

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

ITEM 6

SUBJECT

CONSIDERATION OF AN ORDER APPROVING AN EXTENSION OF TIME FOR A WATER RIGHT PERMIT OWNED BY HERSHEY LAND COMPANY — COLUSA BASIN DRAINAGE CANAL AND SACRAMENTO RIVER IN YOLO COUNTY.

DISCUSSION

Hershey Land Company 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, LP. 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 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 petition indicated that the project was fully developed, but the devices had not been installed. In October 1988, new maps were submitted. The Division provided public notice of the time extension petitions in November 1988. No protests were received.

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 13861A (Application 16361A)

Hershey Land Company

**ORDER APPROVING PETITION FOR
EXTENSION OF TIME**

SOURCE: Colusa Basin Drainage Canal and Sacramento River

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 required 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) held 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 was 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, a time extension petition was to be submitted 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 Company, L.P.

6. On August 22, 1988, Permittees filed a petition for an extension of time and submitted the required fee. 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 shown due diligence in putting the water to beneficial use. The Hershey Land portion of the project was ready for licensing prior to 1988.
10. The requirement that delays to putting the water to full beneficial use be occasioned by obstacles which could not be reasonably avoided is focused on the basic requirement of completing construction and applying the water to beneficial use. Hershey Land had fully developed its place of use and applied the water to beneficial use prior to 1988. The State Water Board required timely submittal of a time extension petition to afford an opportunity to measure diversions for licensing purposes.²
11. Permittees made satisfactory progress toward putting the water to beneficial use. As noted in Order 88-10, Hershey Land submitted flow records and power use data from 1982 to 1986 showing that its diversion and use of water were within the terms of Permit 13861.
12. On July 24, 1989, Knaggs filed a petition for change to include 163 acres of land in the authorized place of use and submitted the required fee.
13. The petition for change was noticed on December 12, 1991. The Department of Fish and Game (DFG) protested the petition. The DFG protest requested that a fish screen be installed on the Sacramento River point of diversion and that measures be taken to protect the giant garter snake. DFG notified the Division in an August 20, 1992 memorandum that a fish screen would be required on the Sacramento River point of diversion because the Sacramento River supports populations of winter-run Chinook salmon. The 1992 memorandum states that the Colusa Basin Drain point of diversion does not require a fish screen. A November 10, 1992 memorandum from DFG conveyed revised protest resolution conditions.
14. On October 21, 1998, Layton Knaggs assigned his interest to Knaggs Farming Company, L.P. (Knaggs Framing).
15. 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.

² This order concerns only the petition for extension of time. 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.

- 16. On December 8, 2006, the Division advised DFG that the Division did not consider DFG's protest to be valid for Permit 13861A, since no changes were requested for this water right. The change petition only concerned the Knaggs Farming diversion (Permit 13861B). DFG's December 22, 2006 response states that although the project would not fall under the requirements of Section 6100 of the Fish and Game Code, the operator might still fall under the requirements of Section 5980, 6020 or 2050, et seq, of the Code, which could still require them to install a fish screen at their point of diversion. DFG requested that the Division notify the operator accordingly and requested that standard Permit Term 214 (listed below) be included in any license issued pursuant to Permit 13861A.

Permit Term 214:

No water shall be diverted under this permit at the Sacramento River point of diversion except through a fish screen on the intake to the diversion structure, satisfactory to meet the physical and operational specifications of the National Marine Fisheries Service to protect winter-run Chinook salmon, listed as endangered or threatened under the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544)]. Construction, operation, and maintenance costs of the required facility are the responsibility of the permittee.

(0000214)

- 17. The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use only upon such conditions determined to be in the public interest. For protection of public trust resources, approval of the time extension should be conditioned on installation of a fish screen on the Sacramento River point of diversion within six months of approval of the extension. A streambed alteration agreement with DFG may be required for installation of the fish screen.
- 18. Subsequent to the Division's issuance of separate permits in 2002, Hershey Land has not filed Progress Reports by Permittee. Hershey Land should promptly file these reports.
- 19. In light of past minimal compliance with Order WR 88-10, the measuring requirement of Permit 13861A shall be revised to require that flows be measured prior to water diversion and use.
- 20. The baseline for this project is August 22, 1988. The requested time extension to complete full beneficial use of water ended on December 31, 1993. 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.

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ORDER

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

PERMIT 13861A 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 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.

3. Six months after issuance of this Order, Permittee is subject to the following condition:

No water shall be diverted under this permit at the Sacramento River point of diversion except through a fish screen on the intake to the diversion structure, satisfactory to meet the physical and operational specifications of the National Marine Fisheries Service to protect winter-run Chinook salmon, listed as endangered or threatened under the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). Construction, operation, and maintenance costs of the required facility are the responsibility of the permittee.

(0000214)

4. Within 60 days of issuance of this Order, Permittee shall submit Progress Reports by Permittee covering the period 1990 through 2007.

5. Permit condition 7 shall be superseded and replaced with the following:

No water shall be diverted until and unless the Permittee installs and maintains a device 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 the 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.

Date

Jeanine Townsend
Clerk to the Board