substantially all annual progress reports. Reports filed with the Division indicate that the proposed place of use had been developed, but that Permittee was using groundwater sources for economic reasons, until construction of the diversion and storage facilities was completed. On April 24, 1995, Permittee filed a petition for an extension of time for a period of ten years to complete construction and beneficial use of the water. The petition for extension of time stated that due to development pressures, the use of groundwater could become less economical and reliable, and that Permittee planned to fully utilize the surface water rights under the permit. By Order dated September 5, 1995, The Division approved the time extension, requiring completion of construction by December 31, 2000, and application of the water to the proposed used by December 31, 2005.
8. Information filed by Permittee accompanying the June 24, 2004 petitions for change and extension of time indicates that, in 1999, pursuant to permit term 18 and preliminary to construction of the proposed reservoir, Permittee submitted to DFG an application for an SAA. DFG advised the Permittee that compliance with the California Environmental Quality Act (CEQA) was required, and strongly recommended that to minimize potential impacts of the proposed project on fish in Kreuse Creek and downstream, Permittee relocate the proposed reservoir to an offstream site. Several months were required for Permittee to study the feasibility of this recommendation, during which time Permittee expended approximately \$92,000 in geotechnical studies, wildlife and vegetation surveys, and other construction-related work. Based on annual progress reports filed since permit issuance and the documented efforts of Permittee to initiate implementation of the project changes proposed by DFG, designed to protect fisheries, Permittee has exercised reasonable due diligence to support filing of the petition for time extension.
9. Permittee has shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided. In 1999, prior to the December 31, 2000 deadline to complete construction, Permittee submitted an application to DFG to enter into an SAA, as required under condition 18 of Permit 20428. As noted above, DFG recommended that the permitted reservoir location be moved offstream in order to avoid potential impacts to fisheries. Permittee's need to obtain an SAA, coupled with the time needed to study and implement DFG's recommendation for relocation of the onstream dam to an alternative site offstream, constituted an obstacle to the timely construction of the project, which could not reasonably be avoided by Permittee.

10. Permittee has shown that satisfactory progress will be made if a time extension is granted. A letter dated September 30, 2005, outlines the agreement reached by the Permittee and Protestants (DFG, NMFS and EDEN) on a series of measures for mitigating the potential impact of the permitted project on Kreuse Creek and downstream fisheries. This has addressed DFG's concerns, and should facilitate issuance of the SAA needed by Permittee to commence construction. Terms based on this agreement are included in the amended permit. In addition, information contained in the petition for change indicates that Permittee's place of use is located in a groundwater deficient basin, and that in 1999, Napa County passed Ordinance No. 1230, which placed new limitations on the extraction of groundwater in Napa County. This circumstance should also compel Permittee to proceed with the development of surface water supplies under Permit 20428. In conclusion, the above factors, collectively, reasonably support Permittee's stated commitment to make satisfactory progress if the requested extension of time is granted.
11. The State Water Board has determined that Permittee has shown good cause for the petitions for change of the POD and an extension of time, and that the former does not constitute the initiation of a new right nor operates to the injury of any other lawful user of water.
12. The State Water Board has delegated the authority to act on requests for an extension of time to the Chief of the Division pursuant to Resolution No. 2002-0106. (Attachment to Resolution No. 2002-0106, section 2.6.11.) The Division Chief has redelegated this authority to the Assistant Division Chief, and the Chief of the Permitting Section, and the Chief of the Hearings and Special Projects Section. (Redelegations memo from Edward Anton (June 19, 2003).)
13. Pursuant to Resolution No. 2002-0106, the State Water Board has delegated authority to the Chief of the Division to administer the duties required under the California Environmental Quality Act (CEQA). (Attachment to Resolution No. 2002-0106, § 2.9.) The Division Chief has redelegated this authority to the Assistant Chief, the Chief of the Permitting Section, and the Chief of the Hearings and Special Projects Section. (Redelegations memo from Edward Anton (June 19, 2003).)
14. On February 1, 2007, the Division provided notice of intent to adopt a mitigated negative declaration (SCH No.2007022028) for the project. (Cal. Code Regs., tit. 14, § 15072.) The mitigated negative declaration reflects the Division's independent judgment and analysis. After considering the document and comments received during the public review process, the Division hereby determines that the proposed project, with mitigation measures, will not have a significant effect on the environment. The mitigated negative declaration is hereby adopted. The documents or other material, which constitute the record, are located in the Division's offices located in Sacramento, California. The Division will file a Notice of Determination within five days from the issuance of this Order.
15. Fish, wildlife, and plant species have been or may be listed under the federal Endangered Species Act and/or the California Endangered Species Act. A condition should be placed in the permit making the Permittee aware of obligations resulting from these acts.
16. There is the possibility that buried archeological deposits or human remains may be present and accidental discovery could occur. In compliance with CEQA, which states that a lead agency is required to make a provision for historical or unique archeological resources or human remains accidentally discovered during construction or operation of projects, conditions should be included in the permit requiring notification of the Chief of the Division if project activities uncover any buried archeological materials or human remains.

