

STATE WATER RESOURCES CONTROL BOARD

THE PAUL R. BONDERSON BUILDING
901 P STREET
SACRAMENTO, CA 95814

Mailing Address:

DIVISION OF WATER RIGHTS
P.O. BOX 2000, Sacramento, CA 95810



April 10, 1989

TO ALL INTERESTED PARTIES

Enclosed is a copy of an Order adopted by the State Water Resources Control Board at its last meeting.

DAVID R. BERINGER
Program Manager
Bay/Delta Program



STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of)
)
REQUEST BY SEVERAL ORGANIZA-) ORDER WR 89- 4
TIONS TO ADOPT INTERIM WATER)
QUALITY OBJECTIVES AND TO)
AMEND THE WATER RIGHT PERMITS)
OF THE STATE WATER PROJECT AND)
THE CENTRAL VALLEY PROJECT)
LISTED IN WATER RIGHT)
DECISION 1485)
_____)

ORDER DENYING REQUEST

BY THE BOARD:

1. Several organizations, including the Environmental Defense Fund, the Bay Institute of San Francisco, the Sierra Club Legal Defense Fund, the Bay Area Audubon Society, California Native Plant Society, Citizens for a Better Environment, National Audubon Society, Point Reyes Bird Observatory, Save San Francisco Bay Association, the Sierra Club, and the Natural Resources Defense Council (hereinafter referred to collectively as EDF, et al.¹) have filed a request with the State Water Resources Control Board (Board);

¹ Several other organizations filed requests with the Board to alter the Bay/Delta proceedings and the scope of the draft Water Quality Control Plan for Salinity. The Board has responded to those requests by instructing its staff to revise the workplan for the proceedings and to revise the scope of the draft Plan. Consequently, no need exists to further respond to those requests.

2. EDF, et al., request that the Board immediately adopt and implement² specific interim freshwater flow and salinity control standards to protect fish and wildlife and related beneficial uses and public trust values of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, which are described as follows:

a. the export limitations set forth in Table 1 of the draft Water Quality Control Plan for Salinity for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (draft Plan), prepared by the Board's staff and released November 3, 1989,

b. the flow and operational requirements set forth in Table 1 of the draft Plan for salmon and Delta fisheries, except that for dry and critical years the Petitioners request that the interim outflow standard be the same as set forth in Table 7.2.3.2-1 of the draft Plan, but with the elimination of the striped bass spawning relaxation provision,

² EDF, et al, ask that the requested changes be accomplished without delay through adoption of water quality objectives and implemented through amendments to the water right permits of the State Water Project and the federal Central Valley Project except to the extent that said projects can show that other water right holders should be held responsible.

- c. the compliance deadline of October 1, 1984 and monitoring station locations for Suisun Marsh protection set forth in Table II of Water Right Decision 1485 (D-1485) as adopted in 1978,³ and
 - d. a moratorium on approval of water right applications, water right amendments or other Board action that could result in decreased outflow to San Francisco Bay and a policy proscribing actions by water right permittees that could lead to freshwater depletions from the Bay/Delta system.
3. EDF, et al., request that such interim standards remain in effect until new permanent standards have been adopted and implemented.
 4. EDF, et al., allege in support of their request that existing standards do not protect the beneficial uses and public trust values of the Estuary, that the existing water quality control plan (existing Plan) violates federal water quality law, that the standards in D-1485 and in the existing Plan violate the Board's legal obligations, that delays in the

³ In 1985 the Board amended the water right permits of the State Water Project and the Central Valley Project. The amendments postponed the date for compliance with certain Suisun Marsh standards until various dates in the future when facilities reasonably can be expected to be completed to accomplish compliance, and changed the location of a monitoring station.

Bay/Delta hearings make interim relief urgent, and that the State Water Project (SWP) and the federal Central Valley Project (CVP) have feasible water supply alternatives.

5. It is unnecessary herein to address the merits of the allegations related in paragraph 4 except for the allegation that interim relief is urgent. EDF, et al., have based their request for interim relief on two grounds: (1) that the Board has not completed its review of the existing Plan and D-1485 as soon as it originally projected, and (2) that striped bass, the Delta smelt, salmon, and steelhead trout show declining population trends. In our following discussion, we examine whether the Board can act faster than in its current proceedings and whether EDF, et al., have demonstrated an urgent need for faster action.
6. EDF, et al., request that the SWP and the CVP be required on an interim basis to meet the requirements described in paragraph 2(a) through 2(c). In effect, EDF, et al., are asking that the Board issue the equivalent of a preliminary injunction against the SWP and the CVP.
7. Additionally, EDF, et al., asks that the Board cease processing all water right applications or amendments that could decrease outflow to the San Francisco Bay and set interim requirements applicable to all diverters and

dischargers who may affect the Estuary, preventing freshwater depletions from the Estuary. These requests could be effected by adoption of regulations that have general applicability, and the second one also could be effected by adoption of a water quality control plan.

