

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
NOVEMBER 18, 2008**

ITEM 5

SUBJECT

CONSIDERATION OF AN ORDER APPROVING PETITION FOR EXTENSION OF TIME AND CHANGE IN PLACE OF USE FOR A WATER RIGHT PERMIT OWNED BY KNAGGS FARMING COMPANY, L.P. -- COLUSA BASIN DRAINAGE CANAL IN YOLO COUNTY.

DISCUSSION

Knaggs Farming Company, L.P., (Knaggs Farming) has requested that the development schedule authorized by its water right permit be extended. The requested time extensions on this permit total 27 years. The State Water Board in [Resolution No. 2007-0057](#) delegated authority to the Deputy Director for Water Rights to grant time extensions when the period of extension, in combination with all extensions previously granted under delegated authority, does not exceed 15 years. The requested time extension on Permit 13861A exceeds the delegated authority and thus requires Board approval.

On February 15, 1963, the State Water Board's Division of Water Rights (Division) issued water right Permit 13861 authorizing direct diversion of 65.36 cubic feet per second (cfs) from the Colusa Basin Drain and the Sacramento River. The permit was subsequently assigned to Hershey Land Company and Knaggs Farming Company, L.P. (Permittees). The time to complete full beneficial use of water ended on December 1, 1966, but two time extensions were subsequently approved, extending the authorized time to complete beneficial use of water to December 1, 1973.

A water right permit allows a party to construct a water supply project and to put water to beneficial use in conformance with permitted conditions. Subject to the State Water Board's continuing authority, a water right is vested based on actual diversion and use. A water right license confirms the amount of water that has been beneficially used. It is common for licenses to be issued for lesser amounts of water than the amount for which the underlying permit was issued. It is important for permittees to measure their diversion and use of water or to be able to estimate that use by other means and to be able to demonstrate conformance with permit conditions in order to receive a license.

In June 1988, following a hearing on a draft Preliminary Cease and Desist Order that had been issued by the Chief of the Division of Water Rights, the State Water Board issued Order 88-10, which ordered several actions. First, the order found that although Hershey and Knaggs each held an undivided interest in the permit, they operated separate water supply projects that delivered water to separate parcels. As a result, the Board split Permit 13861, assigning Permit 13861A to Hershey Land Company and Permit 13861B to Knaggs Farming Company, L.P. The order required the parties to submit maps showing their respective places of use, points of diversion and points of rediversion. The order found that the Permittees had not complied with a permit condition requiring them to submit a water diversion and use monitoring plan, and it

required both parties to maintain records of their water diversion and use and to submit those records to the State Water Board annually. The order also required both parties to submit time extension petitions by September 1, 1988. Lastly, the order directed the Chief of the Division of Water Rights to issue a Preliminary Cease and Desist Order against Knaggs Farming following the issuance of separate permits to the two parties. Separate permits were issued in 2002, but the final Preliminary Cease and Desist Order was never issued. The statutes regarding water right Cease and Desist Orders were amended in 2002, and the revised process specified in the amended statutes no longer provides for the issuance of Preliminary Cease and Desist orders.

On August 22, 1988, Permittees filed a petition for a time extension to 1993 to complete installation of flow measuring devices. The project was fully developed, but the devices had not been installed. There were no protests on the time extension petition.

On July 24, 1989, Permittees filed a petition for change in place of use to include 163 acres of land in the authorized place of use. By memorandum dated November 10, 1992, the Department of Fish and Game (DFG) protested the change petition.

The 1989 petition for change in place of use solely affects Permit 13861B of Knaggs Farming. On August 10, 2006, Knaggs Farming agreed to four of the five DFG protest dismissal conditions in DFG's November 10, 1992 memorandum. The remaining DFG protest issue was resolved on June 11, 2008.

POLICY ISSUE

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

Staff recommends adoption of the proposed order.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-00xx

In the Matter of Permit 13861B (Application 16361B)
Knaggs Farming Company, L.P.

**ORDER APPROVING PETITIONS FOR
CHANGE IN PLACE OF USE AND EXTENSION OF TIME**

SOURCE: Colusa Basin Drainage Canal

COUNTY: Yolo

BY THE BOARD:

WHEREAS:

1. The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permit 13861 to Davidella Hershey, et al., on February 15, 1963, pursuant to Application 16361, and subsequently assigned the permit to Hershey Land Company (Hershey Land) and Layton Knaggs (Knaggs) on December 14, 1976.
2. Permit 13861 requires that construction work be completed by December 1, 1964, and complete application of the water to the authorized use be completed by December 1, 1965
3. Davidella Hershey, et al., requested, and on November 1, 1966, the Division granted, an extension of time to apply the water to full beneficial use by December 1, 1968.
4. Davidella Hershey, et al requested, and on May 26, 1971, the Division granted, an extension to apply the water to the authorized use by December 1, 1973.
5. Until 1988, Hershey Land and Knaggs (Permittees) had an undivided interest in Permit 13861, although they each owned property that was separately operated. In Order 88-10 dated June 16, 1988, the State Water Board directed the issuance of separate permits to cover Hershey Land's and Knaggs' respective uses.¹ Order 88-10 also approved issuance of a Preliminary Cease and Desist Order for: (a) failure to file a petition for an extension of time to complete the beneficial use of water; (b) failure to provide a detailed plan as required by a permit term for measuring the water diverted and placed to beneficial use under the permit; (c) evidence that water may have been diverted at times and in amounts not authorized by the permit; and (d) evidence that permitted water is being used on lands not within the authorized place of use. The Order also required modification and addition of conditions to the permits. Pursuant to Order 88-10, Permittees were to submit a time extension petition by September 1, 1988.

