



4/3/07 Bd Mtg Item 6
Writ of Mandate
Deadline: 3/26/07 12 noon

March 26, 2007

VIA E-MAIL:
Commentletters@waterboards.ca.gov

Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



Re: 4/3/07 Board Meeting, Agenda Item No. 6, Writ of Mandate

Dear Board Members:

This letter concerns the proposed order amending Order WR 2001-22, and the water right permit issued to El Dorado County Water Agency and El Dorado Irrigation District (together "El Dorado"). The proposed order would delete standard permit term 91 ("Term 91") from El Dorado's new permit, in response to a writ of mandate issued by the Sacramento County Superior Court in *El Dorado Irrigation District v. State Water Resources Control Board* (Superior Court Sacramento County No. 01CS01319), and the Court of Appeal decision entered in *El Dorado Irrigation District v. SWRCB*, 142 Cal. App. 4th 937 (2006).

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The San Luis & Delta-Mendota Water Authority ("Authority") does not oppose adoption of the proposed order as a short-term response to the writ of mandate. But the State Water Resources Control Board ("Board") should recognize that deleting Term 91 from this permit is not an adequate response for the long-term. The Board included Term 91 in the permit to address a problem; that is the problem of excessive diversions during times when flows to the Sacramento-San Joaquin Rivers Delta are insufficient to meet water quality standards. During those times, the Central Valley Project ("CVP") and the State Water Project ("SWP") make supplemental releases from their storage facilities to maintain Delta water quality. Allowing new diverters such as El Dorado to divert water during those periods unfairly increases the burden on the CVP and SWP, which must then make yet further supplemental releases from storage to compensate for diversions such as those by El Dorado. Without Term 91 in its permit, El Dorado will now be free to cause that unfair impact.

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This outcome is not compelled by the court's decision. It is important to understand that the Court of Appeal overturned the inclusion of Term 91 in El Dorado's new permit on very limited grounds. It found that including Term 91 violated the rule of priority, because other diverters in the same watershed with more junior priorities did not have Term 91 in their permits. The Court of Appeal did not question the Board's authority to impose Term 91, provided it does so in a way that respects the rule of priority, nor did it question the Board's

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method for determining when diverters must cease diversions under Term 91. Accordingly, the Board could satisfy the court's writ of mandate by retaining Term 91 in El Dorado's permit, while also adding it to the permits of other diverters in the watershed that do not contain Term 91 currently. In that way, the rule of priority would be respected. Thus, while deleting Term 91 from El Dorado's permit is the most expedient course of action, it is not a required course of action, and leaves unaddressed the unfair impact that the Board sought to prevent when it added Term 91.

The Board may and should continue to impose Term 91 in new permits. In future circumstances involving permits that are based on state-filed applications, the Board will be required to consider whether to release the priority of such applications to avoid the conflict in priorities presented in the *El Dorado* case. But nothing in the Court of Appeal decision calls into question the Board's authority to use Term 91 to condition new permits that are not based on state-filed applications.

The Board should also recognize that while it lost on the narrow issue described above, it prevailed against the many other objections that El Dorado, various amici, and the trial court raised against Term 91. In particular, the court rejected arguments that including Term 91 in water rights permits violates the so-called area or watershed-of-origin statutes. Thus, the many other, broad objections to Term 91 that have been raised over the years have now been put to rest.

In sum, the Authority does not oppose the proposed order, on the basis that it is an expedient near-term response to the Board's duty to comply with the writ of mandate. It is not a long-term solution, however, to the problem that Term 91 is intended to address—the diversion of water necessary for maintaining water quality standards in the Delta. To address this problem, the Board should exercise its continuing jurisdiction to add Term 91 to those permits for diversions in the Delta watershed that do not yet include Term 91. This will likely require the Board to commence a water rights proceeding involving these permits. Otherwise, such diversions will continue to unfairly burden the CVP and SWP's efforts to make releases from project storage necessary to maintain water quality standards in the Delta.

Respectfully submitted,



Daniel G. Nelson
Executive Director