

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

ORDER WR 2009-0017

In the Matter of Permit 20551 (Application 26507)

Nan Tucker McEvoy

**ORDER APPROVING PETITIONS FOR CHANGE IN PLACE OF USE,
PURPOSE OF USE, POINTS OF DIVERSION AND RE-DIVERSION,
AND EXTENSION OF TIME; AND ISSUANCE OF AMENDED PERMIT**

SOURCE: Unnamed Stream tributary to San Antonio Creek thence Petaluma River

COUNTY: Marin

BY THE BOARD:

WHEREAS:

1. Permit 20551 was issued to Nan Tucker McEvoy (Permittee) on August 19, 1991, pursuant to Application 26507.
2. The permit requires that construction work be completed and that the water be applied to the authorized use by December 31, 1994.
3. The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) conducted a licensing inspection on September 8, 9, and 10, 1998. Permit 20551 is one of several water rights covering the operations on the McEvoy Ranch. Other water rights that are part of the McEvoy Ranch project include Permits 20549, 20550, 20812, and License 6564. These water rights cover five existing reservoirs on the property and several uses of water. The property was historically part of a cattle ranch operation by previous owners and is currently in the process of being converted to olive orchard. The licensing inspection found that the conversion to olive orchards in the existing place of use and associated expansion of the irrigation system was not complete and that Permittee intended to increase water use from all existing reservoirs. Permittee also planned to expand the place of use through additional planting of orchard and landscaping of surrounding grounds. The inspection also found that a sixth reservoir had been built and was not covered by any basis of right. Surveys of the reservoirs showed that the capacities of Reservoirs 2 and 3 exceeded the amounts covered by their respective permits and that new applications would need to be filed to cover the additional capacity. The Division requested that Permittee file petitions for extension of time for the existing permits, petitions to change the place of use (POU) and purpose of use for all of the existing permits and license, and two new applications to cover the additional capacity of Reservoirs 2 and 3. Permittee has filed the water right applications and petitions needed to allow the project to be expanded and bring it into conformance with water right requirements.

4. On April 28, 2000, Permittee filed with the State Water Board petitions for change in POU, purpose of use and points of diversion and re-diversion, and an extension of time. Permittee included all the required fees and stated the petitions were necessary to continue the development of the POU and the irrigation system for the landscaped grounds. Permittee has filed a petition for change in POU to reflect a reduction in total acreage irrigated and a change in the location of the irrigated acres under Permit 20551. The petition for change was also filed to add a point of diversion to authorize storage in Reservoir 6. Currently water right License 6564 and Permit 20551 authorize storage in Reservoir 1. At the time of licensing, the capacity of Reservoir 1 could not be solely covered by License 6564 and Permit 20551 was issued to authorize the additional water stored in Reservoir 1. License 6564 authorizes 15 acre-feet of storage in Reservoir 1. Permit 20551 currently authorizes 7 acre-feet of storage in Reservoir 1. The actual capacity of Reservoir 1 is 20 acre-feet. Because only 5 acre-feet of storage is needed to cover the remaining capacity in Reservoir 1, the extra 2 acre-feet authorized by Permit 20551 can be used to authorize storage in Reservoir 6 through addition of an extra point of diversion.

The companion petition for extension of time for Permit 20551 was filed by Permittee to provide the additional time needed to complete water use under Permit 20551 and develop the entire place of use. To date water use under Permit 20551 has not occurred. Additional time is needed to expand the irrigation system and POU in the newly designated locations identified in the change petition, and demonstrate full beneficial use of water under Permit 20551.

5. Public notice of the petitions for change in POU, purpose of use, points of diversion and re-diversion, and extension of time was issued on July 27, 2001 and no protests were received.
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. Information contained in the Division's files demonstrates that the reservoirs covered by Permit 20551 are constructed. The 1998 licensing inspection and the yearly Permittee progress reports submitted to the Division, demonstrate that Permittee has been diligently working on additional landscaping of the surrounding area and that to date up to 17 acres have been irrigated. However most of that water use has occurred under License 6564. Water use under Permit 20551 is likely to occur upon full development of the place of use to 25.6 acres.
8. Permittee has shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided. Permit 20551 allowed approximately 3.4 years from the date of permit issuance to put water to full beneficial use. This was a reasonable time in which to develop pasture irrigation for livestock grazing as initially envisioned in the application. However, according to Permittee's 1991 progress report, the USDA Soil Conservation Service advised Permittee to halt pasture grazing to allow the land to recover. Additionally, the land and water right application transferred ownership just before permit issuance. The new owner planned to develop olive orchards rather than simply irrigating pasture. The 3.4 years allotted for permit development were not sufficient to plant orchards. This is particularly true because Permittee is developing the orchards using low impact methods, including hand cultivation. These cultivation methods result in improved soil maintenance and reduced air emissions, but are more time consuming than conventional agricultural practices.

