

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 26, 2003

Agenda ID #1986

TO: PARTIES OF RECORD IN APPLICATION 99-12-025

This is the draft decision of Administrative Law Judge Patrick. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ PATRICK** (Mailed 3/26/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Valencia Water Company
(U-342-W) Seeking Approval of its Updated
Water Management Programs as Ordered in
Commission Resolution W-4254 dated
August 5, 1999.

Application 99-12-025
(Filed December 17, 1999)

**OPINION DENYING PETITION FOR MODIFICATION
OF DECISION 01-11-048**

1. Summary

We deny Sierra Club's Petition for Modification of Decision (D.) 01-11-048 (the Decision), which approved the 1999 Water Management Program (WMP) of Valencia Water Company (Valencia) and authorized certain service area expansions for Valencia. Sierra Club alleges that many of the facts on which the Decision was based have changed or have not come to pass, thus affecting Valencia's ability to serve new customers.

Valencia responds that Sierra Club has failed to show any material change of circumstances sufficient to warrant modifying the Decision. According to Valencia, little has occurred that was not anticipated in the evidentiary record on which the Commission's Decision was based.

The Commission concludes that it would serve no useful purpose to revisit Valencia's 1999 WMP, since the Decision was based on the evidentiary record

existing at that time.¹ A preferable approach is to look to Valencia's next WMP, which may be presented in its next general rate case or would arise if Valencia proposes to extend its service area to serve the future Newhall Ranch development. (*See* D.01-11-048, Ordering Paragraph 4.) Accordingly, the petition is denied and this proceeding is closed.

2. The Petition and the Response

Sierra Club's petition was filed on November 27, 2002. Valencia filed its response on January 16, 2003. We summarize below the petition and the response.

A. The Environmental Impact Reports (EIRs)

Sierra Club alleges that in approving the service area expansions covered by Advice Letters 88 and 90, the Commission allowed Valencia to rely on existing EIRs prepared for the land use approval process by local developers and Valencia's own parent development company, Newhall Land and Farming Company, instead of relying on an updated review of water supply issues.²

¹ After a lengthy and actively contested proceeding, the Commission approved the 1999 WMP and approved certain service area extensions for Valencia. Sierra Club (along with the County of Ventura) filed applications for rehearing of the Decision in December 2001, raising a variety of claims of legal error, but the Commission denied those claims in D.02-04-002, issued in April 2002. The California Supreme Court then denied Sierra Club's and Ventura's petition for review.

² Sierra Club misstates the facts. As the record and the Decision shows, the Commission thoroughly reviewed the water supply issues. The proceeding included testimony by 18 expert witnesses, eight days of hearings covering 1,100 transcript pages, and receipt into evidence of 66 exhibits, all dealing with water supply issues separate from the EIRs. Sierra Club was an active participant in the Commission's proceeding and received an intervenor compensation award of \$46,990.96 for 223.0 hours claimed for Sierra Club's attorney's services, plus its costs.

Valencia responds that, contrary to Sierra Club's assertion, the EIRs on which Valencia's Preliminary Environmental Assessment relied were not prepared "by local developers and the Water Co." The EIRs were prepared by consultants to the lead agencies responsible for permitting the relevant development projects, in these cases the County of Los Angeles and the City of Santa Clarita, and ultimately were adopted and certified by those lead agencies.

B. Action Level for Ammonium Perchlorate

Sierra Club notes that during the evidentiary hearing in this proceeding, the action level for ammonium perchlorate set by the California Department of Health Services (DHS) was 18 ppb (parts per billion), but that DHS lowered its action level to 4 ppb on January 18, 2002. On this basis, Sierra Club asserts that Valencia's Well 157 "is no longer voluntarily closed."

Valencia disputes these assertions and points out that, as the record shows, samples collected from Well 157 in recent years have shown perchlorate ranging from "non-detect" to 14 ppb. Nevertheless, Valencia voluntarily chose not to operate the well. Valencia states that DHS permits water companies to continue using a source of supply indicating up to 10 times the applicable action level, or 40 ppb for perchlorate. Thus, Valencia's choice not to operate Well 157 remains a "voluntary" one.

