STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION - DIVISION OF WATER RIGHTS
FEBRUARY 3, 2009

ITEM 13

SUBJECT

CONSIDERATION OF AN ORDER DENYING PETITIONS FOR RECONSIDERATION OF ORDER WR 2008-0029-EXEC, WHICH APPROVED A TEMPORARY URGENCY CHANGE IN PERMIT CONDITIONS REGARDING THE USE OF JOINT POINTS OF DIVERSION AND THE YUBA TRANSFER

DISCUSSION

On June 17, 2008, the United States Bureau of Reclamation (Reclamation) and California Department of Water Resources (DWR) submitted a temporary urgency change petition to the State Water Board, seeking to temporarily amend the water right permits for the Central Valley Project (CVP) and State Water Project (SWP) to authorize use of one another's pumping plants, often described as joint points of diversion (JPOD) operations, during periods when salinity objectives in the southern Delta were not being met. On June 27, 2008, Reclamation and DWR amended their petition to request on behalf of Yuba County Water Agency (YCWA) a similar change to YCWA's water right permit.

On July 1, 2008, State Water Board Member Arthur G. Baggett, Jr., issued Order WR 2008-0029-EXEC, which approved the temporary urgency change petition. The order temporarily amended the conditions of the water right permits for Reclamation and DWR to allow for use of JPOD and also temporarily amended YCWA's permit so that transfer of up to 200,000 acre-feet of water per annum from YCWA to DWR could be implemented when water quality objectives for salinity were not being met. In Order WR 2008-0029-EXEC, Board Member Baggett found that there was an urgent need for the proposed changes in light of drought conditions, court-imposed limitations on pumping from the Delta, the Governor's proclamation of an emergency due to the drought, and the potential for irretrievable loss of crops in the San Joaquin Valley. The approval was effective from July 31, 2008, to December 12, 2008.

The South Delta Water Agency and Lafayette Ranch, Inc., and the California Sportfishing Protection Alliance filed petitions for reconsideration of Order WR 2008-0029-EXEC on July 22, 2008, and July 31, 2008, respectively. The petitions contend that Order WR 2008-0029-EXEC is contrary to law and not supported by substantial evidence, and request that the State Water Board rescind the order and affirm that JPOD operations are not allowed unless conditions in Reclamation's and DWR's permits are met. Since the temporary changes authorized by Order WR 2008-0029-EXEC expired on December 12, 2008, rescinding Order WR 2008-0029-EXEC would have no practical effect. The purpose of issuing this order denying petitions for reconsideration of Order WR 2008-0029-EXEC would be to address issues of continuing public interest that may recur if Reclamation and DWR seek similar changes to their permits in the future.

The State Water Board would find in this order that:

- Order WR 2008-0029-EXEC correctly determined that there was an urgent need for the temporary urgency changes, notwithstanding the petitioners' contention that Reclamation and DWR did not exercise due diligence in pursuing a non-urgent change to their permits.
- Order WR 2008-0029-EXEC was not predicated on a determination of whether Reclamation or DWR could have met the objectives by implementing additional salinity control measures, and therefore this issue has no bearing on the validity of Order WR 2008-0029-EXEC.
- The findings contained in Order WR 2008-0029-EXEC were supported by the salinity modeling results submitted by Reclamation and DWR.
- Order WR 2008-0029-EXEC correctly determined that the temporary urgency change petition would not unreasonably affect fish and wildlife and was exempt from CEQA requirements.

POLICY ISSUE

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

Staff recommends adoption of the proposed order.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update, 2008-2012: to enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009–00XX

In the Matter of Petitions for Reconsideration of the

SOUTH DELTA WATER AGENCY AND LAFAYETTE RANCH, INC., AND

THE CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

regarding Water Right Order WR-2008-0029-EXEC

SOURCES: Sacramento and San Joaquin Rivers and their tributaries, and the Sacramento-San Joaquin Delta Estuary

COUNTIES: Sacramento and San Joaquin

ORDER DENYING PETITIONS FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (State Water Board or Board) denies petitions for reconsideration (styled as requests for reconsideration) of Order WR 2008-0029-EXEC which were filed by South Delta Water Agency and Lafayette Ranch, Inc., (hereafter SDWA) and the California Sportfishing Protection Alliance (CSPA). Order WR 2008-0029-EXEC approved a petition to temporarily amend the conditions of the water right permits for the United States Bureau of Reclamation's (Reclamation) Central Valley Project (CVP) and the water right permits for the Department of Water Resources' (DWR) State Water Project (SWP).

The approval authorized the CVP and the SWP to use one another's pumping plants in the Sacramento-San Joaquin Delta Estuary (Delta), often described as joint points of diversion (JPOD) operations, even if water quality objectives for salinity in the southern Delta were not being met. Order WR 2008-0029-EXEC also temporarily amended Yuba County Water Agency's (YCWA) Permit 15026 so that the transfer of up to 200,000 acre-feet per annum (afa) from YCWA to DWR could be implemented in 2008, even if the salinity objectives were not being met.

