

**STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING – DIVISION OF WATER RIGHTS  
April 3, 2007**

**ITEM 6**

**SUBJECT**

CONSIDERATION OF AN ORDER AMENDING STATE WATER BOARD ORDER WR 2001-22 TO COMPLY WITH A PEREMPTORY WRIT OF MANDATE ISSUED BY THE SACRAMENTO COUNTY SUPERIOR COURT

(The proposed order would amend the provisions of Order WR 2001-22 that include standard permit term 91 in a water right permit issued to El Dorado County Water Agency and El Dorado Irrigation District.)

**DISCUSSION**

In State Water Board Order WR 2001-22, the State Water Resources Control Board (State Water Board) ordered that standard permit Term 91 be included in a water right permit issued to El Dorado County Water Agency and El Dorado Irrigation District (hereafter collectively referred to as El Dorado). Term 91 is a method for determining when water is available for appropriation from the Sacramento-San Joaquin Delta (Delta) watershed on a real-time basis, taking into consideration the instream flows needed to meet flow-dependent water quality objectives and other inbasin uses.

El Dorado and several other parties to the proceeding concerning El Dorado's permit filed petitions for writ of mandate in Sacramento County Superior Court, challenging various aspects of Order WR 2001-22, including the imposition of Term 91. The superior court ruled in favor of the State Water Board on all issues except for Term 91. The superior court entered a judgment ordering that a peremptory writ of mandate be issued, requiring the State Water Board to set aside the provisions of Order WR 2001-22 that include Term 91 in the permit issued to El Dorado. The State Water Board and two other parties appealed the superior court's judgment on the Term 91 issue.

The Court of Appeal affirmed the superior court's judgment. (*El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937 [48 Cal.Rptr.3d 468].) Although the Court recognized the general suitability of Term 91 as a mechanism for protecting water quality in the Delta, the Court found that inclusion of Term 91 in El Dorado's permit without conducting a proceeding to include a similar restriction in the permits and licenses of junior appropriators in the Delta watershed violated the 1927 priority date of El Dorado's permit.

**POLICY ISSUE**

Should Order WR 2001-22 be amended to remove Term 91 from El Dorado's permit in accordance with the Court of Appeal's decision and the peremptory writ of mandate issued by the superior court?

**FISCAL IMPACT**

None.

**REGIONAL BOARD IMPACT**

None.

**STAFF RECOMMENDATION**

Adopt the proposed order.

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2007 – 00XX**

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In the Matter of  
Applications 29919, 29920, 22921, and 29922  
and Petition for Assignment of State Filed Application 5645 by  
El Dorado County Water Agency and El Dorado Irrigation District  
Applications 30062 and 30453  
and Petition for Assignment of State Filed Application 5645 by  
Kirkwood Associates, Inc., and U.S. Eldorado National Forest  
Application 30204 by  
Kirkwood Meadows Public Utility District  
and U.S. Eldorado National Forest  
Application 30219  
and Petition For Assignment of  
State Filed Application 5645 by Alpine County Water Agency  
Application 30218  
and Petition for Assignment of  
State Filed Application 5645 by Amador County

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SOURCE: South Fork of the American River and Tributaries

COUNTIES: Alpine, Amador and El Dorado

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ORDER AMENDING ORDER WR 2001-22

BY THE BOARD:

**1.0 INTRODUCTION**

By this order, the State Water Resources Control Board (State Water Board) amends State Water Board Order WR 2001-22 to comply with a peremptory writ of mandate issued by the Sacramento County Superior Court in *El Dorado Irrigation District v. State Water Resources Control Board* (Super. Ct. Sacramento County, 2003, No. 01CS01319, consolidated with Nos. 01CS01321 and 01CS01327). The writ of mandate directs the State Water Board to set aside the provisions of Order WR 2001-22 that include standard permit term 91 in a water right permit issued to El Dorado County Water Agency and El Dorado Irrigation District (hereafter collectively referred to as El Dorado).

**2.0 LEGAL AND FACTUAL BACKGROUND**

In 1992, El Dorado filed a petition for partial assignment of state-filed Application 5645. State-filed applications are water right applications that have been filed by the State as part of a general or coordinated plan for the development of the State's water resources. (Wat. Code, § 10500.) State-filed applications have a priority based on the date of filing, and are exempt from the due diligence requirement that normally applies to water right applications. (*Ibid.*) State-filed Application 5645 has a 1927 priority date. The State Water Board may assign a state-filed application when the assignment would not conflict with a general or coordinated plan for the development of the State's water resources or with water quality objectives.

