

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

WR ORDER 2004-0005-DWR

**IN THE MATTER OF WATER RIGHT PERMITS 16597 AND 16600
(APPLICATIONS 14858A AND 19304) OF
THE UNITED STATES BUREAU OF RECLAMATION**

ORDER APPROVING PETITION FOR TEMPORARY URGENCY CHANGE IN PERMIT CONDITIONS BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

1.0 INTRODUCTION

On January 30, 2004, the United States Bureau of Reclamation (USBR) petitioned the State Water Resources Control Board's (SWRCB) Division of Water Rights (Division) for a temporary urgency change pursuant to Water Code section 1435. The petition requests a temporary change in the water right terms for New Melones Reservoir pursuant to Permits 16597 and 16600 (Applications 14858A and 19304). The purpose of the petition is to change the fish and wildlife flow requirement for the San Joaquin River at Vernalis included in Table 3 of Revised Decision 1641 (D-1641) (Condition 2(a) on page 161) from February through June of 2004 (with the exception of the April 15 through May 15 period). Approval of the requested change will allow USBR to conserve storage in New Melones Reservoir by meeting a lower flow requirement.

I am delegated authority to approve this temporary urgency change, pursuant to Water Code section 1435(d) and SWRCB Resolution No. 2002-0106, section 2.6.18.

2.0 SUBSTANCE OF PETITION

USBR is requesting that the SWRCB, under Water Code section 1435 et seq., temporarily approve a change in the current 2,280 cubic-feet per second (cfs) fish and wildlife flow requirement at Vernalis on the San Joaquin River included in the permit conditions for New Melones Reservoir storage to allow for a lower flow requirement based on consultation with the United States Fish and Wildlife Service (USFWS), the California Department of Fish and Game (DFG), and the National Marine Fisheries Service (NOAA Fisheries). The proposed change would allow USBR to conserve storage in New Melones Reservoir to meet existing and future water supply, water quality, and fish and wildlife protection uses of the project.

USBR states that it intends to reinstate informal consultation with the USFWS on the requirements for the protection of delta smelt pursuant to the Federal Endangered Species Act. The flow requirements included in the USFWS's biological opinion for delta smelt (dated March 5, 1995) are the same as the Vernalis fish and wildlife flow objective specified in the 1995 Bay/Delta Water Quality Control Plan and implemented by the SWRCB in D-1641. USBR also indicates that it will continue to coordinate with the CALFED Operations Group and the Water Operations and Management Team, in addition to the fisheries agencies, to determine future operations. USBR proposes to operate New Melones Reservoir to meet minimum fishery flow requirements in the Stanislaus River, water rights agreements, and the Vernalis salinity objectives, as well as meet modified minimum flows at Vernalis as determined by the fisheries agencies. USBR also intends to coordinate its operations with other Central Valley Project (CVP) reservoirs and the California Department of Water Resources (DWR) to satisfy Delta Outflow requirements. In addition, the SWRCB indicated in its public notice of the Temporary Urgency Change Petition that it would likely require a minimum monthly average flow of 1,420 cfs if the change is approved.

3.0 BACKGROUND

USBR was issued Permit 16597 on July 7, 1973 pursuant to Application 14858A and Permit 16600 on July 19, 1973 pursuant to Application 19304. Together the permits authorize storage of 2.4 million acre-feet of water from the Stanislaus River in New Melones Reservoir from November 1 through June 30 of each year. These permits are subject to terms and conditions to protect other legal users of water, water quality, and the environment. The SWRCB retains continuing authority over these permits.

In D-1641, the SWRCB placed additional conditions on USBR's water rights for New Melones Reservoir to protect water quality and fish and wildlife. Included among these conditions is condition 2(a) on page 161 which requires USBR to ensure that the water quality objectives for fish and wildlife beneficial uses for San Joaquin River flow at Vernalis as set forth in Table 3 of D-1641 are met.

