

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0002-EXEC

In the Matter of the Petition for Reconsideration of the
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY
AND
SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY
Regarding Order WR 2010-0029-DWR

**ORDER GRANTING IN PART AND DENYING IN PART THE PETITION FOR
RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

The San Luis & Delta-Mendota Water Authority (Authority) and the San Joaquin River Exchange Contractors Water Authority (Exchange Contractors), collectively referred to herein as "Petitioners," petition the State Water Resources Control Board (State Water Board) for reconsideration of Order WR 2010-0029-DWR (Order), which conditionally approved three change petitions filed by the United States Bureau of Reclamation (Reclamation) to implement the San Joaquin River Restoration Program. Petitioners allege that Order WR 2010-0029-DWR contains errors in law and is not supported by substantial evidence. They request that the State Water Board approve Reclamation's change petitions subject to certain revisions. In part, the State Water Board finds that its decision was appropriate and proper and denies Petitioners' request for reconsideration. The State Water Board also grants reconsideration, in part, and

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to conduct and 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 Board, the Executive Director's consideration of a petition for reconsideration of an order approving a change petition 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 order, or take other appropriate action. The State Water Board has not designated decisions by the Executive Director as precedent decisions pursuant to the Administrative Procedure Act. (State Water Board Order WR 96-1, at p. 17, fn. 11.)

modifies Condition 22 and adds a term regarding seepage monitoring in Reach 4A of the San Joaquin River.

2.0 GROUND FOR RECONSIDERATION

Any person interested in any application, permit, or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs., tit. 23, § 768.) The bases for reconsideration are: (1) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (2) the decision or order is not supported by substantial evidence; (3) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; and (4) error in law. (*Ibid.*)

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 board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action.² (*Id.*, subd. (a)(2)(A)-(C).)

3.0 FACTUAL BACKGROUND

Reclamation holds water right Permits 11885, 11886, and 11887 for the operation of the Friant Division of the Central Valley Project (CVP). In each of the past two years, Reclamation has filed petitions with the State Water Board's Division of Water Rights for the temporary transfer and change of its water rights pursuant to Water Code sections 1725 and 1707.³ Through its change petitions, Reclamation has sought to temporarily change its Friant Dam operations for a one-year period in accordance with provisions of the 2006 Stipulation of Settlement entered in

² The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1); see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

³ Water Code section 1707 authorizes the use of the temporary transfer provisions of Water Code section 1725 et seq. for a change for the purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

NRDC v. Rodgers (E.D. Ca., Sept. 13, 2006, No. CIV. S-88-1658-LKK/GGH) (Settlement) and the San Joaquin River Restoration Settlement Act (Settlement Act), Pub.L. No. 111-11 (Mar. 30, 2009), § 10001 et seq., 123 Stat. 991, 1349 (2009), and as part of the San Joaquin River Restoration Program (SJRRP).

The purpose of the Settlement is to restore and maintain fish populations in the San Joaquin River below Friant Dam while reducing or avoiding water supply impacts to Friant Division long-term contractors that may result from the restoration program. The Settlement provides for releases of interim flows prior to operating a long-term restoration program, in order to collect relevant data on flows, temperatures, fish needs, seepage losses, and water recirculation, recapture and reuse. The interim flow program began on October 1, 2009, after the Deputy Director for Water Rights (Deputy Director) approved Reclamation's change petitions for Water Year (WY) 2010 in State Water Board Order WR 2009-0058-DWR.

In July 2010, Reclamation submitted its petitions for temporary transfer and change to implement the interim flow program for WY 2011. Reclamation sought approval to amend Permits 11885, 11886, and 11887 to (1) add points of rediversion, (2) add to the place of use, and (3) add preservation and enhancement of fish and wildlife resources as an authorized purpose of use. A number of interested persons, including Petitioners, protested the proposed changes. On September 30, 2010, the Deputy Director issued Order 2010-0029-DWR approving Reclamation's petitions.⁴ Petitioners timely filed their petition for reconsideration.

4.0 DISCUSSION

Petitioners contend that the findings in Order WR 2010-0029-DWR concerning the "No Injury Rule" and the Settlement Act are errors in law and the findings regarding the water quality impairment and Condition 9 of the order are not supported by substantial evidence.

