



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.waterboards.ca.gov/waterrights

NOTICE OF PUBLIC HEARING

B. J. Deis, A California Corporation

Willow Creek tributary to Susan River in Lassen County

The State Water Resources Control Board will hold a
Public Hearing on
Proposed Revocation of Permits 18257, 19159, 19160 and 19161
(Applications 25917, 27087, 27088 and 27089)
of B.J. Deis, A California Corporation

The **Public Hearing**
will commence
following the Garrapata Water Company, Inc. hearing
on
Monday, February 22, 2010,
no earlier than 1:00 p.m.

in the
Coastal Hearing Room
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 determining whether Permits 18257, 19159, 19160 and 19161 (Applications 25917, 27087, 27088 and 27089), assigned to B. J. Deis, A California Corporation (B. J. Deis or Permittee), should be revoked for failure to commence, prosecute with due diligence, and complete the work necessary to appropriate water or apply the authorized water to beneficial use as required by the permits, the Water Code or the rules and regulations of the State Water Board.

BACKGROUND

The State Water Board, Division of Water Rights (Division) issued Permit 18257 (Application 25917) on May 13, 1981 and Permits 19159 (Application 27087), 19160 (Application 27088), and 19161 (Application 27089) on March 23, 1984, to B.J.Deis. Under all four permits, diversion is authorized from Willow Creek tributary to Susan River. Water Code 1410 provides that a permit may be revoked if work is not commenced, prosecuted with due diligence, and completed or if water is not applied to beneficial use as contemplated in the permit and in

California Environmental Protection Agency

accordance with the Water Code and the rules and regulations of the State Water Board. All four permits are subject to Water Code section 1390, which states “a permit shall be effective for such time as the water appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.” In addition, Permits 18257, 19160 and 19161 require that “actual construction work shall begin on or before two years from date of permit and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted this permit may be revoked.”

Based on Progress Reports submitted by Permittee and Division staff’s observations documented in the Report of Investigation, the prosecution alleges that since 1986, Permittee has failed to commence or complete construction and apply the water to full beneficial use for all four Permits 18257, 19159, 19160 and 19161. Over a period of 22 years, Permittee has requested, and the Division has granted three time extensions for each of the four permits. By Division order dated January 8, 2008 the Deputy Director for Water Rights denied the latest petitions for extension of time, citing that Permittee failed to show that he: (1) exercised due diligence, (2) could not have reasonably avoided obstacles that prevented compliance with previous time requirements, and (3) would have made satisfactory progress if granted an extension of time. Permittee submitted a timely petition for reconsideration of the denial, which the State Water Board rejected by Executive Order WR 2008-0021, citing that the petition for reconsideration failed to raise substantial issues. Therefore, the December 31, 2001 (Permit 18257) and December 31, 1998 (Permits 19159, 19160 and 191961) deadlines to complete construction of the project and the December 31, 2005 (Permit 18257) and the December 31, 2003 (Permits 19159, 19160 and 19161) deadlines to complete application of water to full beneficial use remain in effect, and Permittee cannot continue with and complete the construction of this project.

On July 14, 2008, the Assistant Division Chief, Division of Water Rights, issued a Notice of Proposed Revocation for Permits 18257, 19159, 19160, and 19160. A copy of the Notice of Proposed Revocation is enclosed with this notice and can be viewed on the Division of Water Rights’ website at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/deis/

The Notice of Proposed Revocation alleges that Permittee has failed to prosecute with due diligence and complete the work necessary to appropriate water under Permits 18257, 19159, 19160, and 19160, and has not made beneficial use of the water in accordance with the permits, the Water Code, and the State Water Board’s regulations.

By letter dated July 22, 2008, B. J. Deis requested a hearing on the proposed revocation of Permits 18257, 19159, 19160 and 19161.

KEY ISSUE

Should Permits 18257, 19159, 19160 and 19161 (Application 25917, 27087, 27088 and 27089) be revoked in accordance with Water Code section 1410? Did B. J. Deis prosecute with due diligence and complete construction of the project and apply the water to full beneficial use as contemplated by the permits and in accordance with the Water Code and the rules and regulations of the State Water Board?

