

D R A F T

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 -

In the Matter of
Implementation of Water Quality Objectives
for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary,
Amending License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887,
11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726,
12727, 12860, 15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638,
5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368,
15764, 22316, 14858A, 19304, and 14858B, respectively) of the United States Bureau of
Reclamation and Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443,
14445A, 17512, and 17514A, respectively) of the Department of Water Resources.

SOURCES: Sacramento and San Joaquin Rivers and their tributaries, and the
Sacramento-San Joaquin Delta Estuary

**ORDER STAYING AND DISMISSING PHASE 8 OF THE BAY-DELTA WATER
RIGHTS HEARING AND AMENDING REVISED DECISION 1641**

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (SWRCB) takes actions to facilitate negotiations that may lead to a settlement of the potential responsibilities of numerous water users to implement the objectives in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, adopted May 22, 1995 (1995 Bay-Delta Plan).¹

¹ From July 1, 1998 through December 21, 1999, the SWRCB conducted Phases 1 through 7 of the Bay-Delta Water Rights Hearing. On December 29, 1999, the SWRCB adopted Decision 1641, determining some of the responsibilities for meeting the objectives in the 1995 Bay-Delta Plan and resolving other related issues. On [footnote continues on next page]

In the absence of this order, the SWRCB would promptly convene the remainder of Phase 8 of the Bay-Delta Water Rights Hearing to consider the water users' potential responsibilities that have not yet been determined.

This order stays the resumption of Phase 8 for eighteen months from the date of this order. This order automatically dismisses Phase 8 at the end of eighteen months, unless the SWRCB receives notice from the Department of Water Resources (DWR) or the United States Bureau of Reclamation (USBR), within eighteen months, requesting resumption of Phase 8. This order establishes an indefinite extension of the responsibilities of the DWR and the USBR under Conditions 1 and 2 to meet the water quality objectives in the 1995 Bay-Delta Plan. Unless the SWRCB issues a further order after notice and an opportunity for a hearing, the extension of their responsibilities will expire no later than two years after the DWR or the USBR requests a hearing. Upon request of the DWR or USBR, the SWRCB will resume Phase 8, or, after dismissal, will commence a new hearing. The SWRCB will expedite any hearing conducted pursuant to this order, to issue a decision within two years after receiving a request from the DWR or the USBR.

The SWRCB will, at least every six months, commencing not later than October 1, 2001, conduct a public informational workshop. The purpose of these workshops will be to provide the public and the SWRCB with information regarding the then-current status of negotiations and plans to implement the flow-dependent objectives, including information about the opportunities for non-parties to the negotiations to provide input.

2.0 BACKGROUND

2.1 Procedural History

This order is part of a series of actions by the SWRCB to protect the beneficial uses of water in the Bay-Delta Estuary against the adverse effects of water diversions. In the Bay-Delta

April 11 and 12, 2000, the SWRCB conducted a session of Phase 8 of the Bay-Delta Water Rights Hearing to consider a petition for change filed by South Sutter Water District in connection with a settlement agreement to resolve the responsibilities of water right holders on the Bear River. The SWRCB approved the petition on July 20, 2000, in Order WR 2000-10.

proceedings, the SWRCB adopts water quality objectives that, when implemented, will protect the beneficial uses. The SWRCB implements the objectives through water right orders and by requesting or directing that other agencies take appropriate actions including water quality control measures to be implemented by the Regional Water Quality Control Boards.

The 1995 Bay-Delta Plan contains the current water quality objectives. D-1641 and Order WR 2000-10 contain the current water right requirements to implement the Bay-Delta flow-dependent objectives. D-1641 includes both long-term and temporary implementation requirements. Order WR 2000-10 requires partial implementation that will remain in effect up to thirty-five years. In D-1641 and in Order WR 2000-10, the SWRCB assigned responsibilities, for specified periods, to water users (including the USBR and the DWR) in the watersheds of the San Joaquin River upstream of Vernalis, the Mokelumne River, Putah Creek, Cache Creek, within the boundaries of the North Delta Water Agency, and within the Bear River watershed. These responsibilities need not be revisited in the near future. These responsibilities require that the water users in these watersheds will contribute specified amounts of water, and that the DWR and the USBR will ensure that the objectives are met in the Delta.

To meet the potential responsibilities that are not yet assigned, but may be assigned to water users in areas not yet addressed, D-1641, in Conditions 1 and 2 on page 146 thereof, requires that the DWR and the USBR temporarily implement the objectives. Conditions 1 and 2 also require that the DWR and USBR meet certain objectives that the SWRCB does not contemplate assigning to other parties, such as export limits and gate closure requirements. D-1641 provides that Conditions 1 and 2 will remain in effect only until the SWRCB makes further decisions establishing the responsibilities of water right holders in the areas where the potential responsibilities have not yet been determined. D-1641 sets these conditions to expire no later than November 30, 2001.