2.0 FACTUAL AND LEGAL BACKGROUND

2.1 State Water Board Decision 1641

In Decision 1641, the State Water Board amended the water right permits for the CVP and SWP to require the projects to meet specified water quality objectives set forth in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. The water quality objectives that the CVP and SWP are required to meet include objectives for salinity in the southern Delta designed to protect agricultural beneficial uses. Specifically, the CVP and SWP water rights are conditioned on implementation of 0.7 millimhos per centimeter (mmhos/cm) electrical conductivity (EC) from April 1 through August 31 each year and 1.0 mmhos/cm EC from September 1 through March 31 each year at the following three locations in the southern Delta: Station C-6 (San Joaquin River at Brandt Bridge), Station C-8 (Old River near Middle River), and Station P-12 (Old River at Tracy Road Bridge).[1] (Revised State Water Board Decision 1641 (2000) at p. 182.) These objectives are referred to in this order as the southern Delta salinity objectives.

In Decision 1641, the State Water Board also amended the water right permits for the CVP and SWP in order to allow JPOD operations. The State Water Board added the SWP's Harvey O. Banks Pumping Plant as a point of diversion and rediversion in Reclamation's permits for the CVP, and added the CVP's Tracy Pumping Plant as a point of diversion and rediversion in DWR's permits for the SWP. (Decision 1641, *supra*, at pp. 149-159.) (The CVP's Tracy Pumping Plant was renamed the C.W. "Bill" Jones Pumping Plant in 2006.) The State Water Board's approval was subject to several conditions, one of which was the requirement that Reclamation and DWR be in compliance with all of the provisions of their water right permits, including requirements relating to the southern Delta salinity objectives. (*Id*. at pp. 149-150, 155-156.)

[1] In addition, the CVP is required to meet the same salinity objectives in the San Joaquin River at Vernalis, but the CVP's ability to meet this objective is not an issue in this proceeding.

2.2 State Water Board Corrected Order WR 2008-0014

In Corrected Order WR 2008-0014, the State Water Board approved YCWA's petition for a long-term transfer of up to 200,000 afa to DWR (hereafter the Yuba transfer). The Board amended YCWA's Permit 15026 to authorize the use of water to meet water quality requirements in the Delta, and the rediversion of water for purposes of export at the SWP's Clifton Court Forebay or the CVP's Jones Pumping Plant. (State Water Board Corrected Order 2008-0014, at pp. 59-61.) (Water is diverted into the Clifton Court Forebay before it is delivered to the Banks Pumping Plant.) The State Water Board's authorization of the rediversion of water at the Clifton Court Forebay or the Jones Pumping Plant was conditioned on Reclamation's and DWR's compliance with water quality objectives as required by Decision 1641. (*Id*. at p. 60.)

2.3 Governor Schwarzenegger's Drought Proclamations

On June 4, 2008, Governor Schwarzenegger issued Executive Order S-06-08, in which the Governor proclaimed a condition of statewide drought. In support of the proclamation, the Governor cited two straight years of below normal rainfall, critically dry water conditions in the Sacramento and San Joaquin River Basins, a record eight-year drought in the Colorado River Basin, and restrictions on SWP and CVP diversions from the Delta due to various factors, including federal court actions to protect fish species. The Governor ordered DWR to take a number of actions to address the drought, including facilitate water transfers to respond to potential emergency water shortages, and coordinate and implement SWP operations and water exchanges to alleviate impacts to San Joaquin Valley agriculture.

On June 12, 2008, the Governor issued another proclamation, this time declaring a state of emergency to exist due to the drought in the counties of Sacramento, San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, Tulare and Kern. The emergency proclamation was based in part on the finding that a reduction in water deliveries to the Central Valley counties would result in the loss of permanent and seasonal crops, increased unemployment, and other direct and indirect economic impacts. To address the drought, the Governor specifically directed DWR to, among other things, file temporary urgency change petitions to facilitate surface water transfers and JPOD operations. Similarly, the Governor directed the State Water Board to expedite the

processing and consideration of temporary urgency change petitions filed by DWR or other agencies to facilitate water transfers to the San Joaquin Valley.