HEARING OFFICER AND HEARING TEAM

State Water Board Member Arthur G. Baggett, Jr., and Frances Spivy-Weber will preside as co-hearing officers over this proceeding. State Water Board staff hearing team members will include Marianna Aue, Staff Counsel; Jane Farwell, Environmental Scientist; and Ernest Mona, Water Resource Control Engineer. The hearing team will assist the hearing officer and other members of the State Water Board throughout this proceeding.

SEPARATION OF FUNCTIONS

A staff prosecutorial team will be a party in this hearing. State Water Board prosecutorial team members will include David Rose, Staff Counsel and Mark Stretars, Senior Water Resource Control Engineer.

The prosecution team is separated from the hearing team and is prohibited from having *ex parte* communications with the hearing officer, other members of the State Water Board, and members of the hearing team regarding substantive issues and controversial procedural issues within the scope of this proceeding.

HEARING PARTICIPATION

IF YOU WANT TO TAKE PART IN THE EVIDENTIARY HEARING, you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, everyone wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the State Water Board no later than the deadline listed below. **If B.J. Deis fails to submit a Notice of Intent to Appear by the deadline specified in this notice, B. J. Deis will have waived its opportunity for a hearing on this matter and the State Water Board will cancel the hearing.**

Within one week after the deadline for Notices of Intent to Appear, the State Water Board will mail out a list of those who have indicated a desire to participate in the hearing and a copy of all Notices of Intent to Appear that were timely received by the State Water Board. The list is provided in order to facilitate exchange of written testimony, exhibits and witness qualifications in advance of the hearing. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence. Copies of witnesses' proposed **testimony, exhibits, lists of exhibits, qualifications, and statement of service** must be **received** by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than the deadline listed below.

12 Noon, Wednesday, January 13, 2010	Deadline for receipt of Notice of Intent to Appear.
12 Noon, Thursday, February 10, 2010	Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.

SUBMITTALS TO THE WATER BOARD

Notices of Intent to Appear, written testimony, and other exhibits submitted to the State Water Board should be addressed as follows:

Division of Water Rights
State Water Resources Control Board
Attention: Jane Farwell
P.O. Box 2000
Sacramento, CA 95812-2000

Phone: (916) 341-5359
Fax: (916) 341-5400

Email: wrhearing@waterboards.ca.gov
With Subject of "B. J. Deis Revocation Hearing"

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, including members of the prosecution team 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 Marianna Aue at (916) 327-4440, or by email to MAue@waterboards.ca.gov; or Jane Farwell at (916) 341-5349, or by email to jfarwell@waterboards.ca.gov.

PARKING, ACCESSIBILITY AND SECURITY

A map to the Joe Serna Jr./Cal-EPA Building and parking information are available at <http://www.calepa.ca.gov/EPABldg/location.htm>. 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.

December 22, 2009

Date



Jeanine Townsend
Clerk to the Board

Enclosures

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

In the Matter of Permits 18257, 19159, 19160 and 19161 (Applications 25917, 27087, 27088 and 27089)

B.J. Deis, A California Corporation

NOTICE OF PROPOSED REVOCATION

SOURCE: Willow Creek Tributary to Susan River

COUNTY: Lassen County

You are hereby notified that, pursuant to sections 1410-1410.2 of the California Water Code, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), is proposing to revoke Permits 18257, 19159, 19160 and 19161 because the Permittee has failed to prosecute with due diligence and complete the work necessary to appropriate water under Permits 18257, 19159, 19160 and 19161, and has not made beneficial use of the water in accordance with the permits, the Water Code, and the State Water Board's regulations.

The proposed revocation is based upon the following facts, information and conclusions:

The State Water Board issued Permit 18257 on May 13, 1981. The permit authorizes B.J. Deis, A California Corporation to divert a total of 60.7 acre-feet of water to storage in two onstream reservoirs, with 47 acre-feet in the lower onstream reservoir (Lake Buz) and 13.7 acre-feet in the upper onstream reservoir (Lake Skeet). The permitted purposes of use are Recreation, Stockwatering and Irrigation. Permit 18257 originally required that construction work be completed by December 1, 1984, and that the water be applied to the authorized use by December 1, 1985.