Valencia states that consistent with the testimony of its expert witness, Valencia plans in the near future to replace Well 157 capacity by constructing a new well in a productive area of the Saugus Formation two and one-half miles away from Well 157. The new well is expected to have no practical effect on the perchlorate problem at Well 157.

C. Production from the Saugus Aquifer

Sierra Club observes that production from the Saugus Aquifer “is now at 3,267 AF” (acre feet) per year, which is “far below” the supply availability stated in Valencia’s WMP.

Valencia responds that, as is evident from the table on which Sierra Club relies, Valencia’s production from the Saugus Aquifer was in a range of 2,728 to 3,267 AF in each of years 1999 through 2001. The lower numbers for years 1999 and 2000 were part of the evidentiary record on which the Decision was based, introduced into evidence by Sierra Club.³ According to Valencia, there has been no change of circumstances.

Valencia states that a basic tenet of Valencia’s WMP is to preserve the Saugus Aquifer as a source of firming supply, available to meet demand in periods of drought or when imported state water may not be available in sufficient quantities. The Commission recognized this feature of the WMP, noting that “[t]he Santa Clarita Valley’s water purveyors have reserved the Saugus Formation as a firming resource and have decided to maximize production from the shallower Alluvial Aquifer, from which water can be pumped at lower cost.” (D.01-11-048, at 33.) Moreover, Valencia has water production capacity available from its Saugus wells and has the ability to construct more wells drawing on the Saugus Aquifer without risk of complicating the perchlorate problem.

³ *See also*, Valencia witness DiPrimio’s testimony describing the decline in production from the Saugus Formation. He testified that ample supplies have been available from other sources. (Tr. 40-42. (DiPrimio).)

Valencia states that, as the Decision recognizes, dry year firming resources are developed only as needed in order to avoid overburdening ratepayers. (*See* D.01-11-048, at 31.) According to Valencia, none of the factors to which Sierra Club alludes effectively challenges the Decision's ultimate finding - its expectation that the water purveyors of the Santa Clarita Valley will remedy the perchlorate problem and preserve their ability to rely on the Saugus Formation as a firming resource. (*See* D.01-11-048, Finding of Fact 32.)

D. Appearance of Perchlorate in Stadium Well

Sierra Club notes the recent closure of Santa Clarita Water Company's Stadium Well, a well near the area of origin of perchlorate contamination (the Whittaker-Bermite site) that draws on the shallow Alluvial Aquifer. Sierra Club asserts that the westerly movement of perchlorate pollution may cause closure of Valencia's downstream alluvial wells.

Valencia responds that Sierra Club's claim that the risk of perchlorate contamination to Valencia's wells has increased is speculation. According to Valencia, the appearance of perchlorate in the Stadium Well "wasn't a big surprise." In fact, the appearance of perchlorate in monitoring wells in the Alluvial Aquifer in the vicinity of the Stadium Well and the possibilities either of migration or of an independent source of perchlorate in that vicinity were noted in the evidentiary record on which the Decision was based. (*See* Exhibit 53 (DiPrimio), at 8-9; Exhibit 58 (Naginis); Tr. 1088-97 (Plambeck).)

Valencia states that it continues to test all of its producing wells for perchlorate in accordance with DHS requirements. They were tested in the spring and again in the fall of 2002. All results were negative.

E. Timely Remediation of the Perchlorate Problem

Sierra Club quotes the Decision's finding that it is reasonable to anticipate effective and timely remediation of the perchlorate problem so as to allow continued reliance on the Saugus Formation for dry-year firming supply. Sierra Club states that remediation has not yet begun, and asserts that dry year firming supplies are not available and that the reduced perchlorate action level will prohibit further pumping from the Saugus Aquifer absent public hearings.