This year's 60-20-20 San Joaquin Valley Water Year Hydrologic Classification (Figure 2, D-1641 page 189) is currently considered to be dry. Pursuant to the Vernalis fish and wildlife flow objective, D-1641 requires USBR to maintain a minimum monthly average flow of 1,420 cfs or 2,280 cfs at Vernalis from February through June (with the exception of the April 15 to May 15 period when a different set of flow requirements applies) under dry year conditions. The higher flow objective applies when unimpaired runoff from the Sacramento and San Joaquin Rivers and their tributaries is at a higher level so that, pursuant to D-1641, Delta Outflow (as determined by the 8 River Index (see D-1641 footnote 9 on page 185)) is required to maintain the fresh water/salt water mixing zone (referred to as X2) in the Delta at the more westerly of two locations (west of Chippis Island). Because the Sacramento River and its tributaries contribute the majority of the flow to the Delta, water year type conditions in the Sacramento River watershed tend to dictate whether the higher or lower flow objective is required. Consequently, even though the San Joaquin River watershed is experiencing dry conditions, the higher flow objective was triggered this year due to wetter conditions in the Sacramento River watershed.

The San Joaquin River watershed has experienced similarly dry conditions over the past 3 years and USBR anticipates that the current year's forecast will approach the critical dry year classification during February of 2004. Consequently, New Melones Reservoir carryover storage has proceeded to drop over the past three years and is expected to continue to drop. Low carryover storage levels may impair USBR's ability to comply with regulatory requirements and fulfill other project needs. USBR states that compliance with the Vernalis fish and wildlife flow objective this year would likely compromise the safe yield of the New Melones project and USBR's ability to meet the various needs of the project, including fish and wildlife needs, during this and subsequent years. As a result, USBR has requested a temporary change in the fish and wildlife flow requirement at Vernalis in order to preserve storage in New Melones Reservoir. USBR has also requested that this issue be addressed in the SWRCB's current periodic review of the 1995 Bay-Delta Water Quality Control Plan.

4.0 OBJECTIONS TO THE PETITION

A public notice of the proposed temporary urgency change was mailed to interested parties on February 10, 2004, and published in the Stockton Record. Comments and/or objections to the proposed change are due by March 1, 2004. Pursuant to Water Code section 1438 (a) the SWRCB may issue an order on a proposed temporary urgency change prior to noticing and, consequently, prior to the close of the comment period. However, the SWRCB retains jurisdiction to modify this order based on any comments or objections that it may receive.

5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGE

Chapter 6.6 of Part 2, Division 2, of the Water Code, commencing at section 1435, provides that any permittee or licensee who has an urgent need to change a point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for a conditional temporary change order. The SWRCB's regulation, at California Code of Regulations, Title 23, section 791(e), provides that the SWRCB shall follow as nearly as possible the procedures for changes in point of diversion, place of use, or purpose of use when processing petitions for other types of changes in water right permits and licenses. Accordingly, the procedures under section 1435 are applicable to changes to terms and conditions of water right permits and licenses pursuant to the SWRCB's duty of continuing supervision over the diversion and use of water.

The SWRCB must make the findings specified in section 1435(b) when issuing a temporary change order pursuant to Chapter 6.6. The required findings are:

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, including findings to support change order conditions imposed to ensure that the change is in the public interest, and may be made without injury to any other lawful user of the water, and without unreasonable effect upon fish, wildlife, and other instream beneficial uses.

5.1 Urgency of the Proposed Change

Under Water Code section 1435, subd. (d), an urgent need to make a proposed change exists when the SWRCB concludes 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.¹

USBR has determined that maintaining releases from New Melones Reservoir to meet the fish and wildlife flow objective at the required level would have potentially significant adverse impacts on New Melones Reservoir carryover storage and USBR's ability to continue to meet water quality, environmental, and water supply needs in this and subsequent years. USBR forecasts that meeting the fish and wildlife flow objective this year may cause New Melones Reservoir carryover storage to drop below 900,000 acre-feet or less, which, in combination with the low refill potential for New Melones Reservoir given current dry conditions in the San Joaquin River watershed, could result in low storage levels for several years to come. Given this potential, USBR in consultation with the fisheries agencies, has determined that it would be judicious to conserve water in New Melones Reservoir by meeting a lower flow requirement. Instead of the current flow requirement, USBR proposes to utilize adaptive management and real time monitoring information to determine the best use of the limited water resources in New Melones Reservoir.