4.1 The "No Injury Rule"

Before approving Reclamation's petitions under Water Code sections 1707 and 1725 et seq., the State Water Board was required to make certain findings, including a finding that the change would not injure any legal user of water. (See Wat. Code, §§ 1707(b)(2) [no unreasonable effect on any legal user of water], 1727, subd. (b)(1) [no injury to legal user of water].) On page

⁴ On October 21, 2010, pursuant to Water Code section 1124, the Deputy Director corrected certain typographic or clerical errors or oversights in Order WR 2010-0029-DWR. This order cites to the pages in the corrected Order WR 2010-0029-DWR.

4 of Order WR 2010-0029-DWR, the Deputy Director discussed the "no injury rule," explaining that,

With respect to the "no injury" inquiry under both statutes, the State Water Board must evaluate whether the change will adversely affect the rights of others to the water. In the case of a CVP water supply contractor who claims an injury due to reductions in the amount of water available to it, for example, the contractor must show that it has a right to the water under its contract with Reclamation and that the redirection of the transferred water will interfere with that contractual right. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 738-743, 805.) It is not enough for the contractor to show that it will receive less water than it historically received. (*Id.*, p. 805.)

Petitioners assert that the Deputy Director's explanation is "incomplete and thus too narrow," arguing that the scope of protection under the "no injury rule" extends beyond the rights afforded under CVP water service contracts. (Memorandum of Points and Authorities in Support of Petition for Reconsideration of Order WR 2010-0029-DWR (Petition), p. 4.) They contend that the Third District Court of Appeal in the *State Water Resources Control Board Cases* made it plain that the scope of the protections afforded by the no injury rule is more extensive than the rights afforded under CVP contracts.⁵ They request the State Water Board to revise the text in the Order to reflect that a CVP water service contractor "may" (instead of "must") show that it has a right to the water under its contract with Reclamation and that the redirection of the transferred water will interfere with "(1) that contractual right, (2) some other contractual right or (3) a right accorded under federal or state law." (*Id.*, p. 4 (underline in original omitted).) They request similar revisions on page 5 of the Order to reflect that a CVP water service contractor may make any of these three showings to be afforded protection under the "no injury rule."

Petitioners misconstrue Order WR 2010-0029-DWR. The Order does not limit the scope of protection afforded to CVP water contractors under the "no injury rule" to their contractual rights and to the exclusion of other rights they may hold. To the contrary, the Order makes clear that the no injury rule requires an evaluation of "whether the change will adversely affect *the rights of others to the water.*" (Order, p. 4 (italics added).) In addition, the Order notes, "it is not enough

⁵ In *State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at 797-806, the court considered the application of the no injury rule and the interpretation of the phrase "legal user of the water involved" found in Water Code section 1702. In reviewing the claim of Westlands Water District (Westlands) that it and other CVP contractors have a legally protectable right to use the water that was the subject of the proposed change, the court concluded that a legal user includes those who lawfully use water under a contract with the appropriator. (*Id.*, p. 804.) The court determined, however, that it was not enough for Westlands to show that the change will result in the district receiving less water, but that Westlands must show that it has a contractual right to the greater amount of water and that the proposed change would interfere with that right. The court concluded that Westlands had not made that showing. (*Id.*, p. 805.)

for interested persons to claim that they will receive less water than they historically received; they must demonstrate that they have a *legal entitlement to the amount of water claimed.*" (*Id.*, p. 9 (italics added).) The Order discusses impacts to CVP water supply contractors as an example of, not as a limitation on, the scope of analysis required under the no injury rule: "In the case of a CVP water supply contractor who claims an injury due to reductions in the amount of water available to it, *for example,*" (*Id.*, p. 4 (italics added).) Because in their protests Petitioners generally described their member agencies as having contracts with Reclamation, and they did not identify injury to their water use under other legal entitlements, it was reasonable for the Order to specifically evaluate injury to their contractual rights. As explained above, the Order makes clear that the protections afforded to water users extend to any legal entitlement, not just a contractual entitlement. (See also *id.*, p. 8 [referring to "contracts or other water rights" when discussing water quality impacts].) Petitioners' claim does not raise substantial issues related to the causes for reconsideration.