2.4 Reclamation and DWR's Temporary Urgency Change Petition

On June 17, 2008, Reclamation and DWR submitted a temporary urgency change petition to the State Water Board, seeking to temporarily amend the water right permits for the CVP and SWP to authorize JPOD operations during periods when the salinity objectives were not met. On June 26, 2008, DWR submitted a request to modify the petition. In the petition, Reclamation and DWR explained that the southern Delta agricultural salinity objectives would be exceeded during the summer of 2008 due to critically dry conditions, and asserted that the objectives could not be met through CVP and SWP operations. Accordingly, Reclamation and DWR maintained that changes to the permits for the CVP and SWP were necessary in order to provide certainty that JPOD operations could occur consistent with Decision 1641. Reclamation and DWR stated that the flexibility of JPOD operations was needed to assist water suppliers and alleviate the impacts to San Joaquin Valley agriculture as directed in the Governor's proclamations. Reclamation and DWR proposed to temporarily amend the term of their permits that requires compliance with all of the conditions of their permits as a condition of the approval of JPOD operations as follows:

a. All stages of [JPOD operations] are subject to the following terms and conditions:
. . .

(4) All other provisions of the above permits are met, <u>provided, however, if the southern Delta water quality objectives are exceeded, and the State Water Board's Executive Director has found that (i) no additional reasonable control measures exist that the SWP or CVP could take this summer or fall in order to meet the objectives, and (ii) the use of JPOD will not unreasonably affect salinity in the southern Delta, then JPOD may occur</u>.

On June 20, 2008, SDWA submitted a response to the temporary urgency change petition. SDWA stated that it would acquiesce to additional pumping under JPOD operations if certain conditions were imposed, but SDWA could not support or agree to the petition, for a variety of reasons. On June 27, 2008, Reclamation and DWR amended their petition to request on behalf of YCWA a similar change to YCWA's permit. On July 1, 2008, the State Water board issued

Order WR 2008-0029-EXEC. The State Water Board issued public notice of the petition on August 27, 2008.

2.5 Water Code Section 1435

Water Code section 1435 provides that a permittee or licensee who has an urgent need to change the point of diversion, place of use, or purpose of use from that specified in the permit or license may petition the State Water Board for a conditional, temporary change. The State Water Board's regulations set forth the filing and other procedural requirements applicable to petitions for temporary urgency changes. (Cal. Code Regs., tit. 23, §§ 805 & 806.) The Board's regulations also clarify that a petition for a temporary urgency change in a permit or license other than a change in point of diversion, place of use, or purpose of use may be filed, subject to the same filing and procedural requirements that apply to petitions for temporary urgency changes in point of diversion, place of use, or purpose of use. (*Id*., § 791, subd. (e).)

Before approving a temporary urgency change, the Board must make the following findings:

(1) The permittee or licensee has an urgent need to make the proposed change.
(2) The proposed change may be made without injury to any other lawful user of water.
(3) The proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses.
(4) The proposed change is in the public interest.

(Wat. Code, § 1435, subd. (b)(1-4).)

The Water Code defines "urgent need" to mean "the existence of circumstances from which the board may in its judgment conclude that the proposed temporary change is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented . . . ." (Wat. Code, § 1435, subd. (c).) The Water Code also provides, however, that the State Water Board shall not find a petitioner's need to be urgent if the Board in its judgment concludes, if applicable, that the petitioner has not exercised due diligence in petitioning for or pursuing a change pursuant to other provisions of the Water Code governing non-urgent changes. (*Ibid*.)

The State Water Board may issue a temporary urgency change order in advance of public notice. (Wat. Code, § 1438, subd. (a).) Public notice must be provided as soon as practicable, unless the change will be in effect less than 10 days. (*Id*., § 1438, subds. (a), (b) & (c).) Any interested person may file an objection to a temporary urgency change, and the Board must give prompt consideration to any objection. (*Id*., subd. (d).) The State Water Board may in its discretion modify or revoke a temporary urgency change order at any time. (*Id.*, § 1440.) Unless an earlier date is specified, temporary urgency change orders automatically expire 180 days after they are issued. (*Ibid*.)

2.6 State Water Board Order WR 2008-0029-EXEC

In Order WR 2008-0029-EXEC, Board Member Arthur G. Baggett, Jr., approved Reclamation and DWR's temporary urgency change petition.[2] The approval authorized JPOD operations to occur and the Yuba transfer to be implemented during the summer and fall of 2008, even if the southern Delta salinity objectives were not met, provided that the State Water Board's Executive Director made the following two findings: (1) no additional reasonable control measures exist that the SWP or CVP could take in the summer or fall of 2008 in order to meet the objectives, and (2) JPOD operations and the Yuba transfer would not unreasonably affect salinity in the southern Delta. (Order WR 2008-0029-EXEC, p. 9.) The approval was effective from July 1, 2008, through December 12, 2008.

Order WR 2008-0029-EXEC included all the findings necessary to approve the temporary urgency change petition. In the order, Board Member Baggett found that there was an urgent need for the proposed changes in light of drought conditions, court-imposed limitations on pumping from the Delta, the Governor's emergency proclamation, and the potential for irretrievable loss of crops. (Order WR 2008-0029-EXEC, p. 6.) Board Member Baggett found that the proposed changes would allow the CVP and SWP to maximize water deliveries to the San Joaquin Valley without unreasonably affecting water quality. (*Ibid*.)