The State Water Board acted on El Dorado's petition for partial assignment in 1996 by adopting Decision 1635. In Decision 1635, the State Water Board approved El Dorado's petition and ordered that a water right permit be issued to El Dorado, subject to specified conditions. The approval authorized El Dorado (1) to divert to storage a total of 32,931 acre-feet per annum (afa) at Lake Aloha, Silver Lake and Caples Lake (which are tributary to the South Fork American River), and (2) to redivert water released from upstream storage and directly divert a total of 17,000 afa at Folsom Reservoir.

Initially, the State Water Board did not order that standard permit term 91 be included in El Dorado's permit. Term 91 is a method for determining when water is available for appropriation from the Sacramento-San Joaquin Delta (Delta) watershed on a real-time basis. In summary, Term 91 prohibits diversions when natural and abandoned flows in the Delta and its tributaries are insufficient to meet flow-dependent water quality objectives in the Delta and other inbasin uses, and the State's two major water supply projects, the Central Valley Project and the State Water Project (the Projects), are supplementing natural and abandoned flows with imported or previously stored water in order to meet the objectives. Under those conditions, water is not considered to be available for appropriation by permittees or licensees who are subject to Term 91. The State Water Board has included Term 91 in permits issued after 1965.

In Decision 1635, the State Water Board concluded that it would be inequitable to include Term 91 in El Dorado's permit when the State Water Board has not included Term 91 in many permits that are junior in priority to Application 5645. The owners and

operators of the Projects, the U.S. Bureau of Reclamation and the Department of Water Resources, and contractors who receive water from the Projects, Westlands Water District and the State Water Contractors, filed petitions for reconsideration of the decision not to include Term 91 in El Dorado's permit. The State Water Board took action on the petitions for reconsideration in Order WR 2001-22. Upon reconsideration, the State Water Board concluded that Term 91 was the best method presently available for determining when water is available for appropriation by El Dorado, taking into consideration the 1927 priority date of El Dorado's permit. (Order WR 2001-22, pp. 10-14.) Accordingly, the State Water Board modified Decision 1635 to require El Dorado's permit to include Term 91.

### **3.0 DISCUSSION**

El Dorado and other parties to the proceeding concerning El Dorado's permit filed petitions for writ of mandate in Sacramento County Superior Court, challenging various aspects of Order WR 2001-22, including the imposition of Term 91. The superior court ruled in favor of the State Water Board on all issues except for Term 91. In a judgment entered on December 23, 2003, the superior court ordered that a peremptory writ of mandate be issued, requiring the State Water Board to set aside the provisions of Order WR 2001-22 that include Term 91 in the permit issued to El Dorado. The State Water Board, Westlands Water District, and the State Water Contractors appealed the superior court's judgment on the Term 91 issue.

On September 8, 2006, the Court of Appeal issued an opinion that concluded that the State Water Board abused its discretion by including Term 91 in El Dorado's permit. (*El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937 [48 Cal.Rptr.3d 468].) Although the Court recognized the general suitability of Term 91 as a mechanism for protecting water quality in the Delta, the Court observed that the State Water Board had not added junior appropriators as parties to the proceeding leading to issuance of El Dorado's permit. The Court found that inclusion of Term 91 in El Dorado's permit without conducting a proceeding to include a similar restriction in the permits and licenses of junior appropriators in the Delta watershed violated the 1927 priority date of the permit. (*Id.* at pp. 969-976.) Accordingly, the Court of Appeal affirmed the superior court's judgment.

**4.0 CONCLUSION**

In accordance with the Court of Appeal's decision and the peremptory writ of mandate issued by the superior court, Order WR 2001-22 should be amended to remove Term 91 from El Dorado's permit.

El Dorado's permit contains standard permit Term 80, which reserves authority to change the authorized season of diversion in the permit to conform to later findings of the State Water Board concerning availability of water and the protection of beneficial uses of water in the Delta and San Francisco Bay. This term will remain unchanged.

**ORDER**

IT IS HEREBY ORDERED that State Water Board Order WR 2001-22 is amended by removing ordering paragraph 42, beginning on page 79.

**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 April 3, 2007.

AYE:

NO:

ABSENT:

ABSTAIN:

**DRAFT**

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Clerk to the Board