

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2005 - 0009

In the Matter of
Permits and Licenses¹
of the

**CALIFORNIA DEPARTMENT OF WATER RESOURCES
AND THE
UNITED STATES BUREAU OF RECLAMATION**

SOURCE: Sacramento and San Joaquin rivers and their tributaries, and the
Sacramento-San Joaquin Delta Estuary

COUNTY: San Joaquin

ORDER DENYING PETITION FOR TEMPORARY URGENCY CHANGE

BY CHAIR BAGGETT²:

1.0 INTRODUCTION

On February 18, 2005, the United States Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) jointly filed a petition for temporary urgency change with the State Water Resources Control Board (State Water Board). Simultaneously, these parties also filed a long-term petition for change that will be processed routinely and is not the subject of this order. The petition for a temporary urgency change requests temporary relief from the requirement in the Bureau's and the DWR's water right permits, that the Bureau and the DWR meet the salinity objective of 0.7 millimhos per centimeter (mmhos/cm) Electrical

¹ The DWR seeks a change in its Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A), and the Bureau seeks a change in its License 1986 (Application 23) and in its Permits 11885, 11886, 12721, 11967, 11887, 12722, 12723, 12725, 12726, 12727, 11315, 11316, 16597, 20245, 11968, 11969, 11970, 12860, 11971, 11972, 11973, 12364, 16600, and 15735 (Applications 234, 1465, 5626, 5628, 5638, 9363, 9364, 9366, 9367, 9368, 13370, 13371, 14858A, 14858B, 15374, 15375, 15376, 15764, 16767, 15768, 17374, 17376, 19304, and 22316).

² Water Code section 1435(d) authorizes the State Water Board to delegate any function under chapter 6.6 (§§ 1435-1442) to any officer or employee of the board. State Water Board Resolution 2002-0106, at paragraph 1.3, delegates authority to a board member individually to authorize or decline to authorize issuance or renewal of a conditional temporary urgency change pursuant to chapter 6.6 of part 2 of division 2 of the Water Code.

Conductivity (EC) value, calculated as maximum 30-day running average of mean daily EC, for agricultural beneficial uses in the southern Delta at stations C-6, C-8, and P-12,³ from April 1, 2005 through September 28, 2005. These stations are referred to herein as the interior southern Delta stations, to distinguish them from the Vernalis station, where the DWR and the Bureau already are required to meet the 0.7 mmhos/cm EC objective.

2.0 AUTHORITY TO ACT ON A TEMPORARY URGENCY CHANGE PETITION

The State Water Board is authorized to issue a conditional, temporary change order in response to a petition for a temporary urgency change of a water right permit or license. Before issuing a change order, the board shall make all of 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.
- (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.” (Wat. Code, § 1435(b).)

“Urgent need,” in the first required finding, is defined as:

“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; except that the board shall not find a petitioner's need to be urgent if the board in its judgment concludes, if applicable, that the petitioner has not exercised due diligence either (1) in petitioning for a change pursuant to provisions of this division other than this chapter, or (2) in pursuing that petition for change.” (Wat. Code, § 1435(c).)

³ The geographic locations of these stations are: the San Joaquin River at the Brandt Bridge site (C-6), the Old River near Middle River (C-8), and the Old River at Tracy Road Bridge (P-12).

3.0 DISCUSSION

The objective for salinity at the three stations in the interior southern Delta was first established in the 1978 Delta Plan for the protection of agricultural beneficial uses in the southern Delta. The objective specifies that it is to be effective in all year types, but “is to become effective only upon the completion of suitable circulation and water supply facilities.” Footnote 4 on page VI-35 of the 1978 Delta Plan states, regarding the objective, “If contracts to ensure such facilities and water supplies are not executed by January 1, 1980, the Board will take appropriate enforcement actions to prevent encroachment on riparian rights in the southern Delta.” The 0.7 mmhos/cm EC value of the objective for April through August currently is scheduled to go into effect on April 1, 2005.

