

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WRO 2005 - 0010**

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In the Matter of  
Permits 16597, 16600, and 20245 (Applications 14858A, 19304, and 14858B)  
of the  
**UNITED STATES BUREAU OF RECLAMATION.**

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SOURCE: Stanislaus and San Joaquin rivers and their tributaries  
COUNTY: San Joaquin County

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**ORDER DENYING PETITION FOR TEMPORARY URGENCY CHANGE**

**BY CHAIR BAGGETT<sup>1</sup>:**

**1.0 INTRODUCTION**

On February 8, 2005, the United States Bureau of Reclamation (Bureau) filed a petition for temporary urgency change with the State Water Resources Control Board (State Water Board).<sup>2</sup> The petition requests temporary relief from the requirement in the Bureau's New Melones water right Permits 16597, 16600, and 20245 (Applications 14858A, 19304, and 14858B), that the Bureau meet the February through June flow objectives at Vernalis for fish and wildlife beneficial uses.

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<sup>1</sup> 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.

<sup>2</sup> The petition is dated February 1, 2005. The State Water Board did not receive the petition in its mailroom, however, until February 8, 2005.

## **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).)

## **3.0 DISCUSSION**

In Decision 1641 (D-1641), adopted December 29, 1999, and amended March 15, 2000, the State Water Board added condition 2 on page 161 of D-1641 to the New Melones water storage permits of the Bureau. The amended permits are Permits 16597 and 16600, issued respectively on Applications 14858A and 19304. Permit 20245 (Application 14858B), for which the Bureau also requested this temporary urgency change, does not contain condition 2 and consequently is not a proper part of the petition.

Condition 2.a. requires that the Bureau ensure that the water quality objective for fish and wildlife beneficial uses for San Joaquin River flow at Airport Way Bridge, Vernalis, set forth in Table 3 is met, with the exception of the April-May pulse flow period, which requires higher

flows. The Vernalis flow objective for fish and wildlife beneficial uses requires that certain flows, which vary by water year type, be maintained at Vernalis from February through June and in October. The objective contains two alternative flow values for each year type, with the higher flow value being triggered when the Delta outflow objective requires the 2 parts per thousand salinity isohaline to be at or west of Chipps Island. The Bureau states that 2005 is currently rated as a dry year in the San Joaquin River watershed. Under either a below normal or dry year type, the required flow at Vernalis, depending on the required location of the isohaline under the Delta outflow objective, is either 1,420 cubic-feet per second (cfs) or 2,280 cfs.

### **3.1 The Petition**

The Bureau is requesting that it not be required to meet the flows at Vernalis in 2005, which are in effect from February through June, excepting the April 15-May 15 pulse flows. The Bureau states that during the February through June period it will operate New Melones Reservoir to meet other requirements, including fishery flows in the Stanislaus River, water right agreements, Vernalis salinity objectives, and a level of protection in the Delta as recommended by the fishery agencies. The Bureau has not specified what flows it proposed to meet instead of the required flows.

To support its petition, the Bureau states that it had 100 thousand acre-feet (taf) less water in storage in New Melones at the end of December 2004 than it had a year earlier; that the higher of the two alternative flow levels under the objective likely will be triggered in at least one of the five applicable months; and that it is very unlikely that the Bureau will be able to support the higher flow by releases from New Melones Reservoir without placing potentially severe shortages on other uses. The Bureau notes that it listed five alternative methods for meeting the objective in a letter dated November 18, 2004. These alternatives are to purchase water, conduct recirculation of water from the Delta through the San Joaquin River and back to the Delta, release water currently in storage south of the Delta, get relief from meeting the flow objective, or operate to a functional equivalent. The Bureau states that it prefers to be relieved of the requirement to meet the objective, and summarily states, regarding the first two alternatives, that it has not purchased water and that the fishery agencies have expressed concern with the use of

recirculation. The Bureau does not explain its rejection of the south of Delta releases and has not developed a plan to operate to a functional equivalent.

The Chief of the Division of Water Rights of the State Water Board sent a letter to the Bureau dated December 16, 2004, requesting that the Bureau develop an adaptive management plan describing the decision making processes the Bureau will use to determine its actions to meet the fish and wildlife flow objective. The Bureau responds in its petition that its plan is to get relief from the flow objective in conjunction with other measures. The Bureau states that it has started discussions with the agencies in the CALFED Water Operations Management Team, and that it will coordinate with them to make operational changes to mitigate for potential fishery impacts due to not meeting the flow objective. The Bureau has not, however, stated what the measures will be, and accordingly, the State Water Board is not in a position to require these measures, if appropriate, in lieu of meeting the objective or as mitigation for not meeting the objective.