The State Water Board issued Permits 19159, 19160 and 19161 on March 23, 1984. Permit 19159 authorizes B.J. Deis, A California Corporation to divert a total of 91 acre-feet of water to storage in two offstream reservoirs, with 42 acre-feet in the northern offstream reservoir (Collection Reservoir) and 49 acre-feet in the southern offstream reservoir (Pressure Reservoir). The purposes of use under Permit 19159 are Recreation, Stockwatering and Irrigation and Power. Permit 19160 authorizes the diversion to storage of 13.7 acre-feet of water in Lake Skeet and the direct diversion of 80 cubic-feet per second (cfs). The purpose of use under Permit 19160 is Power. Permit 19161 authorizes the diversion to storage of 47 acre-feet of water in Lake Buz and the direct diversion of 80 cfs. The purpose of use under Permit 19161 is Power. Permits 19159, 19160 and 19161 originally required that construction work be completed by December 1, 1987, and that the water be applied to the authorized use by December 1, 1988.

A. PERMITTEE HAS FAILED TO PROSECUTE WITH DUE DILIGENCE, AND COMPLETE THE WORK NECESSARY TO APPROPRIATE WATER UNDER THE PERMITS

1. Progress under Permit 18257 between 1981 and 2006:

- a) Annual progress reports submitted by Permittee indicate that that Buz Dam was constructed three times over the years, failing each time during heavy but predictable storm events, the most recent time in January 2006. Skeet Dam was constructed once in 2005, and it too failed in 2006**

- b) Permittee reported beneficial use at Lake Buz for recreation (starting in 1990) and stockwatering (starting in 1991), but these uses have been sporadic at best due to the multiple failures of the dams. Permittee has not reported any use of water for the purpose of Irrigation.
 - c) Although the Permittee claims recreational uses within Lake Skeet from July 25, 2005, Division staff observed an almost empty lake bed on October 25, 2005. In addition, the first opportunity to legally store water in Lake Skeet under Permit 18257 was December 1, 2005 (the start of the annual collection season). Because the dam began failing on December 16, 2005, with complete failure by January 2, 2006, there was insufficient time to accomplish seasonal storage and beneficial use from Lake Skeet under Permit 18257.
 - d) Permittee requested, and the Division granted three extensions of time to complete all construction work (including repairs to Buz Dam) and apply the water to full beneficial use under Permit 18257. Extensions were granted on May 20, 1986, July 11, 1990, and December 15, 1995. The final time extension order required all construction to be complete by December 31, 2001, and that water be placed to full beneficial use by December 31, 2005.
 - e) On May 12, 2003, more than a year after the time to complete construction under Permit 18257 had expired but prior to the time to complete beneficial use was to expire, Permittee filed a petition with the State Water Board requesting an additional extension of time. By Division order dated January 8, 2008, the Deputy Director for Water Rights (Deputy Director) denied the Permittee's petition for extension of time, citing his failure to show that Permittee: (1) exercised due diligence, (2) could not have reasonably avoided obstacles that prevented compliance with previous time requirements, and (3) would have made satisfactory progress if granted an extension of time. Permittee submitted a timely petition for reconsideration of the denial, which the State Water Board rejected by Executive Order WR 2008-0021, citing that the petition for reconsideration failed to raise substantial issues. Therefore the December 31, 2005 deadline to complete application of water to beneficial use remains effective.
2. Progress under Permit 19159 between 1984 and 2006:
- a) Annual progress reports submitted by the Permittee indicate that construction of Collection and Pressure Reservoirs was not completed until 2003 and 2005, respectively, approximately 20 years after issuance of the permit.
 - b) Permittee has reported no beneficial use under the permit, and the power facilities necessary to bring water to the reservoirs (authorized under Permits 19160 and 19161) have not yet been built.
 - c) Permittee requested, and the Division granted, two extensions of time to commence or complete construction work and apply the water to full beneficial use under Permit 19159. Extensions were granted on September 11, 1989 and August 31, 1994. The final time extension order required construction to be complete by December 31, 1998, and that water be placed to full beneficial use by December 31, 2003.
 - d) On May 12, 2003, more than four years after time to complete construction under Permit 19159 expired but prior to the time to complete beneficial use was to expire, Permittee filed a petition with the State Water Board requesting an additional extension of time.