[2] State Water Board Resolution 2007-0057 delegates to the Board Members individually the authority to act on petitions for temporary urgency changes. (Resolution 2007-0057, ¶ 2.2.) The Deputy Director for Water Rights may act on petitions for temporary urgency changes if there are no objections to the petitions. (*Id*., ¶ 4.4.1.)

In Order WR 2008-0029-EXEC, Board Member Baggett also found that the temporary urgency changes would not injure other lawful users of water or unreasonably affect fish, wildlife, or other instream beneficial uses. In support of these findings, Board Member Baggett relied in part on modeling results for the months of June, July, and August, which showed that JPOD operations and the Yuba transfer would have no adverse effect on salinity in the Delta. (Order WR 2008-0029-EXEC, pp. 6-7.) Board Member Baggett also relied on the fact that the Department of Fish and Game (DFG) had been consulted and did not object to the proposed changes, and the fact that the proposed changes would not relieve Reclamation or DWR of their obligation to comply with a variety of regulatory requirements designed to protect water quality and fishery resources. (*Id.* at p. 7.)

Board Member Baggett also determined that approval of the proposed temporary urgency petition was exempt from California Environmental Quality Act (CEQA) requirements pursuant to section 15301 of the CEQA Guidelines[3] and Public Resources Code sections 21080, subdivision (b)(3) and 21172. Section 15301 of the CEQA Guidelines provides an exemption for "existing facilities" involving negligible or no expansion of an existing use. Sections 21080, subdivision (b)(3) and 21172 of the Public Resources Code provide an exemption for projects undertaken or approved in order to address property damage in an area in which a state of emergency has been proclaimed by the Governor.

2.7 Findings of the State Water Board's Executive Director

By letter dated July 24, 2008, the State Water Board's Executive Director made the findings necessary to allow JPOD operations to occur and the Yuba transfer to be implemented during the summer and fall of 2008, even if the southern Delta salinity objectives were not met. The Executive Director found that no additional reasonable control measures existed at the time that the CVP or SWP could take in order to meet the objectives, and that JPOD operations and the Yuba transfer would not unreasonably affect salinity in the southern Delta. The Executive Director's findings were conditioned on Reclamation and DWR continuing to work with SDWA to identify and implement any reasonable and effective actions to address water level and water quality concerns in the southern Delta.

[3] The CEQA Guidelines are published in title 14 of the California Code of Regulations, sections 15000 through 15387.

The Executive Director's findings were based on a report, dated July 14, 2008, that Reclamation and DWR had submitted to the Executive Director regarding the exceedance of the objectives, beginning in June 2008, at the three locations in the southern Delta. In the report, Reclamation and DWR asserted that the degradation in water quality at those locations was due almost exclusively to agricultural and municipal discharges downstream of Vernalis on the San Joaquin River.

Reclamation and DWR reported that agricultural barriers had been installed in the Delta in order to improve water levels and water quality, and DWR would continue to operate flapgates on the barriers in coordination with SDWA. Other than those measures, however, Reclamation and DWR asserted that no additional reasonable control measures existed that the CVP or SWP could take to meet the salinity objectives. In particular, Reclamation and DWR concluded, based on modeling and particle tracking studies, that the CVP and SWP could not effectively control salinity in the southern Delta through changes in Delta exports or flows from the Sacramento River.

2.8 SDWA's and CSPA's Petitions for Reconsideration

SDWA and CSPA filed petitions for reconsideration of Order WR 2008-0029-EXEC on July 22, 2008, and July 31, 2008, respectively. The County of San Joaquin submitted a letter, dated August 19, 2008, in support of SDWA's petition.

3.0 GROUNDS FOR RECONSIDERATION

Any interested person may file a petition for reconsideration of an order or decision made under authority delegated to an officer or employee of the State Water Board pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768-770. Section 768 of the Board's regulations provides that an interested person may petition for reconsideration upon any of the following causes:

(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.
(d) Error in law.

On reconsideration, the Board may:

(a) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration.
(b) Deny the petition upon a finding that the decision or order was appropriate and proper.
(c) Set aside or modify the decision or order.
(d) Take other appropriate action.

(Cal. Code Regs., tit. 23, § 770.)

4.0 DISCUSSION

SDWA and CSPA contend that Order WR 2008-0029-EXEC is contrary to law and not supported by substantial evidence. They request the State Water Board to rescind the order and affirm that JPOD operations are not allowed unless the conditions set forth in Decision 1641 are met.

At the outset, we address the issue of whether this proceeding should be dismissed because it is moot. The temporary changes to Reclamation's, DWR's and YCWA's permits authorized by Order WR 2008-0029-EXEC are no longer in effect. Accordingly, even if we were to grant the relief requested and rescind the order, our action would have no practical effect. Ordinarily, a proceeding that is moot should be dismissed unless it presents an issue of substantial and continuing public interest that is "capable of repetition, yet evading review." (*Department of Corrections v. Office of Administrative Hearings* (1998) 66 Cal.App.4th 1100, 1106; *Chantiles v. Lake Forest II Master Homeowners Ass'n* (1995) 37 Cal.App.4th 914, 921.)

