STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0032

In the Matter of Permits 18506 and 20657 (Applications 25991 and 29058)

Westland Nursery, Inc.

SOURCE: Butano Creek

COUNTY: San Mateo

ORDER APPROVING PETITIONS FOR EXTENSION OF TIME

BY THE BOARD:

1. [a] The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permit 18506 to Westland Nursery, Inc. (Permittee) on May 5, 1982, pursuant to Application 25991. The permit authorizes collection to storage of 10 acre-feet per annum (afa).

   [b] The Division issued Permit 20657 to A.A. Jones and Rona Jones on March 17, 1993 pursuant to Application 29058, and subsequently assigned the permit to Westland Nursery, Inc., on May 13, 1993. The permit authorizes collection to storage of 34 afa.

   Both permits authorize storage in one reservoir, which has a capacity of 44 (af).

2. Permit 18506 requires that the water be applied to the authorized use by December 1, 1986. No time extensions have been granted for this water right.

3. Permit 20657 requires that the water be applied to the authorized use by December 31, 1997. No time extensions have been granted for this water right.

4. The Division conducted a licensing inspection on June 29, 1987 and found that the reservoir capacity is 44 af. This resulted in the filing of Application 29058. Irrigation was occurring on five acres. Water was also used for recreation, fire protection and carryover storage.

5. On October 18, 1989, the Division advised Permittee that the required flow measuring device and stream gage for the permits had not yet been installed. Therefore, Permittee was in violation of Permit 18506.

6. The Division conducted a compliance inspection on June 11, 1999 and found that water was used to irrigate seven acres of flower fields. Permittee had collected 10 af to storage under Permit 18506 and 34 af to storage under Permit 20657. Permittee had withdrawn a total of 23 af from storage, 10 af pursuant to Permit 18506 and 13 af pursuant to Permit 20657. Because Permittee had not installed the required measuring devices, Permittee was not in compliance with the flow measurement requirements of the permits.

7. On February 4, 2000, the Division issued Administrative Civil Liability Complaint No. 262.5-19 for failure to install the required measuring devices.

8. Permittee filed petitions, dated March 17, 2000, for extensions of time to complete installation of the inline flow meter and fish bypass measurement device. A 10-year extension was requested. The estimated date that construction would be completed was August 4, 2000. The estimated year that water would be fully used was 2010. Permittee paid the required fees.

9. On April 14, 2000 the Division advised Permittee that a plan is required for monitoring diversions.

10. The Division's July 28, 2000 letter confirmed the installation of: (a) the in-line flow meter at the Butano Creek point of diversion, (b) the in-line flow meter to record all water being used for irrigation, and (c) a reservoir staff gage.

11. On August 31, 2000, the Division conducted a follow-up compliance inspection. The inspection report documented that the installed in-line flow meters appeared to be working correctly. The proposed location for installation of a Butano Creek streamgage was approved. The gage had not yet been installed and calibrated. The August 31 memorandum to files states that the following terms shall be included in any order approving the time extension petitions:

    No water shall be diverted under this permit until Permittee installs and maintains in-line flow meters, acceptable to the Division of Water Rights, that are capable of measuring the instantaneous diversion rate and the cumulative amount diverted to (1) storage in the reservoir, and (2) beneficial use for irrigation purposes from the reservoir under this permit. Permittee shall maintain records of the end-of-the-month meter readings and of the days of actual diversion, and shall submit these monthly records with the annual Progress Report by Permittee, or whenever requested by the Division.

    Permittee shall install and properly maintain in the reservoir a staff gage, satisfactory to the Division of Water Rights, for the purpose of determining water levels in the reservoir. Permittee shall record the end-of-the-month staff gage readings during the season authorized by this permit. Such readings shall be supplied to the Division with the annual Progress Report by Permittee, or whenever requested by the Division.

12. On August 10, 2000, the Division advised Permittee that it intended to add the new terms listed above to the permits in any order granting time extension and provided opportunity to object or request a hearing. Any objection was required to be submitted by September 9, 2000. Permittee did not respond.

13. Public notice of the requests for extension of time was issued on April 29, 2005 and no protests were received. The notice states that the Permittee seeks extensions to December 31, 2006.

