

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004-0043-EXEC

In the Matter of the Approval of the Water Quality Response Plan

Under SWRCB Decision 1641

Submitted by

DEPARTMENT OF WATER RESOURCES

and

UNITED STATES BUREAU OF RECLAMATION

ORDER DENYING RECONSIDERATION AND AMENDING CONDITION

BY THE EXECUTIVE DIRECTOR¹:

1.0 INTRODUCTION

This Order denies reconsideration of a decision in a letter dated July 28, 2004 from the Chief of the Division of Water Rights (Division), and amends a condition in the letter. The July 28, 2004 letter temporarily and conditionally approves the water quality response plan (WQRP) that the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) submitted to the Division on July 1, 2004. The temporary approval is set to expire on August 1, 2005.

The DWR and the USBR jointly petition the State Water Resources Control Board (SWRCB) for reconsideration of the Division Chief's conditional temporary approval of their proposed WQRP for operation of the Joint Points of Diversion (JPOD) under Stage 1 and Stage 2. The WQRP is

¹ SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, the Executive Director's consideration of petitions for reconsideration of actions taken by a Division Chief falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to deny a petition for reconsideration or set aside or modify the Division Chief's action.

In D-1641, the SWRCB authorized the DWR and the USBR to use the JPOD. The JPOD authorization includes three stages. The three stages correspond to export rates and the purposes

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for which the DWR and the USBR are authorized to divert or redivert water under the JPOD.³ Each stage of the authorization is subject to special terms and conditions to mitigate the effects of using the JPOD. Additionally, all stages are subject to five terms and conditions, one of which is the requirement for a WQRP. The condition provides:

“Permittee shall develop a response plan to ensure that the water quality in the southern and central Delta will not be significantly degraded through operations of the Joint Points of Diversion to the injury of water users in the southern and central Delta. Such a plan shall be prepared with input from the designated representative of the Contra Costa Water District and approved by the Chief, Division of Water Rights.”

In Order WR 2000-02, the SWRCB added this condition to the approval of the JPOD in response to a petition by CCWD for reconsideration of D-1641. CCWD had expressed concern that the JPOD could cause the salinity at CCWD’s intakes on the Contra Costa Canal or at Old River to increase significantly.

The Division Chief conditionally approved the WQRP after having rejected an earlier version due to lack of technical information concerning the potential impacts on water quality caused by JPOD operations. Because there was remaining uncertainty regarding water quality impacts to members of the South Delta Water Agency, however, the Division Chief approved the WQRP only temporarily, until August 1, 2005.

³ The USBR is the primary user of JPOD due to limitations on the capacity of its facilities at the Tracy Pumping Plant. Under Stage 1, the USBR can use the DWR’s point of diversion at Banks Pumping Plant to serve the Cross Valley Canal contractors and Musco Olive, to support a recirculation study, and to recover export reductions taken to benefit fish. Under Stage 2, the USBR can use the Banks Pumping Plant for any purpose authorized under its permits, except that the total pumping at Banks cannot exceed the limits of the U.S. Army Corps of Engineers permit. Under Stage 3, the USBR can use the Banks Pumping Plant up to the physical capacity of the pumping plants, subject to the completion of certain mitigation measures.

4.0 THE PETITION FOR RECONSIDERATION

The DWR and the USBR seek two changes in the approval of the WQRP: (1) that condition 2 of the approval be deleted or revised and (2) that the approval be made permanent, not temporary.

4.1 The Parties' Positions

Condition 2 of the approval requires that the DWR and the USBR model the effects on water quality at CCWD's intakes prior to commencing JPOD diversions during excess conditions when CCWD is authorized to divert water under its Los Vaqueros water rights. The DWR and the USBR state that they did not include this type of modeling in the plan because they concluded that the "JPOD would not cause significant degradation in water quality resulting in injury to CCWD because the water will be usable for the purposes of use identified in CCWD's water right permit." This conclusion is based on their modeling analyses of JPOD operations that they submitted with the WQRP. In most cases, the modeling analyses show that water quality conditions under D-1641 with JPOD will be better than water quality conditions under D-1485 without JPOD. In all cases, the modeling analyses show that the salinity level with JPOD will remain well below the water quality objectives for municipal and industrial uses required in D-1641.