9. Permittee has shown that satisfactory progress will be made if a time extension is granted. Permittee has developed over half of the remaining POU and has requested the extension of time to complete development of the POU and to document the authorized water use. It is likely that Permittee will be able to complete the project and request a license within the extension period.
10. The State Water Board has determined that good cause has been shown for the petition for change in POU, purpose of use, and points of diversion and re-diversion, and the time extension. Approval of the petitions does not constitute the initiation of a new right nor operate to the injury of any other lawful user of water.
11. The State Water Board, Division of Water Rights, as Lead Agency, prepared an Initial Study for this project pursuant to the California Environmental Quality Act. (Cal. Code Regs., tit. 14, § 15063.) The Initial Study identified potentially significant impacts to biological resources, cultural resources, hydrology and water quality. The Division proposed the following mitigation measures to mitigate for the potential environmental impacts that could occur from approval of the changes to this permit, and Permittee agreed to incorporate these measures into the permit:
 - a. measures to prevent deterioration of water quality;
 - b. streamflow bypass for the protection of aquatic life;
 - c. limitations on existing rights under this permit in combination with riparian rights; and
 - d. cultural resource contingency actions in the event that sensitive resources are unearthed during project construction or operation.

Conditions will be included in the permit requiring implementation of these mitigation measures.

12. On March 21, 2008, the Division issued a notice of intent to adopt a Mitigated Negative Declaration (MND) (SCH No. 2008032080) for the project. (Cal. Code Regs., tit. 14, § 15072.) The State Water Board will adopt an order approving the MND and the associated Mitigation, Monitoring and Reporting Plan in conjunction with this order.
13. The permit condition(s) relating to the continuing authority and water quality objectives of the State Water Board will be updated to conform to section 780(a & b), title 23 of the California Code of Regulations.
14. 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 will be placed in the permit making Permittee aware of possible obligations resulting from these acts.
15. A term will be added to the permit to require measurement of water diverted under the permit to comply with Water Code section 1605.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT the State Water Resources Control Board approves the petitions for change in place of use, purpose of use, and points of diversion and re-diversion, and the petition for extension of time. Permit 20551 is amended as follows:

1. Condition 2 of the permit shall be amended to read as follows:

By California Coordinate System of 1983 in Zone 3	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
Reservoir 1 Point of Diversion North 2,250,939 feet and East 5,937,289 feet	SW ¼ of SE ¼	30	4N	7W	MDB&M
Reservoir 6 Point of Diversion and Re-Diversion North 2,251,085 feet and East 5,937,643 feet	SW ¼ of SE ¼	30	4N	7W	MDB&M

2. 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	NE ¼ of SW ¼	30	4N	7W	MDB&M	7.9
	NW ¼ of SW ¼	30	4N	7W	MDB&M	0.1
	SW ¼ of SE ¼	30	4N	7W	MDB&M	9.1
	NW ¼ of SE ¼	30	4N	7W	MDB&M	5.1
	SE ¼ of NW ¼	30	4N	7W	MDB&M	3.4
					TOTAL	25.6
At Reservoirs 1 and 6						
Recreation	SW ¼ of SE ¼	30	4N	7W	MDB&M	
Fire Protection						
Stockwatering						

3. Condition 7 of the permit shall be amended to read as follows:

Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2014.

4. The following term shall be added to the permit:

Permittee shall install staff gages or other measuring devices in the reservoirs, satisfactory to the Chief of the Division of Water Rights, for the purpose of determining water levels in the reservoir.

The measuring devices must be maintained in operating condition as long as water is being diverted or used under this permit.

Permittee shall record the water surface elevation readings on the last day of each month. Permittee shall maintain a record of all water surface elevation readings and shall submit these records with annual progress reports, and whenever requested by the Division.