NOW, THEREFORE, IT IS ORDERED THAT THE STATE WATER BOARD, DIVISION OF WATER RIGHTS, HEREBY APPROVES THE PETITIONS FOR CHANGE OF THE POINT OF DIVERSION AND FOR AN EXTENSION OF TIME. PERMIT 20428 IS AMENDED TO READ AS FOLLOWS:

1. The name on the permit shall be corrected to read "Kreuse Creek Premier Vineyard".
2. Condition 2 of the permit shall be amended to read:

Location of point of diversion:

By California Coordinate System of 1927 in Zone 2	40-acre subdivision of public land survey or projection thereof	Section (projected) *	Township	Range	Base and Meridian
<u>Diversion to Offstream Storage</u> (1) North 224,950 feet and East 1,928,100 feet	NW ¼ of NE ¼	13*	5N	4W	MD
<u>Diversion to Offstream Storage</u> (3) North 225,900 feet and East 1,929,000 feet	NE ¼ of NE ¼	13*	5N	4W	MD
<u>Offstream Storage and Point of Rediversion</u> (4) North 225,750 feet and East 1,927,600 feet	NW ¼ of NW ¼	13*	5N	4W	MD

3. Conditions 3 and 4 of the permit shall be amended to read as follows:

3. Purpose of use	4. Place of use	Section (projected)	Township	Range	Base and Meridian	Acres
Irrigation	NE¼ of NE¼	13	5N	4W	MD	23
	SE¼ of NE¼	13	5N	4W	MD	14
	SW¼ of NE¼	13	5N	4W	MD	12
	NW¼ of NE¼	13	5N	4W	MD	26
					Total	75 Acres

4. Condition 5 of the permit shall be amended to read:

Quantity - Storage, single. The water appropriated shall be limited to the quantity, which can be beneficially used and shall not exceed 35 acre-feet per annum to be collected from December 15 of each year to March 31 of the succeeding year.

(0000005DM)

5. Condition 7 of the permit shall be deleted.

6. Condition 8 of the permit shall be deleted.

7. Condition 9 of the permit shall be deleted and the following term added:

Complete Use. Complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2009.

(0000009)

8. Condition 11 of the permit shall be deleted and the following term added:

Access to Project. Permittee shall allow representatives of the State Water Resources Control Board, the Department of Fish and Game, and other parties as may be authorized from time to time by said State Water Resources Control Board, reasonable access to project works to determine compliance with the terms of this permit.

(0000011M)
(0480300)

9. Condition 14 of the permit shall be deleted.

10. Condition 15 of the permit shall be deleted.

11. Condition 16 of the permit shall be deleted and the following term added:

Measurement Device for Diversion. Permittee shall install and maintain devices satisfactory to the State Water Resources Control Board to measure the rate and quantity of water diverted into the reservoir from Kreuse Creek (point of diversion 1) and the Unnamed Stream (point of diversion 3).

(0060046M)
(0400300)

12. Condition 17 of the permit shall be deleted.

13. Condition 18 of the permit shall be deleted and the following term added:

Stream Alteration Agreement. No work shall commence and no water shall be diverted, stored or used under this permit until a copy of a stream or lake alteration agreement between the Department of Fish and Game and the Permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the Permittee. If a stream or lake agreement is not necessary for this permitted project, the Permittee shall provide the Division of Water Rights a copy of a waiver signed by the Department of Fish and Game.