In Decision 1641 (D-1641), adopted December 29, 1999 and amended March 15, 2000, the State Water Board added condition 6 on page 159 of D-1641 to the permits of the DWR, and added condition 1 on pages 159-160 and condition 1 on pages 160-161 of D-1641 to the permits and license of the Bureau. These conditions require that under the permits and license listed herein the DWR and the Bureau meet the water quality objectives for agricultural beneficial uses in the southern Delta as specified in Table 2 on page 182 of D-1641. The salinity objective for the September through March period is 1.0 mmhos/cm. The DWR and the Bureau have been meeting the 1.0 EC objective year-round since the State Water Board adopted D-1641. Footnote 5 on Table 2 of D-1641 requires that the DWR and the Bureau meet the 0.7 EC objective at the three interior southern Delta stations for the first time commencing on April 1, 2005.⁴

During the hearing leading to D-1641, DWR’s witnesses told the State Water Board that it would complete permanent, operable, barriers in the channels of the southern Delta by 2005 to improve water levels and circulation, and that the barriers would enable the DWR and the Bureau to approach meeting the 0.7 EC objective. Meanwhile, the DWR and the Bureau have been

⁴ Footnote 5 states: “The 0.7 EC objective becomes effective on April 1, 2005. The DWR and the USBR shall meet 1.0 EC at these stations year round until April 1, 2005. The 0.7 EC objective is replaced by the 1.0 EC objective from April through August after April 1, 2005 if permanent barriers are constructed, or equivalent measures are implemented, in the southern Delta and an operations plan that reasonably protects southern Delta agriculture is prepared by the DWR and the USBR and approved by the Executive Director of the SWRCB. The SWRCB will review the salinity objectives for the southern Delta in the next review of the Bay-Delta objectives following construction of the barriers.”

constructing and removing temporary rock barriers in the channels annually. The temporary barriers help, but are not adequate to meet the 0.7 EC objective. In D-1641, adopted in March 2000, the State Water Board conditioned the permits and license of the DWR and the Bureau so that they would not be required to meet the 0.7 EC objective in April 2005 if (1) the permanent barriers had been constructed or equivalent measures were implemented and (2) the DWR and the Bureau had prepared an operations plan acceptable to the Executive Director of the State Water Board that reasonably protects southern Delta agriculture.

3.1 The Petition

In the temporary urgency change petition, the Bureau and DWR are requesting temporary relief from meeting the 0.7 EC objective during 2005. The Bureau and the DWR propose to meet the 1.0 EC objective during the April through August period, as they have since 2000, and to install temporary rock barriers and take other measures to protect agricultural beneficial uses in the southern Delta. They have filed a separate petition under Water Code section 1700, et seq., requesting relief from meeting the 0.7 EC value through December 2008.

The DWR and the Bureau state that the reason for requesting the delay is that the construction of the permanent operable barriers has been delayed by multiple factors, most of which are beyond their control. These matters include discussions with other CALFED agencies and changes in the program for improving the southern Delta agricultural and fish protection measures, including a reduction in the planned increase in pumping capacity at the Banks Pumping Plant to a maximum capacity of 8,500 cubic feet per second (cfs) rather than the 10,300 cfs capacity originally planned. In 2003 and 2004, the Bureau and DWR prepared a biological assessment as part of the process to obtain new biological opinions for Delta smelt and salmonids. The Bureau's Operations Criteria and Plan (OCAP) that it prepared as part of the biological assessment included the proposed permanent barriers and the 8,500 cfs pumping program at the Banks Pumping Plant. The biological opinions were issued in July and October 2004. In effect, the DWR and the Bureau state that the delays are due to their interactions with the CALFED agencies and with the agencies administering the federal Endangered Species Act, and are largely beyond their control. The DWR and the Bureau state that they have been pursuing this

matter diligently, that their draft EIR/EIS will be released in March 2005, and that they expect to begin operating the permanent barriers in late 2008.

The DWR and the Bureau argue that it is in the public interest for the State Water Board to delay the imposition of the 0.7 EC objective on their water right permits and license. They state that if they are required to meet the objective, they may have to release large amounts of water from upstream reservoirs. They believe that the increased flows alone, however, are unlikely to result in compliance with the objective at the three compliance stations. They argue, therefore, that efforts to comply with the 0.7 EC objective could result in a waste and unreasonable use of water in conflict with California Constitution, article X, section 2, and Water Code section 100.

Further, they argue that the necessary releases could significantly impact both the water available to meet other water quality objectives in D-1641 and the ability of the SWP and the CVP to meet their water supply obligations. They argue that without an extension of the effective date, they will be in danger of violating either the requirement in D-1641 to meet the objective or the prohibitions against waste or unreasonable use of water under California Constitution, article X, section 2, and Water Code section 100.

