



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



Arnold Schwarzenegger
Governor

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

NOTICE OF PUBLIC HEARING REGARDING EMERGENCY DROUGHT CONDITIONS

The State Water Resources Control Board will hold a
Public Hearing to Consider
**Taking an Emergency Drought-Related Water Rights Action on a Petition for
Temporary Urgency Change filed by
the Department of Water Resources and the United States Bureau of Reclamation
Regarding Temporary Relaxation of the
February Delta Outflow and the San Joaquin River Flow Objectives
In Response to Current Dry Conditions**

The **Public Hearing** will commence
on **Tuesday, February 17, 2009, following
the State Water Resources Control Board Meeting,
but no earlier than 1 p.m.**

in
the Byron Sher Auditorium
Joe Serna, Jr./Cal-EPA Building
1001 I Street, Second Floor
Sacramento, CA

PURPOSE OF HEARING

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence relevant to action on the petition for temporary urgency change filed on February 10, 2009, by the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) for relaxation of the February Delta Outflow and San Joaquin River Flow objectives contained in [State Water Board Decision 1641](#) (D-1641). The Board may issue a temporary change order prior to the hearing.

BACKGROUND

DWR and USBR have illustrated the current dry conditions in this statement, excerpted from the pending petition for temporary urgency change:

“2009 has the potential to be one of the most severe drought years in California’s history. Extremely low reservoir storage levels are forecast for this coming year in Northern California, in some cases near record low levels. At this time, total storage at the [State

California Environmental Protection Agency

Water Project's] Lake Oroville is roughly 1 million acre-feet (MAF). Storage at the end of December was the lowest since the reservoir was completed in 1964. The total combined storage at the [Central Valley Project's] Shasta, Folsom and New Melones reservoirs is also very low at about 2.8 MAF. Storage in both the Shasta and Folsom complexes are below what they were at this time in 1977, the driest year on record for the Sacramento River."

In D-1641, the State Water Board added numerous conditions to the water rights of the State Water Project (SWP), operated by DWR, and the Central Valley Project (CVP), operated by USBR. These conditions include compliance with the water quality objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta) contained in Tables I, II, and III of D-1641, located on pages 181 through 191. Table III includes objectives for the protection of fish and wildlife beneficial uses, including Delta Outflow (commonly known as the X2 criteria) and San Joaquin River Flows. On February 10, 2009, citing extremely dry conditions in the Bay-Delta watershed, DWR and USBR submitted a temporary urgency change petition (under Water Code section 1435 et. seq.) requesting that the State Water Board modify the requirements in D-1641 regarding Delta Outflow and San Joaquin River Flows objectives for the month of February, 2009. A copy of the petition and supporting information is available on the State Water Board's website at <http://www.waterrights.ca.gov/Hearings/CurrentProjects.htm>.

The petition requests three modifications to the requirements contained in Table III of D-1641. The first modification involves waiving the requirement (described in the third sentence of Footnote 10 to Table III of D-1641) that either the daily average electrical conductivity (EC) or the 14-day running average daily EC at Collinsville is less than 2.64 mmhos/cm. The second modification involves waiving the Delta Outflow requirements described in Table 4, located on page 191 of D-1641. The third modification involves waiving the requirement to meet the higher San Joaquin River Flows objective when X2 is required to be at or west of Chipps Island (described in the second sentence of Footnote 13 to Table II of D-1641).

Chapter 6.6 of part 2, division 2, of the Water Code, commencing at section 1435, provides that any permittee (or licensee) who has an urgent need to change a point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for a conditional temporary change order. The State Water Board's regulation, at California Code of Regulations, title 23, section 791, subdivision (e), provides that the State Water Board shall follow as nearly as possible the procedures for changes in point of diversion, place of use, or purpose of use when processing petitions for other types of changes in water right permits and licenses. Accordingly, the procedures under section 1435 are applicable to changes to terms and conditions of water right permits and licenses. Pursuant to Resolution No. 2007-0057, an individual State Water Board member is delegated authority to act individually on a petition for conditional temporary urgency change.