Valencia responds that, consistent with the Decision and with the evidentiary record on which the Decision was based, substantial progress has been made and is being made toward implementing perchlorate remediation. It states that this is supported by Sierra Club's own exhibit.⁴ According to Valencia, the low current level of production from the Saugus Aquifer provides no basis to conclude that the aquifer is not available as a source of dry year firming supply. Valencia states that, contrary to Sierra Club's assertions, various other sources of firming supply are available as well, such as the Department of Water Resources (DWR) Dry Year Purchase Program (the Drought Water Bank), water transfers and exchanges, and the State Water Project turn-back pools, noted in the WMP and other reports, in expert testimony, and in the Decision.

Valencia asserts that DHS policy guidance for use of "extremely impaired sources" of drinking water supply, Policy Memo 97-005, which

⁴ "State officials ordered the former owner of the Bermite munitions factory Friday to begin cleaning up the polluted site within the next month . . . 'The DTSC is intent on pushing this project forward,' said Sara Amir, the chief of the DTSC's Southern California Cleanup Operations Branch . . . Local officials have praised the DTSC's action as a way to get the site's soil and the water beneath cleaned up to the highest standard as quickly as possible . . . (Petition, Exhibit 7.)

Sierra Club attaches as Exhibit 8 to its petition, is irrelevant, because there is no evidence that any source of supply referenced in the WMP is an “extremely impaired source” as defined in the DHS policy memo. Valencia points out that DHS has not made a finding that the Saugus Aquifer - or any segment of it - is subject to Policy Memo 97-005.

F. The Tesoro del Valle Development

Sierra Club points out that the Tesoro del Valle development, which Valencia was authorized to serve by the Decision’s approval of Advice Letter 90, is currently being served by Newhall County Water District (NCWD). Thus, Sierra Club asserts that this area is “wrongfully” included in Valencia’s service area.

Valencia responds that while it may be unusual for the service area of an investor-owned utility and that of a municipal utility district to overlap, there is nothing “wrongful” about such a circumstance. According to Valencia, the developer of Tesoro del Valle agreed to take water service from NCWD only because of the long delay Sierra Club caused in the Commission’s approval of Advice Letter 90. NCWD’s extension of water service to Tesoro del Valle required capital investment in a pump station and a transmission line running parallel to (and effectively duplicating) an existing Valencia line that could have been used to serve the development at less expense. Valencia believes that so long as NCWD provides adequate service to Tesoro Del Valle, there will be no need or incentive for Valencia to extend its own service. Valencia, however, submits that Sierra Club has shown no need for the Commission to bar Valencia from doing so.

Further, Valencia states that because NCWD is serving Tesoro from just a single source of supply – Castaic Lake Water Agency (CLWA) deliveries of

state water – CLWA has required NCWD to obtain a source of back-up supply. In response, Valencia has agreed to deliver back-up supplies to NCWD for service to the Tesoro development in the event of an emergency outage. According to Valencia, this is another reason why the Commission should not rescind Valencia’s authorization to provide service to Tesoro’s Del Valle.

G. State Water Project Water

Sierra Club notes the Decision’s Finding of Fact No. 34, that CLWA is a State Water Project (SWP) contractor with Table A entitlement to SWP supplies totaling 95,200 AF. It alleges based on certain court decisions that “full entitlement cannot be relied upon for planning purposes.” Sierra Club further alleges that a recent court decision “contradicts and puts into question” testimony by Robert Sagehorn, general manager of CLWA, as to the reliability of SWP supplies, and that a draft delivery reliability report requires that “stated water supplies” be reduced to reflect “actual, real, deliverable water.” Sierra Club also asserts that the new general manager of CLWA, Dan Masnada, has “declared under oath that all state water was needed for current users.” Sierra Club cites the Court of Appeal decision in *Friends of the Santa Clara v. CLWD* (2002) 95 Cal. App. 4th 1373, for its observation that “DWR has historically delivered less water than the entitlements. The reliability of delivery is approximately 50 percent of entitlements.”

Valencia responds that, contrary to Sierra Club’s claim, this court decision provides no basis for challenging the testimony of the former CLWA general manager in this proceeding. Nor, it contends, does Sierra Club present any basis for challenging the Commission’s finding that CLWA’s Table A entitlement was and remains 95,2000 AF.

