

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING - DIVISION OF WATER RIGHTS
SEPTEMBER 22, 2005**

ITEM 13

SUBJECT:

PROPOSED ORDER GRANTING RECONSIDERATION OF THE APPROVAL BY THE CHIEF OF THE DIVISION OF WATER RIGHTS OF A WATER QUALITY RESPONSE PLAN FOR USE BY THE DEPARTMENT OF WATER RESOURCES AND THE UNITED STATES BUREAU OF RECLAMATION OF EACH OTHER'S POINTS OF DIVERSION IN THE SOUTHERN SACRAMENTO-SAN JOAQUIN DELTA

DISCUSSION:

State Water Board Water Right Decision 1641 (D-1641) authorizes the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) to use each other's points of diversion (referred to as joint points of diversion or JPOD) in the southern Sacramento-San Joaquin Delta. The authorization to use JPOD is subject to various conditions, including a requirement to develop a response plan for approval by the Division Chief to ensure that use of JPOD will not significantly degrade water quality to the injury of water users in the southern and central Delta.

On July 1, 2005, the Division Chief approved the April 25, 2005 Water Quality Response Plan submitted by DWR and USBR subject to various conditions. The State Water Board received four timely Petitions for Reconsideration of the Division Chief's approval from Contra Costa Water District, South Delta Water Agency, Central Delta Water Agency, and the Westside Irrigation District. All of the petitioners request reconsideration of Condition 1 of the Division Chief's approval. Condition 1 requires DWR and USBR to meet all of the conditions on their water right permits and licenses in order to use JPOD with one exception. Instead of meeting the required 0.7 mmhos/cm electrical conductivity (EC) objective at specified southern Delta locations, prior to January 1, 2009, Condition 1 allows DWR and USBR to conduct JPOD diversions if they meet an EC objective of 1.0 mmhos/cm as long as they are in compliance with the time schedule established in Draft Cease and Desist Orders 262.31-16 and 262.31-17 or any subsequent final order of the State Water Board on this matter. The petitioners argue that the Division Chief does not have the delegated authority to allow JPOD operations if the 0.7 mmhos/cm EC objective is not being met.

The proposed order grants reconsideration of the Division Chief's conditional approval of the Water Quality Response Plan and orders that this matter be considered during the upcoming State Water Board hearing to consider the above-mentioned Draft Cease and Desist Orders. Pending issuance of an order after the hearing, the proposed order suspends all of Condition 1 with the exception of the first sentence which requires DWR and USBR to meet the requirements in the April 25, 2005 Water Quality Response Plan.

POLICY ISSUE:

Should the State Water Board adopt the proposed order?

FISCAL IMPACT:

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of adopting this order.

STAFF RECOMMENDATION:

Staff recommends that the State Water Board adopt the proposed order.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**ORDER WR 2005 -**

In the Matter of Petitions for Reconsideration of the
Approval of a Water Quality Response Plan
Submitted by the Department of Water Resources and the
United States Bureau of Reclamation for Use of the
Joint Points of Diversion in the Southern Sacramento-San Joaquin Delta

ORDER PROVISIONALLY GRANTING RECONSIDERATION

BY THE BOARD:

On July 1, 2005, the Chief of the Division of Water Rights (Division) conditionally approved the April 25, 2005 Water Quality Response Plan (WQRP) submitted by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) in compliance with Condition 1.a.(5) on pages 150 and 151 and Condition 2.a.(5) on page 156 of State Water Resources Control Board (State Water Board) Decision 1641, as revised on March 15, 2000. The conditions require DWR and USBR to develop a WQRP that is acceptable to the Division Chief prior to use of each other's points of diversion in the southern Sacramento-San Joaquin Delta. The purpose of the WQRP is to ensure that water quality in the southern and central Delta will not be significantly degraded through operations of joint points of diversion (JPOD) to the injury of water users in the southern and central Delta. The plan is to be prepared with input from a designated representative of the Contra Costa Water District (CCWD). The State Water Board received four timely Petitions for Reconsideration of the Division Chief's approval of the WQRP from CCWD, South Delta Water Agency, Central Delta Water Agency, and the Westside Irrigation District.

The State Water Board's regulation at California Code of Regulations, title 23, section 768, authorizes reconsideration based upon any of the following causes:

- a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- b. The decision or order is not supported by the evidence;
- c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d. Error in law.

