

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2007-0027-EXEC

In the Matter of the Petition for Reconsideration of
LLOYD L. PHELPS, JR.; GARY PHELPS; JOEY P. RATTO, JR.; AND RONALD D. CONN
Regarding Term 91 Curtailment Notices

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

Lloyd L. Phelps, Jr., Gary Phelps, Joey P. Ratto, Jr., and Ronald D. Conn (hereinafter collectively referred to as "Petitioners") petition the State Water Resources Control Board (State Water Board or Board) for reconsideration of the "Water Diversion Curtailment Notice" (curtailment notice) issued to Petitioners on May 11, 2007, pursuant to Term 91. The State Water Board finds that the issuance of the curtailment notices was appropriate and proper and denies the petition for reconsideration.²

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a decision or order on any of the following grounds:

- a. [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of petitions for reconsideration falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, set aside or modify the decision or order, or take other appropriate action.

² The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within the 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

- b. [t]he decision or order is not supported by substantial evidence;
- c. [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d. [e]rror in law. (Cal. Code Regs., tit. 23, § 768.)³

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

This order addresses the principal issues raised by Petitioners. To the extent that this order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (§§ 768-769, 1077.)

3.0 FACTUAL BACKGROUND

The State Water Board has issued water right licenses for the diversion of water in San Joaquin County to Petitioners as follows:⁴

License No.	Licensee	Source
13444	Lloyd L. Phelps, Jr.	San Joaquin River
13274	Lloyd L. Phelps, Jr.	San Joaquin River
13194	Joey P. Ratto, Jr.	Middle River
13315	Ronald D. Conn	Middle River

The licenses all contain State Water Board standard Term 91 as a condition of the license. Term 91 prohibits the diversion of water under the license when the United States Bureau of Reclamation (USBR) or the Department of Water Resources (DWR) is releasing stored or foreign water from the federal Central Valley Project (CVP) or the State Water Project (SWP) (hereinafter collectively referred to as the "projects") to satisfy inbasin entitlements, including water quality objectives in the Sacramento-San Joaquin Delta. The purpose of Term 91 is to ensure that water released by the projects to meet water quality objectives is not diverted by

³ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

⁴ While the petition identifies Gary Phelps as a petitioner, the Division of Water Rights' Water Right Information Management System does not identify him as a water right holder.

other water right holders, but instead remains in the watershed and contributes to meeting those objectives.

The State Water Board decided the language, policy objectives, and method of calculation of Term 91 in Decision 1594 (D-1594) and Order WR 81-15 after a lengthy adjudicative process. Pursuant to the policy direction in D-1594, the State Water Board added Term 91 to Petitioners' permits when it issued the permits. Upon licensing, Term 91 remained a condition of the licenses.

Term 91 states:

"No diversion is authorized by this license when satisfaction of inbasin entitlements requires release of supplemental Project water by the Central Valley Project or the State Water Project.

"a. Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the State Water Resources Control Board for maintenance of water quality and fish and wildlife. Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.

"b. Supplemental Project water is defined as that water imported to the basin by the projects plus water released from Project storage which is in excess of export diversions, Project carriage water, and Project inbasin deliveries.

"The State Water Resources Control Board shall notify licensee of curtailment of diversion under this term after it finds that supplemental Project water has been released or will be released. The Board will advise licensee of the probability of imminent curtailment of diversion as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the Project operators."

On May 11, 2007, the State Water Board, through the Division of Water Rights (Division), issued the curtailment notices to Petitioners pursuant to Term 91. Petitioners jointly filed a petition for reconsideration of the notices issued to them.