Valencia states that “SWP entitlements are maximums, but (Valencia Opening Brief, at 54.) Even so, “DWR generally has been very successful in meeting the contractors’ demands.” (*Id.* at 55.) Accordingly, the Decision found that “[r]eceipt of full SWP entitlement in a particular year is not assured, but deliveries have been at least 50% of amounts requested in almost all years” and [t]he WMP’s estimate that a range of from 50 to 100% of SWP entitlement will be available except in an extreme dry year is reasonable. (D.01-11-048, at 40, Findings 35, 36.) Valencia contends that no basis has been shown for reconsidering these findings. According to Valencia, Sierra Club misinterprets the information presented in a two-page excerpt from DWR’s draft SWP Delivery Reliability Report, issued in August 2002, which Sierra Club attaches as Exhibit 10 to its petition.

Further, Valencia asserts that Sierra Club misleads the Commission with its claim that current CLWA general manager Masnada recently “declared under oath that all state water was needed for current users.” According to Valencia, the Masnada declaration addressed CLWA’s 1999 acquisition of 41,000 AF of SWP entitlement pursuant to a transfer that has been the subject of a challenge to the associated EIR. Valencia contends that the excerpt attached to Sierra Club’s petition does not support Sierra Club’s claim about Masnada’s declaration. The most relevant statement was that SWP water deliveries in the Santa Clarita Valley have increased significantly since 1998, and that this increased supply of SWP water is needed to serve both existing and projected demand. (Petition, Exhibit 11, at 4, lines 3-5.) However, in a portion of his declaration that Sierra Club *omitted* from its Exhibit 11, Masnada stated that the 41,000 AF of SWP of entitlement is needed to meet demand of current users, but he also defined “existing water demand” as including both water users currently

receiving deliveries and users that will begin receiving water while a new EIR for the Transfer of Entitlement Agreement is being completed and litigated. He based his projection of demand for “approved and recorded projects” that are not yet operational on data from Los Angeles County’s Development Monitoring System, the same system on which Valencia’s WMP relied for projecting demand for its services.⁵ Valencia asserts that apart from the confusion left by Sierra Club’s incomplete production of documents, there is no inconsistency between any statement in the Masnada declaration and the Commission’s decision in this proceeding.

Valencia notes that the Masnada declaration, dated September 12, 2002, states plainly that “[a]t this time, CLWA’s base Table A SWP Entitlement is 95,200 AFY,” which confirms the continuing accuracy of the Decision’s Finding 34. (*See* Petition, Exhibit 11, at 3, line 13.) Accordingly, Valencia submits that there is no basis for Sierra Club’s claim that the Decision overstates the availability of SWP water supplies.⁶

⁵ *See* D.01-11-048, at 22-23. Copies of the pages of the Masnada declaration that Sierra Club omitted from its Exhibit 11 are appended to Valencia’s response as Attachment A.

⁶ According to Valencia, the Friends of the River’s ongoing legal challenge against CLWA’s EIR for its acquisition of the 41,000 AF of SWP entitlements has not produced any developments that require any reconsideration by the Commission. Early last year, the Court of Appeal ordered the trial court to vacate certification of the EIR for CLWA’s entitlement transfer. In October, 2002, the trial court issued a writ of mandate requiring CLWA to set aside its EIR but declined to bar CLWA from making use of any of its entitlements while the case is pending. Friends of the River recently filed a new notice of appeal to challenge this determinations; therefore, Valencia believes that CLWA is likely to complete and issue its EIR before any future court ruling on this matter.

3. Discussion

As a preliminary matter, we address the procedural defects in Sierra Club's petition. In accordance with the Commission's Rules of Practice and Procedure, "[a] petition for modification asks the Commission to make changes to the text of an issued decision." (Rule 47(a).) A petition for modification "must propose specific wording to carry out all requested modifications to the decision." (Rule 47(b).) If more than one year has elapsed since the effective date of the decision proposed to be modified, the petition must explain why the petition could not have been presented within that time. (Rule 47(d).)