The SWRCB considered and heard comments on earlier drafts of this order at a Board meeting on March 7, 2001 and at a Board meeting on April 4, 2001.

2.2 Physical Setting

The Bay-Delta Estuary includes the Sacramento-San Joaquin Delta, Suisun Marsh, and the embayments upstream of the Golden Gate. The Delta and Suisun Marsh are located at the confluence of the Sacramento and San Joaquin rivers, which converge to flow westward through San Francisco Bay. The watershed of the Bay-Delta Estuary produces water that is used in much of the state for municipal, industrial, agricultural, and environmental purposes. The watershed is a source of drinking water for two-thirds of the state's population. The State Water Project, operated by the DWR, and the Central Valley Project, operated by the USBR, store water upstream of the Delta, release the stored water into the Delta, and export both the stored water and uncontrolled flows² from the Delta. The two projects export water from the Delta to areas south and west of the Delta through a system of water conveyance facilities.

Fish, wildlife, and other public trust resources also use the waterways of the Bay-Delta Estuary and its tributaries. Some of the fish that reside in the estuary or migrate through it are protected under the state or federal Endangered Species Act. Additionally, migratory birds and other animals use the marshlands of the estuary for food and habitat.

3.0 DISCUSSION

It is the policy of the SWRCB in the Bay-Delta proceedings to encourage the parties to resolve among themselves the responsibilities for meeting the objectives in the 1995 Bay-Delta Plan, and to bring their joint proposals for establishing responsibilities to the SWRCB for approval.

The DWR, the USBR, some of their water supply contractors, and the members of the Northern California Water Users Association approached the SWRCB at a workshop on January 11, 2001, with a draft of an agreement among these parties. The parties proposed that the SWRCB adopt an order staying Phase 8 of the Bay-Delta Water Rights Hearing and automatically dismissing Phase 8 after the parties to the agreement complete and approve work plans for developing water supply projects. The parties presented an executed agreement to the SWRCB on April 4, 2001. The agreement includes a commitment by the DWR and the USBR to meet the objectives

² Uncontrolled flows include both natural flow and abandoned flow.

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implemented under Conditions 1 and 2 in D-1641 so long as the agreement remains in effect, and for a period thereafter. This order is not based on the commitment in the agreement.

At the April 4, 2001, meeting, the SWRCB informed the parties to the agreement that, to be able to dismiss Phase 8 as requested, the SWRCB would need an independent commitment from the DWR and the USBR to meet the flow-dependent objectives for an interim period, and that the commitment could not be dependent on the agreement or on progress in implementing water supply projects pursuant to the agreement. The SWRCB further informed the parties that if it received the two projects' independent commitment to meet the objectives for an indefinite interim period and accept an indefinite extension of Conditions 1 and 2, it would (1) stay Phase 8 of the Bay-Delta Water Rights Hearing for up to eighteen months, (2) automatically dismiss Phase 8 after eighteen months had passed, (3) upon request of the DWR or the USBR at any time during the stay or after dismissal of Phase 8, convene a hearing to consider allocating responsibilities to meet the flow-dependent objectives to other parties, (4) set Conditions 1 and 2 to expire no later than two years after the request for hearing unless the SWRCB issues a further order after notice and opportunity for hearing, and (5) expedite the hearing to issue a decision within two years after the request for hearing.

The SWRCB has received the necessary commitment from the DWR and the USBR, by letter dated April __, 2001. This order is based on that commitment. During the interim period, the SWRCB assumes that the DWR, the USBR, and other parties will conduct further negotiations. The SWRCB will take no part in the negotiations, and takes no position with respect to the direction of such negotiations.