4.2 Protection of Third Parties

Petitioners allege that Order WR 2010-0029-DWR is contrary to law because it suggests that the Settlement and the Settlement Act only protect the Authority's member agencies against interference with contractual rights. (Petition, pp. 4-5.) They request the State Water Board to revise Order WR 2010-0029-DWR to "reflect the full scope of protections accorded by the Settlement and [Settlement] Act," namely, the protection of third parties such as the Authority and the Exchange Contractors from any adverse impact caused by implementation of the SJRRP. (*Id.*, p. 6.)

Contrary to Petitioners' assertions, the Deputy Director did not opine on the scope or extent of protections afforded third parties under the Settlement or the Settlement Act in her Order.⁶ Instead, the Order focuses on the relevant inquiry before the State Water Board in considering the proposed change—i.e., whether the proposed change would injure any legal user of water—and concludes that the scope of the no injury inquiry is consistent with provisions of the Settlement Act prohibiting interference with contractual rights. (Order, p. 7 [citing to provisions of the Settlement Act regarding contracts].) Statements such as this cannot be construed as a limitation on any third party protections afforded under the Settlement or the Settlement Act.

⁶ The page of the Order (page 8) to which Petitioners cite in support of their argument does not mention the Settlement or the Settlement Act. That section of the Order addresses alleged water quality impacts, noting that the protestants have not identified any legal obligation to them that would require Reclamation to make certain deliveries. It appears that Petitioners may have meant to refer to page 7 of the Order.

Nor, as discussed above, is the scope of the State Water Board's review limited to contractual rights if a water user has another legal entitlement to the use of water. Petitioners' claim does not raise substantial issues related to the causes for reconsideration.

4.3 Water Quality Impairments

Petitioners allege that Deputy Director's findings regarding water quality impairments were not supported by substantial evidence. Petitioners assert that the Deputy Director incorrectly concluded in the Order that implementation of the SJRRP did not cause water quality impairments in 2010. (Order, p. 8.) In particular, Petitioners contend that the Deputy Director failed to consider that the operation of the SJRRP resulted in higher salinity water in Fresno Slough and the irrigation canal headworks in the Mendota Pool than would have occurred absent the SJRRP. They state that the Deputy Director's conclusion regarding water quality impacts "runs counter to the concessions by Reclamation" made about water quality impairments in its response to comments on the Draft Supplemental Environmental Assessment (SEA) and Proposed Finding of No Significant Impact for the SJRRP's Water Year 2011 Interim Flows Project. (Petition, p. 6.) Petitioners ask the State Water Board to correct the Order to conclude that "Reclamation's implementation of the SJRRP in 2010 did cause water quality impairments." (*Id.*, pp. 6-7.)

Contrary to Petitioners' assertion, in the Order the Deputy Director acknowledges that high salinity occurred in 2010 in the DMC and near the DMC outlet (San Joaquin River at Mendota Pool) when Reclamation was not using the DMC to provide water obtained from the Delta to its contractors. (Order, p. 8.) This characterization by the Deputy Director is consistent with Reclamation's response to comments on the Final SEA, which acknowledged that elevated salinity in Fresno slough and the irrigation canal headworks in the Mendota Pool occurred from April 22 through April 28, 2010. Reclamation attributed this situation, in part, due to the low demands at that time by the irrigators in the Mendota Pool, likely due to cooler and wetter weather conditions, and the consequent meeting of demands at Mendota Pool with deliveries from Friant Dam. Reclamation also noted that the situation was not unique and had occurred historically (prior to the interim flows program).

The issue before the State Water Board in considering the proposed change, however, is whether the proposed change would injure any legal user of water though significant changes in water quality or other changes. (Wat. Code, § 1727, subd. (b)(1).) As discussed above, the Deputy Director acknowledged that high salinity had occurred in 2010, consistent with

Reclamation's characterization of events in the Final SEA. The Order further acknowledges that Reclamation assisted in addressing the short-term water quality impairment. Based on the information in the record, however, the Deputy Director concluded that Reclamation's actions under Order WR 2009-0058-DWR did not cause the water quality impairment, in part, because Reclamation is not required to make deliveries from the DMC if sufficient water is available from the San Joaquin River to meet the needs of the contractors at Mendota. In their petition, Petitioners focus on whether water quality impairments occurred, not whether they failed to receive the water quality to which they are legally entitled. Thus, Petitioners' claim does not raise substantial issues related to the causes for reconsideration.