In this case, although we conclude that the petitions for reconsideration lack merit and should be denied, we find that the petitions raise some substantial issues of continuing public interest concerning CVP and SWP operations and Delta water quality. In addition, some of these issues may recur if Reclamation and DWR seek similar changes to their permits in the future. Finally,

temporary urgency change orders are likely to evade review due to the relatively short 180-day period during which they are effective. Based on the foregoing, we elect to address the petitions for reconsideration.

The petitioners' main contentions are addressed below. To the extent that any issue raised in the petitions is not addressed in this order, we conclude that the issue is not a substantial issue that merits review. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

4.1 Order WR 2008-0029-EXEC Correctly Determined that there was an Urgent Need for the Temporary Urgency Changes

SDWA and CSPA's first contention is that Order WR 2008-0029-EXEC was contrary to law because Reclamation and DWR did not exercise due diligence in pursuing a non-urgent change petition, and therefore Water Code section 1435, subdivision (c) precluded a finding that there was an urgent need for the temporary changes. In support of this contention, SDWA and CSPA argue that Reclamation and DWR have been on notice since at least November 2007, if not earlier, that they would have to file a petition seeking changes to their permits if they anticipated that the salinity objectives would not be met in the summer of 2008 and they wanted to conduct JPOD operations during that period.

Among other things, SDWA and CSPA point to a letter, dated November 28, 2007, from State Water Board Executive Director Dorothy Rice to Reclamation and DWR, in which Ms. Rice clarified that JPOD operations were not allowed unless Reclamation and DWR were in compliance with all of the provisions of their permits, including the requirements relating to southern Delta salinity objectives. Ms. Rice also explained that Reclamation and DWR could file a petition to change the conditions of their permits, and suggested that they submit any such petition as soon as possible so that it could be considered prior to the need for JPOD operations in 2008.

Order WR 2008-0029-EXEC did not address whether petitioners had been diligent in pursuing a non-urgent change petition. Similarly, we need not address this issue because the decision whether to find a lack of diligence is discretionary. As stated above, the Water Code provides that the State Water Board shall not find the need for a proposed temporary change to be

urgent "if the board *in its judgment* concludes, if applicable, that the petitioner has not exercised due diligence . . ." in petitioning for or pursuing a change pursuant to other provisions of the Water Code governing non-urgent changes. (Wat. Code, § 1435, subd. (c), italics added.)[4] In our judgment, it was appropriate not to find a lack of diligence in light of the unusual circumstances that existed last summer, including drought conditions and the Governor's drought proclamation, and the concomitant need for the Yuba transfer and the operational flexibility afforded by JPOD operations.

SDWA and CSPA also advance the related contention that Order WR 2008-0029-EXEC is inconsistent with the due diligence requirement contained in Water Code section 1435 because the order allowed JPOD operations to occur and the Yuba transfer to be implemented if the Executive Director found that no reasonable control measures existed that the CVP or SWP could have taken in the summer or fall of 2008. Petitioners contend that this provision allowed Reclamation and DWR to wait until it was too late to implement measures necessary to meet salinity objectives.

This contention confuses two separate issues: whether Reclamation and DWR were diligent in implementing measures to meet salinity objectives, and whether Reclamation and DWR were diligent in pursuing a non-urgent change petition. Under Water Code section 1435, subdivision (c), the relevant issue is whether Reclamation and DWR were diligent in pursuing a non-urgent change petition, not whether Reclamation and DWR were diligent in implementing salinity control measures. Moreover, as explained below, whether Reclamation and DWR could have implemented any additional reasonable control measures in order to meet salinity objectives in 2008 has no bearing on whether Order WR 2008-0029-EXEC was appropriate and proper.

[4] Section 1435 of the Water Code addresses the petitioner's diligence in the context of the State Water Board's determination of whether there is an urgent need for the change. (Wat. Code, § 1435, subd. (c).) Section 1435 does not include a finding of due diligence among the findings that the State Water Board is required to make before the State Water Board may approve a temporary urgency change. (Wat. Code, § 1435, subd. (b).) This structure reinforces the conclusion that while due diligence may be an issue in the State Water Board's review of a proposed temporary, urgent change, the ultimate issue is whether there is an urgent need, and the State Board may exercise its judgment to conclude that an urgent need exists without finding that the petitioner has exercised due diligence.

4.2 The Issue of whether Reclamation or DWR could have met the Objectives by Implementing Additional Salinity Control Measures has No Bearing on the Validity of Order WR 2008-0029-EXEC

SDWA and CSPA also contend that Reclamation and DWR's temporary urgency change petition and Order WR 2008-0029-EXEC are not supported by substantial evidence because Reclamation and DWR could have met the salinity objectives by implementing additional salinity control measures.

