STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO - 2004 - 0038

In the Matter of Permits 11714 and 11715
Regarding Diversions by
HUMBOLDT BAY MUNICIPAL WATER DISTRICT

SOURCE: Mad River

COUNTIES: Humboldt and Trinity

ORDER APPROVING AN EXTENSION OF TIME AND PARTIAL REVOCATION OF PERMITTED WATER RIGHTS

BY THE BOARD:

1.0 BACKGROUND

Permits 11714 and 11715 were issued to the Humboldt Bay Municipal Water District (District) on March 16, 1959, pursuant to water right applications 16454 and 17291, respectively. These permits allow diversion to storage of up to 120,000 acre-feet per annum (afa), plus direct diversion of up to 200 cubic feet per second (cfs). At present, the District has developed a reservoir storage capacity of 48,030 acre-feet (af) in Ruth Lake, and has diversion capacity of 116 cfs at the community of Essex on the Mad River. These facilities and capacities constitute Phase I of the District's project. The remaining diversion and storage capacities allowed by the permits, presently undeveloped, constitute Phase II of the project.

Permits 11714 and 11715 were subsequently amended three times to add additional time to allow full development of the water allowed to be beneficially used under the two permits. These time extensions, for ten years each, were granted on April 29, 1971; July 7, 1982; and March 2, 1992. The last time extension required the District to fully develop its water rights by December 31, 2002.

On March 18, 2002, the District filed a Petition for Extension of Time (Petition) for an additional ten years to complete development of its rights. By letter of June 20, 2002, the District requested the time extension be granted for 25 years, instead of ten years.

The State Water Resources Control Board (SWRCB) provided the public notice of the Petition on July 22, 2002. No protests to the proposed action were received.

The District has recognized that Phase II will not be developed for several decades, if ever, and will require preparation of an Environmental Impact Report prior to development, as part of the petition process. Therefore, as part of its Petition for Extension of Time, the District Board of Directors also approved submittal of a request that the SWRCB revoke authorization of Phase II of its project, thus limiting the scope of the Petition to the present facilities and capacities (combined direct diversion and storage of 132,030 afa). The District submitted this request on April 30, 2004. The District also submitted substantial evidence in support of its contention that Phase I could be developed to full beneficial use within the next 25 years.

In accordance with the California Environmental Quality Act, the District, as lead agency, has completed and certified a Mitigated Negative Declaration in connection with the proposed project. The SWRCB received no comments or protests to the proposed action.

2.0 DISCUSSION

Approval of Petitions for Extension of Time is normally delegated to the Chief of the Division of Water Rights (SWRCB Resolution No. 2002—0106, section 2.6.11), except when the requested period of extension, combined with all extensions previously granted under delegated authority, exceeds 25 years (section 2.6.11(c)(2)). The District has already been granted time extensions totaling 30 years, and is requesting an additional 25-year time extension. Therefore, the SWRCB must approve any additional extension of time for these permits.

2.1 Applicable Law

Water Code section 1396 requires a permittee to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the SWRCB's regulations, and the terms specified in the permit. The SWRCB may approve a request for an extension of time if the SWRCB finds that there is good cause for the extension. (Wat. Code § 1398, subd. (a).) The SWRCB's regulations allow an extension of time to be granted only on such conditions as the SWRCB determines to be in the public interest, and on a showing to the SWRCB's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The SWRCB generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (Ibid.) After a hearing on a petition for an extension of time, the SWRCB may revoke the permit. (Wat. Code § 1398, subd. (b); § 1410, subd. (a) – (b)(1).)

2.1.1 Due Diligence

The District completed construction of the major Phase I components of its project within four years of the issuance of the permits.

2.1.2 Obstacles

Water usage in the District has developed at a slower rate than originally anticipated, particularly following the closure of a pulp mill near Eureka that had used a substantial amount of water for processing wood pulp. While in past years, prior to 1992, the District has diverted as much as 75,000 afa, it is currently using about 30,000 afa. The pulp mill closed, and the use of water was reduced for reasons beyond the District's control. The District has taken all actions within its power to put the water to reasonable and beneficial use.

2.1.3 Satisfactory Progress

The District has identified several municipal development projects within the authorized place of use of these permits. These projects are in various stages of authorization and development. The District anticipates that these developments will be served with water from Phase I of its project. (see Wat. Code § 106.5.)

3.0 FINDINGS

1. The permittee (District) has proceeded with due diligence, and good cause has been shown for an extension of time.

2. The SWRCB has determined that the petition for an extension of time neither constitutes the initiation of a new right nor operates to the injury of any other lawful user of water.

3. The permit conditions relating to the continuing authority and water quality objectives of the SWRCB should be updated to conform to Section 780 (a & b), Title 23 of the California Code of Regulations.

4. Fish, wildlife, and plant species have been or may be listed under the federal Endangered Species Act and/or the California Endangered Species Act. A condition should be added to the permits stating that the permits do not authorize any act that results in the taking of a threatened or endangered species.

5. The SWRCB is a responsible agency pursuant to the California Environmental Quality Act (CEQA). The SWRCB has considered the environmental effects of the Petition for Change as described by the petitioner in the Mitigated Negative Declaration prepared for this project. The proposed mitigation measures will reduce any potential impacts of the continued operation of Phase I of the project to less than significant levels.

6. The SWRCB has determined that the partial revocation of the District's water rights is consistent with a reasonable expectation of future demand in the District's place of use.