3. Progress under Permit 19160 between 1984 and 2006:

- a) Permittee's annual reports indicate no work completed or beneficial use made under Permit 19160. There was no substantial progress on the power generation facilities at Lake Skeet and no power use at all. Any progress on the construction on the dam/lake would have been accomplished under Permit 18257.
- b) Permittee requested, and the Division granted, two extensions of time to commence or complete construction work and apply the water to full beneficial use under Permit 19160. Extensions were granted on September 11, 1989 and August 31, 1994. The final time extension order required construction to be complete by December 31, 1998, and that water be placed to full beneficial use by December 31, 2003.
- c) On May 12, 2003, more than four years after time to complete construction under Permit 19160 expired but prior to the time to complete beneficial use was to expire, Permittee filed petitions with the State Water Board requesting an additional extension of time.

4. Progress under Permit 19161 between 1984 and 2006:

- a) Permittee's annual reports indicate very little work was accomplished or beneficial use made under Permit 19161. Reports show only minimal progress was made on the power generation facilities at Lake Buz (installation of a penstock and some preliminary installation work on transmission lines for power) and no power use at all. Any progress on the construction of Buz Dam or Lake Buz would have been accomplished under Permit 18257.
- b) Permittee requested, and the Division granted, two extensions of time to commence or complete construction work and apply the water to full beneficial use under Permit 19161. Extensions were granted on September 11, 1989 and August 31, 1994. The final time extension order required construction to be complete by December 31, 1998, and that water be placed to full beneficial use by December 31, 2003.
- c) On May 12, 2003, more than four years after time to complete construction under Permit 19161 expired but prior to the time to complete beneficial use was to expire, Permittee filed petitions with the State Water Board requesting an additional extension of time.

5. On September 19, 2005, the Division opened Complaint No. (18-27-01) to investigate allegations by the Lahontan Regional Water Quality Control Board (Regional Board) that the Permittee was violating the terms of its permits. The Division's investigation of the complaint included a physical inspection of the project by Division staff on October 25, 2005. Division staff confirmed the following status of the project (under all four permits) as of October 25, 2005:

- a) **Lake Buz was full and spilling and the lake had occasionally been used for recreation since the dam was last repaired. Term No. 17 of Permit 18257 and Term No. 16 of Permit 19159 require the design, approval by the Division, and installation of measuring devices in the creek to ensure minimum bypass flows are met before any diversion of water is authorized pursuant to these permits. No such device had been proposed, approved, or installed prior to the diversion of water to storage. No evidence was available to support a finding that stockwatering uses had recently occurred or irrigation uses had ever occurred.**
- b) **Skeet Dam was almost complete (Permittee was scheduled to place a concrete cap on the dam the following week), but was impounding only a minimal amount of water below the outlet pipe elevation. No beneficial use had occurred.**
- c) **Construction of Pressure Reservoir was complete and while both it and Collection Reservoir were storing water collected from diffused surface runoff, facilities to divert water to storage from Willow Creek had not been constructed.**

6. **Starting** on December 16, 2005, first the upper dam (Skeet Dam) and then the lower dam (Buz Dam) began failing due to runoff from significantly intense rainfall. Complete failure of both dams occurred on or before January 2, 2006. On June 28, 2007, Division staff made a follow-up inspection of the project and found that stabilization work on Skeet Dam and Buz Dam was underway and nearing completion. Neither dam was capable of seasonally storing water at that time. Division staff documented the findings of the investigation of Complaint (18-27-01) in a Report of Investigation dated October 3, 2007.
7. Based on the Progress Reports submitted by Permittee and Division staff's observations documented in the Report of Investigation, Permittee failed to complete construction of the project by the December 31, 2001 deadline for Permit 18257 or the December 31, 1998 deadline for Permits 19159, 19160 and 19161.
8. Permittee has never beneficially used water under Permit 18257 for the purpose of irrigation (its primary use), or for any purpose of use under Permits 19159, 19160 and 19161, and therefore has not made full beneficial uses of the water as contemplated in the permits and in accordance with the Water Code and rules and regulations of the State Water Board.
9. Permittee stated that construction progress was held up because of the following reasons:
 - a) The limited amount of time (approximately four months) available to work on the project due to winter snows and limitation for working in the streambed imposed by the Department of Fish and Game.
 - b) A lawsuit between Permittee and the County of Lassen regarding when a special use permit issued by the County for construction of an airport expired resulted in legal expenses and a temporary injunction that prevented Permittee from any construction on the property for two years (1993 -1995). Although Permittee eventually prevailed in the legal proceedings that lasted seven years, Permittee was concerned that any precedent set by the court decision might prejudice the Permittee's land use permit for hydroelectric power generation (a beneficial use under related water right permits).
 - c) Obtaining necessary permits from the US Army Corps of Engineers, the Regional Board and the Department of Fish and Game took three years.
 - d) Design of Lake Skeet Dam required knowledge of the physical and legal location of the Permittee's property lines. Under an agreement with Bureau of Land Management (BLM) in 1994, BLM was to survey the property lines and relocate a road in exchange for an easement onto Permittee's property. BLM did not complete a survey of the property until 2004.
10. Permittee has had 23 years to construct the project and complete application of water to beneficial use. During this time Permittee constructed Buz Dam three times only to have the dam fail each time. Permittee also constructed Skeet Dam, but it too failed shortly after construction. The Division issued three time extensions for Permit 18257 and two time extensions for Permits 19159, 19160 and 19161 to complete construction of the project and application of beneficial use. The Permittee attributes delays to a lawsuit and to time required in obtaining environmental permits, yet these delays constitute at most ten of the 23 years since issuance of the permit. Permittee also attributes delays because BLM took too long to undertake a survey of Permittee's property, however Permittee could have relied on another party to complete this task and the principal party of the corporation is a Registered Civil Engineer who owns a consulting firm that does surveying work. Lastly, Permittee attributes delays because construction of the project is only possible during four months of the year due to weather limitations and Fish and Game imposed constraints. The ability of the Permittee to build dams a total of four times, is evidence that sufficient time was available to build two dams to withstand the levels of flow that have occurred several times over the past 23 years.

