
State Water Resources Control Board

JUL 03 2013

In Reply Refer to:
BRC:A028883

Ernest Righetti and Sons, Inc.
c/o Mr. Robert J. Saperstein
Brownstein Hyatt Farber Schreck, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

Dear Mr. Saperstein:

WITHDRAWAL OF ADMINISTRATIVE CIVIL LIABILITY COMPLAINT, PERMIT 20496
(APPLICATION 28883) – WEST CORRAL DE PIEDRA CREEK IN SAN LUIS OBISPO COUNTY

On January 3, 2011, the Prosecution Team of the Division of Water Rights (Division) issued an Administrative Civil Liability (ACL) Complaint against Ernest Righetti and Sons (Righetti) for an unauthorized diversion of water to storage. Your letter dated May 13, 2013 inquired about the status of the ACL Complaint.

Permit 20496, issued pursuant to Righetti's Application 28883, authorizes the diversion to storage of up to 400 acre-feet of water from December 1 to May 31 of each year subject to specific terms and conditions. One term restricting retention of collected storage under Permit 20496 is Term 23.

Term 23 of Permit 20496, which is not included in senior Permits 12887, 14086, and 15444 states:

"Beginning July 1, the permittee shall release all water stored in the preceding storage season under this permit unless the total rainfall at the Cal Poly Gage for the period of July 1 of the previous year to June 30 of the current year is greater than or equal to 26.0 inches. Releases shall be made at the rate of 2 cubic feet per second. In the event that the total rainfall is no longer measured and/or recorded at the Cal Poly Gage, the permittee shall correlate the equivalent of 26.0 inches at the Cal Poly Gage to an alternative gage acceptable to the Chief of the Division of Water Rights. Upon written approval by the Chief of the Division of Water Rights, the correlated rainfall at the alternative gage will be the standard for determining whether water is available for storage."

The State Water Resources Control Board's (State Water Board) Decision 1627, resulting from the 1990 hearing on whether to approve Application 28883, implemented Term 23. Within that hearing, a witness for Righetti testified that it is reasonable to assume precipitation at the Cal Poly gage was representative of the precipitation at the reservoir, since the Righetti property and the Cal Poly gage both lie on the same isohyets. As a result of that testimony and 119 years of records for the Cal Poly gage, the State Water Board chose the Cal Poly gage as the measurement site for Term 23.

For the 2009-2010 water year, Righetti collected a total of 655 acre-feet of appropriative water subject to the permitting authority of the State Water Board. The 655 acre-feet excludes 40 acre-feet reported as carryover storage from the prior year and a net 16 acre-feet of groundwater pumped into the reservoir. Of the 655 acre-feet collected, 591 acre-feet was collected to storage under Permits 12887, 14086, and 15444 (Applications 17840, 21061, and 22704) with the remaining 64 acre-feet collected to storage under Permit 20496 (Application 28883).

On June 30, 2010, only 19 inches of accumulated precipitation, seven inches less than the threshold for Term 23, was reported at the Cal Poly gage. On June 30, 2010, Division staff notified Robert Saperstein, counsel for Righetti, by letter and e-mail that Term 23 had been triggered and the 64 acre-feet of water collected under Permit 20496 would need to be released beginning on July 1 at a rate of 2 cubic feet per second (cfs).

Righetti contested the reliability of the Cal Poly rain data and was advised that the Division requires adherence to the permit term conditions and the 64 acre-foot quantity of water was to be released starting July 1, 2010. Righetti submitted, and subsequently withdrew, a request for modification of Term 23. The Division notified Righetti that a change petition is required to alter the terms and conditions of the permit.

On September 16, 2010, Robert Saperstein, counsel for Righetti, indicated that Righetti had been releasing water for the past few weeks at 250 gallons per minute (gpm) above the required release rate. Mr. Saperstein then stated the release rate would be increased to 2 cfs to account for the remainder of water stored under Permit 20496. The required release rate for periods outside the collection season is any net water entering the reservoir, less reported riparian diversions, as calculated on the monthly Righetti spreadsheet. The required release rate is independent of the 64 acre-foot quantity of water subject to Term 23. Thus, Righetti is obligated to release the normal required release rate plus any additional quantity, such as the 2 cfs Term 23 rate, if applicable. Using the then most current spreadsheet submitted on December 7, 2010, Righetti's reservoir operation record showed only four days in the July 1, 2010 to December 6, 2010 time period (September 24, 25, 26, and 28) where a bypass flow greater than or equal to Term 23's required 2 cfs (899 gpm) release rate was reported.

The Division's Prosecution Team issued an ACL Complaint dated January 3, 2011. The basis of the ACL Complaint was Righetti's unauthorized storage of water from West Corral de Piedra Creek from July 1, 2010 to December 6, 2010. Had Righetti released the 64 acre-feet of stored water at the rate of 2 cfs beginning on July 1, as specified in Term 23, the 64 acre-foot quantity would have been discharged by July 16, 2010 (4 acre-feet per day for 16 days). Instead, Righetti delayed the release and only complied with the 2 cfs release rate on four days in late September. As of December 6, 2010, a total of 86.1 acre-feet of water was required to have been released (22.1 acre-feet of inflow subject to bypass + 64 acre-feet under Term 23). As of December 6, 2010, only 64.1 acre-feet of water had been released resulting in the 22.1 acre-feet deficiency.

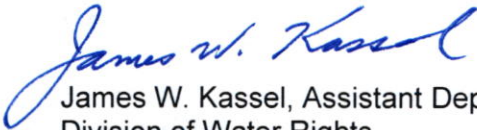
Subsequent to issuance of the ACL Complaint, the Division's Prosecution received new information regarding the precipitation records of the operative gage for the dates at issue. Based on this new information, the Prosecution Team hereby withdraws the ACL Complaint dated January 3, 2011.

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As of the date of this letter, the Prosecution Team is not aware of any active petition on file to amend Term 23 of Permit 20496, which means that the gage specified in that condition (the gage commonly referred to as Cal Poly #1.0, located on the Cal Poly campus next to building number 4A, the "Aero Hangar"), and the requirement to immediately begin releases based on recorded total rainfall less than 26.0 inches, remains an operative condition of Permit 20496, notwithstanding any disputes regarding the accuracy of the gage. As specified in Term 23, if total rainfall is no longer measured and/or recorded at the Cal Poly Gage, Righetti may seek approval of the Deputy Director of Water Rights to assign and correlate another gage for purposes of compliance with this condition. So long as total rainfall is measured and/or recorded at the Cal Poly Gage, modification of this term can only be achieved by approval of a change petition.

If you have any questions or concerns, please do not hesitate to contact Mr. Brian Coats at (916) 341-5389 or via e-mail at Brian.Coats@waterboards.ca.gov.

Sincerely,



James W. Kassel, Assistant Deputy Director
Division of Water Rights

cc: Ernest Righetti & Sons, Inc.
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ec: Michael Buckman, Supervisor
Hearings Unit
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