(0000063)
(0400300)

14. Condition 19 of the permit shall be deleted and the following term added:

Wildlife Restoration Plan. For the protection of wildlife, Permittee shall consult with the Department of Fish and Game and develop a mutually agreeable written plan for restoring and enhancing natural wildlife habitat in the vicinity of the water diversion facilities. Permittee shall submit a copy of the written plan to the State Water Resources Control Board within six months after constructing the diversion facility on Kreuse Creek and thereafter implement the plan as soon as reasonably possible.

(0490500)

15. The following terms shall be added:

No Offseason Storage. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.

(0000005I)

Rate of Diversion to Offstream Storage. The maximum rate of diversion to offstream storage from either point of diversion 1 or point of diversion 3 shall not exceed 0.8 cubic foot per second.

(0000005J)

(0400300)

Minimum Bypass Flow. Permittee shall not divert water at point of diversion 1 unless there is at least a minimum bypass flow of 1.0 cubic feet per second at said point of diversion.

(0000211M)

(0140300)

Infiltration Gallery. Permittee shall install an infiltration gallery for the diversion of water from point of diversion 1. The infiltration gallery shall meet United States Fish and Wildlife Service recommendations to avoid impacts on fish passage, and shall include an automated float switch within Kreuse Creek above point of diversion 1, for turning the pumps on and off.

(0560300)

Flow Meters. Permittee shall install flow meters at POD 1 and POD 3 (one at each location), and these flow meters shall record flow data and diversion information to an automated data logger. This flow and diversion data shall be submitted to the Division of Water Rights and the Department of Fish and Game within 30 days upon request.

(0060300)

Measuring Device for Bypass. No water shall be diverted under this permit until Permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring the bypass flow required by the conditions of this permit. Said measuring device shall be properly maintained. In order to insure full compliance with this requirement, Permittee shall implement all provisions of Permit 20428 (Application 29351) flow bypass compliance plan dated July 19, 2006 on file with the State Water Resources Control Board.

(0060062AM)

(0050300)

Approval of Plans and Specifications. Before starting construction and installation of any of the improvements related to the diversion, redirection or storage of water under this permit, Permittee shall submit plans and specifications to the Chief of the Division of Water Rights for

approval, prior to the diversion of water. Construction of the offstream reservoir shall not begin until the Napa County Engineer, the United States Natural Resource Conservation Service, or a civil engineer registered by the State of California has approved the plans and specifications for the reservoir. Construction of the reservoir shall be under the direction of said approving party.

(0490000)

Other Agency Permits. The Permittee shall obtain all necessary federal (including United States Army Corps of Engineers Section 404), state and local agency permits required by other agencies prior to construction and diversion of water. Copies of such permits and approvals shall be forwarded to the Chief of the Division of Water Rights.

(000000J)

Construction Pollution Prevention. No debris, soil, silt, cement that has not set, oil, or other such foreign substance will be allowed to enter into or be placed where it may be washed by rainfall runoff into the waters of the State. When operations are completed, any excess materials or debris shall be removed from the work area.

(0000208)
(0400300)

Protection of Sensitive Species. Prior to and during construction of the infiltration gallery and reservoir and initial filling of the reservoir, Permittee shall take the following actions to ensure that construction of the infiltration gallery and reservoir and initial filling of the reservoir shall not harm sensitive species that may be present at or near the reservoir site:

- a) Hire a qualified biologist, acceptable to the Department of Fish and Game and the United States Fish and Wildlife Service to:
 - i) Conduct a pre-construction biological survey of the construction site and surrounding environs to determine if sensitive species, including Northwestern Pond Turtle and California Red-Legged Frog, and/or their habitats may be present;
 - ii) Conduct a training session for construction field crews to inform them of the possible presence of sensitive species, their appearance and explain actions to be taken if they are encountered during construction of the reservoir; and
 - iii) Monitor infiltration gallery and reservoir construction and initial reservoir filling activities to ensure that harm to sensitive species encountered is avoided, and if it is determined that specific individual species encountered must be physically captured and relocated, ensure that such capture and relocation activities are performed only by a qualified collection biologist duly certified by the Department of Fish and Game and the United States Fish and Wildlife Service.
- b) Stop all infiltration gallery and reservoir construction activities if sensitive species are encountered and refrain from resuming construction activities until the biologist hired under part a) above declares that individual species encountered have either safely left the work area or have been safely removed and relocated by a qualified collection biologist duly certified by the Department of Fish and Game and the United States Fish and Wildlife Service.

