

**IN THE MATTER OF THE PROPOSED REVOCATION OF PERMITS 16209,
16210, 16211 AND 16212 FOR THE AUBURN DAM PROJECT OF U.S.
BUREAU OF RECLAMATION IN PLACER AND EL DORADO COUNTIES**

DIVISION OF WATER RIGHTS PROSECUTION TEAM EXHIBIT 1

WRITTEN TESTIMONY OF KATHERINE MROWKA, SENIOR ENGINEER

My name is Katherine Mrowka. I am a Senior Engineer assigned to Watershed Unit 3 of the Permitting Section, Division of Water Rights (Division), State Water Resources Control Board (State Water Board). I have a Bachelors of Science degree in Environmental Resources Engineering, and a Master of Science degree in Civil Engineering. I am a registered civil engineer. I have been employed in the Division for 22 years. A true and correct copy of my resume is attached as Prosecution Team (PT) Exhibit 2.

I am the supervisor in charge of the Watershed Unit 3 that processes water right applications and petitions for change and time extensions on applications, permits and licenses. My unit is also responsible for processing both voluntary and statutory revocations of water right permits and licenses. Regarding petitions, I conduct reviews and make recommendations on whether specific petitions should be processed for approval or denied. The Division's process is shown on flow charts. (PT 5.) I also make recommendations on whether permits and licenses should be processed for statutory revocations.¹

Petition Processing Procedures

After a water right permit is issued, a permittee may request an extension of time within which to commence or complete construction work or apply the water to full beneficial use, pursuant to California Code of Regulations, title 23, section 842. This request must be submitted upon a form supplied by the State Water Board.

After a Petition for Extension of Time is filed, the following steps are taken in order to process the petition:

- The petition is noticed in accordance with California Code of Regulations, title 23, section 843.

¹ When it appears that the Permittee may have failed to commence or complete construction work or beneficial use of water with due diligence in accordance with terms of the permit, the regulations of the board and the law, I prepare a Notice of Proposed Revocation to notify the Permittee that the State Water Board is considering revocation of the permit. (Cal. Code Regs., tit. 23, § 850.)

- Division of Water Rights staff evaluates any protests to the petition. If the protest meets the requirements for submittal, the Division will acknowledge receipt and direct the petitioner to respond to the allegations therein.
- Staff reviews the petition to determine whether there is cause for extension of time under California Code of Regulations, title 23, section 844.

Section 844 provides:

“An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board’s satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay....”

Based on this review, the Division processes the petition in one of two ways:

- (a) If cause is shown for approval of a time extension, staff commences a preliminary review to determine if the project is subject to the California Environmental Quality Act (CEQA). If so, staff prepares, or directs the preparation of, an initial study to determine what type of CEQA document is required. After completion of a CEQA document and resolution of all protests, an order granting time extension may be issued.
- (b) If the petitioner is unable to provide the information to show cause for time extension required under California Code of Regulations, title 23, section 844, one of two courses of action is followed. For projects that have not been built, a Notice of Proposed Revocation may be issued and the permit revoked by the Board under Water Code section 1410. For projects that have been built, the project is inspected for licensing and a license may be issued for the portion of the water under the permit that has been put to beneficial use. The remainder of the permit for water which has not been applied to beneficial use, and work not prosecuted with due diligence, may be revoked by the Board under Water Code section 1410.

Permits 16209, 16210, 16211 and 16212

The Prosecution Team and Reclamation have entered into a Stipulation to Facts (Stipulation). (PT 3.) Inasmuch as the permits are described in the Stipulation, they are not described herein.

Petitions for Extension of Time

The permits require that construction work be completed on or before December 1, 1975 and complete application of the water to the proposed uses be made on or before December 1, 2000. (PT 3, item 2.)

In response to August 12, 1975 and October 21, 1983 requests for extension of time, the State Water Board issued a May 11, 1984 Order as follows.

- (a) The dates contained in Permits 16209, 16210, 16211 and 16212 within which to complete construction work and application of water to the authorized use are deleted.
- (b) Permittee shall, prior to submittal of the Auburn-Folsom South Unit to Congress for reauthorization and prior to resumption of construction, but not later than December 31, 1987, submit the project under Permits 16209, 16210, 16211 and 16212 to the State Water Board for determination and approval in accordance with Water Code section 10504.5 and establishment of dates for completion of construction work and use of water.
- (c) The project submittal to the State Water Board shall include the documents prepared by Permittee to fulfill the requirements of the National Environmental Policy Act (NEPA). In the event the proposed project becomes a joint venture with one or more state or local agencies, the project submittal shall include the documents necessary to fulfill the requirements of the California Environmental Quality Act (CEQA). (PT 3, item 8.)

Deletion of the dates within which to complete construction work and apply water to an authorized use did not operate as an extension of time. The May 11, 1984, Order did not operate to allow construction after the December 1, 1975, date established by the permits, or authorize any expansion of use beyond the December 1, 2000, date established by the permits. Instead, the May 11, 1984 order required Reclamation to submit the project for review by the State Water Board, and specified that the State Water Board would have to establish new dates for completion of construction and use of water before the construction could be resumed and water put to use under the permits. The May 11, 1984,

Order was a preliminary step that could have led to an extension, but was not itself an extension of time.