4.0 STATUS OF PENDING LITIGATION

The State Water Board must consider the petition for reconsideration while an appeal involving the parties to the petition and raising similar issues is pending in the Third District Court of Appeal. (*Lloyd L. Phelps, Jr., et al., v. State Water Resources Control Bd., et al.* (Case No. C052770).) In 2004 the State Water Board issued Order WRO 2004-0004 imposing

administrative civil liability on Lloyd L. Phelps, Jr. (Licenses 13444 and 13274), Joey P. Ratto, Jr. (License 13194), and Ronald D. Conn (License 13315). Their licenses include Term 91. Based on evidence received in an adjudicative hearing, the State Water Board concluded that the licensees' diversions of water during the curtailment period in 2000 and 2001 violated Term 91. The licensees challenged Order WRO 2004-0004 in the Sacramento County Superior Court, and in 2006 the trial court affirmed the State Water Board's order in its entirety. The licensees have appealed the trial court judgment to the Third District Court of Appeal.

5.0 DISCUSSION

5.1 Summary of Petitioners' Arguments

Petitioners state that they are raising all of the same issues that they raised in the pending litigation regarding the purported invalidity of the State Water Board's curtailment of their diversions pursuant to Term 91. They incorporate arguments made in their appellate opening and reply briefs by reference in their petition for reconsideration, alleging that:

"(1) Petitioners were not required to raise any of the instant challenges at the time of issuance of their permits and licenses.

"(2) Petitioners are not required to raise any of the allegations at the time of issuance of the Curtailment Notices

"(3) The [State Water Board's] imposition of diversion restrictions pursuant to Term 91 without first making a finding that such restrictions would achieve the purpose for which they were imposed constitutes an abuse of the [State Water Board's] discretion.

"(4) The [State Water Board's] implementation of diversion restrictions pursuant to the instant Term 91 Curtailment Notices deprives Petitioners of their rights to divert under the Watershed Protection Statute.

"(5) The [State Water Board's] implementation of diversion restrictions pursuant to the instant Term 91 Curtailment Notices deprives Petitioners of their rights to divert under the Delta Protection Act.

"(6) The [State Water Board's] implementation of diversion restrictions pursuant to the instant Term 91 Curtailment Notices deprives Petitioners of their . . . seniority over some of the Projects' water rights.

"(7) The [State Water Board's] implementation of diversion restrictions pursuant to the instant Term 91 Curtailment Notices is based on wrongfully substituted [revised Decision 1641 (D-1641)] outflow standards rather than the required D-1485 standards."

In addition, Petitioners state that they are supplementing those allegations with the following additional allegations:

- The curtailment notices are legally defective on their face because they do not include an express determination that the satisfaction of inbasin entitlements requires the release of supplemental Project water, and they should be set aside as a matter of law.
- If the curtailment notices are not legally defective, then the State Water Board should set aside the notices and hold an evidentiary hearing to review the legal and factual validity of imposing diversion restrictions during any portion of the remainder of the year.
- The Chief of the Division of Water Rights (Division Chief) is required to, but did not, make factual and legal findings regarding the propriety of imposing diversion restrictions pursuant to Term 91 before issuing the curtailment notices.
- If the State Water Board or the courts determine the curtailment notices to be invalid, the State Water Board should reimburse Petitioners for any expenses or losses incurred in detrimental reliance on the notices.

As explained below, Petitioners' claims are without merit.⁵

5.2 Petitioners' Challenges to the Methodology and Implementation of Term 91 are Time-Barred

Petitioners raise a number of wide-ranging legal challenges to the State Water Board's application of Term 91. Petitioners, however, are time-barred from challenging the basis for Term 91, its methodology, or the addition of Term 91 to their water right licenses.

The Water Code establishes the statutory process and deadlines for challenging a State Water Board decision or order. Water Code section 1122 allows the State Water Board to order reconsideration of a decision or order on its own motion or on the petition of any interested person. A petition for reconsideration must be filed with the State Water Board no later than 30 days from the date on which the State Water Board adopts a decision or order. No later than 30 days from the date of the State Water Board's final action, an aggrieved party may file a petition for writ of mandate. (Wat. Code, § 1126, subd. (b).) If a petition for writ of mandate is

⁵ The reasoning of Order WRO 2004-0004 regarding Petitioners' claims that are time-barred, and their arguments regarding application of the Delta Protection Act and watershed protection statutes, are incorporated by reference herein.

not timely filed, then the State Water Board's decision or order is not subject to review by any court. (*Id.* subd. (d).)

