

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

**DIVISION OF WATER RIGHTS**

---

**In the Matter of Permit 20063 (Application 28465)**

**Malacha Hydro Limited Partnership**

**ORDER APPROVING TEMPORARY URGENCY CHANGE**

---

SOURCE: Pit River

COUNTY: Lassen

---

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

**1.0 SUBSTANCE OF TEMPORARY URGENCY CHANGE PETITION**

On April 4, 2014, Malacha Hydro Limited Partnership (Malacha or Petitioner) filed a Temporary Urgency Change Petition (TUCP) with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) requesting approval of a change pursuant to California Water Code section 1435. Permit 20063 is a right to directly divert water for power generation. The petition seeks to temporarily add collection to storage as a method of diversion and reduce the existing bypass flow from 50 cubic feet per second (cfs) to 25 cfs.

Any approved temporary urgent change is in effect for a maximum of 180 days from the date of the approved Order.

**2.0 BACKGROUND**

Malacha holds two water rights for its facility, as described below. The existing facilities are located within the Pit River watershed. Surface water is diverted from the Pit River by Malacha for power generation at its Muck Valley Power Plant. These diversions may be held in Collett Reservoir for later release pursuant to Permit 20445 or Malacha may generate power by direct diversion from the Pit River under Permit 20063. Water is released from Malacha's Power Plant into an afterbay and subsequently released into the Pit River at a location approximately 13 miles downstream of its point of diversion. The petition states that during the past few weeks, when surface water has been available from the Pit River over 50 cfs (the bypass flow for Permit 20063), water was diverted into Collett Reservoir for temporary regulation. On April 3, 2014, 6,050 acre-feet (af) of water was being held in Collett Reservoir. Absent approval of the proposed changes, direct diversions by Malacha would occur when flows in the Pit River at its point of diversion were more than 50 cfs and the reservoir could only be used for pass-through direct diversion and temporary regulation in accordance with California Code of Regulations, title 23, section 657 ("direct diversion of water to a tank or reservoir in order that the water may be held for use at a rate other than the rate at which it may be conveniently diverted from its source.") The Malacha facilities are located upstream of Pacific Gas and Electric Company's (PG&E) Pit River power facilities.

Permit 20063:

Permit 20063 authorizes direct diversion of 700 cfs from the Pit River throughout the year. Diversion is contingent on maintaining a minimum bypass of 50 cfs, or the natural streamflow, whichever is less. The permit does not have standard condition 91 (Term 91), which curtails diversions when certain Delta conditions are occurring. The TUCP was filed for this water right. Water Quality Certification pursuant to Clean Water Act Section 401 was waived for direct diversion for power pursuant to this right. The right does not include any reference to PG&E's senior rights in the watershed, likely because water directly diverted for power returns to the stream system, above PG&E's point of diversion, within a short time period.

Permit 20445:

Permit 20445 (Application 29300) authorizes collection to storage of 19,500 acre-feet per annum (afa) in Collett Reservoir. The diversion season is October 1 of each year to May 31 of the succeeding year. Collection to storage is contingent on maintaining an instream flow of 1,200 cfs. This right is subject to Clean Water Act Section 401 Water Quality Certification conditions and Term 91. Term 91 requires curtailment of water diversion when specific Delta conditions are in effect. The permit is also subject to the prior rights of PG&E under Applications 1891, 1892, 14743, 14928 and 15407 and downstream parties, such as the parties listed in the Pit River Stream System Decree 6395. As noted in the petition, current and anticipated hydrologic conditions in the Pit River limit the opportunity to utilize Permit 20445 this year.

### **3.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

The State Water Board is lead agency pursuant to CEQA. The State Water Board will issue a Notice of Exemption.

### **4.0 PUBLIC NOTICE OF THE TEMPORARY URGENCY CHANGE PETITION**

The State Water Board will issue, as soon as practicable, a notice of the TUCP pursuant to Water Code section 1438. Pursuant to Water Code section 1438, subdivision (b)(1), Malacha is required to publish the notice in a newspaper having a general circulation, and that is published within the counties where the points of diversion are located. The State Water Board will post the notice of the temporary urgency change and the TUCP (and accompanying materials) on its website. The State Water Board will also distribute the notice through an electronic notification system. Pursuant to Water Code section 1438, subdivision (a), the State Water Board may issue a temporary urgency change order in advance of the required notice.

