

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

DIVISION OF WATER RIGHTS

ORDER WR 2009-0056-EXEC

In the Matter of Permit 10477 (Application 12842)

North San Joaquin Water Conservation District

ORDER APPROVING TEMPORARY URGENCY CHANGE

SOURCE: Mokelumne River tributary to San Joaquin River

COUNTY: San Joaquin

BY THE EXECUTIVE DIRECTOR:

1.0 SUBSTANCE OF PETITION

On July 30, 2009, the North San Joaquin Water Conservation District (District) filed a Petition for Temporary Urgency Change under Water Code Section 1435 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). With the petition, the District requests relief from a condition included in Order WR 2006-0018-DWR issued pursuant to water right Permit 10477 that limits the quantity of water that can be diverted to underground storage. The District requests that it be allowed to divert 1,000 acre-feet (af) to underground storage from August 20, 2009 through February 28, 2010. This water is requested as an addition to the 1,000 af per annum (afa) allowed by Order WR 2006-0018-DWR. This modification will not increase the total amount of water that can be diverted under Permit 10477.

2.0 BACKGROUND

2.1 History of Permit 10477

Permit 10477 was issued on July 3, 1956 pursuant to Application 12842, for direct diversion of 500 cubic feet per second (cfs) and storage of 50,000 afa from about December 1 of each year to July 1 of the succeeding year. Beneficial uses include irrigation, domestic, municipal, recreational and industrial uses. In a 1992 approval of a petition for time extension, Permit 10477 was limited to a total combined maximum direct diversion rate of 80 cfs with no more than 40 cfs being diverted at any one facility, and direct diversion and diversion to storage were limited to a combined total of 20,000 afa.

2.2 Conjunctive Use Project

In 2002, the District was awarded a CALFED grant for a conjunctive use pilot project, the North San Joaquin Pilot Recharge Project (Bureau of Reclamation Cooperative Agreement 02FC200107). The pilot project involved the construction of two four-acre infiltration ponds and the District initially proposed to divert 1,000 afa to the ponds. Water discharged to the infiltration ponds was proposed to be stored underground and eventually be pumped out for either irrigation purposes or discharged back into the San Joaquin River for fish and wildlife preservation purposes. In May 2004, in order to implement the pilot conjunctive use project, the District filed a petition to include a new point of diversion/rediversion on the Mokelumne River and to add underground storage as a place of storage to Permit 10477.

On November 30, 2006, Order WR 2006-0018-DWR was issued to the District allowing the new point of diversion/rediversion and the diversion of water to underground storage.¹ However, the diversion to underground storage was limited to 1,000 afa. Condition 1(a) of Order WR 2006-0018-DWR, the subject of this petition for temporary urgency change, reads as follows:

Term 2 of the permit is amended to add the following point of diversion and rediversion:

California Coordinate System of 1927, Zone 3, North 603,200 feet and East 1,793,790 feet in the SE 1/4 of NW 1/4 of Section 33, T4N, R7E, MDB&M.

No water shall be diverted at this point of diversion until permittee informs the Division of Water Rights in writing, with a copy to the Department of Fish and Game, that it has complied with **Terms 15, 23**, and any other provision of this permit requiring the installation of fish screens prior to diverting water.

The water appropriated at this point of diversion shall be limited to the quantity that can be beneficially used and shall not exceed 1,000 acre-feet per annum to be collected to underground storage at a maximum rate of 10 cubic feet per second from December 1 of each year to July 1 of the succeeding year.

2.3 Description of the Temporary Urgency Change

The San Joaquin Groundwater Basin is in a state of critical overdraft and the local agencies within the basin are working on replenishing the basin through the recharge of surface water into the groundwater basin. The District estimates the average annual overdraft of the basin, within District boundaries, at 50,000 afa. The District further estimates the total overdraft in the District to be between 500,000 to 750,000 af. Groundwater levels in the District have declined by as much as 80 to 100 feet in some locations.

