

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2007-0028-DWR

**IN THE MATTER OF PETITION FOR TEMPORARY URGENCY CHANGES
TO PERMITS 15254 AND 15255 (APPLICATIONS 16950 AND 21443) OF THE
CALIFORNIA DEPARTMENT OF WATER RESOURCES**

SOURCE: Big Grizzly Creek tributary to Middle Fork Feather River

COUNTY: Plumas

ORDER APPROVING TEMPORARY URGENCY CHANGE IN
CONDITION 15 OF PERMITS 15254 AND 15255 (APPLICATIONS 16950 AND 21443)

1.0 INTRODUCTION

On July 30, 2007, the Department of Water Resources (Department or DWR) filed petitions requesting approval of Temporary Urgency Changes with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), pursuant to Water Code section 1435 et seq. The petitions request a temporary suspension of Condition 15 of Permits 15254 and 15255 to reduce or cease streamflow releases from Grizzly Valley Dam to enable the Department of Fish and Game (DFG) to implement its proposed Lake Davis Pike Eradication Project.

2.0 BACKGROUND

The Division issued two permits for storage in the 84,371 acre-feet (af) capacity Lake Davis, formed by Grizzly Valley Dam, as listed below.

- Permit 15254 was issued to the Department on January 5, 1967 pursuant to Application 16950 and authorizes collection to storage of 49,000 af per annum from October 1 through June 30 of the succeeding year.
- Permit 15255 was issued to the Department on January 5, 1967 pursuant to Application 21443 to collect to storage 34,000 af per annum from October 1 through June 30 of the succeeding year.
- Both permits allow water to be used for municipal, incidental domestic, irrigation and streamflow enhancement purposes.

Condition 15 of the Permits, as amended by the State Water Board on August 22, 1997, states: "Minimum downstream releases in Big Grizzly Creek for recreation and fishery enhancement shall be made at the flow rates set forth in the Agreement dated March 31, 1994 between DWR, the Forest Service, and DFG. These releases shall include the quantities of water released for diversion from Big

Grizzly Creek pursuant to agreements between DWR and water users. Any changes in the minimum downstream releases agreed to by DWR and DFG shall not become effective until and unless approved by the Chief of the Division of Water Rights.”

3.0 SUBSTANCE OF THE PETITIONS

The Department petitions the State Water Board, under Water Code section 1435 et seq., to approve temporary changes in the minimum releases from Grizzly Valley Dam required pursuant to Condition 15 of both permits. Permit Condition 15 is based on a Streamflow Release Agreement between the Department and DFG as amended March 31, 1994. DFG, in cooperation with the Department, plans to conduct a project to eradicate Northern Pike (pike), a significant threat to biological resources, from Lake Davis and its tributaries. The proposed project involves the application of rotenone to the reservoir and its tributaries to eradicate the invasive northern pike, illegally introduced to the reservoir in the 1980's. The project requires cessation of releases from Grizzly Valley Dam during chemical treatment and a significant reduction or cessation during the neutralization phase. DFG plans to implement the project when the lake contains between 45,000 to 48,000 acre-feet (af) of water. The temporary reduction in releases downstream of the dam will occur between September 3, 2007 and October 31, 2007, and treatment is currently scheduled to begin about September 25, 2007. The downstream flow reduction may continue for up to 45 days after the water is treated with rotenone. The California Department of Health Services, the Central Valley Regional Water Quality Control Board and the Plumas County Environmental Health Department will be consulted to determine when normal releases to Big Grizzly Creek may resume.

3.1 Description of the Temporary Urgency Changes

The Department seeks State Water Board approval for Temporary Urgency Changes to Permits 15254 and 15255. The petitions request the State Water Board approve a temporary suspension in minimum downstream releases required pursuant to permit Condition 15 to enable DFG to implement the Lake Davis Pike Eradication Project. As a result of the cessation or reduction of releases from Lake Davis, inflow to the reservoir will be captured prior to October 1, 2007, which is the beginning of the authorized season for collection to storage in the permits. However, the quantities of natural inflow to Lake Davis during September are not anticipated to exceed evaporation and seepage losses at the reservoir. Consequently no diversion to storage is expected to occur outside of the authorized season, which begins on October 1 of each year.