After the DWR or the USBR requests a hearing to determine the responsibilities of the parties to meet the flow-dependent objectives, a hearing is likely to require two years or more. Therefore, an extension of Conditions 1 and 2 after the request for a hearing will help ensure that any necessary additional environmental documentation can be prepared and will ensure that the implementation of the objectives does not lapse. During any further hearing, the objectives in the 1995 Bay-Delta Plan must be met. A lapse in implementation could have serious

consequences for the beneficial uses the objectives are intended to protect.³ In the absence of a hearing, the SWRCB could not place responsibility for meeting the objectives on a party or parties other than the DWR and the USBR.⁴ Accordingly, the most reasonable approach is to retain the existing responsibilities to meet the objectives until the SWRCB is able to complete a hearing and make a decision after the hearing.⁵

A stay is appropriate for eighteen months, with the DWR and the USBR meeting the objectives. A dismissal after the stay is appropriate only if the objectives will be met for a reasonable, albeit interim, period. The DWR and the USBR will meet the objectives for an adequate period. Therefore, this order stays and dismisses Phase 8, effective eighteen months after the date of this order, unless either the DWR or the USBR requests, within eighteen months, that the SWRCB resume Phase 8. The stay and subsequent dismissal applies to proceedings to determine the responsibilities of the water right holders and water users within the watersheds of the Sacramento, Calaveras and Consumnes Rivers to meet the flow-dependent objectives in the 1995 Bay-Delta Plan.

³ Conditions 1 and 2 require full implementation of the objectives for municipal, industrial, and agricultural beneficial uses, and require full implementation of the flow-dependent objectives for fish and wildlife beneficial uses for an interim period. The objectives protect the public interest.

⁴ The hearing record for D-1641 supports continuing the implementation by the DWR and the USBR of the objectives in the 1995 Bay-Delta Plan as provided by this order. See, for example, the Bay-Delta EIR, which analyzes the effects of imposing Conditions 1 and 2 on the DWR and the USBR.

⁵ This conclusion addresses the need to extend the responsibilities of the DWR and the USBR for an adequate interim period. This conclusion does not predetermine the allocation of responsibility after completion of any further proceedings before the SWRCB, should further proceedings become necessary. The DWR and the USBR historically have been responsible for meeting Bay-Delta objectives. SWRCB Decision 1641 continues the responsibility of the DWR and the USBR to meet the municipal, industrial, and agricultural objectives, and the flow-dependent fish and wildlife objectives on an interim basis. To stay or dismiss of Phase 8, it is necessary to continue the interim requirements imposed on the DWR and the USBR. If it did not extend the responsibility of the DWR and the USBR for at least two years beyond the date when the DWR or the USBR requests resumption or initiation of a hearing, the SWRCB would have to conduct a hearing to determine whether to require a party or parties to meet the objectives pending completion of the hearing. Considering their historical involvement, the public interest in continuously implementing the objectives, their role as public entities managing vast quantities of the state's water supply, and the lack of any other means for setting interim requirements, it is reasonable to continue the responsibility of the DWR and the USBR until the SWRCB establishes other responsibilities to meet the objectives.

The administrative record of this order includes the entire evidentiary hearing record of the Bay-Delta Water Rights Hearing, from July 1, 1998, through April 12, 2000, and the notices and correspondence sent or received by the SWRCB regarding Phase 8 through the date of this order.

4.0 ENVIRONMENTAL CONSIDERATIONS

Under the California Environmental Quality Act (CEQA) (Pub. Resources Code §§ 21000, et seq.), the SWRCB is the lead agency for preparation of environmental documentation for this order. The SWRCB has prepared and certified a final Environmental Impact Report for the Implementation of the 1995 Bay-Delta Water Quality Control Plan (Bay-Delta EIR). The Bay-Delta EIR fully analyzes the effects of several alternatives for assigning responsibility to water right holders in the watershed of the Bay-Delta Estuary, including Flow Alternative 2, under which the DWR and the USBR are jointly responsible for meeting all of the flow-dependent objectives in the 1995 Bay-Delta Plan. D-1641 adopts Flow Alternative 2 as an interim measure, by including Conditions 1 and 2 in the water rights of the DWR and the USBR. This order amends Conditions 1 and 2 of D-1641 by extending the periods for which the requirements set forth in those conditions are effective.

CEQA contemplates that agencies may make serial decisions relying on a single EIR. (Cal. Code Regs., tit. 14, §§ 15165, 15168.) This order is one in a series of orders relying on the Bay-Delta EIR.

Except as applied to the Joint Point of Diversion and the San Joaquin River Agreement, the findings set forth in D-1641 in sections 14.3.1, 14.3.4, 14.3.5, 14.3.6, 14.3.7, 14.3.8, and 14.4 are applicable to the inclusion of Conditions 1 and 2 in the permits of the DWR and the USBR for an extended period. Those findings are incorporated herein by reference to the extent that they are applicable to this order. The SWRCB will file a Notice of Determination under CEQA after it adopts this order, and the Notice of Determination will state that this order relies on the Bay-Delta EIR.

