

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

**ORDER WR 2015-0030-EXEC**

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In the Matter of Petition for Reconsideration of  
**Middletown Farm and Cattle Company**  
Regarding Water Right Applications 31454, 31557, and 31558

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:<sup>1</sup>

**1.0 INTRODUCTION**

On June 17, 2013, the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division) notified Middletown Farm and Cattle Company (Middletown or Petitioner) that its Application numbers 31454, 31557 and 31558, for appropriation of water from an unnamed stream, Putah Creek, and Harbin Creek in Lake County, were canceled. The Division's June 17, 2013 cancellation of the applications was based on Petitioner's failure to submit requested information in a timely manner. Petitioner filed a petition for reconsideration, which was received on July 16, 2013. Petitioner requested an order from the State Water Board rescinding the cancellation order and allowing the subject applications to continue to be processed.

**2.0 GROUNDS FOR RECONSIDERATION**

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs. tit. 23, § 768.)<sup>2</sup> The legal bases for reconsideration are: (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (b) the decision or order is not supported by substantial evidence; (c) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; or (d) error in law. (*Id.*)

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 may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

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<sup>1</sup> State Water Board Resolution No. 2012 - 0061 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 of a Division order issuing a permit falls within the scope of the authority delegated under Resolution No. 2012 - 0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

<sup>2</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.

### 3.0 LEGAL AND FACTUAL BACKGROUND

On June 20, 2001, the Division received Application Nos. 31454 and 31557. Both applications requested the right to divert 349 acre-feet per annum (afa) to storage from an unnamed stream, Putah Creek, and Harbin Creek. Application 31558 was filed with the Division on October 10, 2003, requesting the right to divert 434 afa to storage from an unnamed stream and Putah Creek. The requested season of diversion for all three subject applications was November 1 through April 30 of the following year. The diverted water would be used for irrigation, frost control, heat control and incidental recreation. By letter dated October 10, 2003, the Division accepted Application 31454. Applications 31557 and 31558 were accepted by letter dated March 1, 2005.

A Memorandum of Understanding (MOU) was executed by the Division on February 9, 2006, for the preparation of environmental documents and a Preliminary Work Plan (PWP) for the three subject applications. The PWP was to describe the scope of the work to be performed and a schedule for completing the various tasks described therein. By letter dated February 9, 2006, the Division directed Petitioner to file the PWP by April 10, 2006. The PWP was not timely filed.

By letter dated May 15, 2008, the Division notified Petitioner that the PWP was still required and had not yet been received. The Division provided an additional thirty days to submit the PWP and noted that failure to submit the requisite PWP in a timely manner could result in cancellation of the MOU. Again, the PWP was not timely filed.

By letter dated July 1, 2010, the Division notified Petitioner that a PWP had not been submitted within the previously established timeframes, and provided an additional thirty days to submit the PWP and one hundred and twenty days to submit a related water availability analysis (WAA). The July 1 letter warned that failure to timely file the requested documents could result in the subject applications being cancelled without further notice. Neither the PWP nor the WAA were timely filed.

On June 17, 2013, the Division issued an Order cancelling Applications 31454, 31557 and 31558 for failure to submit the requested information within the period provided, pursuant to Water Code section 1276.

On July 16, 2013<sup>3</sup>, Petitioner filed for reconsideration, claiming that there was relevant evidence that was not provided to the Division, which prevented Petitioner from proceeding diligently with the processing of the applications. The relevant evidence not previously provided to the Division involved the death of the Petitioner's father and business partner in 2004, which tied up assets that would have otherwise allowed consultants to continue with the required analysis and filing of the documents requested by the Division. The petition for reconsideration also included submittal of a PWP.

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<sup>3</sup> The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

**4.0 DISCUSSION**

**4.1 NEWLY SUBMITTED INFORMATION COULD HAVE BEEN PRODUCED PRIOR TO CANCELATION OF APPLICATIONS**

Petitioners contend that "there is relevant evidence that was not provided to the State Water Board that prevented the Applicant from diligently proceeding with the processing of the Applications." That is not the standard for granting a petition for reconsideration; a petition for reconsideration must show "there is relevant evidence which, *in the exercise of reasonable diligence*, could not have been produced." (Cal. Code Regs., tit. 23, § 768, italics added.) The evidence Petitioner contends supports its reconsideration is that the Petitioner's father/business partner passed away and that Petitioner's assets were under review. In as much as the petition notes Petitioner's father/business partner passed away in 2004, that evidence unquestionably could have been produced before 2013.

**4.2 PETITIONER DID NOT PROCEED DILIGENTLY WITH THE PROJECT TO SUPPORT AN ADDITIONAL EXTENSION OF TIME**

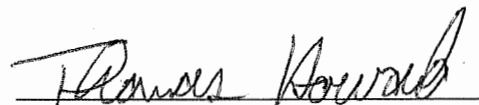
California Code of Regulations, title 23, section 840 requires an applicant "to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion," or, at a minimum, to show that the applicant will be able to proceed within a reasonable time, not affected by absence of a feasible plan, lack of financial resources or another cause. (Cal. Code, Regs., tit. 23, § 840.) Section 844 further clarifies that "[a]n extension of time within which to complete an application ... will be granted only ... upon a showing to the board's satisfaction that due diligence has been exercised.... Lack of finances, occupation of other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as cause for delay."

Petitioner was advised on multiple occasions, as described above, that a PWP and a water availability analysis were required promptly in order to move forward with processing of the subject applications. Petitioner's failure to diligently move forward with the project was, as contended in the petition for reconsideration, due to lack of finances and other conditions incident to Middletown and not to the enterprise. Accordingly, Petitioner's petition for reconsideration also does not meet the criteria for an extension of time to complete an application under Section 844.

**ORDER**

For the foregoing reasons, the State Water Board finds that the decision to cancel Applications 31454, 31557, and 31558 was appropriate and proper. Accordingly, Petitioner's petition for reconsideration is denied.

Dated: 9/30/15

  
Thomas Howard  
Executive Director