KEY ISSUES

1. Should the Delta Outflow objective, commonly known as "the X2 criteria", be temporarily modified for the month of February 2009? These temporary modifications would involve waiving the "Starting Gate" requirement (described in the third sentence of Footnote 10 to Table III of D-1641, located on page 185) and waiving the requirement to meet 24 "Chipps Island days" (described in Table 4, located on page 191 of D-1641). If so, what

(if any) temporary terms and conditions on the permits of the SWP and CVP should be adopted?

2. Should the San Joaquin River Flows objective at Airport Way Bridge, Vernalis, be temporarily modified for the month of February 2009? The temporary modification would involve waiving the requirement to meet the higher San Joaquin River Flows objective when X2 is required to be at or west of Chipps Island (described in the second sentence of Footnote 13 to Table II of D-1641, located on page 186). If so, what temporary terms and conditions on the CVP and the SWP operations should be adopted?
3. Have DWR and USBR shown an urgent need to make the proposed modifications?
4. Would the proposed modifications injure other legal users of water?
5. Would the proposed modifications unreasonably affect fish, wildlife, or other instream beneficial uses?
6. Are the proposed changes in the public interest?
7. If DWR and USBR were to meet the February Delta Outflow and San Joaquin River Flows objectives without the modifications identified in Key Issues 1. and 2., above, what would be the potential impact to DWR's and USBR's ability to meet other water quality objectives throughout the rest of 2009?
8. Are there operational modifications or any other actions that could be taken, either as opposed to or in addition to the modifications identified in Key Issues 1. and 2., above.
9. The evidence should address key issues and matters listed in California Code of Regulations, title 23, section 767, subdivision (c), regarding the bona fide drought emergency, water conservation measures, and availability of alternative sources of water supply.

HEARING OFFICERS AND HEARING TEAM

State Water Board Members Arthur G. Baggett, Jr. and Charles R. Hoppin, will preside as hearing officers over this proceeding. State Water Board staff hearing team members will include Erin Mahaney, Senior Staff Counsel, Jean McCue, Water Resource Control Engineer, and Diane Riddle, Staff Environmental Scientist.

HEARING PARTICIPATION

PARTIES WHO WISH TO TAKE PART IN THIS EVIDENTIARY HEARING by presenting evidence must bring to the hearing sufficient copies of the proposed exhibits, testimony, and a completed Exhibit Identification Index for other parties who may want copies of such documents, **plus ten (10) copies** for the use of the State Water Board and staff. The State Water Board also requests that each participant submit one (1) electronic copy of each of its exhibits in separate PDF files in addition to the ten hard copies. Witnesses will be required to (1) provide all technical testimony in writing and (2) appear at the hearing and affirm that the written testimony is true and correct. The State Water Board will receive testimony under oath

or affirmation, and will permit cross-examination and rebuttal of all evidence. Parties shall submit a statement of qualifications for each expert witness, and copies for the other parties.

Because this hearing is being held in response to drought emergency conditions, it is being expedited in accordance with section 767 of the State Water Board regulations. The parties will not be required to submit notices of intent to appear or their exhibits in advance. After the hearing, the State Water Board member delegated authority to act on behalf of the State Water Board may modify any order already issued, adopt an order, or take other action on the change petition.

IF YOU HAVE ANY QUESTIONS

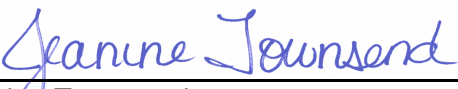
During the pendency of this proceeding, and commencing no later than the issuance of this notice, there shall be no *ex parte* communications between State Water Board members or State Water Board hearing team staff and any of the other participants regarding substantive or controversial procedural matters within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters (Gov. Code, § 11430.20, subd. (b)) should be directed to Senior Staff Counsel Erin Mahaney at (916) 341-5187, or by email to emahaney@waterboards.ca.gov, or Staff Engineer Jean McCue at (916) 341-5351, or by email to jmccue@waterboards.ca.gov.