### **5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY URGENCY CHANGE**

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 for a conditional temporary change order. The State Water Board's regulations set forth the filing and other procedural requirements applicable to TUCPs. (Cal. Code Regs., tit. 23, §§ 805, 806.) The State Water Board's regulations also clarify that requests for changes to permits or licenses other than changes 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 changes in point of diversion, place of use, or purpose of use. (*Id.*, § 791, subd. (e).)

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

1. The Petitioner 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).)

### **5.1 Urgency of the Proposed Change**

The Petitioner states that based on Department of Water Resources Bulletin 120 publication for March 2014, Water Year 2014 is preliminarily classified as a critically dry year type according to the Sacramento Valley Water Year Type Index (40-30-30). In addition, Bulletin 120 indicates that the forecasted unimpaired runoff into the Pit River at a 50% exceedance is 580,000 acre-feet during April through July, which is 55% of the average runoff of 1,046,000 acre-feet.

Petitioner asserts that reducing the bypass flow to 25 cfs would allow it to generate power when it otherwise could not do so, particularly following rainfall events that could occur at any time. To address one of the State Water Board's concerns, Petitioner has agreed to inclusion of Term 91 in any order on the TUCP. Petitioner asserts that the change increases water collected to storage in Collette Reservoir for power generation, which will provide operational flexibility.

The change would provide the ability to produce additional hydropower generation during the current drought that would otherwise not be produced. On the facts presented, the change constitutes an urgent need necessitating approval of a TUCP.

### **5.2 Governor's 2014 Drought State of Emergency Proclamation**

On January 17, 2014, Governor Edmund G. Brown Jr. issued a Proclamation of a Drought State of Emergency (Proclamation). The Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmer's long-term investments at risk. The conditions also threaten the survival of animals and plants that rely on California's rivers, including many species in danger of extinction. Although the Proclamation does not specifically address hydropower generation, it does direct the Water Board to consider modifying reservoir releases or diversion limitations, where existing requirements were established to implement a water quality control plan. This situation does not apply to Permit 20063 because Water Quality Certification was waived, but it does apply to the overall operation of the hydroelectric project.

### **5.3 No Injury to Any Other Lawful User of Water**

The TUCP asserts that PG&E is not opposed to the proposed changes. By email dated April 18, 2014, Kevin Richards, of PG&E Water Management stated that "PG&E is not opposed to the TUC as written, and our discharge requirements will not be affected."

Direct diversion for power generation is a non-consumptive use of water. The water is returned to the stream system shortly after it is taken under control. However, collection to storage for power generation results in water being absent from the stream system for a longer period of time. This creates the potential for injury to other water rights. Also, some water is lost to reservoir evaporation and seepage. The current request to add storage to Permit 20063 would have the effect of converting a non-consumptive water right to a water right that has potential consumptive losses associated with storage. Furthermore, pursuant to the current petition, the rate and timing of flows would change, shifting when water is returned to the stream system and potentially reducing the quantity returned to the stream due to reservoir evaporation and seepage losses. However, such losses would be minimized by the brief storage period and limited evaporation losses than occur in April and May.

The petition cites State Water Board Decision 940 (D-940) for the proposition that a direct diversion right can be converted to a storage right; however the petition does not address the difference between conversion of a direct diversion right for consumptive use, with no change in rate of diversion from the stream or the period of the year during which water is diverted, as was the case in D-940, and conversion of a direct diversion right for non-consumptive to a non-consumptive storage right. Where the potential impacts of conversion of a consumptive right were mitigated or eliminated by the limitations on rate and season in D-940, the change in timing and magnitude of the flows, along with potentially increased losses from evaporation and transpiration, may cause injury to the rights of others in the non-consumptive use situation. The petition also notes that Order WR 2009-0061 allows a change from a storage right to direct diversion (or vice-versa) as a change in what is done with water after it is diverted from the natural streamflow and therefore does not per se result in an expansion of a water right.