These additional remedies could be effected significantly faster than completion of the current proceedings only by adoption of emergency regulations; however, emergency regulations would have to meet the requirements of Government Code Section 11346.1, including a finding of emergency that supports the conclusion that the adoption of the regulation is necessary for the immediate preservation of the public peace, health and safety or general welfare. Gov. Code Section 11346.1(b). In effect, a finding of emergency would require findings of facts similar to those required for a preliminary injunction.

8. The objective of the following findings is to determine whether EDF, et al., have demonstrated the existence of the facts necessary for the requested expedited relief.
9. The Board currently is engaged in proceedings to review and if appropriate revise the existing Plan and D-1485.

10. In order to adopt valid water quality objectives, even of an interim nature,⁴ the Board would have to adopt or amend a water quality control plan in compliance with the requirements of the Water Code at Section 13000 et seq. and the requirements of the federal Clean Water Act at 33 USC Section 1251 et seq.
11. The Board could not prepare an interim water quality control plan any faster than it could prepare a revised draft Plan, which the Board expects to release for public review in October, 1989.
12. The Board plans to consider flow needs in the Estuary after it has considered adopting a new water quality control plan with salinity and possibly other water quality objectives. The Board will consider flow needs in proceedings to determine the reasonable needs of the beneficial uses of the waters of the Bay-Delta Estuary and the means by which the beneficial uses may be given reasonable protection.
13. By fall, 1990, the Board expects to take up consideration of flow requirements which may lead to changes in water rights.

⁴ We note that all water quality objectives, since they are reviewed every three years under Section 303 of the Clean Water Act, are interim in nature.

14. In accordance with D-1485, the permits of the CVP and the SWP currently contain terms and conditions requiring that the two projects maintain specified flows and water quality objectives in the Estuary.
15. To enforce new flow objectives against the water rights of the State Water Project and the Central Valley Project, the Board would have to amend the terms and conditions it inserted in the water right permits of the two projects in D-1485.
16. In order to impose the specific requirements listed in paragraph 2(a) through (c) by amending only the CVP and SWP water right permits it would be necessary to provide notice and an opportunity for an adjudicative water right hearing.
17. The request of EDF, et al., that the SWP and the CVP be required on an interim basis to carry the full burden of any increased flows requested appears inconsistent with United States v. SWRCB (1986) 182 Cal. App.3d 82, 118, which requires the Board to consider the responsibilities of all diverters from the watershed of the Estuary, not just the SWP and the CVP.
18. No statutory authorization exists for a water right permit change to be made in advance of notice and an opportunity for

a hearing with regard to the type of water right terms and conditions in the permits of the SWP and CVP suggested to be changed herein (temporary changes can only be made with regard to the point of diversion, place of use, or purpose of use at the request of the water right holder under narrowly defined circumstances; see Water Code Sections 1435 et seq. and 1725 et seq.).

19. In accordance with the decision in United States v. SWRCB, which criticized the Board for confusing its water quality obligations with its water rights authority, the Board is proceeding first to consider adopting a revised water quality control plan, and then a water right decision.
20. The Board anticipates that any water quality standards and flow requirements ultimately adopted pursuant to the Board's Bay/Delta proceedings will be adequate to protect fisheries and other beneficial uses. EDF, et al., have failed to demonstrate that fisheries will be irreparably injured if the Board does not grant the interim relief requested.
21. Based on the foregoing, we conclude that EDF, et al., have not demonstrated a basis either for adopting emergency regulations or adopting a water quality control plan and a water right decision requiring the SWP and the CVP to meet the requested flow levels earlier than the Board completes

its scheduled proceedings. Nor is there a basis for embarking on a consideration of non-emergency regulations or an additional water quality control plan and expedited water right proceeding to accomplish the relief requested by EDF, et al., while the current proceeding is ongoing.

ORDER

NOW, THEREFORE, BASED ON THE FOREGOING FINDINGS, the request filed by EDF, et al., for interim relief is denied.

CERTIFICATION

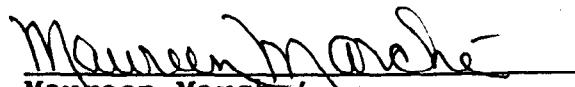
The undersigned, Administrative to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 5, 1989

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego

NO: None

ABSENT: Danny Walsh

ABSTAIN: None


Maureen Marche
Administrative Assistant to
the Board