

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

ORDER WR 2009-0013-EXEC

In the Matter of Specified Permits¹ of the
STATE WATER PROJECT AND THE CENTRAL VALLEY PROJECT

**ORDER DENYING TEMPORARY URGENCY CHANGE REGARDING
TEMPORARY RELAXATION OF THE FEBRUARY DELTA OUTFLOW
OBJECTIVES IN RESPONSE TO DROUGHT CONDITIONS**

BY BOARD MEMBERS ARTHUR G. BAGGETT, JR., AND CHARLES R. HOPPIN:

1.0 INTRODUCTION

On February 10, 2009, the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) (hereinafter Petitioners) filed a Petition for Temporary Urgency Change, pursuant to Water Code section 1435 et seq., to temporarily modify the requirement to meet Delta outflow objectives and San Joaquin River flow objectives contained in their water rights for the State Water Project (SWP) and Central Valley Project (hereinafter Projects). An urgent need for the proposed changes may well have existed at the time the petition was filed. Due to the passage of time and a change in hydrological circumstances from the time the petition was filed to the date of this order, however, an urgent need for the change no longer exists. Accordingly, this order denies the petition for temporary urgency change.

2.0 BACKGROUND

On June 4, 2008, citing two straight years of below-average rainfall and significant restrictions on diversions from the Delta due to various factors, including federal court actions to protect fish

¹The petition was filed for Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512 respectively) of the Department of Water Resources' State Water Project and Permits 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12727, 12860, 16597, 20245, and 16600 (Applications 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9368, 15764, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation. Petitioners also hold additional water right permits and one license to which the Delta outflow objectives apply, but they did not seek to amend those water rights.

species, Governor Schwarzenegger proclaimed a statewide drought in Executive Order S-06-08. Since then, dry conditions have persisted into the middle of February 2009, leading Petitioners to conclude that this year had “the potential to be one of the most severe drought years in California’s history” (DWR-2, p. 7). In addition, storage in the Projects’ reservoirs was reported to be at near-record low levels. (*Ibid.*)

As a result of these dry conditions, on February 5, 2009, Petitioners submitted a letter to the Executive Director of the State Water Resources Control Board (State Water Board or Board) notifying the Board of water supply and environmental concerns in the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta) watershed associated with the persistent dry conditions. Due to the water supply concerns that existed at that time, Petitioners indicated that they would be submitting a Petition for Temporary Urgency Change pursuant to Water Code section 1435 et seq. requesting temporary modifications to their water right permit requirements established in State Water Board Decision 1641 (D-1641). On February 10, 2009, Petitioners submitted a petition requesting temporary relaxation of Delta outflow and San Joaquin River flow objectives established to protect fish and wildlife beneficial uses contained in Table 3 of D-1641. (DWR-2.) The petition and supporting information are posted on the State Water Board’s website at http://www.waterrights.ca.gov/Hearings/emergency_drought.html.

The petition requested three modifications to the requirements contained in Table 3 of D-1641:

1. A waiver of the requirement commonly referred to as the “starting gate” requirement. Under this requirement (described in the third sentence of Footnote 10 to Table 3 of D-1641), either the daily average electrical conductivity (EC) or the 14-day running average daily EC at Collinsville must be less than or equal to 2.64 millimhos per centimeter (mmhos/cm) for at least one day between February 1 and February 14 when the Eight River Index (8RI)² for January is more than 900 thousand acre-feet (TAF).³ January’s 8RI was slightly higher than 900 TAF at 973 TAF, thus triggering the starting gate requirement. (DWR–2, p. 5.)

² The 8RI refers to the sum of the unimpaired runoff as published in the DWR Bulletin 120 for the following locations: Sacramento River flow at Bend Bridge, near Red Bluff; Feather River, total inflow to Oroville Reservoir; Yuba River flow at Smartville; American River, total inflow to Folsom Reservoir; Stanislaus River, total inflow to New Melones Reservoir; Tuolumne River, total inflow to Don Pedro Reservoir; Merced River, total inflow to Exchequer Reservoir; and San Joaquin River, total inflow to Millerton Lake.