The DWR and the USBR argue, in effect, that it would be illegal and unconstitutional to require them to maintain water quality better than the salinity objectives in the 1995 Bay-Delta water quality control plan when they use the JPOD. They cite as authority *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424, 90 P.2d 537 and *Town of Antioch v. Williams Irrigation District* (1922) 188 Cal. 451, 205 P. 688. In each case, the court decided that the protection due to a downstream senior water right holder when an upstream junior appropriator's diversions impacted the quality of water available to the senior water right holder was less than the full amount claimed by the downstream senior water right holder. Based on these cases, the DWR and the USBR argue that if the water at CCWD's intakes meets the 250 milligrams per liter chloride objective, the water is useable as a matter of law and they should not have to do further analysis to determine whether the JPOD will cause a significant degradation of the water quality in the southern and central Delta due to operation of the JPOD.

As an alternative to deleting condition 2, the DWR and the USBR argue that the SWRCB should modify the condition. They state that they cannot practically conduct water quality modeling that would determine the annual average potential changes in water quality as required by condition 2. Instead, they say that they could provide forecasts by modeling of short-term water quality conditions during excess conditions.

In response to the joint petition for reconsideration, CCWD argues that the SWRCB's anti-degradation policy in SWRCB Resolution 68-16 would be violated if the JPOD were allowed to cause the chloride level to increase up to the maximum level under the objective. Resolution 68-16 provides, in substance, that whenever the existing quality of water is better than the quality established in water quality objectives, the existing high quality will be maintained unless it is demonstrated that a change will be consistent with maximum benefit to the people of the state, will not unreasonably affect the beneficial use of the water, and will meet the water quality objectives. CCWD cites with approval the Division Chief's statement that "significant degradation of water quality may occur in the absence of violation of water quality objectives in cases where the degradation impairs a senior water right of water of a usable quality." CCWD also argues that if there were a significant degradation of its water quality due to JPOD operations, mitigation would be required under the California Environmental Quality Act. CCWD points out that much has changed since the two court decisions relied upon by DWR and USBR, including more information, statutory changes, and further court decisions more directly focused on the unique problems presented in the Delta. In consequence, CCWD suggests that given these changes, the *Antioch* decision in particular might have been decided differently under the current circumstances. CCWD also argues that in any event, the two cases are not directly on point because the current situation does not involve an upstream diversion of water. Finally, CCWD supports the requirement that the DWR and the USBR provide additional information in order to evaluate whether degradation of water quality due to JPOD is significant.

4.2 Discussion

Although the DWR and the USBR characterize condition 2 of the WQRP approval as a legal issue, and CCWD relies on legal arguments to respond to the DWR and the USBR, condition 2

of the WQRP approval is based on a need for more factual information.⁴ The purpose of condition 2 of the WQRP approval is to require more information in advance of a planned JPOD operation so that the Division Chief can make a factual determination, if necessary, as to whether the condition in D-1641 is satisfied. The determination of whether water quality will be significantly degraded through operation of the JPOD at a particular time will depend on the facts presented. Such determination may also vary based on factors both within and outside the southern and central Delta, including treatment requirements, public health concerns, and the effect on water supplies and water quality available to other users taking water either directly from the Delta or from water suppliers in distant locations.⁵ This determination need not be based on a statistical expression of significance.

The modeling required by condition 2 is intended to supply some of the necessary information. The condition requires modeling of the potential annual average change in water quality. The DWR and the USBR now request that if condition 2 is retained, it should instead require modeling that will forecast water quality on a short-term basis in the southern Delta. The Division did not require this type of modeling because the Division believed that the DWR and the USBR did not have the means to provide forecasts by modeling short-term water quality changes during excess conditions. Modeling to obtain short-term forecasts of water quality will provide a more accurate assessment of the immediate effects of using the JPOD, but in some cases it could give the appearance of an overall annual degradation when in fact there is an overall annual improvement in water quality. Since the DWR and the USBR can provide the short-term modeling and are willing to do so, I will modify condition 2 to require modeling that forecasts water quality on a short-term basis.