### **3.2 History of the Objective and its Implementation**

The State Water Board added the Vernalis flow objective to the Bureau's New Melones storage permits in D-1641, which became final on March 15, 2000. Despite the fact that the Bureau's witnesses testified in the hearing leading to D-1641 that it would be difficult to meet the flow objective in all years, the Bureau signed the San Joaquin River Agreement, which provides that the Bureau will meet the February through June Vernalis flow objective with the exception of the April-May pulse flow. In consideration of the various commitments in the agreement, including the Bureau's commitment to meet the flow objective, the State Water Board approved the water right change petitions needed to allow the Vernalis Adaptive Management Plan (VAMP) under the Agreement to be conducted. The VAMP is a twelve-year experiment running from April 2000 through 2011, and is focused on the April-May pulse flow. The State Water Board imposed various conditions on the change petitions and also conditioned the Bureau's permits to require it to meet the Vernalis flow objective. The Bureau's requirement is in condition 2.a. on page 161 of D-1641. The Bureau did not challenge condition 2.a.

The Bureau has established a history of not fully meeting the Vernalis flow objective. When it has asked for a temporary urgency change, the Bureau has been tardy in making its request. In

2002, the Bureau violated the flow objectives during part of the five-month effective period. In 2003, the Bureau violated the flow objectives and then petitioned for a temporary urgency change later. Objections were filed and the Bureau withdrew the petition. In 2004, the Bureau petitioned for a temporary urgency change and the Division of Water Rights approved it before the comment period closed. The Fish and Wildlife Service, the Department of Fish and Game, and the National Marine Fisheries Service (fisheries agencies) supported the change petition but stated that it was preferable to meet the objective. The Division added conditions to the approval of the change. The conditions required the Bureau to provide a plan by November 15, 2004, detailing how it would meet the objective in 2005. By letter dated November 18, 2004, the Bureau provided the five alternatives summarized above, but did not commit to any of them. The Division Chief responded by letter dated December 16, 2004, asking for either an adaptive management plan or a commitment as to the alternative the Bureau intended to use. The Division Chief requested that any change petition be filed within ten days; i.e., by December 26, 2004. The Bureau did not file the change petition until February 8, 2005.

### **3.3 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 Bureau has failed to identify a way to meet the objective in advance of the objective's effective period despite the Division Chief's condition on the approval granted in 2004, and has waited until after the objective is in 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 history of compliance with the Vernalis flow objective, I am not convinced that any 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 Bureau of the requirement to meet the objective, in the absence of any showing that the change will further the constitutional policy, 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. I have no evidence that there will be no injury to other lawful users of water.

Third, section 1435(b)(3) requires that the change be made without unreasonable effect on fish, wildlife, or other instream beneficial uses. The purpose of the objective that the Bureau seeks to avoid, however, is to protect fish and wildlife uses. There is no definite plan offered in the change petition to ensure that removing the protection of the objective will not unreasonable affect the uses it seeks to protect.

Finally, there is no basis provided in the petition for finding that the proposed change is in the public interest, as required by section 1435(b)(4).

### **3.4 Related Proceedings**

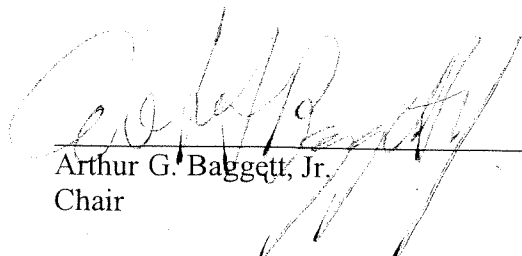
The Vernalis flow objectives implemented by the condition on Permits 16597 and 16600, and the potential methods of implementation of the Vernalis flow objective, will be topics of consideration in March in an ongoing workshop on potential changes in the 1995 Bay-Delta Plan. At the workshop, parties may address the question whether the Vernalis flow objectives should be modified and whether there should be changes in the method for determining that the higher or lower value of the objective is applicable. 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 Bureau's water right permits, they could serve as a basis for the State Water Board to consider future changes in the water right permits. Also, the airing of these topics in the workshop may expose information that might help the Bureau support a change in Permits 16597 and 16600. This order can be reconsidered if the Bureau provides 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 16597, 16600, and 20245 (Applications 14858A, 19304, and 14858B) is denied.

Dated: 2/17/2015

  
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Arthur G. Baggett, Jr.  
Chair