DFG and the U.S. Forest Service (USFS) prepared an Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the project to eradicate the pike from Lake Davis and all of its tributaries in order to re-establish the trout fishery at Lake Davis and to prevent the pike from escaping from the reservoir and causing ecological impacts in other parts of the State and region, including the ecologically sensitive Sacramento/San Joaquin Delta, such as have occurred at Lake Davis. The EIR/EIS evaluated the impacts of seven project alternatives to eradicate the pike. Alternatives varied in the degree to which the reservoir water level would be lowered and in the formulation of rotenone utilized. A non-chemical alternative for eradication and a no action alternative were also evaluated. Lake Davis is located on USFS land. Two potential temporary forest closure orders are included in the proposed project to prohibit human entry during chemical treatment and to protect cultural resources when the lake is drawn down for treatment. Alternative D was selected as the environmentally superior alternative. Under Alternative D, Lake Davis will be drawn down to a storage level of approximately 45,000 to 48,000 af and rotenone will be applied to Lake Davis and its tributaries. Neutralization of the rotenone is required prior to discharge of any water from Lake Davis to Big Grizzly Creek to protect downstream aquatic resources. Since 1997, the median minimum reservoir elevation has been 45,000 af. This is considered the normal operating volume in January.

On August 13, 2007 the storage level at Lake Davis was 44,645 af. When chemical treatment of Lake Davis commences on September 25, 2007 DFG anticipates that the lake level will be approximately 41,500 af.

4.0 PUBLIC NOTICE AND OBJECTIONS TO THE PETITIONS

A public notice of the proposed temporary urgency changes was mailed to interested parties on August 3, 2007, and published in the Portola Reporter on August 15, 2007. Objections were required to be received by the Division by August 20, 2007. Urgency changes may be approved prior to the end of the noticing period. The Division received no objections to the proposed temporary changes as of the date of this Order.

5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

Chapter 6.6 of Part 2, Division 2, of the Water Code, commencing at section 1435, provides that any Permittee or Licensee who has an urgent need to change a point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for a conditional temporary change order. The State Water Board's regulations, at California Code of Regulations, Title 23, section 791(e), provides that the State Water Board shall follow as nearly as possible the procedures for changes in point of diversion, place of use, or purpose of use when processing petitions for other types of changes in water right permits and licenses. Accordingly, the procedures under section 1435 are applicable to changes to water right permits and licenses that the State Water Board approves pursuant to its duty of continuing supervision over the diversion and use of water.

The State Water Board must make the findings specified in section 1435(b) when issuing a temporary change order pursuant to Chapter 6.6. The required findings are:

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.

5.1 Urgency of the Proposed Change

Under Chapter 6.6, an urgent need to make a proposed change exists when the State Water Board concludes that the proposed temporary change is necessary to further the constitutional policy that the water resources of the State are put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented. An urgent need does not exist, however, if the Department has failed to exercise due diligence either in petitioning for a change pursuant to other provisions of Division 2 of the Water Code or in pursuing the petition for change.

The Department has stated and DFG concurs that the existence of Northern Pike in Lake Davis has degraded the local trout fishery, and the threat of the Northern Pike escaping from Lake Davis continues to be a significant threat to the biological resources downstream of Lake Davis, including the ecologically sensitive Sacramento/San Joaquin Delta. Therefore, the Permittee has an urgent need for the proposed temporary change.

5.2 No Injury to Any Other Lawful User of Water

Historically, Lake Davis served as a source of municipal water supply for the City of Portola and the Grizzly Lake Resort Improvement District (GLRID) via contracts with the Plumas County Flood Control and Water Conservation District (District). The District, as a State Water Project contractor, and the Department executed a long-term water supply contract on December 26, 1963. The District may request up to 2,700 af of Lake Davis water per year as part of that agreement. Historically, water from Lake Davis was treated at the Plumas County Water Treatment Plant, which was constructed around 1970. Domestic use of Lake Davis water was suspended in 1997 due to DFG's 1997 chemical treatment of Lake Davis to control pike. Domestic use of water from Lake Davis cannot resume until completion of a new water treatment plant to ensure that the water meets the current drinking water quality standards.

The Division has record of only one water right on Big Grizzly Creek downstream of Lake Davis. License 5905 (Application 16910) of Stein (dba Walton's Grizzly Lodge) authorizes collection to storage of 140 af per annum from November 1 of each year to June 15 of the following year for domestic, fire protection, recreational and stockwatering uses. The water is stored in a reservoir known as the Grizzly Ice Pond. There is also one Statement of Water Diversion and Use on file for riparian or pre-1914 appropriative rights on the Middle Fork Feather River downstream of Lake Davis. Plumas Pines Golf Resort claims a diversion of one cubic foot per second (370 af) by direct diversion from August 1 through September 30 for irrigation use under Statement of Water Diversion and Use 15482.