ORDER

IT IS HEREBY ORDERED THAT PERMITS 11714 AND 11715 ARE AMENDED AS FOLLOWS:

1. Condition 4 of the permits shall be deleted. Condition 5 shall be amended to read:

   Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2029.

(0000009)

2. The continuing authority condition shall be updated to read as follows:

   Pursuant to California Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the SWRCB 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.

   The continuing authority of the SWRCB may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to accurately determine water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the SWRCB determines, after notice to affected parties and

opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the SWRCB also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the SWRCB determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

3. The water quality objectives condition shall be updated to read as follows:

The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the SWRCB if, after notice to the permittee and an opportunity for hearing, the SWRCB finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the SWRCB finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

4. Permits 11714 and 011715 shall be amended to include the following Endangered Species condition:

This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project.

Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)

5. Paragraph 1 of Permit 11714 is deleted in its entirety, and the following term is substituted:

   The amount of water to be appropriated shall be limited to the amount that can be beneficially used and shall not exceed 48,030 afa by storage, to be collected from October 1 of each year to April 30 of the succeeding year. The maximum amount per annum to be stored under this permit and Permit 11715 shall not exceed 48,030 afa. The total annual diversion and use allowed under this permit and Permit 11715 shall not exceed 132,030 afa.

(0000005)

6. Term 1 of Permit 11715 is deleted in its entirety, and the following term is substituted:

   The amount of water to be appropriated shall be limited to the amount that can be beneficially used and shall not exceed 116 cfs by direct diversion, year-round, and 20,000 afa by storage, to be collected from October 1 of each year to April 30 of the succeeding year. The maximum amount to be appropriated by direct diversion under this permit shall not exceed 84,000 afa. The maximum amount per annum to be stored under this permit and Permit 11714 shall not exceed 48,030 afa. The total annual diversion and use allowed under this permit and Permit 11714 shall not exceed 132,030 afa.

(0000005)

7. All other conditions of Permits 11714 and 11715 are still applicable.

CERTIFICATION

The undersigned Clerk 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 August 26, 2004.

AYE: Peter S. Silva
Richard Katz
Gary M. Carlton

NO: None.

ABSENT: Arthur G. Baggett, Jr.
Nancy H. Sutley

ABSTAIN: None.

Debbie Irvin
Clerk to the Board

STATE OF CALIFORNIA—STATE WATER RIGHTS BOARD

PERMIT TERMS

Application No. 17291 Filled out by JTA Date 2/4/59

This is to certify that the application of which the foregoing is a true and correct copy has been considered and is hereby approved SUBJECT TO VESTED RIGHTS and the following limitations and conditions:

1 ~~2~~. The amount of water appropriated ~~under permit issued pursuant to Application 17291~~ shall be limited to the amount which can be beneficially used and shall not exceed 200 cubic feet per second by direct diversion, year-round, and 20,000 acre-feet per annum by storage to be collected from about October 1 of each year to about April 30 of the succeeding year.

2 ~~3~~. The maximum amounts herein stated may be reduced in the license~~s~~ if investigation so warrants.

3 ~~4~~. Actual construction work shall begin on or before December 1, 1960, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, th~~ese~~is permit~~s~~ may be revoked.

4 ~~5~~. Said construction work shall be completed on or before July 1, 1967.

5 ~~6~~. Complete application of the water to the proposed use shall be made on or before July 1, 1970.

6 ~~7~~. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7 ~~8~~. All rights and privileges under th~~ese~~is permit~~s~~ including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable

8 ~~9~~. For the protection, propagation and preservation of fish life permittee shall:

a. At all times by-pass or release minimum flow of five cubic feet per second into the natural stream bed of Mad River immediately below Ruth Dam.

b. During the periods herein specified, by-pass or release into the natural stream bed of Mad River immediately below Essex Diversion Dam the following minimum flows or the natural flow of Mad River as regulated by diversions now in existence, whichever is less:

October 1 through October 15	30 cfs
October 16 through October 31	50 cfs
November 1 through June 30	75 cfs
July 1 through July 31	50 cfs
August 1 through August 31	40 cfs
September 1 through September 30	30 cfs

9 ~~10~~. ~~These permits are~~ This permit is subject to the Memorandum of Understanding between Humboldt Bay Municipal Water District and County of Trinity, drafted on January 28, 1959, and duly approved by both agencies and on file with the State Water Rights Board.

deleted request & pson

~~10. A separate application for the approval of plans and specifications for construction of the dam shall be filed with and approved by the Department of Water Resources prior to commencement of construction of the dam described under this approved water right application.~~

The equivalent of such continuous flow allowance for any thirty day period may be diverted in a shorter time if there be no interference with vested rights.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Actual construction work shall begin on or before _____ and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Said construction work shall be completed on or before _____

5. Complete application of the water to the proposed use shall be made on or before _____

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

MINIMUM FEE $5.00 FOR ALL PERMITS

~~IRRIGATION~~ Municipal			~~POWER~~		
SCHEDULE	ACRES	CHARGE	SCHEDULE	THEO. HORSE POWER	CHARGE
0 to 50 COVERED BY MINIMUM FEE	0	$5.00	0 to 50 COVERED BY MINIMUM FEE		$5.00
Over 50 to 100 @ 10¢			Over 50 to 100 @ 10¢		
Over 100 to 1000 @ 5¢			~~Over 100 to 1000 @ 5¢~~		
Over 1000 @ 3¢			Over 1000 @ 1¢		
TOTALS	0	$5.00			

Terms OK. L. W. Carter

Permit No. 11715

Date approved 3-16-59

FORM O-13 (REV.)
67148 12-57 1M ① SPO