11. **Permittee cannot continue with and complete the construction of this project because, by Division order of January 8, 2008, the Deputy Director for Water Rights (Deputy Director) denied the Permittee's latest petitions for extensions of time under Permits 18257, 19159, 19160 and 19161. The order cited that the Permittee failed to show that he: (1) exercised due diligence, (2) could not have reasonably avoided obstacles that prevented compliance with previous time requirements, and (3) would have made satisfactory progress if granted an extension of time. Permittee submitted a timely petition for reconsideration of the denial, which the State Water Board rejected by Executive Order WR 2008-0021, citing that the petition for reconsideration failed to raise substantial issues. Therefore the December 31, 2001 (Permit 18257) and December 31, 1998 (Permits 19159, 19160 and 19161) deadlines to complete construction of the project, and the December 31, 2005 (Permit 18257) and the December 31, 2003 (Permits 19159, 19160 and 19161) deadlines to complete application of water to beneficial use remain in effect.**
 12. **Even though more than 26 years has passed since the issuance of Permit 18257, the Permittee cannot clearly define how the water will be placed to beneficial use. The final plan for the use of water for irrigation has not been identified other than an indication that the water might be used for either a golf course or to irrigate alfalfa. However, use of the land for either a golf course or irrigated agriculture is still many years away. Permittee has clearly not exercised due diligence and should be required to reevaluate his water use needs and submit a new application for a water right permit rather than rely on a permit for a 23 year-old project that is still not constructed and for which beneficial use of water has been minimal and not in compliance with the terms and conditions of the permits.**
- B. PERMITTEE HAS NOT APPLIED THE WATER TO BENEFICIAL USE CONSISTENT WITH THE TERMS AND CONDITIONS OF THE PERMITS**
1. **Progress Reports submitted by Permittee and Division staff's Report of Investigation contain evidence to support a conclusion that during the last five years, the only possible beneficial use of water by Permittee was for incidental recreation in Lake Buz under Permit 18257. However, authorization for diversion and use of water under Permit 18257 is subject to Term No. 17. Term No. 17 requires that no water shall be diverted under the permit until Permittee has installed a device, satisfactory to the State Water Board, which is capable of measuring the flow required by the conditions of the permit. Permittee has never submitted plans for a measuring device and no device was in place at the time of the October 25, 2005 inspection. Therefore any use of water under Permit 18257 was inconsistent with the terms and conditions of the permit.**
 2. **Chapter 9, Article 3, paragraph 1611 of the California Water Code states that "If the board determines that the construction and condition of the works or the use of water therefrom are not in conformity with ... the terms of the permit, it may revoke the permit in the manner provided (under the Water Code)".**
- C. BASED ON THE ABOVE FACTS AND INFORMATION, THE DIVISION CONCLUDES THAT CAUSE EXISTS FOR THE REVOCATION OF PERMITS 18257, 19159, 19160 AND 19161 PURSUANT TO WATER CODE SECTION 1410, SUBDIVISION (a) BECAUSE:**
1. **Permittee has failed to prosecute with due diligence, and complete the work necessary to appropriate water under Permits 18257, 19159, 19160 and 19161 and has failed to apply to beneficial use water authorized for appropriation as contemplated in the permit and in accordance with the Water Code and the regulations of the State Water Board.**
 2. **Permittee violated Term Nos. 17 and 19 of Permit 18257, Term No. 17 of Permit 19159, and Term No. 14 of Permits 19160 and 19161.**