The essential underpinnings of Petitioners' allegations challenge the validity of the State Water Board's direction in Order WR 81-15 and D-1594, and the administrative proceedings in which the Board imposed Term 91 in Petitioners' permits and licenses. The State Water Board issued water right licenses containing Term 91 to Petitioners beginning in 1995 and ending in 1999. Petitioners could have sought review of those Board actions through the administrative reconsideration and mandamus procedures. They failed to do so. Petitioners thus have acquiesced to the inclusion of Term 91 in their water rights for 8-12 years. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511 [138 Cal.Rptr. 472] [landowner is barred from challenging permit condition if he has acquiesced to that condition by failing to object to and accepting benefits afforded by the permit].)

Petitioners now invoke the administrative reconsideration process to challenge the State Water Board's curtailment of diversions through issuance of the May 2007 curtailment notice. To the extent that Petitioners attempt to revisit the State Water Board's prior decisions or orders regarding the adoption or implementation of Term 91 through their challenge to the May 11 curtailment notice, Petitioners' claims constitute an improper collateral attack on the State Water Board's prior administrative determinations. (*Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 654-655, 660 [260 Cal.Rptr. 736].) At a minimum, those claims should have been raised when the State Water Board imposed Term 91 in Petitioners' permits and licenses. Those claims are now time-barred for failure to comply with the applicable statute of limitations. (See, e.g., Wat. Code, § 1126, subd. (b).); *United States v. State of Cal.* (E.D.Cal., as amended 1982) 529 F.Supp. 303, 312 [concluding that the United States must file its request for relief from a State Water Board decision within 30 days of the Board's final action]; *North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1607 [concluding that water right permittee cannot accept permit conditions and then wait two years to challenge the premise on which they were based]; *County of Imperial, supra*, 19 Cal.3d at pp. 510-511.)

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As explained on page 17 of Order WRO 2004-0004:

"The [State Water Board] decided the language, policy objectives, and method of calculation of Term 91 in [State Water Board] Decision 1594 (D-1594) and in [State Water Board] Order WR 81-15 after a lengthy adjudicative process in which the [Petitioners] were parties. Pursuant to the policy direction in D-1594, the [State Water Board] added Term 91 to [Petitioners'] permits when it issued the permits. [Fn. omitted.] [Petitioners] did not, however, file timely challenges to either D-1594 or their permits. (See Wat. Code §§ 1122 and 1126(b), derived from Wat. Code §§ 1055.1, 1357, 1360, 1412, 1413, 1615, 1616, 1677, 1705.5, 1730, 1739, 1740, and 10507.) Having accepted Term 91 without bringing a timely challenge to the inclusion of this condition in their water right permits, the [Petitioners] cannot now collaterally attack Term 91 as a defense to this enforcement action." [Fn. omitted.]

Petitioners claim that they are not raising a facial challenge to Term 91, D-1594, or Order WR 81-15, but instead assert that they are raising an "as applied" challenge as to whether the State Water Board complied with the text of Term 91 when it applied the term against Petitioners in May 2007. Thus, Petitioners contend, they were not required to raise their challenges at the time of the issuance of their permits and licenses.⁶

Petitioners' challenges, however, cannot be characterized as "applied" challenges to the State Water Board's issuance of the May 2007 curtailment notices. Petitioners do not specify factual grounds to support their claim that the State Water Board failed to properly interpret and apply Term 91 when it issued the curtailment notices. They do not identify any sentence, phrase, or requirement in Term 91 that the State Water Board allegedly has misapplied. Nor do they claim that the State Water Board failed to properly apply any of the algebraic equations contained in Order WR 81-15 and D-1594 that translate the narrative formula in Term 91. Instead, as explained above, Petitioners' arguments attack the validity of the State Water Board's decisions to impose Term 91 as a term of their permits.⁷