Petitioner does not address whether legal users of water, other than PG&E, could be injured due to the change. The Pit River watershed includes many other legal users of water, including the persons listed in the Pit River Stream System Decree 6395. Water users throughout the region, including the State Water Project (SWP) and the federal Central Valley Water Project (CVP) are also experiencing shortages in 2014 and could be impacted by upstream changes that reduced instream flows. Although Malacha intends to release stored water for later power production, such releases may not offset water lost when Malacha puts water in storage if the releases occur outside of the authorized diversion seasons of the other legal users. To limit any potential impacts to other downstream users, the collection to storage period shall end on May 31, 2014. With this limitation, and considering both the size of the change in bypass and timing for releases, potential injury to other users is adequately addressed by conditions of this Order.

Petitioner agreed to inclusion of Term 91 in any change order. However, this condition alone does not address all potential bases for injury to other legal users of water. The potential for injury includes extension of the storage collection season which would result if the petition is approved. Currently, Petitioner's authorized storage collection season ends on May 31. This order limits the collection season under Permit 20063 to the same season as under Petitioner's existing storage right.

The petition indicates that by April 3, 2014, Malacha had put 6,050 af in Collette Reservoir when it was bypassing 50 cfs and would like to retain that water in storage for later power generation. In accordance with California Code of Regulations, title 23, section 657, Petitioner is entitled to hold some water, for less than 30 days, "for use at a *rate* other than the rate at which it may be conveniently diverted from the source." (Italics added.) Water held for later use constitutes storage and, unless covered by Permit 20445, is not authorized by Permit 20063. (Cal. Code Regs., tit. 23, § 658) Petitioner has provided no evidence of any analysis showing that reduction in downstream flows, when such diversion would not otherwise occur under the storage right, is not injurious to all other legal users of water, such as the decreed right holders on the Pit River and other parties experiencing shortages in their 2014 water supply, like the SWP and CVP and their contractors. However, the stream reach below Petitioner is highly regulated by PG&E's Pit River facilities. These facilities include reservoir storage. PG&E releases water from its facilities in accordance with a power generation protocol and minimum instream flow requirements. Accordingly, any impact downstream of the regulated stream reach is likely to be either non-measurable or minimal. Further, the proposed conditions address potential injury.

Based on the above, with inclusion of the proposed conditions, the State Water Board finds that there would be no injury to other legal users of water from the change.

#### **5.4 No Unreasonable Effect upon Fish, Wildlife, or Other Instream Beneficial Uses**

On March 24, the petitioner requested concurrence of California Department of Fish and Wildlife (CDFW) with a proposal for a temporary reduction in project bypass flows. On March 25, 2014, CDFW indicated that it supports a one-time reduction in bypass flow to 25 cfs during the drought conditions. The conditional approval was based on the project description, which states that Malacha would use water collected in

Collette Reservoir to augment the natural flow, to assist in supplementing the available flows in the Pit River when the natural flow is less than 25 cfs.

CDFW notes that it has been documented that this stretch of the Pit River is subject to extreme fluctuations from upstream irrigation projects and natural flashy conditions that often render it with little to no river flow. Further, CDFW states that in the early 1990's, the Pit River at the project intake dried up during the summer months three years in a row. CDFW states the change, if granted, should shorten the period when the Pit River is not flowing.

CDFW concurs with the change based on the following conditions: (1) Flow collection data, as proposed by the petitioner, to be submitted to CDFW by December 31, 2014; (2) Temperature data collected as proposed below the after bay discharge and in the bypass reach just above the afterbay discharge point, at an hourly increment. Data to be reported to CDFW by December 31, 2014; (3) A minimum ramp down from 50 cfs to 25 cfs with at least one ramp down over a two hour period to be more than 10 cfs, but not less than 20 cfs. The final ramp down would then go down to the 25 cfs minimum instream flow; and (4) Concurrence with bypass flow requirement is from date of their letter through November 1, 2014, and a one-time only accommodation of the drought.

### **5.5 The Proposed Change is in the Public Interest**

Approval of the TUCP would allow Malacha to generate power needed by California during the drought that it would not otherwise be able to generate under current conditions. This additional non-greenhouse gas-producing power generation likely provides benefit to the public.

### **6.0 CONCLUSIONS**

As conditioned below, the requested change meets the requirements of Water Code section 1435.

