

4/3/07 BAMA Item 6
Writ of Mandate
Deadline: 3/26/07 noon

March 26, 2007

Song Her, Clerk to the Board
Executive Office
State Water Resources Control Board
Post Office Box 100
Sacramento, California 95812-0100



4/03/07 State Water Board Meeting Water Rights Item 6

Dear Ms. Her,

Enclosed are the Department of Water Resources comments on Topic 6 of the April 3, 2007 State Water Resources Control Board Meeting addressing the consideration of an amendment to Water Rights Order 2001-22 approving the assignment of state filed applications to the El Dorado Irrigation District. The comments will also be submitted electronically.

If you have any questions, please contact me at (916) 653-5613 or crothers@water.ca.gov.

Sincerely

A handwritten signature in cursive that reads "Cathy Crothers".

Cathy Crothers
Senior Staff Counsel

Department of Water Resources
Comments Regarding WRO 2001-22 (Item 6)
Assignment of State Filed Application to El Dorado

Division of Water Rights staff is recommending the Board adopt an order amending WRO 2001-22 issued to El Dorado County Water Agency and El Dorado Irrigation District (collectively El Dorado) to comply with a peremptory writ of mandate issued by the Sacramento County Superior Court requiring the Board set aside the provisions requiring the inclusion of Term 91 in the permit issued to El Dorado in Decision 1635.

The SWRCB established Standard Permit Term 91 in Decision 1594 to protect the State Water Project (SWP) and Central Valley Projects' (CVP) previously stored water, to which the Projects have an exclusive right. Since 1978, with the adoption of D-1485, the Projects have been allocated responsibility for meeting flow-dependent water quality objectives in the Delta. SWRCB has recognized that this burden was not equitable and that future water rights proceedings would reallocate some of the obligation to other water users within the Delta watershed. Term 91 was adopted as an interim measure to allow processing of new water rights applications pending development of a long-term method for determining when water is available for appropriation.

The SWRCB determines when the Term 91 period is effective, which generally occurs in the summer months, depending on hydrologic conditions. All diverters in the watershed, including the Projects, may divert water when unregulated flow is sufficient to meet all demands including those necessary to meet the water quality objectives in the Sacramento/San Joaquin Delta. When there is insufficient unregulated flow, the Projects are required to cease diverting to storage and bypass the natural flow necessary to satisfy in-basin demands and Delta Water Quality objectives. When the natural flow is insufficient to meet the Delta objectives, the Projects begin releasing water from reservoir storage to meet Delta objectives. It is only during this latter period, when the Projects are releasing stored water, that the SWRCB invokes Term 91.

WRO 2001-22 modified D-1635 requiring the inclusion of Term 91 in the permits issued to El Dorado, state filed Application 5645, concluding it was the best method presently available for determining when water is available for appropriation. El Dorado and other parties filed petitions for writ of mandate in Sacramento Superior Court challenging the inclusion of Term 91 among other provisions. The Superior Court ruled against the SWRCB on the issue of the inclusion of Term 91. Although the Court of Appeal affirmed the lower court decision, the appellate court explained that Term 91 was a suitable provision for

protecting the Projects' water rights and water quality in the Delta. The Court found, however, that in this case, where El Dorado's permit was based on an assignment of a state filed application with a priority date of 1927, the SWRCB did not have sufficient justification to impose Term 91 on El Dorado's permits when other junior appropriators in the Delta watershed did not have this term. (*El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 976 [48 Cal.Rptr.3d 468, 499].)

Allowing continued diversions by El Dorado and others parties whose permits were issued prior to 1965 to divert during periods when there is insufficient natural flow to meet water quality requirements in the Delta will require the Projects to increase supplemental storage releases in an attempt to meet Delta objectives. DWR believes that the El Dorado decision should be interpreted narrowly based upon the special facts related to this assignment of the state-filed application. DWR requests that the SWRCB include in the order amending WRO 2001-22 a clear statement that it reserves jurisdiction to consider terms that may provide protection of the Project's supplemental storage releases in a manner that sufficiently addresses the Court's decision regarding other diverters junior to El Dorado's permit. In addition, DWR requests that the SWRCB consider in future petitions for assignment of state-filed applications that an assignment include special terms that would avoid an impact on the Project's supplemental storage releases or release the priority of the application to prevent an impact.