⁶ Petitioners also contend that they were not required to raise these challenges at the time the State Water Board issued the May 2007 curtailment notices. Because, however, Petitioners petitioned for reconsideration of the May 2007 curtailment notices, the State Water Board need not consider this issue further. Nonetheless, it merits noting that despite Petitioners' contentions to the contrary, the Term 91 curtailment notice is a decision or order of the State Water Board instructing permittees and licensees to immediately discontinue water diversions as specified in the notice. This action is subject to the statutory procedures governing reconsideration and judicial review. (Wat. Code, §§ 1122, 1126, subd. (b).) Thus, a petition for reconsideration is required to challenge the State Water Board's issuance of the curtailment notice.

⁷ In fact, Petitioners' reliance on legal arguments made in their appellate opening and reply briefs, submitted October 6, 2006, and April 11, 2007, respectively, further weakens their argument that their challenge is an "as applied" challenge because these arguments were made before the State Water Board issued the May 11, 2007 curtailment notice.

Petitioners suggest that because the State Water Board did not expressly address the Watershed Protection Act, Delta Protection Act, and priority issues in D-1594 and Order WR 81-15, which are raised by Petitioners herein, those issues could be "addressed in the future should the circumstances occur which create a conflict with those laws." (Petition for Reconsideration, Ex. B., p. 12.) Not so. Of course, when an agency applies a precedent decision to a party as part of a permitting decision, as the State Water Board did when it applied D-1594 and Order WR 81-15 by adopting Term 91 as a term in Petitioners' permits, the party may raise arguments as to why the precedents were incorrectly decided or are not applicable to that party, whether or not the issues were discussed in the precedent decision. But the issue here is whether Petitioners, having failed to timely challenge the inclusion of Term 91 in their permits, may still challenge that permit term when it is later enforced. As discussed herein, any claims challenging the validity of Term 91 or its inclusion in Petitioners' permits that were not raised or were rejected by the State Water Board at the time Term 91 was included in Petitioner's water rights are time-barred. Petitioners may raise challenges that are specific to the State Water Board's issuance of the May 2007 curtailment notice, including, for example, whether the facts supported issuance of the curtailment notice consistent with Term 91, but cannot use a proceeding applying Term 91 as a vehicle for challenging Term 91 or the decision to include it as a term of Petitioners' permits. As explained below, Petitioners' claims are not specific to the curtailment notice.

5.3 Term 91 does not Require the State Water Board to Make Particular Water Quality Findings

Petitioners contend that the State Water Board's implementation of diversion restrictions pursuant to the curtailment notices, without first making a finding that such restrictions would achieve the purpose for which they were imposed, constitutes an abuse of the State Water Board's discretion. More specifically, Petitioners contend that the State Water Board must make findings regarding the degree to which, if any, Petitioners' particular diversions during a particular curtailment period result in the Projects having to release storage water to offset those diversions' impacts. First, for the reasons stated above, to the extent that Petitioners' claims constitute a challenge to the validity of Term 91 or to the imposition of Term 91 in their water rights, those claims are time-barred.

Second, neither Term 91's narrative formula nor the translation of that formula into algebraic equations in Order WR 81-15 and D-1594 requires the State Water Board to make the particular

findings that Petitioners allege. The plain language of Term 91 does not contain any requirement for findings concerning the specific impacts of a permit holder's diversion on water quality as a pre-condition to the application of Term 91, and neither do Term 91's translating equations. Indeed, Petitioners' demand for additional findings amounts to an attack on the basic principles underlying Term 91. Term 91 provides a real-time mechanism for determining when water is available for appropriation by the appropriators who have Term 91 in their permits. (D-1594, at p. 24.) Thus, when the State Water Board determines that the conditions calling for issuance of a curtailment notice consistent with Term 91 apply, this determination constitutes a finding that no water is available for appropriation by those subject to Term 91. If no water is available for appropriation, no appropriation is authorized. (See Wat. Code, § 1375, subd. (d).) An additional finding of harm is not required.