This contention is misplaced because the Board's order was not predicated on a determination of whether additional control measures could have been implemented in order to meet the objectives, nor was the Board required to make such a determination in order to approve the temporary urgency change petition. Under certain circumstances, a petitioner's ability to have obviated the need for a temporary urgency change might be relevant to the issue of whether the change is necessary to maximize the beneficial use of water resources, and therefore whether an "urgent need" for the change exists as defined in Water Code section 1435, subdivision (c). In appropriate circumstances, a petitioner's ability to have obviated the need for the change may also be relevant to whether the change is in the public interest, as required by Water Code section 1435, subdivision (b)(4). In this case, however, the issue of whether Reclamation or DWR could have obviated the need for their petition by implementing additional salinity control measures before they filed their petition has no bearing on the validity of the determination that there was an urgent need for the proposed changes in order to respond to the drought emergency. Nor would the issue change the determination that the change was in the public interest. Whether or not there were measures available to Reclamation and DWR during the period before the Governor issued drought proclamations that would have avoided the need for the change petition later, there was still an urgent need for the changes, and approval of the changes was in the public interest at the time the change petition was approved.

Although Order WR 2008-0029-EXEC did not address the issue of whether Reclamation or DWR could have implemented additional salinity control measures before they filed their petition, it did address the need to implement feasible salinity control measures during the period when the approved changes were in effect. Implicit in the order was the determination that JPOD operations and the Yuba transfer should not be allowed during periods when the

objectives were not met if there were additional reasonable control measures that Reclamation and DWR could implement prospectively, in the summer or fall of 2008, in order to meet the objectives. Accordingly, the order did not authorize JPOD operations or the Yuba transfer to occur during periods when the objectives were not met unless the Board's Executive Director found that there were no additional reasonable control measures that Reclamation or DWR could implement in the summer or fall of 2008 in order to meet the objectives. But Order WR 2008-0029-EXEC itself did not address the issue of whether Reclamation or DWR could implement additional reasonable control measures during the summer or fall of 2008.

As stated above, the Executive Director found, by letter dated July 24, 2008, that there were no additional reasonable control measures that Reclamation or DWR could implement in the summer or fall of 2008 in order to meet the salinity objectives. The validity of this finding, however, is not the subject of SDWA's and CSPA's petitions for reconsideration. It also merits note that the Executive Director's finding was conditioned on Reclamation and DWR continuing to work with SDWA to identify and implement any reasonable and effective actions to address water level and water quality concerns in the southern Delta, and SDWA and CSPA have not alleged that Reclamation and DWR failed to fulfill this condition.

4.3 The Findings contained in Order WR 2008-0029-EXEC were Supported by the Salinity Modeling Results.

SDWA and CSPA also contend that Order WR 2008-0029-EXEC is not supported by substantial evidence because the water quality modeling relied on in the order was flawed. As explained above, the finding contained in the order that the temporary urgency changes would not injure other lawful users of water or unreasonably affect fish, wildlife, or other instream beneficial uses was based in part on modeling results, which showed that JPOD operations and the Yuba transfer would have no adverse effect on salinity in the Delta. DWR submitted the modeling results from the Delta Simulation Model 2 (DSM2) in support of the change petition. In the petition, DWR explained that DSM2 tends to underestimate salinity discharges from local agricultural and municipal sources in south Delta channels. Accordingly, the modeling results indicated that salinity objectives would be met in June, July, and August of 2008, even though

DWR anticipated that the objectives would not be met. Nonetheless, DWR asserted that the model could be used to compare water quality conditions with and without JPOD operations and transfers.

SDWA and CSPA argue that the modeling was unreliable because it underestimated salinity levels. Additionally, SDWA and CSPA contend that the modeling does not attempt to accurately predict water quality conditions throughout the southern Delta, as opposed to just at the three compliance locations.

These arguments are unpersuasive. The modeling was intended to predict the extent to which salinity concentrations would increase with the increased pumping associated with both JPOD operations and transfers. The fact that DSM2 tends to underestimate salinity concentrations in the southern Delta and does not attempt to predict water quality conditions throughout the southern Delta channels does not necessarily mean that DSM2 does not accurately predict the extent to which salinity concentrations would increase if JPOD operations and transfers were implemented. Despite its tendency to under-predict southern Delta salinity, DSM2 is currently the best tool available to predict the real-time effects of Delta export pumping on water levels and water quality in the southern Delta. SDWA and CSPA assert that there is no evidence to support the claim that the model could be used for comparative purposes, but it was incumbent on SDWA and CSPA to demonstrate that the model should not have been used for comparative purposes, and they have not done so.

