

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
DECEMBER 2, 2008**

ITEM 6

SUBJECT

CONSIDERATION OF A PROPOSED ORDER REVOKING THE UNITED STATES BUREAU OF RECLAMATION PERMITS TO DIVERT WATER FOR THE AUBURN DAM PROJECT FROM THE NORTH FORK AMERICAN RIVER AND KNICKERBOCKER CREEK IN PLACER AND EL DORADO COUNTIES.

DISCUSSION

Permits 16209, 16210, 16211 and 16212 authorize the United States Bureau of Reclamation (Reclamation) to appropriate water from the North Fork American River and Knickerbocker Creek in connection with the Auburn-Folsom South Unit of the Central Valley Project (Auburn Dam Project). On July 21, 2008, the State Water Board conducted a hearing on the proposed revocation of Permits 16209, 16210, 16211 and 16212.

During the hearing, a staff Prosecution Team presented the case for revoking the Auburn Dam Project permits. In addition to the Prosecution Team, participants in the hearing included: Reclamation, the California Sportfishing Protection Alliance, County of San Joaquin and San Joaquin County Flood Control and Water Conservation District, Stockton East Water District, Friends of the River, Save the American River Association, Defenders of Wildlife, Sacramento County and Sacramento County Water Agency, the Auburn Dam Council, South Delta Water Agency, San Luis and Delta-Mendota Water Authority, Westlands Water District, Friends of the North Fork, and the American River Authority.

Based on the evidence in the hearing record, the proposed water right order concludes:

- Cause for revocation of the Auburn Dam Project permits exists because Reclamation has not constructed the project or applied water to beneficial use with due diligence as required by Reclamation's water right permits, the Water Code, and the State Water Board's regulations. In addition, Reclamation has not diligently pursued a time extension that might otherwise excuse Reclamation's delay in constructing the project and applying water to beneficial use.
- Revocation is in the public interest. The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law designed to protect the public interest by preventing the "cold storage" of water rights. The proposed order concludes that it would be contrary to long-standing precedent and the public interest to allow Reclamation to continue to reserve water under its permits without the ability to apply the water to beneficial use or any plan to do so in the foreseeable future.

POLICY ISSUES

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT

None

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the proposed order.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012, to enhance consistency across the Water Boards on an ongoing basis, and to promote fair and equitable application of laws, regulations, policies, and procedures. In particular, approval of this item will assist in fulfilling Objective 6.1, to target consistency improvements in process and policy for Water Board enforcement activities to promote compliance

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-

In the Matter of Permits 16209, 16210, 16211 and 16212
(Applications 18721, 18723, 21636 and 21637) of
UNITED STATES BUREAU OF RECLAMATION
Auburn Dam Project

SOURCE: North Fork American River and Knickerbocker Creek

COUNTIES: Placer and El Dorado

ORDER REVOKING PERMITS 16209, 16210, 16211 and 16212

BY THE BOARD:

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (State Water Board or Board) revokes water right Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636 and 21637) of the United States Bureau of Reclamation (hereafter Reclamation or USBR).¹ Permits 16209, 16210, 16211, and 16212 authorize Reclamation to appropriate water in connection with the Auburn-Folsom South Unit of the Central Valley Project (CVP) (the Auburn Dam Project).

The State Water Board may revoke a water right permit if the permittee fails to appropriate water under the permit with due diligence by promptly constructing the necessary water diversion facilities and applying the water to beneficial use. The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law intended to protect the public interest by preventing the “cold storage” of water rights. By “cold storage” we mean a situation in which an appropriation is initiated, so that the water that is subject to appropriation is not available to

¹ The applicant and permittee listed on the permits is the United States of America, care of the United States Department of Interior, Bureau of Reclamation.

other parties who could potentially put it to beneficial use, but the appropriator is not diligently pursuing development of that water supply, so the water remains unused, contrary to the public interest.

In this case, the Auburn Dam Project permits required Reclamation to complete construction of the project by December 1, 1975, and to complete application of water to beneficial use by December 1, 2000. Reclamation failed to meet these deadlines, and subsequently failed to diligently pursue a request for an extension of time. Moreover, as Reclamation has made clear, Reclamation has no plans to provide the information necessary to obtain a time extension for the permits, or otherwise move forward with project development, unless or until the project is reauthorized by the United States Congress. Accordingly, cause for revocation exists.