¹ The Division did not issue separate permits until June 10, 2002 when it issued Permit 13861A to Hershey Land Company, and Permit 13861B to Knaggs Farming Co. L.P.

6. On August 22, 1988, Permittees filed a petition for an extension of time and submitted the required fee. Permittees requested a five-year extension to complete installation of the measuring devices to comply with Order WR 88-10. Permittees would request a license upon compliance with Order WR 88-10. A five-year extension to comply with Order 88-10 would have ended on December 31, 1993. In actuality, Permittees seek a 20-year extension, from 1973 (end of previously authorized extension period) to 1993.
7. Public notice of the request for an extension of time was issued on November 4, 1988. No protests were filed.
8. The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use upon a showing of good cause. (Wat. Code, § 1398.) Permittee must show that (1) due diligence has been exercised; (2) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (3) satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay. (Cal. Code Regs., tit. 23 § 844.)
9. Permittees have not complied with permit requirements to measure water put to beneficial use. However, Permittees have shown due diligence in actually putting the water to beneficial use. Permittees completed construction and applied the water to the permitted use before the end of the requested extension period.
10. The requirement that delays to putting the water to full beneficial use be occasioned by obstacles that could not be reasonably avoided is primarily focused on the basic requirement of completing construction and applying the water to beneficial use. Permittees had completed construction and fully developed the place of use by 1988. Permittees were ready for licensing in 1988. The extension of time was requested in order to comply with Order 88-10 and to complete installation of a measuring device to document water use.²
11. Permittees have made satisfactory progress within the requested extension period. Subsequent to Order 88-10 a measuring device was installed, and Permittees provided 1991 diversion data to the Division. Sometime after installation of the device, vandals destroyed the device, and a new measuring device was not installed. (June 2006 telephone conversation documented in December 8, 2006 letter.)
12. The State Water Board will only approve a time extension when it determines it is in the public interest to do so. Because Permittees complied with Order 88-10, which directed Permittees to apply for a Petition for Extension of Time, and granting the extension will allow the Division to utilize the completed licensing inspections conducted on February 8 and March 29, 1977, and October 22, 1980, the Division concludes it is appropriate to grant the petition. Further, there are no outstanding protests filed pursuant to the petition.
13. On July 24, 1989, Permittees filed a petition for change of place of use and submitted the required fee. Pursuant to the change petition, Permittees requested the inclusion of an additional 163 acres of land in the authorized place of use. Permittees are requesting to enlarge the place of use to conform the area served under the permit in support of the ongoing farming practice. No new land will be cultivated as a result of the petition.

² This order concerns only the petition for extension of time and change of place of use. Insofar as Permittees have not complied with Order 88-10, or with Permittees' original permit requirements, the Division may still utilize enforcement mechanisms to address Permittees' non-compliance with Order 88-10 and permit conditions.

14. The petition for change was noticed on December 12, 1991. The Department of Fish and Game (DFG) protested the petition. The DFG protest requests that a fish screen be installed on the points of diversion and measures be taken to protect the giant garter snake.
15. DFG's November 10, 1992 memorandum conveyed revised protest resolution conditions. DFG staff had determined that a fish screen was not required for the Colusa Basin drain point of diversion. Under Permit 13861B, Knaggs Farming only uses the Colusa Basin Drain point of diversion.
16. On October 21, 1998, Layton Knaggs assigned his interest to Knaggs Farming Company, L.P. (Knaggs Framing).
17. On June 10, 2002, the Division of Water Rights issued separate permits, as follows: (1) Permit 13861A to Hershey Land Company (Hershey Land) for diversion of 17.51 cfs from Colusa Basin Drainage Canal and Sacramento River, and (2) Permit 13861B to Knaggs Farming Company, L.P., for diversion of 47.85 cfs from Colusa Basin Drainage Canal.
18. On August 10, 2006, Knaggs Farming agreed to the protest dismissal conditions in DFG's November 10, 1992 memorandum, with the exception of the fifth item relative to the need for a Section 1603 Agreement prior to performing canal maintenance. The agreed upon terms are:
 - (a) Canal maintenance shall be performed from May 1 through October 1 of each year to avoid adverse impacts to giant garter snakes;
 - (b) Conduct canal maintenance only on one side of the canal on an annual basis;
 - (c) During canal maintenance, minimize disturbance of the inside canal bank above the normal water line (i.e., minimize disturbance to bank vegetation); and
 - (d) Maintain the canal as an earthen ditch (broken concrete may be used for erosion control).
19. On December 8, 2006, the Division advised DFG that it does not generally condition permits regarding obtaining a 1603 Agreement each time that a canal is maintained, because the Division is not advised when permittees conduct scheduled maintenance. Consequently, the Division would consider the protest dismissed on December 23, 2006 unless DFG advised the Division to the contrary.