14. The Department of Fish and Game visited the project site on May 11, 2005 and did not identify any issues of concern.

15. Permittee's February 1, 2006 letter clarified that a time extension to December 31, 2006 is sought for purposes of documenting diversions and beneficial uses of water while complying with metering and bypass terms. The February 1 letter states that there has been no change in the size of the seven irrigated acres since the June 29, 1987 Division inspection. After the extensions are approved, Permittee intends to request licensure.

16. On May 8, 2007, Permittee documented that all of the corrective actions required by the Division's October 10, 2000 letter had been completed. On August 31, 2007, the Division's compliance unit confirmed that all of the flow measurement requirements of the permits had been met.

17. 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. (Cal.Code Regs., tit.23, § 844.)

18. Permittee has shown that due diligence has been exercised. The project facilities have been built, and irrigation of seven acres has occurred.

19. The Division's inspections document that Permittee stored the maximum amount of water (44 af) allowed under both permits and had irrigated five acres in 1987 and seven acres in 1999. The requirement that delays in putting the water to full beneficial use be occasioned by obstacles which could not be reasonably avoided is focused on the basic requirement of completing construction and applying the water to beneficial use. Permittee had completed construction of the storage reservoir, collected the water, and had applied the water to beneficial use at the time of the 1987 inspection. Additional time was necessary only to install measuring devices to document this use.

20. Permittee has shown that satisfactory progress will be made if a time extension is granted. Permittee requested an extension to December 31, 2006 to comply with the permit terms related to installation of flow measuring devices. On August 31, 2007, the Division concurred that Permittee had complied with the permit conditions.

    Permittee completed development of the seven-acre place of use prior to the 1999 inspection and requests a license for this use. The permits, however, state that no water may be used prior to installing the flow measuring devices. Thus, Permittee seeks an extension to 2006 to include the water put to use after the measuring devices were installed in 2006. Satisfactory progress in making full beneficial use in compliance with permit conditions occurred during the requested extension period.

21. Permittee has shown good cause for the time extension.

22. The project is exempt from the California Environmental Quality Act (CEQA) under California Code of Regulations, title 14, section 15061, subdivision (b)(2). The Division will file a Notice of Exemption in accordance with the California Code of Regulations, title 14, section 15062 after issuance of this order.

23. The permit conditions relating to the continuing authority of the State Water Board should be updated to conform to California Code of Regulations, title 23, section 780, subdivisions (a) & (b).

24. 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 permits making Permittee aware of obligations resulting from these acts.

25. A term has been added to require measurement of water diverted under the permit to comply with Water Code section 1605.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT THE STATE WATER BOARD HEREBY APPROVES THE PETITIONS FOR EXTENSION OF TIME. PERMITS 18506 AND 20657 ARE AMENDED TO READ AS FOLLOWS:

1. Condition 7 of both permits is deleted and replaced with:

   Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2006.

   (0000009)

2. No water shall be diverted under this permit until Permittee installs and maintains in-line flow meters, acceptable to the Division of Water Rights, that are capable of measuring the instantaneous diversion rate and the cumulative amount diverted to (1) storage in the reservoir, and (2) beneficial use for irrigation purposes from the reservoir under this permit. Permittee shall maintain records of the end-of-the-month meter readings and of the days of actual diversion, and shall submit these monthly records with the annual Progress Report by Permittee, or whenever requested by the Division.

3. Permittee shall install and properly maintain in the reservoir a staff gage, satisfactory to the Division of Water Rights, for the purpose of determining water levels in the reservoir. Permittee shall record the end-of-the-month staff gage readings during the season authorized by this permit. Such readings shall be supplied to the Division with the annual Progress Report by Permittee, or whenever requested by the Division.

4. 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)

5. The following Endangered Species Act condition shall be added:

This permit does not authorize any act that results in the taking of a threatened, candidate or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & Game Code, §§ 2050-2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531-1544). 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)

6. 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)

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 July 15, 2008.

AYE:	Chair Tam M. Doduc Vice Chair Gary Wolff, P.E., Ph.D Arthur G. Baggett, Jr. Charles R. Hoppin Frances Spivy-Weber
NAY:	None
ABSENT:	None
ABSTAIN:	None

Jeanine Townsend

Jeanine Townsend
Clerk to the Board