Further, they argue that there will be no injury to either agriculture or to the environment due to the delay because existing conditions will not change with an extension. The DWR and the Bureau currently meet the 1.0 EC objective in the southern Delta, implement the temporary barriers program, do site specific modifications to agricultural diversion, and comply with operational agreements to protect agriculture. These will continue. DWR will file a notice of exemption under CEQA for the temporary change.

DWR and the Bureau state that they expect to finalize their environmental documentation for the permanent barriers by the end of 2005. The barriers will take three years to construct.

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3.2 Requirement for Findings

As discussed in section 2.0 above, the State Water Board or its delegate must make all of the findings required by Water Code section 1435(b) before it can approve a temporary urgency change. In this case, the Department and the Bureau have waited until very close to the time when the objective will go into effect before seeking a change. Where a violation is threatened if a requirement remains in effect, and the requirement is in the public interest, the State Water Board believes that the more appropriate course is to bring the threatened violator into compliance rather than change the requirement to avoid the violation. If immediate compliance cannot reasonably be achieved, an enforcement action may include establishing a schedule of compliance. (See Wat. Code, § 1831, subd. (b).)

Based on the contents of the petition for temporary urgency change and the long history of promised channel improvements extending from the 1980's in draft agreements with the southern Delta agricultural interests, I am not convinced that two of the findings required by Water Code section 1435(b) are supported by this petition. Section 1435(b)(1) requires an urgent need to make the proposed change. To the extent that urgency may arguably exist, however, it appears to be an urgency to remove the requirement to meet the objective before it is violated, not an urgent need, as defined in section 1435(c), to make changes that further the constitutional policy requiring that water resources be put to full beneficial use and not wasted. I am not convinced that relieving the DWR and the Bureau of the requirement to meet the objective is supported by an urgent need. Delaying until a violation is imminent does not create an urgent need for a change, although it may well create an urgent need to take enforcement action.

Second, section 1435(b)(2) requires that the change be made without injury to any other lawful user of water. If there were not concerns that the high salinity is causing continuing injury to other legal users of water, the requirement would not have been necessary in the first place.

3.3 Related Proceedings

The EC objectives implemented by the condition on the permits and license of the DWR and the Bureau will be topics of consideration in March in an ongoing workshop on potential changes in

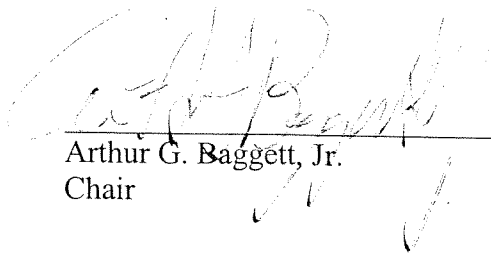
the 1995 Bay-Delta Plan. At the workshop, parties may address the question whether the EC objectives should be modified. Parties also may address the question whether the Program of Implementation in the 1995 Bay-Delta Plan should be amended to account for legal and regulatory changes or recent actions to improve habitat and meet water quality objectives.

While any changes in the 1995 Bay-Delta Plan would not have a direct effect on the conditions of the DWR's and the Bureau's water right permits and license, they could serve as a basis for the Board to consider future changes in the objectives and subsequently in the water right permits. Also, the airing of these topics in the workshop may expose information that might help the DWR and the Bureau to support a change in their permits and license. This order can be reconsidered if the DWR and the Bureau provide an appropriate cause for reconsideration as specified in the State Water Board's regulations at California Code of Regulations, title 23, sections 768-769.

ORDER

IT IS HEREBY ORDERED that the petition for temporary urgency change of Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A) of the DWR, and License 1986 (Application 23) and Permits 11885, 11886, 12721, 11967, 11887, 12722, 12723, 12725, 12726, 12727, 11315, 11316, 16597, 20245, 11968, 11969, 11970, 12860, 11971, 11972, 11973, 12364, 16600, and 15735 (Applications 234, 1465, 5626, 5628, 5638, 9363, 9364, 9366, 9367, 9368, 13370, 13371, 14858A, 14858B, 15374, 15375, 15376, 15764, 16767, 15768, 17374, 17376, 19304, and 22316) if the Bureau is denied.

Dated: 24 January 2005



Arthur G. Baggett, Jr.
Chair