⁴ In part, the DWR/USBR legal arguments are an attack on the inclusion of the condition in revised D-1641 requiring a water quality response plan. The DWR and the USBR did not object to this condition when it was proposed, however, and did not challenge it in court. It is now too late to challenge the inclusion of that condition. (See Wat. Code, § 1126, subd. (b).) When the SWRCB gets the facts it needs, it will be in a better position to interpret the condition in light of the actual factual context.

⁵ This determination will require a balancing. The SWRCB recognizes that the amount of water available for diversion from the Delta is directly related to the quality of the water maintained in the Delta, that the water supplies available to the DWR and the USBR are limited, and that there is a great demand for water supplies.

The DWR and the USBR also seek to have the SWRCB change the requirement in D-1641 from a requirement that the water quality in the southern and central Delta not be significantly degraded by JPOD operations to a requirement that the water quality in the Delta be fit for the uses for which the water users taking water from the Delta divert it. The DWR and the USBR would further define water as being fit for use by the water user if the water meets the water quality objective for that beneficial use.⁶ In D-1641, the SWRCB adopted the requirement that the JPOD not significantly degrade the water quality. I will not change this requirement. If the DWR and the USBR want to seek a change in a condition imposed on their permits and licenses in D-1641, they must file a petition for a change in their water right permits and licenses.

Additionally, the WQRP temporary approval requires, in condition 3, additional information regarding the potential water quality impacts to southern Delta diverters related to Stage 1 and Stage 2 JPOD diversions. The DWR and the USBR do not directly address this requirement, but they request that the WQRP approval be made permanent. Making the approval permanent at this time would nullify the requirement in condition 3. To allow time for condition 3 to be satisfied, I will not make the approval permanent at this time.

5.0 CONCLUSION

1. The petition for reconsideration should be denied.
2. Condition 2 of the July 28, 2004 approval should be revised to provide for short-term forecasting of water quality in the central and southern Delta.
3. The approval of the WQRP should remain temporary.

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⁶ Depending on the facts, this proposed definition could be circular. The requirement in SWRCB Resolution No. 68-16 to maintain the existing high quality of water unless a change (1) is consistent with maximum benefit to the people of the state, (2) will not unreasonably affect the beneficial use of the water, and (3) will meet the water quality objectives is itself a water quality objective. (See SWRCB Order WQ 86-17 at 17 [“Resolution 68-16 has been adopted, as a general water quality objective, in all . . . regional water quality control plans.”].) Accordingly, allowing the water quality to be degraded until it barely meets the numerical objective could violate this objective.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied, and condition 2 of the July 28, 2004, temporary approval is amended as follows:

~~“Prior to commencing JPOD diversions during excess conditions when CCWD is authorized to divert water under its Los Vaqueros water rights, DWR and USBR shall conduct water quality modeling to determine annual average potential changes in water quality at CCWD’s intakes associated with planned JPOD diversions in comparison to conditions that would have existed under D-1485 conditions that will forecast water quality on a short-term basis in the southern Delta near CCWD’s intakes associated with planned JPOD diversions. If modeling indicates that there may be an annual average increase in chloride levels as a result of JPOD operations, DWR and USBR shall consult with CCWD to determine whether an agreement may be reached regarding JPOD diversions. DWR and USBR shall submit results of the modeling forecasts to CCWD and the SWRCB. If CCWD objects to the planned JPOD diversions, and the Projects and CCWD are unable to agree on operations of JPOD, the Projects shall contact the Chief of the Division for a determination regarding required mitigation, if any, for potential water quality impacts associated with JPOD operations. In order to substantiate an allegation of potential harm to its use of water, CCWD should submit detailed information concerning how the change in chloride levels would impact CCWD’s operations (including potential health concerns, treatment costs, blending ability, and availability of water to meet environmental and customer demands).”~~

Except as modified herein, all conditions of the July 28, 2004 temporary approval remain in effect.

Dated: October 22, 2004

ORIGINAL SIGNED BY HARRY M. SCHUELLER for
Celeste Cantú
Executive Director