The District has determined that its initial estimates for groundwater recharge at the pilot recharge project were too conservative. This is the first year that the District has operated its project. By July 2009, 600 af had been put into underground storage. The District now estimates that they will reach the maximum authorized amount of 1,000 afa for underground storage by August 20, 2009, and the District then will have to cease diversions to underground storage.

In an attempt to maximize use of its project, the District has requested the State Water Board allow an increase in the total amount of water diverted to underground storage from 1,000 afa to 2,000 afa. This will not increase the total amount of water that the District is allowed to appropriate under Permit 10477. For the remainder of 2009, all of the water that will be directed to underground storage under the temporary urgency change petition is water previously collected to storage at Camanche Reservoir during the Permit 10477 diversion season of December 1 through July 1. During 2010, water may be stored in the groundwater basin in lieu of Camanche Reservoir.

3.0 COMMENTS REGARDING THE PETITION

The State Water Board issued a public notice of the temporary urgency change petition on August 4, 2009 and received written comments from the California Sportfishing Protection Alliance (CSPA), East Bay Municipal Utility District (EBMUD) and Kenneth and Marion Bond.

¹ State Water Board Order WR 2008-0016 partially set aside the portion of Order WR 2006-0018-DWR concerning an extension of time. The State Water Board did not reconsider the portion of the Order WR 2006-0018-DWR relating to Division's approval of the changes in the point of diversion and place of storage and those approvals remain in effect. (State Water Board Order WR 2007-0005, p. 1, fn. 1.)

3.1 California Sportfishing Protection Alliance

CSPA objected to the proposed temporary urgency change by letter dated August 17, 2009. CSPA objected based on the following three issues: 1) approval of the change would create a waste of water when the water could be used for irrigation, environmental, or municipal purposes; 2) there is no assurance that water diverted under this petition will be diverted to storage or will replenish the groundwater basin as is stated in the petition; and 3) the manner and place to which water stored in the groundwater basin would be put to beneficial use is unclear.

Regarding issue 1, CSPA asserts that approval of the petition would create a waste of water. CSPA did not provide any substantiation for its claim that underground storage is a wasteful method of diversion. Water Code section 1242 provides that underground storage constitutes a beneficial use if the stored water is subsequently applied to the beneficial uses for which the diversion to storage was made. Pursuant to Order WR 2006-0018-DWR, Permit 10477 was amended to add underground storage with subsequent application to irrigation, water quality, and fish and wildlife preservation and enhancement uses as the purposes of use. These ultimate uses of water are similar to the beneficial uses of water to which CSPA suggests the water should be applied.

Regarding issue 2, CSPA indicates that the water will not be stored in the groundwater basin. Water previously stored in Camanche Reservoir will be rediverted to the groundwater basin. Also, once the Permit 12842 diversion season begins on December 1, until the end of the temporary change period on February 28, 2010, water may be directly routed to the groundwater basin for storage. The water will be withdrawn from the basin using extraction wells once the irrigation season begins or later, as needed for water quality enhancement purposes.

It appears that CSPA's principal concern is that the water diverted to groundwater storage will not be used to address the overdraft problem in the groundwater basin, but instead, will be promptly extracted for beneficial use. The State Water Board considered a similar issue when it adopted Order WR 2008-0016, which conditionally approved the District's petition for extension of time, and the Board imposed various requirements on the District to ensure that its approval would not exacerbate critical overdraft or water quality problems in the groundwater basin. The applicable monitoring, reporting, and planning measures imposed in that order will help to ensure that the District monitors its diversion and storage, avoids waste and unreasonable use, and identifies measures to address overpumping when appropriating water under its permit.

Regarding issue 3, this appears to be a request for information rather than an objection to the proposed change. As authorized under its permit and State Water Board orders, the District will use the water within its service area, and if water is pumped from the groundwater basin and discharged to the stream, it will serve the purposes of water quality enhancement and fish and wildlife preservation and enhancement.