The EIR/EIS, Mitigation Measure Impact PS-5, states that DFG shall temporarily provide alternative water supply to all riparian and appropriative water right holders along Big Grizzly Creek below the dam to meet existing water demands. The July 27, 2007 Agreement between DFG and the Department states that DFG has determined that initiating the streamflow curtailment after September 4, 2007 will allow for continued normal operation of Walton's Grizzly Lodge Camp during the summer months.

To protect the prior water right under License 5905, a protective measure shall be incorporated in the Order. If the project reduction or cessation of releases period (i.e., the period when water is held in Lake Davis to allow the rotenone to break down) extends past November 1, 2007 (the beginning of the collection to storage period for License 5905) and, by two weeks prior to the end of the Temporary Change period, the Department calculates that Grizzly Ice Pond will not fill, the Department shall provide an equivalent amount of water to serve License 5905 as would have otherwise been available. The Department shall maintain a record of inflow, or use an accounting methodology acceptable to the Chief of the Division of Water Rights, to tabulate inflow to Lake Davis from November 1 until the end of the reduction or cessation of releases period and shall provide an equivalent amount of water from Lake Davis storage as would have been available under License 5905. The water shall be supplied during the collection to storage period for License 5905.

Water is diverted from Big Grizzly Creek pursuant to four water supply agreements between the Department and (1) USFS (Todd York, lessee), (2) Grizzly Creek Ranch, (3) David Lake, and (4) Grizzly Ranch Development. On August 13, 2007, DFG verified that it had entered into Agreements/ Memoranda of Understanding with the four downstream water users to ensure they will have an adequate water supply when flow is reduced or curtailed downstream of the dam. The EIR/EIS identified provision of a temporary alternate water supply as a mitigation measure for the project.

In addition, DFG identified approximately 32 unrecorded riparian diversions downstream from Lake Davis. Each person was sent notification via registered mail of the proposed project. Only three of the 10 respondents indicated that they need water during the time when flows downstream of the dam will be curtailed. DFG has verbal agreements with these parties to provide water and/or truck in water as needed. Consequently, the Order will require the Department to protect any valid users of water, including any valid riparian right holders who may be impacted by any reduction or cessation of releases from Grizzly Valley Dam.

With these measures, the proposed project should not cause injury to any lawful user of water. Impacts on instream beneficial uses, which may also be considered legal users of water to the extent that those uses are protected by the public trust or other legal doctrines, are discussed in section 5.3.

5.3 No Unreasonable Effect Upon Fish, Wildlife, or Other Instream Beneficial Uses

As stated in the EIR/EIS, the project is necessary because efforts to control and contain the pike population in Lake Davis have been of limited success. The pike population continues to grow despite these efforts, and anglers are increasingly catching more pike. In addition, in 2006 Lake Davis came within 27-inches of maximum capacity because of an unusually wet winter and spring, and small pike were found for the first time in the cove near the Lake Davis spillway. Should pike escape or be moved from Lake Davis, they have the potential to do irreversible damage to the aquatic ecosystem and fisheries in the San Francisco Bay-Delta estuary and its watershed, as well as other areas of California. The CALFED Bay-Delta Program Ecosystem Restoration Program Plan has identified as a strategic objective halting the unauthorized introduction and spread of potentially harmful non-native introduced species of fish, such as pike in Lake Davis, to the Bay-Delta and Central Valley. (CALFED 2000.)

Temporarily discontinuing flow downstream of Lake Davis will have impacts on instream uses. Nonetheless, the Fish and Game Commission (Commission) adopted a regulation that temporarily supersedes Fish and Game Code section 5937 for the specific and limited purpose of implementing the project to eradicate pike from Lake Davis and its tributaries to protect fish, wildlife, and other natural resources under the jurisdiction of the Commission. The regulation, which was approved by the Office of Administrative Law, became effective on July 11, 2007. (Cal. Code Regs., tit. 14, § 721.) The regulation authorizes closure of the outlet valve at Grizzly Valley Dam for a period of up to 45 days.

DFG has determined that the project benefits to public trust resources outweigh the temporary impacts. On January 23, 2007, DFG issued a Notice of Determination approving the project identified in the EIR/EIS. The EIR/EIS includes a Statement of Overriding Considerations.