All of the petitioners request reconsideration of Condition 1 of the Division Chief's approval. Condition 1 requires DWR and USBR to meet all of the conditions of their water right permits and licenses in order to use JPOD with one exception. Instead of meeting the required 0.7 mmhos/cm electrical conductivity (EC) objective at specified southern Delta locations, prior to January 1, 2009, Condition 1 states that DWR and USBR may conduct JPOD diversions if they meet an EC objective of 1.0 mmhos/cm as long as they are in compliance with the time schedule established in Draft Cease and Desist Orders 262.31-16 and 162.31-17 or any subsequent final order of the State Water Board on this matter.

The petitioners allege causes for reconsideration under each of the available causes listed above. The petitioners primarily argue that the Division Chief does not have the delegated authority to allow JPOD operations if the 0.7 mmhos/cm EC objective is not being met and that they were denied a fair hearing on this matter.¹ The petitioners allege that allowing use of JPOD if the 0.7mmhos/cm EC objective is not being met will cause injury to legal users of water, injury to the environment, violation of the public trust, and unreasonable and wasteful use of water and unreasonable method of diversion. The

¹ In this regard, the petitioners suggest that the Division Chief did not follow the procedures set forth in Resolution No. 2002-0106, paragraph 2.4, which require that the Division Chief bring certain matters to the attention of the members of the Board. This is a duty that runs solely from the Division Chief to the Board when acting under this resolution. The Division Chief has not violated either this provision or any arguably broader duty to report to the members of the Board and has communicated appropriately. Further, the delegation under which the Division Chief acted in this case is not Resolution No. 2002-0106, but rather is set forth in Condition 1.a.(5) on pages 150-151 and Condition 2.a.(5) on page 156 of D-1641. As provided in Resolution No. 2002-0106, paragraph 2.3, "Enumeration of delegated authorities in this

petitioners request that the State Water Board rescind or revise Condition 1 to require compliance with the 0.7 mmhos/cm EC objectives at the interior southern Delta compliance locations as a condition of JPOD operations. The petitioners argue that the State Water Board should not consider taking the action in Condition 1 relaxing compliance with the objective without first holding a hearing.

Conditions 1a(4) on page 150 and 2a(4) on page 156 of Revised Decision 1641 require that “all other provisions of the above permits be met” as a condition of authorization of JPOD. Regardless of the Division Chiefs’ approval of the WQRP, this condition is in effect and controls the use of JPOD by the DWR and the USBR. Nevertheless, the petitioners have pled allegations that meet the pleading criteria in section 768 of the State Water Board’s regulations, cited above. Based on the importance of the central issue being raised and based on the petitioners’ allegations, which if substantiated would be adequate cause to reconsider the Division Chief’s July 1, 2005 conditional approval of the WQRP, the State Water Board will conduct a public hearing before taking final action on the petitions for reconsideration. (See Cal. Code Regs., § 770.) The State Water Board makes no judgment at this time on the merits of the Division Chief’s conditional approval or the alleged reasons to change the approval. At the hearing, State Water Board will receive evidence on what, if any, changes should be made to the Division Chief’s July 1, 2005, approval of the WQRP. The public hearing shall be conducted concurrent with the scheduled hearing on Draft Cease and Desist Orders 262.31-16 and 162.31-17 against DWR and USBR, respectively, for the threatened violation of the 0.7 mmhos/cm EC requirement at specified interior southern Delta compliance locations.

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document shall not be interpreted as revoking authorities delegated, or hereafter delegated, to the Division Chief pursuant to other Board decisions, orders, or resolutions.”

ORDER

NOW, THEREFORE, IT IS ORDERED that the petitions for reconsideration of the Chief of the Division of Water Rights' (Division) July 1, 2005 conditional approval of the April 25, 2005 Water Quality Response Plan (WQRP) are provisionally granted, subject to further action by the State Water Resources Control Board (State Water Board) after a hearing.

With the exception of the first sentence, Condition 1 of the Division Chief's July 1, 2005 conditional approval of the WQRP is suspended pending issuance of a further order of the State Water Board after a hearing to receive evidence on what, if any, changes should be made to the Division Chief's July 1, 2005, approval of the WQRP.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 22, 2005.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Debbie Irvin
Clerk to the Board