Nonetheless, it merits noting that Condition 26 of the Order requires Reclamation to develop and submit to the Deputy Director for Water Rights, by February 1, 2011, a water quality response plan that address the following: (a) the contribution of Interim Flows to high salinity conditions in the DMC, Mendota Pool, and Fresno Slough; (b) an identification of the different entities and individuals that may contribute to or play a role in the response to high salinity conditions; (c) the current legal and contractual roles and responsibilities of those entities; and (d) possible response mechanisms, including those that are under the control of Reclamation and those that are the responsibility of other entities and individuals. This plan is to be further informed by the water quality monitoring conducted pursuant to the water quality monitoring plan described in Appendix E of the Supplemental EA and required by Condition 25 of the Order.

4.4 Seepage Damages below Reaches 2A and 3

Petitioners assert that the State Water Board must amend Condition 9 of Order WR 2010-0029-DWR, which addresses seepage conditions, to include Reaches 2A through 4A of the San Joaquin River and to lower the threshold for evaluating flow levels. Condition 9 requires Reclamation to conduct a daily evaluation of groundwater levels, river flow, and related river stage in Reaches 2A and 3 of the river when interim flows are greater than 475 cubic feet per second (cfs).⁷ If groundwater elevations create seepage conditions,

⁷ Condition 9 states: "When interim flows are greater than 475 cfs in Reaches 2A and 3 of the San Joaquin River, Reclamation shall conduct on a daily basis an evaluation of adjacent groundwater levels, river flow and related river stage, and post the information on the SJRPP website (<http://www.restoresjr.net/>). In the event that groundwater elevations create seepage conditions, Reclamation shall reduce or redirect flows to the last known flow volume that did not result in seepage conditions until Reclamation determines that increasing flows would not create seepage conditions (i.e., seepage is caused by an activity not related to the interim flows)."

Reclamation must reduce or redirect flows to the last known volume that did not result in seepage conditions.

Petitioners contend that because flows are conveyed downstream through Reach 4A, seepage can cause damage in any of the reaches, and that it already has caused damage in Reaches 2A and 4A. Thus, Petitioners explain, Condition 9 should be revised to include Reaches 2A through 4A. In addition, Petitioners allege that the threshold of 475 cfs fails to consider the impact of flows at much lower levels. To ensure that the flow levels will not cause the water surface in the river at the end of Reach 4A to rise to a level that will cause seepage damage, they request that Condition 9 be amended to establish a flow level that initially starts at 50 cfs into Reach 4A and to require measurements and analyses to be conducted at 50 cfs increments before allowing the next 50 cfs rise in flow level. (Petition, pp. 7-8.)

As described in section 6.1.2b of the Order, Reclamation monitors 93 seepage wells (with additional wells to be installed in WY 2011), including real time, weekly, and monthly monitoring stations. Consequently, monitoring occurs in all stream segments irrespective of flow level. More intensive monitoring occurs in specific locales within the stream segments. In addition to Condition 9, Reclamation is required to implement a Seepage Monitoring and Mitigation Program (Condition 7) to avoid exceeding an action threshold to the extent possible. The action thresholds are groundwater elevations used to determine when impacts to agricultural lands or levee stability are imminent.

In Reclamation's response to comments in the Final SEA (p. 83), Reclamation acknowledges that seepage in Reach 4A may be a greater concern than anticipated. Reclamation stated that it was evaluating the data from the WY 2010 Interim Flows Project and working to determine what resulted in groundwater thresholds being exceeded in this area, but there was not sufficient information at that time to change its assessment of channel capacities in the reach. Thus, the information in the record does not support extending the specific thresholds of Condition 9, which apply to Reaches 2A and 3, to Reach 4A. Nonetheless, to better evaluate the effects of potential seepage below Reach 3, the State Water Board will modify the Order to include a term requiring Reclamation to submit to the Deputy Director a report on existing and proposed groundwater thresholds in Reach 4A, a summary of its evaluation of seepage monitoring data from the WY 2010 Interim Flows Project regarding Reach 4A, any changes to its assessment of channel capacities in Reach 4A, and any measures taken to ensure that flows

under the SJRRP do not create seepage conditions, to the extent this information is not already provided to the Division under Condition 7.

4.5 Proposed Changes to Conditions Imposed by Order WR 2010-0029-DWR

Petitioners request the State Water Board to add one new condition and amend two existing conditions in Order WR 2010-0029-DWR.