ORDER

A. IT IS HEREBY ORDERED that Phase 8 of the Bay-Delta Water Rights Hearing is stayed for a period of eighteen months from the date of this order. Phase 8 will be automatically dismissed at the end of eighteen months from the date of this order unless the DWR or the USBR notifies the SWRCB in writing, before the end of the eighteen month period, that it is requesting the SWRCB to resume Phase 8.⁶ The purpose of the stay and dismissal is to allow water right holders whose rights might be amended after Phase 8 to negotiate toward a mutual settlement of their responsibilities to meet the flow-dependent objectives in the 1995 Bay-Delta Plan. If the DWR or the USBR requests a hearing to allocate responsibilities to meet the flow-dependent objectives to other parties, the SWRCB will convene a water right hearing, will determine whether the water right holders in the watersheds of the Sacramento, Cosumnes, and Calaveras Rivers have responsibility to meet the flow-dependent objectives in the 1995 Bay-Delta Plan, and will determine the amount of such responsibility.

B. IT IS HEREBY ORDERED that License 1986 (Application 23) and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 16600, and 20245 (Applications 13370, 13371, 234, 1465, 5638, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 19304, and 14858B, respectively) of the

⁶ The stay and dismissal do not apply to the following proceedings related to the Bay-Delta Proceedings:

- (a) Any proceedings necessary to respond to a writ of mandate or other court order, decision or opinion issued in connection with litigation to which the SWRCB is a party.
- (b) An order necessary to implement new water quality objectives or amendments to the 1995 Bay-Delta Plan.
- (c) A proceeding on an issue that is sufficiently unrelated [e.g. carriage water] to the subject of long term responsibility to meet the flow-dependent objectives in the 1995 Bay-Delta Plan that the proceeding will not adversely affect any negotiations among the parties seeking to settle their responsibilities to meet the Bay-Delta objectives. The SWRCB shall hold a workshop to obtain input from the parties before initiating any such proceedings.
- (d) A proceeding relating to the implementation of the narrative salmon doubling objective set forth in Table 3 of the objectives in the 1995 Bay-Delta Plan. The existing D-1641 terms and conditions for fish and wildlife protection provide reasonable protection for a range of aquatic species in the Bay-Delta Estuary and help implement all of the objectives, including the narrative salmon doubling objective. Compliance with the existing flow objectives and other objectives in the 1995 Bay-Delta Plan may be sufficient to implement the salmon objective. Moreover, statutorily mandated non-flow fish restoration programs currently being implemented in other forums (e.g., CVPIA implementation and CALFED) will help implement the salmon objective. As other programs are implemented and monitored, the SWRCB will review the progress toward meeting the objective and may take additional action if needed.

United States Bureau of Reclamation and Permits 16478, 16479, 16481, 16482, and 16483 (Applications 5630, 14443, 14445A, 17512, and 17514A, respectively) of the Department of Water Resources shall be amended by revising Conditions 1 and 2 in SWRCB Decision 1641 as follows.

1. Licensee/Permittee shall ensure that the water quality objectives for municipal and industrial beneficial uses and agricultural beneficial uses for the western Delta, interior Delta, and export area as set forth in Tables 1 and 2, attached, are met on an interim basis until the Board adopts a further decision assigning responsibility for meeting these objectives. Unless it is renewed pursuant to a further order after notice and an opportunity for hearing, this condition shall expire no later than two years after the DWR or the USBR requests that the SWRCB convene a water right proceeding to determine whether to replace this condition with another condition that meets the objectives in Tables 1 and 2. The SWRCB shall expedite any proceeding it conducts to assign long term responsibility to meet the objectives in Tables 1 and 2, in an effort to keep the proceeding under two years. This condition does not mandate that the Licensee/Permittee use water under this license/permit if it uses other sources of water or other means to meet this condition.

2. Licensee/Permittee shall ensure that the water quality objectives for Delta outflow and for Sacramento River flow at Rio Vista for fish and wildlife beneficial uses as set forth in Table 3, attached, are met on an interim basis until the Board adopts a further decision in the Bay-Delta Water Rights Hearing assigning responsibility for meeting these objectives. Unless it is renewed pursuant to a further order after notice and an opportunity for hearing, this condition shall expire no later than two years after the DWR or the USBR requests that the SWRCB convene a water right proceeding to determine whether to replace this condition with another condition that meets the objectives in Table 3. The SWRCB shall expedite any proceeding it conducts to assign long term responsibility to meet the objectives in Table 3,

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in an effort to keep the proceeding under two years. This condition does not mandate that the Licensee/Permittee use water under this license/permit if it uses other sources of water or other means to meet this condition.

CERTIFICATION

The undersigned, Administrative Assistant 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 26, 2001.

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Administrative Assistant to the Board