Petitioners suggest that Order WR 81-15 requires the Division Chief to make certain findings before any diversion curtailments are implemented pursuant to Term 91, including findings whether to implement Term 91 or to institute additional exceptions to the use of Term 91. Order WR 81-15 delegates certain authorities to the Division Chief with respect to Term 91, including the authority to "make findings concerning the existence of supplemental Project water and the satisfaction of conditions required for the implementation of diversion restrictions under Term 91." (Order WR 81-15, at p. 11; D-1594, at p. 60.) Petitioners do not provide any basis for concluding that in issuing the curtailment notices, the Division Chief acted inconsistent with or in excess of this delegated authority. Order WR 81-15 does not require the Division Chief to consider the exercise of other delegated authority, such as instituting exceptions, prior to issuing the curtailment notices, as Petitioners appear to allege. (See Order WR 81-15, at p. 10 [explaining scope of delegated authority].) In fact, Term 91's implementing equations leave the Division Chief with little discretion in determining whether Term 91 requires a permittee or licensee to curtail diversions.⁸

Petitioners also attempt to show that the reclamation and farming of their land actually results in a net increase in the projects' storage supplies, arguing that they should receive a credit for the water savings afforded the projects. Again, however, this argument amounts to a claim that Term 91 should not have been included in Petitioners' permits, and does not raise any basis for

⁸ Because Term 91 is dependent on hydrologic conditions that may abruptly change, however, the Division Chief certainly has the discretion to take those conditions into account when determining when to issue a curtailment notice.

arguing that the Chief of the Division of Water Rights erred in issuing the curtailment notices. Moreover, the argument rests on their assertion that the evapotranspiration of wetlands exceeds that of irrigated farmland. According to Petitioners, if the Delta were in its natural condition, the projects would have to release even more stored water. The projects were built, however, in part to provide enhanced summer flow to impede seawater intrusion in the Delta during the irrigation season, an action that requires releases of stored water and that benefits the Petitioners. Petitioners' arguments have no merit.

5.4 Implementation of Term 91 does not Deprive Petitioners of a Right to Divert Under the Watershed Protection Statutes

Petitioners contend that the State Water Board's implementation of the Term 91 diversion restrictions deprives Petitioners of their rights to divert under the Watershed Protection Act (Wat. Code, §§ 11460-11463).⁹ First, for the reasons stated above, to the extent that Petitioners' claims constitute a challenge to the validity of Term 91 or to the imposition of Term 91 in their water rights, those claims are time-barred.

Second, the watershed protection statutes do not create a right to divert water. They provide the inhabitants of the protected watershed with an area of origin priority against water project exports. The statutes do not allow junior area of origin users the right to divert when the projects are releasing stored water for water quality purposes. (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 976 [48 Cal.Rptr.3d. 468] [Legislature did not intend to give users within an area of origin the right to water stored by DWR without paying for it].)

Third, watershed protection statutes do not grant any priority "[a]s between competing uses within the area of origin." (*SWRCB Cases, supra*, 136 Cal.App.4th at pp. 758-760.) Instead, as the Third District Court of Appeal noted, "all beneficial uses within the area of origin stand on equal footing under section 11460." (*Id.* at p. 758.) The very purpose of Term 91 is to ensure that the natural flow and released stored water present in the watershed and necessary to maintain Delta water quality objectives actually remain in the Delta watercourses. Thus, the State Water Board's implementation of Term 91 does not contravene the watershed protection

⁹ These statutes, to which Petitioners refer as the Watershed Protection Act, are also known as the "watershed protection statutes." The statutes were enacted as part of the part of the legislation authorizing construction of the CVP. (Wat. Code, §§ 11460-11465; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 754, fn. 32 [39 Cal.Rptr.3d 189] (*SWRCB Cases*).)

statutes because the water quality objectives and Petitioners' use of water are "competing uses within the area of origin." (*Id.* at pp. 758-760.)