4.5.1 *New Condition Requiring Recirculation, Recapture, Reuse, Exchange or Transfer of Flows*

Petitioners request a new condition requiring Reclamation to prepare and submit to the Deputy Director for Water Rights a plan for recirculation, recapture, reuse, exchange or transfer of flows provided under the SJRRP.

Pursuant to the Order, recirculation, recapture, reuse, exchange, and transfer of SJRRP flows are subject to the following criteria: (a) any San Joaquin River water temporarily stored or routed through San Luis Reservoir shall not be delivered to south-of-Delta contractors other than Friant Division Contractors (Condition 2); and (b) rediversion and conveyance of water under Permits 11885, 11886, and 11887 by or through Central Valley Project (CVP) and State Water Project (SWP) facilities is limited to pumping and conveyance that is available at the C.W. Jones Pumping Plant, at the Harvey O. Banks Pumping Plant, in the Delta-Mendota Canal or in the California Aqueduct, after satisfying all contractual obligations to CVP and SWP contractors entitled to water from Delta Facilities and that existed prior to the date of the change order (or were subsequently renewed) (Condition 18). In other words, rediversion and conveyance of SJRRP flows at CVP and SWP Delta facilities are junior to all existing contractual obligations to CVP and SWP contractors entitled to water from Delta Facilities. The Order does not prescribe conditions that specifically regulate re-diversion at any San Joaquin River locations. These conditions define the criteria for recapture at any point in the system, and allow Reclamation to maximize recapture of the SJRRP flows to the extent possible without adversely impacting existing CVP and SWP Delta diversions. Thus, Petitioners' claim does not raise substantial issues related to the causes for reconsideration.

4.5.2 *Amendment to Condition 18*

As noted above, Condition 18 subordinates rediversion of SJRRP flows at the CVP and SWP Delta facilities to all existing contractual obligations to CVP and SWP contractors entitled to water from Delta Facilities. Petitioners request that the term be revised to also subordinate the

redirection of such flows to any future contractual obligations. In determining whether there is injury to any legal user of water, the State Water Board reviews the information in the record before it. The State Water Board will not evaluate impacts to future users of water who do not possess legal entitlements at the time of the board's decision. (See Gould, *Transfer of Water Rights* (1989) 29 Nat. Resources J. 457, 460 fn. 12 [the no injury rule protects junior appropriators' right to continuation of stream conditions that existed at the time of their appropriations].) Petitioners' claim does not raise substantial issues related to the causes for reconsideration.

4.5.3 *Amendment to Condition 22*

In Condition 22, the State Water Board reserved jurisdiction to supervise the short-term change, including responding to information provided by the monitoring programs required under the order. Petitioners request that the term be expanded to include monitoring programs and plans. Petitioners indicate that their interest is in making it clear that the State Water Board reserves jurisdiction to enforce all conditions set forth in the Order. The State Water Board's ability to enforce the terms of its Order is not contingent on the language of Condition 22. Nonetheless, the modification to Condition 22 requested by Petitioners is reasonable because the Order requires submittal of information in response to various monitoring plans (see Condition 7, for example.)

7.0 **CONCLUSION**

For the reasons discussed above, the State Water Board finds that the Division's order conditionally approving the petitions for transfer and change was appropriate and proper and that the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration with the exception of revision of Condition 22 and addition of a new condition relating to evaluation of potential seepage impacts in Reach 4A. 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 in part and granted in part.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied in part and granted in part. Reconsideration is granted for the purpose of revising Condition 22 and adding Condition 28 as follows:

22. The State Water Board reserves jurisdiction to supervise the short-term change under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses as future conditions may warrant or as appropriate to respond to information provided by the monitoring programs or plans required under this order.
28. By March 1, 2011, Reclamation shall submit to the Deputy Director for Water Rights, to the extent this information is not already provided to the Division under Condition 7, a report describing: (a) current and proposed groundwater elevation thresholds (acceptable, potential buffer, and threat) in Reach 4A; (b) a summary of its evaluation of seepage monitoring data from the WY 2010 Interim Flows Project regarding Reach 4A; (c) any changes to its assessment of channel capacities in Reach 4A; and (d) any measures taken to ensure that flows under the SJRRP do not cause exceedance of a groundwater elevation action threshold in Reach 4A.

Dated:

1/26/2011


Thomas Howard
Executive Director