CSPA also faults the modeling because it only evaluated salinity impacts and did not address potential impacts to other water quality parameters such as dissolved pesticides or metals. It was appropriate to model only salinity impacts, however, because the only change that Order WR 2008-0029-EXEC made to Reclamation's, DWR's, and YCWA's permits was a temporary change to the requirement that the salinity objectives be met before JPOD operations and the Yuba transfer could occur. The order did not change any of the other conditions that have been imposed on JPOD operations and the Yuba transfer in order to protect water quality. In addition, CSPA has not provided any support for its assumption that the temporary urgency changes had the potential to cause an increase in constituents other than salinity, such as dissolved pesticides or metals, which should have been modeled.

4.4 Order WR 2008-0029-EXEC Correctly Determined that the Temporary Urgency Change Petition would not Unreasonably Affect Fish and Wildlife.

CSPA contends that Order WR 2008-0029-EXEC incorrectly determined that the temporary urgency change petition would not unreasonably affect fish, wildlife, or other instream beneficial uses. This determination in the order was based on the modeling results discussed above, the fact that DFG had been consulted and did not object to the proposed changes, and the fact that the proposed changes would not relieve Reclamation or DWR of their obligation to comply with a variety of regulatory requirements designed to protect water quality and fishery resources, including Decision 1641 and Endangered Species Act (ESA) requirements for winter-run Chinook salmon, Delta smelt, spring-run Chinook salmon, and steelhead.

CSPA faults DFG's approval for several reasons, including that fact that DFG stated in its approval that Water Operations Management Team (WOMT)[5] agencies should discuss the risk to Delta smelt of ongoing CVP and SWP operations, including JPOD operations. CSPA alleges that the WOMT agencies have failed to prevent the collapse of salmonid and pelagic fisheries, and therefore Order WR 2008-0029-EXEC "traded certainty of protection for fish" for a WOMT process that has historically failed to protect fisheries. CSPA also argues that Decision 1641 and ESA requirements have not been adequate to protect fishery resources. CSPA's arguments amount to a challenge to the adequacy of the WOMT process, Decision 1641, and various ESA requirements to protect fishery resources.

The problem with these arguments is that Order WR 2008-0029-EXEC did not change any regulatory requirements designed to protect fish, wildlife, or other instream beneficial uses. As stated above, the only changes authorized under the order were to the requirements to meet southern Delta salinity objectives as a condition of approval of JPOD operations and the Yuba transfer. The salinity objectives are designed to protect agricultural uses, not fish and wildlife uses, and the objectives are not a surrogate for the protection of fish and wildlife uses. Accordingly, the adequacy of the WOMT process, Decision 1641, and various ESA requirements has no bearing on the issue of whether Order WR 2008-0029-EXEC was correctly decided, unless those regulatory requirements were necessary to mitigate any impacts of the

[5] The WOMT agencies include Reclamation, DWR, the United States Fish and Wildlife Service, the National Marine Fisheries Service and DFG.

temporary urgency changes on fish, wildlife, or other instream beneficial uses. There is no evidence in the record, however, that the temporary urgency changes would have any adverse impacts on fish, wildlife, or other instream beneficial uses that might warrant mitigation.

CSPA alleges that allowing JPOD operations during periods when the salinity objectives are not met has the potential to unreasonably affect instream beneficial uses by causing an increase in salinity and other pollutants. As discussed in section 4.3 above, however, CSPA has not proffered any evidence to substantiate the allegation that the temporary urgency changes would adversely affect water quality. For the foregoing reasons, we conclude that Order WR 2008-0029-EXEC correctly determined that the temporary urgency change petition would not unreasonably affect fish, wildlife, or other instream beneficial uses.

4.5 Order WR 2008-0029-EXEC Correctly Determined that the Temporary Urgency Change Petition Was Exempt from CEQA Requirements.

SDWA and CSPA's final contention is that Order WR 2008-0029-EXEC incorrectly determined that approval of the temporary urgency change petition was exempt from CEQA as an existing facility pursuant to section 15301 of the CEQA Guidelines. First of all, even if this contention were correct, it would not follow that Order WR 2008-0029-EXEC incorrectly determined that approval of the petition was exempt from CEQA requirements. As stated above, Order WR 2008-0029-EXEC also determined that approval of the petition qualified for an emergency exemption pursuant to sections 21080, subdivision (b)(3) and 21172 of the Public Resources Code. SDWA and CSPA have not challenged this determination. In addition, SDWA and CSPA's contention with respect to the applicability of the existing facility exemption lacks merit, for the reasons explained below.