³ If the best available estimate of the 8RI for January is between 650 TAF and 900 TAF, the Executive Director is delegated authority to decide whether this requirement applies. (D-1641, table 3, fn. 10)

2. A modification of the requirement described in Table 4 of D-1641 that Petitioners must maintain a daily or 14-day running average EC of 2.64 mmhos/cm (also referred to as X2) at Chipps Island for a specified number of days (referred to as Chipps Island days) or to meet a 3-day running average Net Delta Outflow Index (NDOI)⁴ of 11,400 cubic-feet per second (cfs) for a specified number of days (also referred to as Chipps Island days). The number of Chipps Island days required for February of 2009, is 24 days based on January's 8RI of 973 TAF. The Petition requested that the State Water Board waive the requirement to meet the Chipps Island day requirement. Petitioners proposed to continue to meet the Delta Outflow requirement of 7,100 cfs included in footnote 10 of Table 3 of D-1641 (page 185). In addition, if flows at Freeport exceed 20,000 cfs for 3 days, Petitioners proposed to meet the remaining Chipps Island days for February or the number of days required by D-1641, whichever is less. (DWR-2, p. 4-5.)
3. For February of 2009, a waiver of USBR's permit requirement to meet the higher San Joaquin River flow objective that is in effect when the Chipps Island day requirement described above is triggered (described in the second sentence of Footnote 13 to Table 2 of D-1641) (DWR-2, p.5). At the hearing, Petitioners withdrew their request to modify the San Joaquin River flow objective. Accordingly, modification of that objective is not discussed further in this order.

The petition explained the reasons for requesting these changes as follows:

Without a modification of the above X2 [Delta Outflow] standards, the Projects could be forced to reduce exports even further than the severe restrictions currently projected and increase releases from upstream reservoirs in February to increase the NDOI from 7,100 cfs to 11,400 cfs (approximately 8,000 acre-feet per day). Based on the January 8RI of 973 TAF, twenty-four (24) X2 compliance days are required at Chipps Island by interpolation of values in Table 4. This could result in a required release of up to nearly 200,000 acre-feet of water just to meet the February X2 requirements. By way of contrast, the outflow level for most of January was 4,500 cfs. If all the X2 requirements remain in effect as currently mandated in D-1641, these outflow targets could jeopardize the Projects' ability to meet the critical needs of California's water users, maintain cold-water reserves in upstream reservoirs for the protection of salmon and steelhead, and provide potential flows for delta smelt, salmon, or steelhead in 2009. The lack of sufficient upstream storage also has the potential to result in a

⁴NDOI is described in Figure 3 at page 190 of D-1641 and is defined as: Delta inflow minus net Delta consumptive use minus Delta exports.

“loss of control” over salinity encroachment in the Delta by late 2009 and into 2010 if conditions do not improve.

(DWR-2, p. 10-11.)⁵

3.0 HEARING TO CONSIDER THE PETITIONS

On the same day that the State Water Board received the petition, it issued notice of a public hearing for February 17, 2009, to consider the petition pursuant to the Board's regulations governing emergency drought conditions. (Cal. Code Regs., tit. 23, § 767.) The hearing was held on February 17 and 18, 2009.

The following persons and entities participated in the evidentiary portion of the hearing: DWR; USBR; the Bay Institute; California Sportfishing Protection Alliance; San Joaquin County, Central Delta Water Agency, and South Delta Water Agency; Environmental Defense Fund; Dr. Russell T. Brown; San Luis and Delta-Mendota Water Authority and Westlands Water District; Kern County Water Agency and the State Water Contractors; Butte Environmental Council; and Stockton East Water District. A number of persons and entities also submitted policy statements.