5.5 The Delta Protection Act does not Provide a Basis for Invalidating the May 2007 Curtailment Notice

Petitioners claim that the State Water Board's implementation of diversion restrictions pursuant to the curtailment notices deprives Petitioners of their rights to divert under the Delta Protection Act. They assert that implementation of Term 91 deprives them of their statutory entitlement to salinity control and an adequate water supply, complaining that Petitioners must curtail their diversions while the projects divert water from the Delta that Petitioners allege is necessary to provide an adequate water supply for users within the Delta. Again, Petitioners' claims constitute a challenge to the validity of Term 91 and to its imposition in their water rights. Those claims are time-barred.

Those claims also are without merit. Water Code sections 12200-12205 are commonly known as the Delta Protection Act. (*SWRCB Cases, supra*, 136 Cal.App.4th at p. 767.) The Delta Protection Act "recognizes the importance of providing salinity control and an adequate water supply in the Delta to serve dual goals: (1) maintaining and expanding agriculture, industry, urban, and recreational development in the Delta; and (2) providing fresh water for export to areas of water deficiency." (*Id.* at p. 768.) But "[n]othing in the Delta Protection Act purports to grant any kind of water right to any particular" water user. (*Id.* at pp. 771-772 [disagreeing that Central Delta parties have a right to water stored upstream by others].)

Moreover, Term 91 complies with the Delta Protection Act because the term is designed to ensure maintenance of Delta water quality objectives by preventing diversions when the natural flow of the watershed is insufficient to meet those objectives. This outcome comports with the Delta Protection Act's finding that an adequate water supply for Delta beneficial uses is necessary for health, safety, and welfare of the State. (Wat. Code, § 12201; see *SWRCB Cases, supra*, at p. 771 [rejecting claim that the State Water Board violated the Delta Protection Act by not assuring an "adequate" water supply for users in the Delta].)

5.6 Implementation of Term 91 does not Deprive Petitioners of their Seniority over Project Water Rights

Petitioners contend that the State Water Board's implementation of diversion restrictions pursuant to the curtailment notices deprives Petitioners of their seniority over some of the projects' water rights. Petitioners first claim that the USBR holds a direct diversion right (A027319) for hydroelectric power purposes at New Melones Reservoir that is junior in priority to Petitioners' water rights. The State Water Board issued this right to the USBR in Decision 1616 and expressly subjected the right to prior rights and limited it to hydroelectric nonconsumptive uses. (Decision 1616, at pp. 4, 28, 36-37; see Cal. Code Regs., tit. 23, § 686 [defining nonconsumptive use as one that "returns substantially all of the water to a surface stream or other surface body of water"].) Thus, water appropriated under this right is not stored and is not significantly detained in its journey to the Delta. Petitioners have failed to identify any information supporting their contention that the exercise of this nonconsumptive hydropower right during the curtailment period impairs their senior right.

Second, Petitioners claim that application of the Term 91 curtailment period violates the rule of priority because Mr. Phelps' two water right licenses are senior to three water right permits held by the USBR.¹⁰ Term 91 only triggers a curtailment period when natural and abandoned flows in the watershed are insufficient to meet Delta water quality objectives and the projects must release stored water to meet those objectives. During such conditions, all of the natural and abandoned flows in the watershed are committed to meeting the objectives, and the projects only divert for export purposes water released from upstream storage at project facilities. Senior in-basin diverters cannot claim a right to the stored water released by upstream projects. (*El Dorado Irrigation Dist.*, *supra*, 136 Cal.App.4th at 976; *SWRCB Cases*, *supra*, 136 Cal. App.4th at 738, 743.) Thus, Petitioners have no right to the previously stored water of the DWR or the USBR. Nor can they claim a right to natural flow needed for prior inbasin entitlements reserved from their rights. During periods of Term 91 curtailment, project operations are occurring under rights that are considerably more senior to those of Petitioners. Therefore, the rule of priority is not violated.