Notice of Proposed Revocation

Applications A025917, A027087, A027088, A027089

Permits 18257, 19159, 19160, 19161

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Based on the above facts and conclusions, the State Water Board, Division of Water Rights is proposing revocation of Permits 18257, 19159, 19160 and 19161. As required by Water Code section 1410.1, you are hereby notified that unless the Division receives a written request for a hearing, signed by or on behalf of the Permittee, the State Water Board will revoke Permits 18257, 19159, 19160 and 19161. The written request for hearing must be postmarked or delivered no later than 15 days from the receipt of this notice. You may request a hearing by delivering or mailing the request to the State Water Board at the following address within the time period provided: Division of Water Rights, P. O. Box 2000, 1001 I Street, Sacramento, CA 95812-2000.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

*James W. Kassel, Assistant Division Chief
Division of Water Rights*

Dated: **JUL 14 2008**

INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced:

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 officer may extend these rights to a non-party participant or may limit the participation of a non-party participant.

Any requests for exceptions to procedural requirements shall be filed in writing with the State Water Board and served on the parties. To provide time for other participants to respond, the hearing officer will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

2. **PARTIES:** The parties are B. J. Deis, a California Corporation and the Prosecution Team for the State Water Board. Other persons or entities wishing to participate as parties may do so only if authorized by the hearing officer. Only parties and other participants who are authorized by the hearing officer 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. **NOTICE OF INTENT TO APPEAR:** Participants in this hearing must file either an electronic copy or a paper copy of a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear and exhibits in a timely manner may be interpreted by the State Water Board as intent not to appear. Any faxed or emailed Notices of Intent to Appear must be followed by a mailed or delivered hard copy with an original signature.

The Notice of Intent to Appear must state: (1) the name and address of the participant; (2) the name of each witness who will testify on the participant's behalf; (3) a brief description of each witness' proposed testimony; and (4) an estimate of the time that the witness will need to present a brief oral summary of their testimony. The witness's testimony must be submitted in writing as described in section 4 below. Participants who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear. Participants who decide not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the State Water Board and the other participants as soon as possible.

In order to expedite the exchange of information and lower the cost of participating in the hearing, the State Water Board encourages participants to submit written policy statements, written opening statements, written testimony, exhibits, and an Exhibit Identification Index to the State Water Board in electronic form. In addition, participants may exchange the foregoing documents in electronic form. Hearing participants are not required to submit these documents in electronic form or accept electronic service; however, those who choose to submit these documents electronically must comply with the requirements described in section 5, below. If you are willing to accept electronic media service in lieu of receiving hard copies of items, please check the appropriate box on the Notice of Intent to Appear.

The State Water Board will mail a service list of parties to exchange information to each person who has submitted a Notice of Intent to Appear. The service list will indicate which participants agreed to accept electronic service. If there is any change in the hearing schedule, only those persons or entities that have filed a Notice of Intent to Appear will be informed of the change.

4. **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.

Each participant shall submit to the State Water Board either: seven paper copies of each of its exhibits; or five paper copies and one electronic copy of each of its exhibits. **All electronic and paper copies must be received by the State Water Board no later than the deadline stated in the hearing notice.** Each participant shall also serve a copy of each exhibit on every participant on the service list. Participants may serve those parties who agree to electronic service with an electronic copy of exhibits. Participants must serve paper copies of exhibits on those participants who do not agree to electronic service. Hearing participants who intend to make only policy statements are not required to exchange information and will not receive copies of written testimony or exhibits from the parties.

With its exhibits, each participant must submit to the State Water Board and serve on the other participants a completed Exhibit Identification Index. If possible, each participant should submit to the State Water Board and serve on the other participants an electronic copy, as well as a paper copy of the Exhibit Identification Index. Please see section 5 for details regarding electronic submissions.