3.2 EBMUD

By letter dated August 14, 2009, EBMUD commented on the temporary urgency petition, seeking conditions or clarifications on any State Water Board approval of the petition that would avoid adverse impacts to EBMUD's operations. EBMUD did not otherwise object to the proposed temporary urgency change.

Permit 10477 allows the District to directly divert from the Mokelumne River during the season of December 1 to July 1, provided water is available that is surplus to EBMUD needs. Because the District has no surface storage facilities, EBMUD stores water in Camanche Reservoir for later use by the District subject to an agreement between the two agencies. The agreement stipulates that EBMUD stores up to 20,000 afa of water for the District when space is available in EBMUD's Mokelumne River reservoirs, and releases water from storage in Camanche Reservoir from July 1 through November 5 (in years when water is available for the District), for rediversion downstream by the District.

EBMUD commented that the District's proposed time period for the temporary urgency change includes the entire month of November, and that, as explained above, EBMUD does not release water for the District's use from November 6 through November 30. Therefore, during that period of time the District will not be able to divert water from the Mokelumne River (that was previously stored in Camanche Reservoir) to underground storage. This order incorporates the diversion season limitation on the District.

EBMUD also commented that releases from Camanche Reservoir are in part regulated by the Federal Energy Regulatory Commission's Joint Settlement Agreement (JSA) signed by EBMUD, the California Department of Fish and Game (DFG) and the United States Fish and Wildlife Service. The JSA includes flow and non-flow measures to protect fish and wildlife resources in the lower Mokelumne River system. The JSA dictates that during the low flow periods in the non-irrigation season, EBMUD release water to meet minimum flow requirements for the Mokelumne River fishery below Camanche Dam. A bypass provision was included as Term 22 in Permit 10477 when it was amended in 1992. Term 22 reads as follows:

The North San Joaquin Water Conservation District shall allow any water bypassed or released from Camanche Reservoir by the East Bay Municipal Utility District under permitted Application 13156 for the protection and/or enhancement of fish and wildlife to continue downstream. Nothing in this permit shall be construed as authorizing the North San Joaquin Water Conservation District to appropriate said flows.

Therefore, EBMUD emphasized that unless there are flood flows in the river, there will be no water available for the District to divert under their temporary urgency petition from November 5 through February 28. Approval of this temporary urgency change only allows an increase in the quantity of water directed to underground storage. All other terms of Permit 10477 and any subsequent orders issued pursuant to the permit will be in full effect. The District is authorized to directly divert water from about December 1 to July 1. Therefore, the District will only directly divert water from December through February for use under this temporary urgency change should natural flow in the Mokelumne River be in excess of the JSA flows at that time.

3.3 Kenneth and Marion Bond

Kenneth and Marion Bond objected to the petition for temporary urgency by letter dated August 11, 2009. The Bonds stated that the water in the District's boundaries needs to remain within those boundaries and should not be diverted for special interests or monetary gains.

The temporary urgency change will increase underground storage for subsequent use within the District. Therefore, there is no basis for the objection.

4.0 COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

The District, as Lead Agency as defined in the California Environmental Quality Act (CEQA), prepared a Notice of Exemption for this project. The Notice of Exemption states that the proposed action is exempt from CEQA under title 14, section 15301; Class 1, Existing Facilities, because the project involves the operation of a pre-existing point of diversion that is already in use for the same purpose.

The State Water Board has reviewed the information submitted by the District and has determined that the petition qualifies for an exemption from CEQA under title 14, section 15301, Existing Facilities. This class of categorical exemption includes the operation and permitting of existing facilities involving negligible or no expansion of use beyond that existing at the time of the agency's determination. (Cal. Code Regs., tit. 14, § 15301.) As conditioned in this order, the proposed temporary urgency change will not cause an increase in annual total diversions above the annual maximum diversion during any of the last ten years. The State Water Board will issue a Notice of Exemption for the temporary urgency change.