Sierra Club has failed to comply with these requirements. Its petition asserts that the Commission should require changes in Valencia's WMP and should delete various portions of Valencia's service area, but does not propose any "changes to the text of an issued decision" and does not "propose specific wording" to carry out its requested modifications. Sierra Club fails to explain why its petition could not have been filed within one year of the November 29, 2001, effective date of D.01-11-048, but simply claims that its petition "is timely filed in accordance with Rule 47."

The Commission might excuse these procedural defects if Sierra Club had demonstrated material changes of circumstances that justify reopening consideration of Valencia's WMP. But, we are not persuaded that Sierra Club has done so.

For the past decade, the Commission has provided for the periodic submission and review of WMPs for all Class A and some Class B water utilities. As the Commission stated in its 1992 decision establishing this procedure, effective in 1994, "the water management programs now on file with the

Commission should be formally updated and reviewed as part of the general rate case process.” (*Re Measures to Mitigate the Effects of Drought on Regulated Water Utilities*, D.92-09-084, 45 Cal. PUC 2d 630 (1992).) Valencia’s WMP, like other utilities’ water management programs, is not a set of rules that remain in effect until modified. Rather, it is a planning document, including an evaluation of water supply and demand and a description of facilities, projects, and initiatives aimed to achieve and maintain a proper balance of supply and demand, including appropriate water conservation efforts.

Sierra Club has not justified its attempt to reopen this proceeding to revisit Valencia’s 1999 WMP. The WMP is a periodic planning and reporting vehicle, revised and reviewed on what is generally a three-year cycle. Not every projection embodied in a WMP will prove accurate, but variations in subsequent events provide no reason for the Commission to reopen its proceedings to modify past WMPs. Rather, the attention of the utilities, Commission staff, and interested parties should be directed to the drafting and review of future WMPs, and any changes of circumstances warranting different estimates of water supply and demand should be taken into consideration in that context.

In summary, we conclude that this proceeding has reached the end of its useful life and no sufficient cause has been shown to modify the Decision in any respect.

4. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____.

5. Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Bertram D. Patrick is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Sierra Club seeks modification of D.01-11-048 on the basis that:
 - (1) the Commission allowed Valencia to rely on the existing EIRs prepared for the land use approval by local developers and Valencia's own parent development company, Newhall Land and Farming Company, instead of an updated review of water supplies; and
 - (2) many of the facts on which D.01-11-048 was based have substantially changed or have not come to pass, thus affecting Valencia's ability to serve new customers.
2. Contrary to Sierra Club's assertions, the EIRs were not prepared by local developers and Valencia's own parent development company. They were prepared by consultants to the lead agencies responsible for permitting the relevant development projects.
3. Contrary to Sierra Club's assertions, the Commission did not rely on the EIRs to determine the adequacy of water supplies to serve the proposed new developments.
4. Contrary to Sierra Club's assertions, the Commission conducted its own separate investigation into the water supply issues, as fully described in D.01-11-048.
5. Contrary to Sierra Club assertions, the Commission, acting as a responsible agency, separately reviewed the EIRs certified by the County of Los Angeles and the City of Santa Clarita for the proposed developments.

6. Neither the reduction by DHS of the action level for perchlorate nor the current level of production from the Saugus Aquifer justifies reopening or modifying the Decision.

7. Appearance of perchlorate in the Stadium Well does not justify reopening or modifying the Decision.

8. No basis has been presented by Sierra Club for challenging the Decision's findings anticipating effective and timely remediation of the perchlorate problem.

9. No need has been shown for removing the Tesoro del Valle Development from Valencia's Service Area.

10. Sierra Club's assertions and speculations about state water litigation do not justify reopening or modifying the Decision.

11. Speculation about the courts setting aside the West Creek EIR does not justify reopening or modifying the Decision.

Conclusions of Law

1. Sierra Club has shown no change of circumstances that calls into question any aspect of the Commission's Decision.

2. Even were Sierra Club able to demonstrate changed circumstances of the sort it claims, reopening the proceeding or modifying the Decision would not be justified.

3. Sierra Club's petition should be denied.

O R D E R

IT IS ORDERED that:

1. The petition of Sierra Club to modify Decision 01-11-048 is denied.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.