In accordance with footnote 87 on page 160 of D-1641, USBR is not required to use water under Permits 16597 and 16600 to meet the February through June Vernalis flow requirements if it uses other sources of water or other means to meet these conditions. Because this is the third dry year in the San Joaquin basin, however, supplies are not plentiful in the basin for the USBR to acquire.

Based on the above discussion, I find that the permittee has an urgent need for the proposed temporary change.

5.2 No Injury to Any Other Lawful User of Water

The proposed temporary change will result in a reduction of flows to the Stanislaus River of up to 860 cfs during February through June of 2004. However, USBR will likely be required to maintain substantially higher flows through consultation with the fisheries agencies. To ensure that there will be no impacts to other legal users of water, USBR is required to meet all water quality and prior rights release requirements, as well as fishery flow requirements for the Stanislaus River. In addition, conserving water this year will likely result in fewer impacts to other legal users of water in the future if dry conditions continue since more water will be available to meet all of the needs of the project than would be available absent the change. To ensure that there will be no impacts on DWR's ability to meet delta Outflow and other requirements due to the proposed change, USBR is required pursuant to this Order to prepare a plan to prevent or mitigate for any potential impacts to DWR's water rights due to the proposed change.

¹ An urgent need does not exist, however, if the petitioner has failed to exercise due diligence either in petitioning for a change pursuant to other provisions of Division 2 of the Water Code or in pursuing the petition for change.

Based upon the information before me, I find that the proposed change will not cause injury to any lawful user of water. Impacts on instream beneficial uses, which may also be considered legal users of water to the extent that those uses are protected by the public trust or other legal doctrines, are discussed in section 5.3.

5.3 No Unreasonable Effect upon Fish, Wildlife, or Other Instream Beneficial Uses

In order to ensure the protection of environmental resources, this Order requires USBR to consult with the fisheries agencies to determine flows above 1,420 cfs that are necessary to protect fish and wildlife resources. USBR will be required under this change to meet the flows recommended by the fisheries agencies for the term of this change unless the Chief of the Division of Water Rights (Division) revises the flows recommended by the fisheries agencies. This order also requires USBR to comply with all recommendations made by the USFWS upon reconsultation pursuant to the Federal Endangered Species Act regarding the protection of delta smelt and to prepare and implement a plan, in consultation with the fisheries agencies and subject to approval by the Chief of the Division, to mitigate for any adverse impacts to fish and wildlife resources that may result from this change. In addition, by allowing USBR to temporarily replace the February through June Vernalis flow requirement included in D-1641 (which, as previously mentioned, may not adequately correlate with dryer hydrological conditions on the San Joaquin River) with a lower variable flow requirement based on real time monitoring data to protect fish and wildlife resources, this Order allows for the preservation of limited water resources. Given the potential for carryover storage in New Melones Reservoir to remain low in future years, water conserved this year will be available in future years to meet water quality and fish and wildlife uses when environmental water needs may be more critical.

Based on inclusion of the conditions discussed above, I find that the proposed change will not have an unreasonable effect on fish, wildlife and other instream beneficial uses of water.

5.4 The Proposed Change is in the Public Interest

The purpose of the proposed change is to preserve carryover storage in New Melones Reservoir to maximize beneficial uses for the environment and other water users now and in the future. As a result, the overall public interest will benefit from the change. In addition, this Order requires USBR to comply with fishery flow requirements above 1,420 cfs that may be recommended by the fisheries agencies to protect the environment. If USBR does not agree with the flows recommended by the fisheries agencies, USBR may request the Chief of the Division to make a determination on required flows. Upon good cause shown for reevaluation, the Division Chief will make a determination that will best preserve the public interest. Based on the available information, the change authorized herein allows the most reasonable use of the water supply. Therefore I find that the proposed change is in the public interest.