Failure to control Northern Pike will adversely impact public trust resources. The proposed project will mitigate the impact of pike on public trust resources, although there will be impacts to instream resources downstream of the dam associated with implementing the project. Balancing of the public trust considerations results in a finding that the project will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

5.4 The Proposed Change is in the Public Interest

Lake Davis is an established fishing and recreational facility. Since the rediscovery of pike at Lake Davis in 1999, the pike have become well established and are found throughout Lake Davis. The EIR/EIS states that the pike have adversely affected the trout fishery as well as the ecology of the reservoir. The problems pike have caused at Lake Davis could occur in other areas of the state or region if pike escape or are moved and become established elsewhere. Pike are voracious predators that are likely to successfully invade other waters, including those of the Central Valley, should they escape from Lake Davis. Escape is likely unless the pike are eradicated. The proposed change is in the public interest because it will allow DFG to conduct the pike eradication project.

6.0 ENVIRONMENTAL COMPLIANCE

A joint EIR/EIS was prepared by DFG and the USFS for the proposed Lake Davis Pike Eradication Project (dated January 13, 2007). DFG is the Lead Agency under the California Environmental Quality Act (CEQA), and USFS is the lead agency under the National Environmental Policy Act. The project specifics are described in the CEQA findings and attachments/exhibits, which were approved by DFG on January 13, 2007 and were subsequently filed with the California State Office of Planning and Research. On January 23, 2007, DFG issued a Notice of Determination approving the project identified in the

EIR/EIS. A Statement of Overriding Considerations was adopted by DFG for this project. As a Responsible Agency pursuant to CEQA, the Department issued a Notice of Determination for the project on July 26, 2007. The USFS issued a Record of Decision on February 8, 2007.

The EIR/EIS identified impacts in Big Grizzly Creek below the dam due to cessation or reduction of flow at the dam and provided mitigation as listed below. The EIR/EIS also identified downstream impacts associated with drawdown to reduce storage in the reservoir prior to rotenone treatment. The selected alternative of drawing the reservoir down to 48,000 af should be accomplished in all water years by August 1. No reservoir refilling operations are needed for this alternative. Reservoir drawdown occurred prior to submittal of the Temporary Change Petitions. Water will not be released from Lake Davis to serve prior right holders, except as required by this Order for License 5905. The maximum quantity that could potentially be released for License 5905 is 140 af (the license face value), which is 0.3 percent of the normal operating volume of 45,000 af in January. Any reservoir release to satisfy License 5905 would be within the normal operating parameters for the reservoir.

Impacts to desirable fish species.

DFG will conduct a fish rescue and relocation effort in the upper portion of Big Grizzly Creek below Grizzly Valley Dam while the rotenone neutralization is occurring and streamflows are reduced. If necessary, desirable fish species will be stocked following neutralization in accordance with the Fisheries Management Plan. No mitigation was identified as necessary for flow effects on Middle Fork Feather River.

Impacts to macroinvertebrates.

Less than significant, no mitigation required.

Temperature effects.

To minimize the potential for adverse temperature effects during flow curtailment, treatment will be conducted in September or October rather than August. No other feasible mitigation is available. Therefore, if this impact occurs during the project, DFG found that it would be significant and unavoidable.

Dissolved oxygen impacts.

No feasible mitigation is available. DFG found that mitigation measures would not reduce these effects to less than significant. Thus, this impact is significant and unavoidable.

Cumulative surface water quality impacts: turbidity in Lake Davis, elevated bacterial level, and increased suspended sediment and reduced dissolved oxygen in Big Grizzly Creek.

No feasible mitigation is available. The surface water quality impact is considered cumulatively significant and unavoidable.

Impacts to water users.

DFG identified impacts to downstream water users as mitigable through surveying for affected property owners, entering into agreements for provision of alternate water supply through (a) trucking, (b) assisting with private well pumping costs, (c) providing water obtained from Grizzly Ice Pond (for diversions downstream from Grizzly Ice Pond), and (d) providing pasture or hay for identified persons. DFG has entered into agreements for provision of alternate water supply as discussed in section 5.2 of this Order. To ensure that the mitigation measure is carried out, the Order requires the Department, as Petitioner, to provide an alternate water supply to any person having valid basis of right when the Department ceases or reduces flow at its dam. The Order also requires the Department to provide water to the holder of License 5905, should the project impact collection to storage pursuant to the license. The Order does not

require any measures, however, to serve any other appropriative rights because the Division only has a record of one right, License 5905, downstream of the dam that may be impacted by approval of this petition. Thus, although the Department provides water to persons identified in section 5.2 pursuant to private agreements, no provision is made for requiring water delivery to those persons in the Order. Nonetheless, DFG has entered into agreements to serve the private parties while the project is in operation.

The State Water Board, having reviewed and considered the information contained in the Final EIR/EIS and Statement of Overriding Considerations of DFG dated January 23, 2007, finds that there are no additional mitigation measures within the jurisdiction of the State Water Board for the identified environmental impacts.