DFG responded on December 22, 2006, requesting that standard term 63 be included in any Order approving the petition to address the 1603 Agreement issue.

Term 63:

If construction or rehabilitation work is required for the diversion works covered by this permit within the bed, channel, or bank of the affected water body, the permittee shall enter into a streambed or lake alteration agreement with the State Department of Fish and Game. Permittee shall submit a copy of the agreement, or waiver thereof, to the Division of Water Rights prior to commencement of work. Compliance with the terms and conditions of the agreement is the responsibility of the permittee.

Term 63 advises persons of their legal obligation to obtain any required streambed alteration agreement needed for the diversion works, which differs from requiring a streambed alteration agreement for canal maintenance. On June 11, 2008, Knaggs Farming agreed to inclusion of the term in any order. Inclusion of this condition resolves the fifth item of the DFG protest. Consequently, the protest is considered dismissed.

- 20. The State Water Board has determined that the petition for change in place of use does not constitute the initiation of a new right, nor does it operate to the injury of any other lawful user of water. Approval of the change in place of use does not authorize any additional water diversion.
- 21. In light of minimal compliance with Order WR 88-10, the measuring requirement of Permit 13861B shall be revised to require that flows be measured prior to water diversion and use.
- 22. There is the possibility that buried archeological deposits may be present and accidental discovery could occur. In compliance with the California Environmental Quality Act, which states that a Lead Agency is required to make a provision for historical or unique archeological resources accidentally discovered during construction or operation of projects, a condition should be included in the permit requiring notification of the State Water Board Deputy Director for Water Rights if project activities uncover any buried archeological materials.
- 23. In light of Permittee's past minimal compliance with Order 88-10, the measuring requirement of Permit 13861B shall be revised to require that flows be measured prior to water diversion and use.
- 24. The baseline for this project is August 22, 1988. The requested time extension to complete full beneficial use ended on December 31, 1993. The 163 acres of land that would be added to the authorized place of use were irrigated prior to August 22, 1988. The project is fully developed, and there has been negligible or no expansion of use or construction of new facilities during the extension period beyond that existing on August 22, 1988. The project is exempt from CEQA under California Code of Regulations, title 14, section 15061, subdivision (b) (2). The State Water Board will file a Notice of Exemption in accordance with the California Code of Regulations, title 14, section 15062, after issuance of this order.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT THE STATE WATER BOARD HEREBY APPROVES THE PETITION FOR EXTENSION OF TIME AND THE PETITION FOR CHANGE.

PERMIT 13861B IS AMENDED TO READ AS FOLLOWS:

- 1. Condition 5 of the permit is deleted and replaced with:

Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 1993. (0000009)
- 2. The following canal maintenance requirements shall be added:
 - (a) Canal maintenance shall be performed from May 1 through October 1 of each year to avoid adverse impacts to giant garter snakes;
 - (b) Conduct canal maintenance only on one side of the canal on an annual basis;

- (c) During canal maintenance, minimize disturbance of the inside canal bank above the normal water line (i.e. minimize disturbance to bank vegetation); and
 - (d) Maintain the canal as an earthen ditch (broken concrete may be used for erosion control).
3. The following condition shall be added:
- If construction or rehabilitation work is required for the diversion works covered by this permit within the bed, channel, or bank of the affected water body, the Permittee shall enter into a streambed or lake alteration agreement with the State Department of Fish and Game. Permittee shall submit a copy of the agreement, or waiver thereof, to the Division of Water Rights prior to commencement of work. Compliance with the terms and conditions of the agreement is the responsibility of the Permittee.
4. The place of use is modified as follows:
- 2,078 net acres within a gross area of 2,449.1 acres; being within projected Sections 7, 8, 9, 10, 16, 17, 19, 20 and 21, T10N, R3E, MDB&M, as shown on the map dated July, 1993, on file with the State Water Board.
5. Permit condition 7 is superseded and replaced with the following condition:
- No water shall be diverted until and unless Permittee installs and maintains devices satisfactory to the State Water Resources Control Board to measure the instantaneous rate of diversion and cumulative quantity of water diverted under this permit. A monthly record of such measurements shall be maintained by Permittee and made available to interested parties upon reasonable request. A copy of such records shall be submitted to the State Water Resources Control Board with the annual Progress Report by Permittee.
6. All other permit terms and conditions not specifically modified or added by this Order shall remain in effect.

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 November 18, 2008.

Jeanine Townsend
Clerk to the Board