### **ORDER**

**NOW, THEREFORE, IT IS ORDERED THAT:** the petition filed by Malacha for a 180-day temporary urgency change is approved for the period April 24 through October 21, 2014, subject to the following conditions.

1. Collection to storage is added to Permit 20063 for a season ending May 31, 2014.
2. Total combined instantaneous diversion from the Pit River by direct diversion, diversion to regulatory storage and collection to storage shall not exceed 700 cfs.
3. Any diversion to storage authorized under this order is subject to standard Term 91. Any exemption for direct diversion hydropower generation shall not apply to water stored or regulated in Collette Reservoir after the date when Term 91 Curtailment Notice is issued.

Term 91:

No diversion is authorized by this permit when satisfaction of inbasin entitlements requires release of supplemental Project water by the Central Valley Project or the State Water Project.

- a. Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the State Water Resources Control Board for maintenance of water quality and fish and wildlife. Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.

- b. Supplemental Project water is defined as that water imported to the basin by the projects plus water released from Project storage which is in excess of export diversions, Project carriage water, and Project inbasin deliveries.

The State Water Resources Control Board shall notify permittee of curtailment of diversion under this term after it finds that supplemental Project water has been released or will be released. The Board will advise permittee of the probability of imminent curtailment of diversion as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the Project operators.

(0000091)

4. Any diversion authorized under this order is subject to any Notice of Curtailment issued by the State Water Board.
5. The required bypass flow of 50 cfs for Permit 20063 at the point of diversion is changed. Permittee shall at all times bypass a minimum flow of 25 cfs, or the natural streamflow, whichever is less.
6. Beginning October 1, 2014, storage in Collette Reservoir is covered by Permit 20445, and is subject to the bypass conditions of Permit 20445, not the conditions of this order.
7. This condition is in effect only while there is water remaining in Collette Reservoir. When reservoir storage has been depleted, supplemental flows pursuant to this condition are no longer required. Whenever natural streamflow in the Pit River exists and is less than 25 cfs, Petitioner shall provide a continuous flow of 25 cfs in the Pit River by releasing any water stored or regulated in Collette Reservoir to augment instream flow, or as otherwise agreed to by CDFW. Daily monitoring of the bypass flows, including identification of any reservoir releases, is required. All records shall be submitted to the State Water Board on the first of each month immediately succeeding any month in which the project is operated in accordance with the changes authorized under this order.
8. Petitioner shall maintain daily records of the amount diverted to Collette Reservoir and amount continuously bypassed at the Point of Diversion, the daily storage content at Collette Reservoir, the amount continuously discharged for power generation or otherwise discharged downstream into the Pit River to meet conditions of this Order. The daily records must include documentation that total combined instantaneous diversions from the Pit River by direct diversion, regulation and collection to storage did not exceed 700 cfs. All records shall be submitted to the State Water Board on the first of each month immediately succeeding any month in which the project is operated in accordance with the changes authorized under this order. Copies of the flow data shall be submitted to DFW by December 31, 2014. Authorization to collect water in storage is contingent on timely record submittal.
9. Petitioner shall collect temperature data below the Afterbay discharge and in the bypass reach just above the Afterbay discharge point in hourly increments. The temperature data shall be submitted to the CDFW and the State Water Board by December 31, 2014.
10. Petitioner shall, at a minimum, ramp down from 50 cfs to 25 cfs with at least one ramp down over a two hour period to be more than 10 cfs, but less than 20 cfs. The final ramp down would then go down to the 25 cfs minimum instream flow.
11. This Order does not authorize any act that results in the taking of a candidate, threatened or endangered species, or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 to 1544). If a "take" will result from any act authorized under this Order, the Petitioner shall ensure authorization for an incidental take permit is obtained prior to operation of the project.

12. The State Water Board reserves jurisdiction to supervise the temporary urgency change under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest as future conditions may warrant.
13. The temporary urgency changes authorized under this Order shall not result in creation of a vested right, even of a temporary nature, but shall be subject at all times to modification or revocation in the discretion of the Board. The temporary urgency changes approved in this Order shall automatically expire 180 days after the date of issuance, unless specifically noted in this order, or upon revocation of this order.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

*Barbara Evoy, Deputy Director  
Division of Water Rights*

Dated: April 24, 2014