The State Water Board, as a Responsible Agency, proposes to issue a Notice of Determination in compliance with Section 21108 of the California Public Resources Code. The impacts not substantially lessened by mitigation in the EIR/EIS are listed above. To the extent that significant adverse environmental effects impacts will not be reduced to a less-than-significant level with adopted mitigation, the State Water Board has found that specific economic, social, and other considerations support approval of the project. In making this Statement of Overriding Considerations, the State Water Board has considered information contained in the Final EIR/EIS. The State Water Board has balanced the project's benefits against the unavoidable adverse impacts identified in the Final EIR/EIS and hereby determines that the project's benefits outweigh the significant and unmitigated adverse impacts. The benefits of the project, which outweigh the impacts of the project, include:

- The devastation to the local trout fishery from pike will be halted. (Appendices A, G, EIR/EIS.)
- The local trout fishery will be re-established. (Appendices A, G, EIR/EIS.)
- The local economy will benefit from the halt of the devastation to the local trout fishery from pike. (Section 12 and Appendix I, EIR/EIS.)
- The local economy will benefit from the re-establishment of the local trout fishery. (Appendix I, EIR/EIS.)
- The threat of pike escaping Lake Davis will be removed, protecting the aquatic ecosystems of threatened and endangered species in the state and region. (Appendix A, EIR/EIS.)
- The economy of the state and region will benefit from the removal of the threat of pike escaping Lake Davis. (Section 12 and Appendix I, EIR/EIS.)

7.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

Resolution 2002-0106, section 2.6.17 delegates to the Chief of the Division the authority to approve temporary urgency changes in accordance with Water Code sections 1435 et seq, provided the necessary findings can be made.

8.0 CONCLUSIONS

1. The Department has an urgent need to have Condition 15 in Permits 15254 and 15255 temporarily changed in order to implement the proposed Lake Davis Pike Eradication Project.
2. The proposed temporary change may be made without injury to any other lawful user of water.
3. Failure to control Northern Pike will adversely impact public trust resources. The proposed project will mitigate the impact of pike on public trust resources, although there will be impacts to instream resources downstream of the dam associated with implementing the project. Balancing of the public trust considerations results in a finding that the project will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.
4. The proposed temporary change is in the public interest.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

The Department's petition for temporary urgency change to modify Condition 15 of its permits to allow the Department to temporarily reduce or cease streamflow releases from Grizzly Valley Dam to allow Department of Fish and Game (DFG) to implement its proposed Lake Davis Pike Eradication Project for Permits 15254 and 15255 under Water Code section 1435 is approved, subject to the following terms and conditions.

1. Condition 15 under Permits 15254 and 15255 shall be temporarily suspended to allow the Department to temporarily reduce or cease streamflow releases from Grizzly Valley Dam by closure of the outlet valve on Grizzly Valley Dam.
2. All current terms and conditions of Permits 15254 and 1522 (Applications 16950 and 21443) shall remain in effect, except as temporarily modified by the terms and conditions of this Order and any further related Order that may be issued during the effective period of the temporary changes.
3. If the project reduction or cessation of flow releases period (i.e., the period when water is held in Lake Davis to allow rotenone to break down) extends past November 1, 2007 and, by two weeks prior to the end of the temporary change period, the Department calculates that Grizzly Ice Pond will not fill, the Department shall provide an equivalent amount of water to serve License 5905 as would have otherwise been available. The Department shall maintain a record of inflow, or use an accounting methodology acceptable to the Chief of the Division of Water Rights to tabulate inflow to Lake Davis from November 1 until the end of the reduction or cessation of flow releases period. The water shall be supplied during the collection to storage period for License 5905.
4. Water shall be provided by the Department to any holder of valid riparian rights or pre-1914 appropriative rights, as needed, when the outlet valve at Grizzly Valley Dam is closed or partially closed. Only the quantity that would have otherwise been available to the water right holder if the project were not in operation, or such lesser amount as the water right holder deems acceptable, shall be provided.

5. The temporary change modifying Condition 15 of Permits 15254 and 15255 will be effective for a period of 180 days commencing on the date of this order and may be renewed for additional periods of time, not to exceed 180 days from the date of renewal.
6. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this temporary change Order are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.
7. The Chief of the Division of Water rights reserves jurisdiction to supervise the transfer, exchange, and use of water under this Order and to coordinate or modify terms and conditions for the protection of vested rights; fish, and wildlife, instream beneficial uses; and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD



*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: August 29, 2007