Following receipt of the petition and issuance of the hearing notice, several precipitation events occurred resulting in increased inflows to the Delta. According to the California Data Exchange Center website (<http://cdec.water.ca.gov/river/rivcond.html>), by the first day of the hearing on February 17, 2009, flows in the Sacramento River at Freeport were in excess of 20,000 cfs. Flows at Freeport also exceeded 20,000 cfs on February 18th and 19th.⁶ Despite the precipitation events, Petitioners maintained their request at the hearing to change Delta outflow requirements.

⁵ The United States Fish and Wildlife Service assisted with preparation of the Petition for Temporary Urgency Change and agrees with the statements in the petition regarding impacts to fish and wildlife.

⁶ We take official notice of the fact that Sacramento River flows at Freeport have exceeded 20,000 cfs for at least three days in February. Official notice is taken pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the State Water Board to take official notice of matters that may be judicially noticed), and pursuant to Evidence Code section 452, subdivision (h) (authorizing judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

4.0 THE LAW GOVERNING TEMPORARY URGENCY CHANGE PETITIONS

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; and
- (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 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. (*Id.*, subd. (d).) The Board must promptly consider and may hold a hearing on any objection. (*Id.*, subd. (e).) State Water Board Resolution 2007-0057 delegates to the Board Members individually the authority to

hold a hearing, if necessary, and act on a temporary urgency change petition. (Resolution 2007-0057, ¶ 2.2.)⁷

5.0 THE PROPOSED CHANGES ARE NOT SUPPORTED BY AN URGENT NEED

As discussed above, before issuing a temporary urgency change order, the State Water Board must find that there is an urgent need to make the proposed change. (Wat. Code, § 1435, subd. (b)(1).) As explained below, there is no urgent need supporting approval of Petitioners' proposed changes to the Delta outflow requirements.

At the time Petitioners filed their petition, they had apparent reason to believe that their need was urgent. Based on then-existing hydrologic conditions, including ongoing drought conditions, extremely dry conditions in January and predicted future conditions, Petitioners believed it was necessary to seek changes in the Delta outflow requirements for the month of February. Circumstances have, however, changed since Petitioners filed their request for a temporary urgency change on February 10, 2009; an urgent need to make the changes they request therefore no longer exists.

5.1 The Starting Gate Requirement

It is too late to grant one of the changes that Petitioners seek, namely a waiver of the starting gate requirement, which must be met for at least one day between February 1 and February 14. By the time the State Water Board considered the change at its February 17-18 hearing, the applicable time period for complying with this requirement had ended. The State Water Board cannot retroactively change the terms and conditions of a water right permit or license, and thereby somehow annul a violation after it has occurred. Moreover, assuming, *arguendo*, that the State Water Board could retroactively waive the starting gate requirement after the time to meet the requirement has passed, a retroactive approval would do nothing to maximize the beneficial use of water or prevent waste. Therefore, the need for a retroactive change does not constitute an "urgent need" as defined in section 1435, subdivision (c) of the Water Code.

Our inability to make changes retroactively serves to underscore the importance of filing any future temporary urgency change petitions in a timely manner so that the State Water Board has

⁷ The Deputy Director for Water Rights may act on a temporary urgency change petition if there are no objections to the petition. (Resolution 2007-0057, ¶ 4.4.1.)

an adequate amount of time to review and act on the petitions before the requested changes are needed. We recognize that it may be difficult under certain circumstances to predict whether or precisely what changes may be needed. Nonetheless, we urge Petitioners to file as early as possible any petitions for changes that Petitioners believe may be needed in light of projected future conditions.

During the hearing, DWR's representative indicated that one of the reasons why DWR desires retroactive changes to its water right permits is to protect DWR from potential enforcement action. Although the issue of whether to take enforcement action is not the subject of this proceeding, we would like to inform petitioners that, based on the record of this proceeding and the circumstances of this case, including the ongoing drought, we do not recommend taking enforcement action in response to Petitioners' failure to meet the starting gate requirement during the month of February.