PARKING, ACCESSIBILITY AND SECURITY

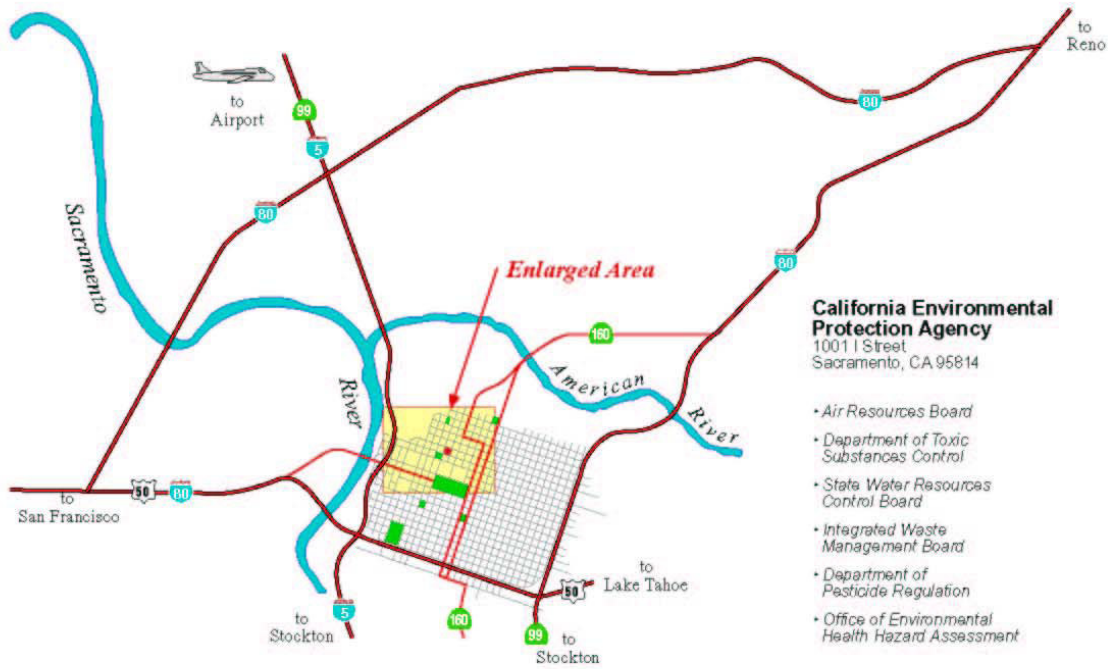
The enclosed maps show the location and parking for the Joe Serna Jr./Cal-EPA Building in Sacramento. The Joe Serna Jr./Cal-EPA Building is accessible to people with disabilities. Individuals who require special accommodations at the Joe Serna Jr./Cal-EPA Building are requested to contact Catherine Foreman, Office of Employee Assistance, at (916) 341-5881.

Due to enhanced security precautions at the Cal-EPA Headquarters Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Depending on their destination and the building's security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