Pursuant to State Water Board Resolution No. 83-86, the delegation of authority document in force in 1984, the Chief of the Division of Water Rights was authorized to approve permit extensions for up to a total of ten years' time. (PT 6.) Under the authority delegated in Resolution No. 83-86, a valid extension of time could only have been granted until December 1, 1985 to complete construction. As noted above, however, the May 11, 1984 Order did not operate to authorize any extension of time, even for a brief period. Resumption of construction was not authorized until Reclamation submitted the required information and the State Water Board established a new date for completion of construction.

Because Reclamation did not comply with the requirements of the May 11, 1984 Order, (by never submitting, prior to December 31, 1987, the project to the State Water Board for determination and approval in accordance with Water Code section 10504.5 and establishment of dates for completion of construction work and use of water) no new development schedule within which to complete construction work and apply the water to full beneficial use was ever issued.

Thus, as the permits currently stand, Reclamation is not authorized to construct the project or make beneficial use of water absent approval by the State Water Board of a new development schedule. The 1984 Order indicates that Reclamation had not yet prepared a NEPA/CEQA document for the time extension petitions. Had Reclamation complied with NEPA/CEQA within the time frame specified in the May 11, 1984 Order, the State Water Board could have established a new development schedule at that time because there were no protests to the time extension petitions.

The dates for completion of construction and putting water to use, as set by the original permits, have long since expired, and the State Water Board has not approved any extension that operates to allow construction or putting additional water to use after the dates set by the original permits. Failure by Reclamation to timely address the requirements of the May 11, 1984 Order and obtain a valid extension to construct the project and put water to beneficial use is not consistent with due diligence, and is tantamount to putting the water rights in cold storage.

Documentation of Lack of Finances and Lack of Progress toward Project Development

In 1975, Reclamation halted construction of the dam. The dam has not been completed, and Reclamation has not diverted any water under Permits 16209, 16210, 16211 and 16212. (PT 3, item 10.) The lack of financing for construction of the dam is documented in the Stipulation and is not repeated herein. (PT 3.)

Petition Processing/Notice of Proposed Revocation

In accordance with the general procedures for reviewing time extension petitions described above, I reviewed the four permits to determine the next step in processing the petitions. Reclamation had not provided any information to show (1) that due diligence had been exercised in the 38 years since permit issuance, (2) that failure to comply with previous time requirements had been occasioned by obstacles which could not reasonably be avoided, or (3) that satisfactory progress would be made if a time extension is granted. Moreover, Reclamation had not funded preparation of a CEQA/NEPA document for the time extension petitions or resolved the protest to approval of the petitions.

California Code of Regulations, title 23, section 844, explicitly states that lack of finances will not generally be accepted as good cause for delay in developing a permitted project.

To document diligent project development, Reclamation would have to show that it had taken steps to complete the project since construction was halted in 1975. Moreover, Reclamation would have to document compliance with the 1984 Order by: (a) complying with the December 31, 1987 date for submittal of the requested information to the State Water Board to establish the complete construction and full beneficial use dates and (b) submitting a NEPA/CEQA document for the petitions for extension of time. Reclamation did not comply with the Order, and has not done so to date.

Since the permittee did not submit information necessary to demonstrate that the requirements of section 844 of the California Code of Regulations were satisfied, and the project has not yet been built, I recommended to the Assistant Deputy Director, Division of Water Rights that the permit be revoked. On January 24, 2008, the Assistant Deputy Director, Division of Water Rights issued a Notice of Proposed Revocation of Permits 16209, 16210, 16211 and 16212. The facts and information on which the proposed revocation is based are set forth in the Notice of Proposed Revocation and Stipulation. (PT 4, PT 3.)

Status of the Watershed

The Auburn Dam Project is located on the North Fork American River and Knickerbocker Creek in Placer and El Dorado Counties. These streams are tributaries of the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta). The Bay-Delta watershed is subject to intense competition for water. The water resources available to serve both existing and new water users are limited. Increasing demands on water from the Bay-Delta and its tributaries by water users and mounting environmental concerns increase the need for the State

Water Board to require timely project development and, for parties that do not demonstrate timely development, prompt revocation of unused rights.

Water Policy Supporting Proposed Revocation

Upholding the due diligence requirement supports the State Water Board's policy to apply water to beneficial use to the fullest extent possible. This holds true particularly in watersheds where there is a heavy demand for water and the supply is limited. The Bay-Delta has intense competition for water resources and the supply is limited and even scarce under certain conditions. The disparity between demand and available supply has increased in the last decade.

If the water is not needed to serve senior rights, it is available (subject to Decision 1594) for assignment to new applications. There is heavy competition for water in the Bay-Delta. Thus, the Division is reviewing whether permittees are exercising due diligence on a periodic basis to ensure that the limited available water resources are assigned to those persons who will timely develop their projects.

Cause for Revocation has been Established

Water Code section 1410 states that "[t]here shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to the beneficial use as contemplated in the permit...." In the course of my investigation pursuant to the permittee's request for a time extension, I found that Reclamation has taken no steps toward completion of the project contemplated in Permits 16209, 16210, 16211 and 16212 since at least 1975. Water has not been applied to beneficial use, and the documentation shows it unlikely that Reclamation will timely apply water to beneficial use in the future. Permittee's response is only that Reclamation lacks the Congressional approval to fund the construction of this project. Lack of finances is explicitly identified in section 844 as a factor that will not generally be accepted as good cause for delay. The Bay-Delta has a limited supply of water and there are other potential users able to apply the water to beneficial use. Allowing Reclamation to put this water right in cold storage violates the State Water Board policy to apply water to beneficial use to the fullest extent possible. Therefore, State Water Board should revoke the permits and declare the water subject to appropriation.