5.2 The Chipps Island Requirement

The remaining changes that Petitioners have requested are no longer necessary due to a change in circumstances that has occurred since the petition was filed. Petitioners ask the State Water Board to modify the requirement to meet X2 at Chipps Island in the month of February by allowing them to instead meet the requirement by maintaining a daily NDOI of 7,100 cfs, calculated as a three-day running average, at Collinsville. Their petition further specifies that "if sufficient precipitation occurs such that the Sacramento River inflow as measured at Freeport exceeds 20,000 cfs for at least 3 days in February, then Reclamation and DWR would meet X2 compliance at Chipps Island for the remainder of February or for the number of days called for in Table 4 [of D-1641], whichever is less." (DWR-2, pp. 4-5.)

As discussed above, between the time that the State Water Board received the petition and noticed the hearing on February 10, and the beginning of hearing on February 17, a series of precipitation events occurred in the Bay-Delta watershed causing flow conditions throughout the watershed to increase substantially. Additional precipitation events are also predicted for the remainder of the month of February. At various points during the hearing, DWR's witness, Mr. John Leahigh, testified that he had great confidence that the Projects could meet the Chipps Island requirement and that Delta outflow was likely to be above 11,400 cfs for the remainder of the month. Accordingly, based on DWR's own evidence at the hearing, Petitioners are able to meet the requirement for the rest of the month. There can be no urgent need to change the

Delta outflow requirement for the rest of the month of February if it is likely to be met during that time.

Moreover, as discussed above, Petitioners have proposed to meet the Chipps Island requirement for the remainder of February if there is sufficient precipitation such that Sacramento River inflow exceeds 20,000 cfs for at least three days. Sacramento inflow exceeded 20,000 cfs for three days from February 17 through 19. Accordingly, even if the State Water Board were to approve the proposed change, by the very terms of that change, Petitioners would not alter Project operations. Thus, the change is not necessary to ensure that water is put to full beneficial use and not wasted, in furtherance of constitutional policy, and therefore an urgent need for the change does not exist.

6.0 CONCLUSION

For the reasons explained above, the record in this proceeding does not support a finding that Petitioners have an urgent need for the changes they have requested. We are satisfied that Petitioners filed their temporary urgency change petition in good faith based on the circumstances that existed at the time of filing. Since that time, however, circumstances have changed, and an urgent need for the requested changes no longer exists. Accordingly, the petition should be denied. Because we are denying the petition, we need not make findings regarding any of the other issues raised in this proceeding, including the issue of whether the proposed changes are exempt from California Environmental Quality Act requirements,⁸ or whether the proposed changes would injure any other lawful user of water or unreasonably affect fish, wildlife, or other instream beneficial uses.

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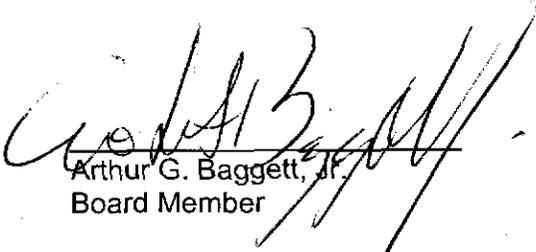
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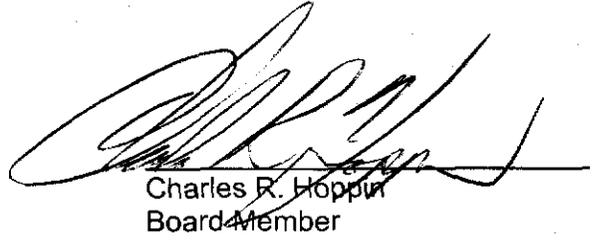
⁸ CEQA does not apply to the State Water Board's action to deny an application or change petition. (Pub. Resources Code, § 21080, subd. (b)(5).)

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition for temporary urgency change under Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512, respectively) of the Department of Water Resources and Permits 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12727, 12860, 16597, 20245, and 16600 (Applications 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9368, 15764, 14858A, 14858B, and 19304, respectively) of the U.S. Bureau of Reclamation is denied.



Arthur G. Baggett, Jr.
Board Member



Charles R. Hoppin
Board Member

Dated: **FEB 24 2009**