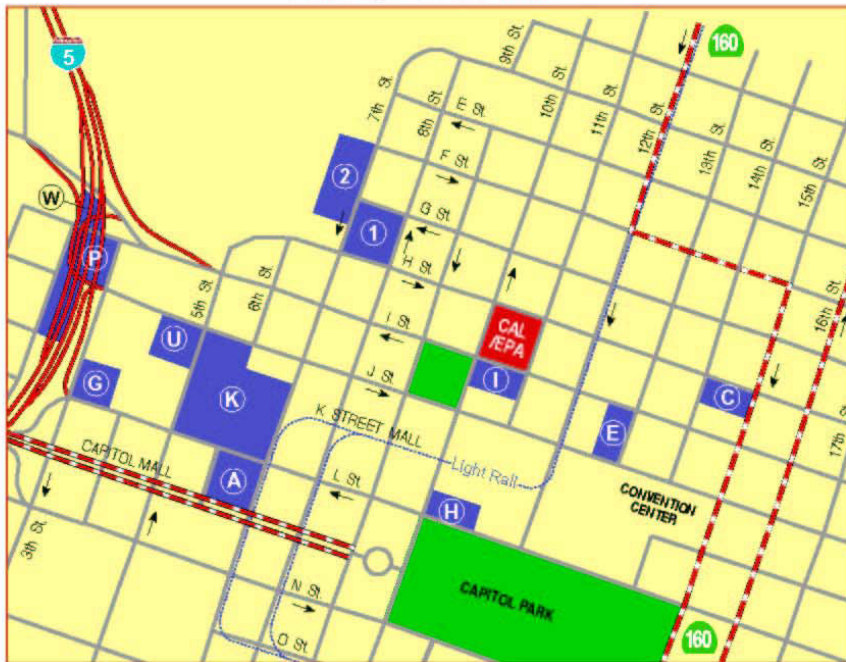
February 10, 2009
Date


Jeanine Townsend
Clerk to the Board

Enclosures



Parking Lot Locations



Parking Lot Locations

- Lot 1 (7th & G St.)
- Lot 2 (7th & G St.)
- Lot A (7th & Capitol)
- Lot C (14th & H St.)
- Lot G (3rd & L)
- Lot H (10th & L)
- Lot I (10th & I, 11th & I)
- Lot K (6th & J/L, 7th & K)
- Lot P (2nd & I)
- Lot U (5th & J)
- Lot W (2nd & I St.)

**INFORMATION CONCERNING APPEARANCE AT
FEBRUARY 17, 2009 EMERGENCY DROUGHT WATER RIGHT HEARING**

The following procedural requirements will apply in the hearing, although the hearing officers may revise the requirements as necessary to secure relevant information expeditiously in the proceeding:

1. **HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Board is available upon request or may be viewed at the State Water Board's web site: http://www.waterboards.ca.gov/laws_regulations.

Each party has the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. The hearing officers may extend these rights to a non-party participant or may limit the participation of a non-party participant.

2. **PARTIES:** The parties are the California Department of Water Resources and the United States Bureau of Reclamation. Only parties and other participants who are authorized by the hearing officers will be allowed to present evidence.

A person or entity that appears and presents only a policy statement will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. The rules for policy statements are discussed below.

3. **WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each participant proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.¹ Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A participant who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

PARTIES WHO WISH TO TAKE PART IN THIS EVIDENTIARY HEARING by presenting evidence must bring to the hearing sufficient copies of the proposed exhibits and testimony for other parties who may want copies of such documents, **plus ten (10) copies** for the use of the State Water Board and staff.

The following requirements apply to exhibits:

¹ The hearing officers may make an exception to this rule if the witness is adverse to the participant presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement. In such a case, the hearing officers may allow presentation of the oral direct testimony without requiring written testimony.