A statement of service with manner of service indicated shall be filed with each participant's exhibits. The exhibits and indexes for this hearing, and a statement of service, must be **received by the State Water Board and served on the other participants no later than the deadline prescribed in the Hearing Notice.**

¹ The hearing officer 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 officer may allow presentation of the oral direct testimony without requiring written testimony.

The following requirements apply to exhibits:

- 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 officer has 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 so advise the other participants prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a participant waives the opportunity to obtain a copy of the exhibit, the participant sponsoring the exhibit will not be required to provide a copy to the waiving participant. Additionally, such exhibits may be submitted to the State Water Board in electronic form, using a file format readable by Microsoft Office 2003 software.
 - 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.
5. **ELECTRONIC SUBMISSIONS:** Participants are encouraged to submit the following documents to the State Water Board in electronic form: written opening statements; written policy statements; written testimony; exhibits; and Exhibit Identification Indexes. In addition, the foregoing documents may be served electronically on those participants who have agreed to accept electronic service. Paper copies of all other documents must be submitted to the State Water Board and served on the other parties, unless the hearing officer specifies otherwise.

Any documents submitted or served electronically must be in Adobe Portable Document Format (PDF), except for Exhibit Identification Indexes, which may be in a version supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 12 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: wrhearing@waterboards.ca.gov with a subject of "B.J. Deis Revocation Hearing." Electronic submittals to the State Water Board of documents greater than 12 megabytes in total size should be sent by regular mail in PDF format on compact disk (CD) media. Each electronically submitted exhibit must be saved as a separate PDF file with the file name in lower case lettering!

Electronic service on participants shall be in the same format as submittals to the State Water Board, and should be submitted to the other participants to the e-mail address provided on the Notice of Intent. Participants who agree to electronic service may request that specific documents be provided to them in paper copy, or by mail on CD. Requests should be made to the participant who submitted the document, not to the State Water Board. Participants who receive such a request shall provide a copy of the requested document within five days of the date the request is received. The State Water Board will post a list of all exhibits submitted for the hearing on its website at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/deis/

6. **ORDER OF PROCEEDING:** The State Water Board member serving as hearing officer 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. The time limits specified below may be changed by the hearing officer, at his discretion.
 - 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:
 - i. Policy statements are not subject to the pre-hearing requirements noted above for testimony or exhibits, except that persons wishing to make policy statements are requested to file a Notice of Intent to Appear, indicating clearly an intent to make only a policy statement.
 - 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 five minutes or such other time as established by the hearing officer.
 - 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 officer may allow redirect examination and recross examination. The hearing officer 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. Each participant will be allowed up to one hour total to present its opening statement and all of its direct testimony.²
 - 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

² The hearing officer may, for good cause, approve a party's request for additional time to present direct testimony during the party's case-in-chief. In addition, the hearing officer 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.

intended to establish, and the relationship between the major points and the key issues. A participant may submit a written opening statement. Please see section 5, above, for details regarding electronic submittal of written opening statements. 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 to summarize or emphasize their written testimony on direct examination.
 - 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 one hour per witness or panel of witnesses. The hearing officer has 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 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. **Rebuttal:** After all participants have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officer will allow participants to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented in another participant's case-in-chief. Rebuttal testimony and exhibits need not be submitted prior to the hearing. Rebuttal evidence is limited to evidence that is responsive to evidence presented in a case-in-chief, and it does not include evidence that should have been presented during the presenter's case-in-chief. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.
 - d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times if appropriate, the hearing officer may allow oral arguments or set a schedule for filing briefs or closing statements. If the hearing officer authorizes 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.
7. **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.

8. **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.

NOTICE OF INTENT TO APPEAR

_____ plans to participate in the water right hearing regarding
(name of party or participant)

**B. J. Deis, A California Corporation
Revocation Hearing**

**scheduled to commence
February 22, 2010**

Check all that apply:

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we agree to accept electronic service of hearing-related materials.
- I/we plan to call the following witnesses to testify at the hearing.

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

Name, Address, Phone Number and Fax Number of Attorney or Other Representative:

Signature: _____ Dated: _____

Name (Print): _____

Mailing
Address: _____

Phone Number: () _____ Fax Number: () _____

E-mail: _____