The State Water Resources Control Board may require the release of water that cannot be verified as having been collected under a valid basis of right.

(0100900)

5. The following term shall be added to the permit:

Prior to diversion or use of water under this permit, Permittee shall install and maintain in-line flow meters, satisfactory to the Chief of the Division of Water Rights, that measure the instantaneous rate and the cumulative amount of water withdrawn from each Reservoir and consumptively used. Permittee shall maintain a record of the end-of-the-month meter readings and of the days of actual water withdrawal for consumptive use, and shall submit these records with annual progress reports, and whenever requested by the Division.

(0100900)

6. The following term shall be added to the permit:

Permittee shall prevent any debris, soil, silt, cement that has not set, oil, or other such foreign substance to enter into or be placed where it may be washed by rainfall runoff into the waters of the State.

(0400500)

7. The following term shall be added to the permit:

For the protection of fish, wildlife, and public trust resources, under all bases of right, Permittee shall, during the period October 1 through May 31, bypass a minimum of 0.5 cubic feet per second. Under all bases of right Permittee shall bypass the total streamflow from June 1 through September 30. The total streamflow shall be bypassed whenever it is less than the 0.5 cubic feet per second. Bypass flows shall be met downstream of Reservoir 4.

(0140400)

8. The following term shall be added to the permit:

No water shall be diverted or used under this permit until Permittee has installed devices, satisfactory to the State Water Resources Control Board, which are capable of measuring the bypass flows required by the conditions of this permit. Said measuring device shall be properly maintained.

(0060062B)

9. The following term shall be added to the permit:

Based on the information contained in the Division of Water Rights (Division) files, riparian water has not been used on the place of use. Diversion of water is not authorized under this permit if in the future Permittee diverts water under riparian right. With the Chief of the Division's approval, 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 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 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.

(0560300)

10. The following term shall be added to the permit:

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)

11. The following term shall be added to the permit:

If human remains are encountered, then Permittee/Licensee shall comply with Section 15064.5 (e) (1) of the CEQA 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.

(0380500)

12. The following term shall be added to the permit:

Within three months of the issuance of this permit, Permittee shall submit a Compliance Plan for approval by the Chief of the Division of Water Rights that will demonstrate compliance with the flow bypass terms specified in this permit. The Compliance Plan shall include the following:

- a) A description of the physical facilities (i.e., outlet pipes, siphons, pipelines, bypass ditches, splitter boxes etc.) that will be constructed or have been constructed at the project site and will be used to bypass flow.
- b) A description of the gages and monitoring devices that will be installed or have been installed to measure stream flow and/or reservoir storage capacity, including any necessary calibration.
- c) A time schedule for the installation and rating of these facilities.
- d) A description of the frequency of data collection and the methods for recording bypass flows and storage levels.
- e) An operation and maintenance plan that will be used to maintain all facilities in good condition.
- f) A description of the events that will trigger recalibration of the monitoring devices, and the process that will be used to recalibrate.

Permittee shall implement the compliance plan within one year of the Division's approval of the plan. Diversion or use of water is not authorized under this permit if Permittee has not 1) implemented the compliance plan or 2) installed devices satisfactory to the State Water Resources Control Board,

which are capable of measuring the bypass flows required by the conditions of this permit within one year of the Division approval of the plan. Said measuring devices shall be properly maintained.

Permittee shall be responsible for all costs associated with developing the Compliance Plan, and installing and maintaining all flow bypass and monitoring facilities described in the Compliance Plan.

The monitoring data shall be maintained by Permittee and made available to the Chief of the Division of Water Rights, upon request.

(0490400)

13. The continuing authority condition, shall be updated to read as follows:

Pursuant to California Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by Permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

14. The water quality objectives condition, shall be updated to read as follows:

The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Board if, after notice to Permittee and an opportunity for hearing, the State Water Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

15. Permit 20551 is amended to include the following Endangered Species condition:

This permit does not authorize any act which results in the taking of a threatened, endangered or candidate 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, 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. Permittee shall maintain records of the amount of water diverted and used to enable the State Water Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605.

(0000015)

17. All other conditions of Permit 20551 are still applicable and will be included in the amended permit issued in accordance with this order.

CERTIFICATION


The undersigned Clerk 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 March 17, 2009.

AYE: Chair Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Arthur G. Baggett, Jr.
Tam M. Doduc

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board