



MEMORANDUM

TO: Antelope Valley Watermaster Board DATE: September 23, 2020
FROM: Craig A. Parton FILE NO.: 23641-1
General Counsel to the Watermaster
Cc: Watermaster Engineer
SUBJECT: Limitations on Use of New Production Rights

Question Presented

Upon approval of an application for New Production, is the Party limited to the Production amount specified in their application, or can they Produce in excess of the approved amount, and just pay additional Replacement Water Assessments (“RWA”)? Alternatively, can New Production applicants be enjoined from Producing in excess of the amount approved in their application, regardless of whether they pay RWAs on such excess Production?

Brief Answer

The Judgment and the Rules and Regulations are silent on this issue. Given the importance of the Material Injury analysis in determining whether to approve a New Production application, the most reasonable interpretation is that New Production applicants are limited to the amount specified in their application, otherwise the Material Injury analysis would be rendered largely meaningless. If the Watermaster Board decides to implement this interpretation of the Judgment, the Rules and Regulations and the New Production application form may need to be amended to this effect in order to clarify this issue.

Discussion

New Production is defined in the Judgment as “[a]ny Production of Groundwater from the Basin not of right under this Judgment, as of the date of this Judgment.” (§ 3.5.20.) Because of the State constitutional mandate for reasonable and beneficial use of water, “any New Production, including that by a member of the Non-Pumper Class must comply with the New Production Application Procedure specified in Paragraph 18.5.13.” (§ 9.2.2(1)-(2).) “[I]f in the future a member of the Non-Pumper Class proposes to Produce Groundwater for reasonable and beneficial use, the Watermaster as part of the New Production Application Procedure, has the authority to determine whether such a member has established that the proposed New Production is a reasonable and beneficial use in the context of other existing uses of Groundwater and then-current Basin conditions.” (§ 9.2.2(4).) “[T]he Watermaster’s determinations as to the approval, scope, nature and priority of any New Production is reasonably necessary to the promotion of the

State's interest in fostering the most reasonable and beneficial use of its scarce water resources.” (¶ 9.2.2(5).)

Paragraph 18.5.13 sets forth the procedures and requirements for the Watermaster Engineer to “determine whether a Party or Person seeking to commence New Production has established the reasonableness of the New Production in the context of all other uses of Groundwater in the Basin at the time of the application, including whether all of the Native Safe Yield is then currently being used reasonably and beneficially.” (¶ 18.5.13.) “Considering common law water rights and priorities, the mandate of certainty in Article X, section 2 [of the California Constitution], and all other relevant factors, the Watermaster Engineer has authority to recommend that the application for New Production be denied, or approved on condition of payment of a Replacement Water Assessment.” (*Ibid.*)

The Watermaster Engineer shall require New Production applicants to submit specific information for consideration, set forth at Paragraphs 18.5.13.1.1-12, including but not limited to the proposed quantity of Groundwater to be used, as well as the proposed source, season and place of use. (¶ 18.5.13.2.) The application must also include economic and physical impact analyses, and a “written statement, signed by a California licensed and registered professional civil engineer, determining that the New Production will not cause Material Injury.” (¶ 18.5.13.1.8-10.) The applicant must agree to pay the applicable RWA for any New Production. (¶ 18.5.13.1.11.) Most importantly, the Watermaster Engineer shall not make recommendation for approval of a New Production application unless it finds, after considering all the facts and circumstances, including any requirement that the applicant pay RWAs, that such New Production will not cause Material Injury. (¶ 18.5.13.2.) These requirements are also recited in the Rules and Regulations Sections 7.b.xi and 14.1.

Nothing in the Judgment or the Rules and Regulations explicitly prohibits a New Production applicant from Producing in excess of the amount approved in their application. Clearly the Party would be required to pay RWAs on any and all Production from the applicable well, whether within or in excess of the approved amount. However, given that the requisite Material Injury analysis is based on the specific amount set forth in the New Production application, it is reasonable for the applicant to be limited to no more than the approved amount, and enjoined from Producing in excess of that amount at the Watermaster's discretion, in addition to paying RWAs on any excess Production. Although payment of RWAs will go towards replacement of the excess water Produced in order to prevent or alleviate harm to the Basin, failure to enforce a strict limit on New Production would render the Material Injury analysis largely meaningless. Moreover, failure to impose a strict limit would mean that all New Production applicants would have free reign to Produce an unlimited amount of Groundwater as long as they pay RWAs, which could not have been the intent of the Judgment. Assuming the Board agrees with this interpretation, this should be incorporated into an amendment to the Rules and Regulations and the New Production application in order to clarify Parties' responsibilities, and substantiate the Watermaster's authority to seek injunctive relief against New Production applicants who Produce in excess of their approved Production Right.