¹⁰ Mr. Phelps holds Licenses Nos. 13444 (Application No. 21162) and 13274 (Application No. 20957). The USBR's water rights referenced by Petitioners are Permit Nos. 16211 (Application No. 21636), 16212 (Application No. 21637), and 15735 (Application No. 22316). (See Decision 1485, Table I.)

Moreover, Petitioners' claims have no basis in fact. USBR Applications 21636 and 21637 include the Auburn Dam as a point of diversion, a facility that was never built and thus has no impact on Delta hydrology. The State Water Board approved Application 22316 for the diversion to storage of 5,400 acre-feet of water in Contra Loma Reservoir with the point of diversion in the Delta at Rock Slough. Diversion under this right is not permitted between June 30 and September 30. During that period, when the Delta is in balanced conditions and Term 91 is in effect, diversions at Rock Slough are supported by upstream storage releases. No water being diverted under these permits is water to which the Petitioners are entitled.

To the extent Petitioners suggest that the State Water Board has an obligation to investigate water use by junior water right holders before implementing Term 91, Petitioners are mistaken. While the State Water Board has the discretion to take enforcement action against an unauthorized diversion of water, it is not required to investigate or exercise that discretion prior to sending the curtailment notices. Finally, as explained above, Petitioners' claims that constitute a challenge to the validity of Term 91 or to the imposition of Term 91 in their water rights are time-barred.

5.7 The State Water Board has Applied the Correct Water Quality Objectives in Implementing Term 91

Petitioners contend that the State Water Board wrongfully issued the 2007 curtailment notices based on D-1641 outflow standards instead of standards established under Decision 1485 (D-1485), a predecessor decision issued in 1978. Petitioners essentially claim that because Order WR 81-15 refers to compliance with D-1485 standards (Order WR 81-15, p. 8), then the State Water Board cannot rely on different standards without providing notice and an opportunity for a hearing.

Term 91 does not specify a specific water quality objective, but instead refers to "flows required by the State Water Resources Control Board for maintenance of water quality and fish and wildlife." At the time of the May 2007 curtailment notice, the Bay-Delta water quality objectives applicable to the CVP and the SWP were those set forth in D-1641. Thus, the State Water Board correctly applied the D-1641 standards in reaching its Term 91 determinations.

Contrary to Petitioners' assertion, Order WR 81-15 did not permanently affix the applicable water quality objectives as those contained in D-1485. At that time, the only applicable

objectives were those contained in D-1485. The First Appellate District found that the objectives were not established in a manner required by law. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82.) Petitioners' claim that the State Water Board singled out the Delta outflow standards from the D-1485 standards in Order WR 81-15 does not alter the fact that those standards—whether expressly identified by the State Water Board or not—were disapproved. The State Water Board initiated new water quality proceedings that resulted in new water quality objectives implemented under D-1641. Term 91 cannot be read to require the State Water Board to apply disapproved water quality objectives when implementing the term.¹¹

Moreover, the basic principle incorporated in Term 91 – that no water is available for appropriation when supplemental project releases are required because natural flows are insufficient to meet prior inbasin entitlements and water quality objectives – logically applies to the water quality objectives in effect at the time the supplemental project releases are being made. To the extent that they differ, the water quality objectives in effect when the curtailment notices are issued, not the water quality objectives in effect when Term 91 was first formulated, determine what is necessary to meet water quality objectives and whether, taking into account flows needed to meet those objectives, water is available for appropriation by those with Term 91 in their permits.

D-1594 expressly recognized that Term 91 did not permanently fix the applicable water quality objectives, noting that “the standards currently in effect were established by Board Decision 1485.” (D-1594, p. 35; see *id.* at pp. 35-36 [contemplating future proceedings involving revisions to Delta water standards affecting season of diversion of Term 80 permittees].) The conditional language in the Decision would be unnecessary if Order WR 81-15 permanently affixed the Term 91 water quality objectives. Petitioners' claim is without merit.