5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY URGENCY CHANGE

Chapter 6.6 of part 2, division 2, of the Water Code, commencing with 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 urgency change order. The State Water Board's regulation, at California Code of Regulations, title 23, section 791, subdivision(e), provides that the State Water Board 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 Water Code section 1435 are applicable to temporary urgency changes to terms and conditions of water right permits and licenses.

The State Water Board must make the findings specified in section 1435, subdivision (b), when issuing a temporary urgency 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; and
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, subdivision (c), an urgent need to make a proposed change exists when the State Water Board concludes that the proposed temporary urgency 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. However, the State Water Board shall not find the need urgent if it concludes that the petitioner has failed to exercise due diligence in petitioning for a change pursuant to other appropriate provisions of the Water Code. In this case, an urgent need exists due to the state of critical overdraft in the San Joaquin Groundwater Basin. A recent study of groundwater in California's Central Valley by the U.S. Geological Survey has determined that the San Joaquin Valley groundwater aquifer levels have dropped nearly 400 feet since 1961. USGS has indicated that the current drought in the Central Valley has aggravated the problem as recent groundwater levels have dropped back down close to historical lows. The District has already directed over 900 af to underground storage. Although it initially underestimated the amount of water that could be diverted and put into underground storage, the District has a unique opportunity to maximize groundwater recharge for its conjunctive use pilot project with this temporary urgency change petition. The District also has filed a long-term change petition with the State Water Board to change the place of use, purpose of use, and add underground storage under Permit 10477.

5.2 No Injury to Other Legal Users of Water

Until November 5, 2009, the water that will be directed to underground storage pursuant to the temporary urgency change petition has already been collected to storage in Camanche Reservoir. EBMUD is contractually obligated to release this water to the District. The water released by EBMUD for redirection by the District is neither water that is subject to appropriation, nor considered natural flow in the river subject to diversion by downstream riparian users. From December 1, 2009 through February 28, 2010, the District will be operating within the diversion limitations of Permit 10477. At all times, the District must comply with terms of its permit. For example, the District will not be allowed to divert water required to meet JSA flows. Therefore, the District will not injure the EBMUD water rights. Consequently, there will be no injury to other legal users of water.

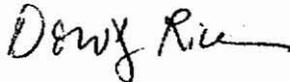
ORDER

NOW, THEREFORE, IT IS ORDERED THAT the petition filed by the District for temporary urgency change in Permit 10477 is approved.

All existing terms and conditions of the subject permit, and orders issued pursuant to the subject permit remain in effect, except as temporarily amended by the following provisions:

1. The water appropriated at the point of diversion/rediversion located at California Coordinate System of 1927, Zone 3, North 603,200 feet and East 1,793,790 feet, in the SE 1/4 of NW 1/4 of Section 33, T4N, R7E, MDB&M shall be limited to the quantity that can be beneficially used and shall not exceed 1,000 afa to be collected to underground storage at a maximum rate of 10 cfs from the date of this Order until February 28, 2010. This water is in addition to the 1,000 af allowed by Order WR 2006-0018-DWR. No water shall be diverted from November 6, 2009 through November 30, 2009.
2. Using diversions during any of the last ten years as a measurement baseline, the District shall reduce its diversion at the original points of diversion authorized under Permit 10477 by an amount equal to the quantity of water directed to groundwater recharge under this order. This action is required to negate any expansion of use under this temporary urgency change.
3. By April 15, 2010, the District shall report the total quantity of water recharged to groundwater pursuant to this temporary urgency order and shall report the total quantity subsequently put to beneficial use. This information shall be provided to the Division as described in the District's July 29, 2009 Revised Measuring Device Compliance Plan, which is Condition 8 of Order WR 2008-0016.

STATE WATER RESOURCES CONTROL BOARD



Dorothy Rice
Executive Director

Dated: 9-01-09