(0600500)

Riparian Water Use. Permittee shall not use more water under the basis of riparian right on the place of use authorized by this permit than Permittee would have used absent the appropriation authorized by this permit. Based on the information in the Division of Water Rights files, riparian water has not been used on the place of use. Therefore, consistent with this term, Permittee may not divert any additional riparian water for use on the place of use authorized by this permit under basis of riparian right. With the Chief of the Division of Water Rights approval, this information may be updated, and Permittee may use water under basis of riparian right on the authorized place of use, provided that Permittee submits reliable evidence to the Chief of the Division of Water Rights quantifying the amount of water that Permittee likely would have used under the basis of riparian right absent the appropriation authorized by this permit. The Chief of the Division of Water Rights is hereby authorized to approve or reject any proposal by Permittee to use water under the basis of riparian right on the place of use authorized by this permit.

(0560300a)

Cultural Resources Protection. Should any buried archeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. Prehistoric archeological indicators include: obsidian and chert flakes and chipped stone tools; bedrock outcrops and boulders with mortar cups; ground stone implements (grinding slabs, mortars and pestles) and locally darkened midden soils containing some of the previously listed items plus fragments of bone and fire affected stones. Historic period site indicators generally include: fragments of glass, ceramic and metal objects; milled and split lumber; and structure and feature remains such as building foundations, privy pits, wells and dumps; and old trails. The Chief of the Division of Water Rights shall be notified of the discovery and a professional archeologist shall be retained by Permittee to evaluate the find and recommend appropriate mitigation measures. Proposed mitigation measures shall be submitted to the Chief of the Division of Water Rights for approval. Project-related activities shall not resume within 100 feet of the find until all approved mitigation measures have been completed to the satisfaction of the Chief of the Division of Water Rights.

(0000215)

Human Remains. If human remains are encountered, then the Applicant shall comply with Section 15064.5 (e) (1) of the California Environmental Quality Act Guidelines and the Public Resources Code Section 7050.5. All project-related ground disturbance within 100 feet of the find shall be halted until the county coroner has been notified. If the coroner determines that the remains are Native American, the coroner will notify the Native American Heritage Commission to identify the most-likely descendants of the deceased Native Americans. Project-related ground disturbance, in the vicinity of the find, shall not resume until the process detailed under Section 15064.5 (e) has been completed and evidence of completion has been submitted to the Chief of the Division of Water Rights.

(0380000)

Erosion Control Plan. An erosion control/revegetation plan and implementation schedule, prepared by a licensed civil engineer, shall be submitted to and approved by the Chief of the Division of Water Rights, prior to starting construction. The erosion control plan shall be incorporated into the terms and conditions of any lake or streambed alteration agreement between Permittee and the Department of Fish and Game for the diversion works identified in this permit. Before storing water in the reservoir, Permittee shall furnish evidence, which substantiates that the erosion control/revegetation plan has been implemented. Evidence includes photographs showing the project area vegetation and slopes.

(0000207)

(0400300)

Water Management Plan. Permittee shall develop a water management plan that will set priorities for the use of water from the offstream storage reservoir during the irrigation season, and will include a plan for avoiding the use of Permittee's groundwater supplies during the period of July 1 through September 30 of each year. A copy of the plan shall be submitted to the Chief of the Division of Water Rights. Notwithstanding this condition, it is acknowledged that Permittee reserves any and all of its claims to groundwater rights, and this condition shall not be construed as establishing any jurisdiction over Permittee's water supplies that are legally classified as percolating groundwater.

(0490500)

(0410300)

Endangered Species. 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 applicable Endangered Species Act for the project authorized under this permit.

(0000014)

16. All other terms and conditions of Permit 20428 (Application 29351) shall remain unchanged.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY STEVEN HERRERA for

Victoria A. Whitney, Chief

Division of Water Rights

Dated: July 23, 2007