6.0 ENVIRONMENTAL COMPLIANCE

This action is statutorily exempt from the California Environmental Quality Act under Title 14, California Code of Regulations, section 15307. Section 15307 exemptions apply to “actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment.” The proposed change will enable USBR to preserve carryover storage in New Melones Reservoir to meet water quality, water quantity, and environmental protection needs during 2004 and subsequent years at times when that water might be critical in meeting environmental as well as other needs, while at the same time utilizing adaptive management techniques to protect fish and wildlife during the term of the change. Without the proposed change, New Melones Reservoir carryover storage may continue to drop to critically low levels, thus compromising water quality, water supply and environmental uses of the project. As discussed above, this Order includes terms and conditions to protect the environment and other beneficial uses of water.

7.0 CONCLUSIONS

1. USBR has an urgent need to change the required fish and wildlife flow requirement at Vernalis under Condition 2(a) on page 161 of D-1641 in order to preserve carryover storage in New Melones Reservoir.
2. The proposed temporary change may be made without injury to any other lawful user of water.
3. The proposed temporary change may be made without unreasonable effect upon fish, wildlife, and other instream beneficial uses of water.
4. The proposed temporary change is in the public interest.

ORDER

NOW, THEREFORE, IT IS ORDERED that the United States Bureau of Reclamation's (USBR) petition for temporary urgency change under Water Code section 1435, et seq., to modify the fish and wildlife flow requirement for the San Joaquin River at Vernalis included in water right Permits 16597 and 16600 (Applications 14858A and 19304) for New Melones Reservoir is approved, subject to the following terms and conditions.

1. Table 3 on page 184 of State Water Resources Control Board (SWRCB) Revised Decision 1641 (D-1641) as referenced in Condition 2(a) at page 161 concerning "Water Quality Objectives for Fish and Wildlife Beneficial Uses" for the San Joaquin River at Airport Way Bridge, Vernalis shall be temporarily changed to a minimum monthly average requirement of 1,420 cubic-feet per second (cfs) under dry year and below normal year conditions and a 7-day running average requirement of not less than 20 percent below 1,420 cfs (1,136 cfs) regardless of the location of the 2 parts per thousand isohaline referenced in footnote 13 on page 186.
2. USBR shall consult with the United States Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NOAA Fisheries), and the California Department of Fish and Game (DFG) as environmental conditions warrant to determine required additional flows above the minimum flow requirement specified in paragraph 1, above, necessary to protect fish, wildlife and other environmental resources. USBR shall immediately notify the Chief of the Division of Water Rights (Division) of any recommended increases in flows by these agencies to protect the environment. USBR shall maintain the recommended flows unless the Chief of the Division requires different flows above 1,420 cfs.
3. Within 30 days from the date of this Order, USBR shall prepare a plan in consultation with the USFWS, NOAA Fisheries, and DFG acceptable to the Chief of the Division to prevent or mitigate for potential impacts on delta smelt, Chinook salmon and/or other environmental resources that may result from the temporary change.
4. Within 30 days from the date of this order, USBR shall prepare a plan in consultation with DWR that is acceptable to the Chief of the Division to prevent or mitigate for any potential impacts to DWR's water rights.
5. Not later than October 15, 2004, USBR shall provide to the Chief of the Division and to any parties requesting a copy, a report documenting actual flow conditions during the term of the proposed change, the amount of water that was conserved as a result of the change, and how water from New Melones Reservoir not used to meet the flow requirement was utilized.
6. All current terms and conditions of Permits 16597 and 16600 shall remain in effect, except as temporarily modified by the terms and conditions of this Order and any further Order changing the terms and condition of Permits 16597 and 16600 that may be issued during the effective period of the temporary change.
7. The temporary change in permit conditions will be effective commencing on the date of this Order and ending on July 1, 2004. However, this change is not effective during the Vernalis pulse flow period from about April 15 through about May 15. The temporary change may be renewed for additional periods of time, not to exceed 180 days from the date of renewal.
8. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this temporary change Order, are subject to the continuing authority of the SWRCB 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.

9. This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the 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.

10. I reserve jurisdiction to supervise the use of water under this Order and to coordinate or modify terms and conditions for the protection of vested rights; fish, and wildlife, instream beneficial uses; and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: February 25, 2004