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
 - b. The hearing officers have discretion to receive in evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A participant offering an exhibit by reference shall advise the other participants and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the participant relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.
 - c. A participant seeking to enter in evidence as an exhibit a voluminous document or database may submit the exhibit to the State Water Board in electronic form, using a file format readable by Microsoft Office 2003 software. The participant must bring to the hearing sufficient copies of the proposed exhibit for other parties who may want copies of such documents and ten copies (10) of the exhibit on compact disk (CD™) media.
 - d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
 - e. Participants submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, participants may supply, for the hearing record, a reduced copy of a large format original if it is readable.
4. **ELECTRONIC SUBMISSIONS:** The State Water Board also requests that each participant submit one (1) electronic copy, in addition to the ten hard copies described above, of each of its exhibits on compact disk (CD™) media in separate Adobe™ Portable Document Format (PDF) files, except for Exhibit Identification Indexes, which may be in a version supported by Microsoft Excel or Word.
 5. **ORDER OF PROCEEDING:** The State Water Board members serving as hearing officers will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events.
 - a. **Policy Statements Within the Evidentiary Hearing:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not hearing participants. Policy statements will be heard at the start of the hearing, immediately after a hearing officer identifies the parties and other participants. Policy statements are subject to the following provisions in addition to the regulation:
 - a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
 - b. The hearing officers have discretion to receive in evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A participant offering an exhibit by reference shall advise the other participants and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the participant relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.
 - c. A participant seeking to enter in evidence as an exhibit a voluminous document or database may submit the exhibit to the State Water Board in electronic form, using a file format readable by Microsoft Office 2003 software. The participant must bring to the hearing sufficient copies of the proposed exhibit for other parties who may want copies of such documents and ten copies (10) of the exhibit on compact disk (CD™) media.
 - d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
 - e. Participants submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, participants may supply, for the hearing record, a reduced copy of a large format original if it is readable.

- i. Policy statements are not subject to the pre-hearing requirements noted above for testimony or exhibits.
 - ii. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 5, above, for details regarding electronic submittal of policy statements. Oral summaries of the policy statements will be limited to three minutes or such other time as established by the hearing officers.
- b. **Presentation of Cases-In-Chief:** Each participant may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement provided by the participant, oral testimony, introduction of exhibits, and cross-examination of the participant's witnesses. The hearing officers may allow redirect examination and recross examination. The hearing officers will decide whether to accept the participant's exhibits in evidence upon a motion of the participant after the case-in-chief has been completed. As set forth above, the hearing officers may adjust the following times and order of proceeding in light of the number of participants.
- i. **Opening Statements:** At the beginning of a case-in-chief, the participant or the participant's attorney may make an opening statement briefly and concisely stating the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to 3 minutes per participant. A participant may submit a written opening statement. Any policy-oriented statements by a participant should be included in the participant's opening statement.
 - ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to 5 minutes to summarize or emphasize their written testimony on direct examination.² Each participant will be allowed up to 30 minutes total to present all of its direct testimony.
 - iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness' oral testimony, and other relevant matters. If a participant presents multiple witnesses, a hearing officer will decide whether the participant's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to 30 minutes per witness or panel of witnesses. The hearing officers have discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Any redirect examination and recross-examination permitted by a hearing officer will be limited to the scope of the cross-examination and the redirect examination, respectively. Witnesses may be cross-examined on relevant subjects that are not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) Ordinarily, only a participant or the participant's representative will be permitted to examine a witness, but a hearing officer may

² The hearing officers may allow additional time for the oral direct testimony of the witness if the witness is adverse to the participant presenting the testimony and the hearing officer is satisfied that the participant could not produce written direct testimony for the witness.

allow a participant to designate a person technically qualified in the subject being considered to examine a witness. State Water Board members and the State Water Board's counsel may ask questions at any time, and the State Water Board members and staff may cross-examine any witness.

- c. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times if appropriate, the hearing officers may allow oral arguments or set a schedule for filing briefs or closing statements. If the hearing officers authorize the participants to file briefs, five copies of each brief shall be submitted to the State Water Board, and one copy shall be served on each of the other participants on the service list. A participant shall not attach a document of an evidentiary nature to a brief unless the document is at the time in the evidentiary hearing record or is the subject of an offer of the document in evidence. Every participant filing a brief shall file a statement of service with the brief, indicating the manner of service.
6. **EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications between either State Water Board members or State Water Board hearing team staff and supervisors, and any of the other participants, including the members of the prosecution team and their supervisors, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b).) A document regarding *ex parte* communications entitled "Ex Parte Questions and Answers" is available upon request or from our website at: http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.
7. **RULES OF EVIDENCE:** Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