5.8 The Term 91 Curtailment Notices are Valid

Petitioners contend that the curtailment notices are legally defective on their face because they do not include an express determination that the satisfaction of inbasin entitlements requires the release of supplemental Project water. This contention lacks any support. There is no

¹¹ In addition, the flow objectives in D-1485 in the summer months were slightly higher than those in D-1641. As a practical matter, the difference in the duration of the curtailment period under the two decisions is immaterial.

requirement for the curtailment notice to contain any express determination. The language in Term 91 that Petitioners cite is part of the notification to the permittees and licensees, and does not impose any requirement on the State Water Board to make express findings in the notice itself. At best, Term 91 merely requires the State Water Board to “notify licensee of curtailment of diversion under this term after it finds that supplemental Project water has been released or will be released.”

Petitioners’ challenge to the curtailment notice represents yet another attempt to challenge the underlying basis, methodology, and implementation of Term 91. Through its adoption of the Term 91 methodology in Order WR 81-15 and D-1594, the State Water Board has established the criteria by which it can determine when the satisfaction of inbasin entitlements require release of supplemental Project water. No other express determination is required. As explained above, to the extent that Petitioners’ claims constitute a challenge to the validity of Term 91 or to the imposition of Term 91 in their water rights, those claims are time-barred. Petitioners’ claims have no merit.

5.9 An Evidentiary Hearing is not Required

Petitioners also argue that the State Water Board should set aside the curtailment notices and hold an evidentiary hearing to review the legal and factual validity of imposing diversion restrictions during any portion of the remainder of the year. For example, Petitioners claim that the State Water Board must evaluate and determine which water quality objectives trigger the need for the projects to release supplemental project water and whether Petitioners’ farming diversions provide net benefits to the projects’ storage supplies. The factual issues raised by Petitioners, however, relate to their claims regarding the underlying policy and methodological bases for Term 91, or the appropriateness of including Term 91 in Petitioners’ permits. These issues are now time-barred. Petitioners do not raise specific infirmities related to the May 2007 curtailment notice, and no evidentiary hearing is required.

5.10 The Division Chief is not Required to Make Certain Factual and Legal Findings Before Issuing Term 91 Curtailment Notices

Similarly, Petitioners claim that the Division Chief is required to, but did not, make factual and legal findings regarding the propriety of imposing diversion restrictions pursuant to Term 91 before issuing the notices. Petitioners cite to the delegation of authority to the Division Chief to make certain findings and to institute exceptions to the use of Term 91 that are set forth in Order

WR 81-15. They also allege that the Division Chief is required to make other findings, such as that the imposition of diversion restrictions is in accordance with law and not contrary to declarations of policy in the Water Code. Petitioners' claims are without merit.

As a practical matter, to the extent any particular determinations may have been required, the State Water Board made them when it adopted Order WR 81-15 and D-1594. Thus, the State Water Board is not required to find that curtailment would fulfill the purposes for which it was imposed, that the curtailment would not result in the deprivation of the water right holders' rights, or that water must be released to satisfy inbasin entitlements before implementing Term 91. To the extent that Petitioners' claims constitute a challenge to the premise of Term 91 or to the imposition of Term 91 in their water rights, those claims are time-barred. Petitioners' claims have no merit.

5.11 Reimbursement is not Required

Finally, Petitioners contend that if the State Water Board finds the curtailment notices to be invalid, the State Water Board should reimburse Petitioners for any expenses or losses incurred in detrimental reliance on the notices. Petitioners cite no legal authority for this proposition, and the State Water Board need not consider this claim further.

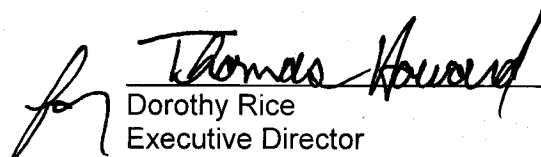
6.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that its decision to issue curtailment notices to Petitioners was appropriate and proper. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that these issues are insubstantial. The petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

Dated: **AUG 22 2007**



Dorothy Rice
Executive Director