Section 15301 of the CEQA Guidelines exempts "the *operation*, repair, maintenance, *permitting*, leasing, licensing, or minor alteration of *existing public or private structures, facilities*, mechanical, equipment, or topographical features, *involving negligible or no expansion of use* beyond that existing at the time of the lead agency's determination." (Cal. Code Regs., tit. 14, § 15301, italics added.) As stated earlier, the determination contained in Order WR 2008-0029-EXEC, that approval of the temporary urgency change petition qualified for the existing facility exemption, was based in part on Reclamation and DWR's projection that, even if the petition were approved, total CVP and SWP exports from the Delta would not exceed

approximately 60 percent of historic average exports for the period 2000 through 2007. (Order WR 2008-0029-EXEC, pp. 5 & 7.)

SDWA and CSPA argue that section 15301 does not apply in this case because the use of JPOD during periods when salinity objectives are not met has not previously been approved or reviewed pursuant to CEQA. Similarly, SDWA argues that exporting a smaller amount of water during periods when permit conditions are not met constitutes an expansion in use. In connection with this argument, SDWA implies that JPOD operations were not conducted prior to 2008 during periods when the objectives were not met.

Contrary to SDWA and CSPA's argument, however, the existing facility exemption applies to the ongoing operation of an existing facility, such as the CVP or SWP, regardless of whether operation of the facility was previously authorized or reviewed pursuant to CEQA, provided that continued operation of the facility will not cause a significant effect on the environment relative to existing conditions. (*Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277-1280; *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1312-1315.) In determining whether the exemption applies to an existing facility, the key consideration is not whether the existing facility was previously authorized or reviewed pursuant to CEQA, but "whether the project involves negligible or no expansion of an existing use."[6] (Cal. Code Regs, tit. 14, § 15301.)

In this case, approval of the petition did not involve an expansion of an existing use because approval of the petition did not cause an increase in total CVP and SWP exports from the Delta relative to export levels in recent years. (Order WR 2008-0029-EXEC, pp. 5 & 7.) In addition, SDWA's argument that allowing JPOD operations when salinity objectives are not being met represents a departure from past CVP and SWP operations is inconsistent with allegations contained in SDWA's and CSPA's petitions. In their petitions, SDWA and CSPA allege that Reclamation and DWR conducted JPOD operations in 2007 during periods when the salinity objectives were not being met. We need not determine whether this allegation is true for purposes of addressing the petitions for reconsideration. We note, however, that the allegation

[6] The fact that an unauthorized facility may be exempt from CEQA requirements pursuant to section 15301 does not mean that the facility is protected from enforcement action. To the contrary, the courts have made clear that the appropriate mechanism for addressing prior illegal activity is direct enforcement by the appropriate agencies, as opposed to evaluating the impact of the activity pursuant to CEQA. (See, e.g., *Fat v. County of Sacramento*, *supra*, 97 Cal.App.4th at p. 1280, [discussing *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428].)

further supports the conclusion that allowing JPOD operations in 2008 during periods when the salinity objectives were not met did not involve a change or expansion in CVP or SWP operations relative to past operations.[7]

5.0 CONCLUSION

For the foregoing reasons, the State Water Board concludes that Order WR 2008-0029-EXEC was consistent with applicable law and supported by substantial evidence. Accordingly, the petitions to reconsider Order WR 2008-0029-EXEC are denied.

ORDER

IT IS HEREBY ORDERED that Order WR 2008-0029-EXEC is affirmed, and SDWA's and CSPA's petitions for reconsideration are denied.

[7] Our determination that the temporary urgency change petition was exempt from CEQA requirements is consistent with Order WR 2006-0006. In that order, the State Water Board granted petitions for reconsideration of the Chief of the Division of Water Rights' approval of a water quality response plan that had been prepared by Reclamation and DWR. In Decision 1641, the State Water Board had required preparation of the plan as another condition of the approval of JPOD operations. In her July 1, 2005, approval of the plan, the Division Chief authorized JPOD operations prior to January 1, 2009, if Reclamation and DWR met an objective of 1.0 EC at the three southern Delta compliance locations. In Order WR 2006-0006, the State Water Board disapproved this change to the requirement that Reclamation and DWR meet the 0.7 EC objective during the period from April through August of each year as a condition of JPOD operations. The State Water Board reasoned that the change was inconsistent with Decision 1641, and the potential impacts of the change had not been evaluated as required by CEQA. (Order WR 2006-0006, pp. 25-26.)

Unlike the short-term change involved in this proceeding, the change disapproved in Order WR 2006-0006 would have been effective for approximately three and a half years and could have entailed an increase in CVP and SWP exports from the Delta relative to historic average conditions. Accordingly, application of the existing facility exemption to the approval of that change would not have been appropriate. In this case, by contrast, the record supported the determination that allowing JPOD operations and the Yuba transfer in the summer or fall of 2008 during periods when the objectives were not met would not cause an increase in total CVP and SWP exports from the Delta, and therefore application of the existing facility exemption was appropriate.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly adopted at a meeting of the State Water Resources Control Board held on February 3, 2009.

AYE:

NAY:

ABSENT:

ABSTAIN:

DRAFT

_____

Jeanine Townsend
Clerk to the Board