The Board held a public hearing on this matter on July 21, 2008, in which a number of participants expressed their support for, or opposition to, the Auburn Dam Project. It bears emphasis that the decision before us is whether Reclamation's permits should be revoked for failure to develop the project with due diligence, not whether the Auburn Dam Project itself should be approved or disapproved. Revoking the water right permits will not necessarily foreclose the possibility of constructing the project. If Congress ever reauthorizes the project, Reclamation could file new water right applications. In addition, it is conceivable that other parties could file new water right applications for storage or direct diversion projects. Conversely, even if the permits were not revoked, Reclamation would have to obtain a time extension from the Board before Reclamation could proceed to construct the project and divert water under the permits. As explained in greater detail later in this decision, the process for obtaining either new water right permits or a time extension for the existing permits would be substantially the same under the circumstances of this case.

Moreover, not revoking Reclamation's permits despite Reclamation's lack of diligence would be against the public interest. The purpose of the due diligence requirement is to ensure that appropriators do not prevent the water resources of the State from being put to beneficial use. It has been more than 30 years since the Board issued the Auburn Dam Project permits to Reclamation, but the project has not been constructed, no water has been applied to beneficial use, and Reclamation has no plans to move forward with project development. Water supply is a vital resource underpinning the California economy, especially at this time of physical drought

and regulatory uncertainty in the Delta. It would be contrary to long-standing precedent and against the public interest to allow Reclamation to continue to reserve water under its permits without the ability to apply the water to beneficial use or any plan to do so in the foreseeable future. Accordingly, the permits should be revoked.

2.0 LEGAL BACKGROUND

2.1 The Due Diligence Requirement

The Water Code and the State Water Board's regulations require appropriative water rights to be developed with due diligence. The purpose of the due diligence requirement is to ensure that appropriators do not hold water rights in "cold storage," thereby preventing water resources from being put to beneficial use. (See *California Trout Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 619 [discussing Water Rights Board's regulations and the fact that "the statutory requirement of diligence does not allow the Water Board to countenance a scheme placing water rights in 'cold storage' for future use"]; see also State Conservation Commission, Report of the Conservation Commission of the State of California to the Governor and Legislature of California (1913) pp. 20-21, 39-40 [not sound public policy to allow cold storage of a valuable natural resource such as water]; and see *Nevada County and Sacramento Canal Company v. G. W. Kidd* (1869) 37 Cal. 282, 314 ["The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others"].)

In accordance with the due diligence requirement, a water right application must set forth, among other things, the time within which the applicant proposes to begin construction of any necessary facilities, the time required to complete construction, and the time required to complete application of the water to the proposed use. (Wat. Code, § 1260, subds. (g), (h) & (i).) The State Water Board will deny an application if the Board determines that the applicant does not intend to develop the project with diligence, or if the applicant will not be able to proceed with diligence for any reason, including the lack of a feasible plan or the required financial resources. (Cal. Code Regs., tit. 23, § 840; see, e.g., State Water Board Decisions 1083 (1963) and 893 (1958).)

Once the State Water Board has issued a permit, the permittee must begin construction by the deadline specified in the permit, and prosecute with due diligence the construction of project facilities and the use of water for beneficial purposes in accordance the Water Code, the Board's regulations, and the terms of the permit. (Wat. Code, §§ 1395, 1396.) The permittee must complete construction and application of water to beneficial use by the deadlines specified in the permit. (Wat. Code, § 1397.)

2.2 The Law Governing Time Extensions

For good cause, the State Water Board may extend the deadlines specified in a permit for beginning construction, completing construction, and completing application of water to beneficial use. (Wat. Code, § 1398.) The Board's regulations provide that the Board will grant a petition for an extension of time only upon such conditions as the Board determines to be in the public interest, and only upon a showing that (1) due diligence has been exercised, (2) failure to comply with previous time requirements was caused by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension is granted. (Cal. Code Regs., tit. 23, § 844.) "Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay." (*Ibid*; State Water Board Order WRO 2003-0003 [lack of time and money were not valid excuses for failure to diligently pursue a project].) Approval of a petition for an extension of time is a discretionary act that is subject to the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code, §§ 21000-21177).

2.3 The Law Governing Revocation of a Permit

Water Code section 1410 provides that the Board may revoke a permit 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 accordance with the Water Code and the rules and regulations of the State Water Board. After any hearing, the Board may, upon a finding that cause exists, revoke the permit and declare the water subject to appropriation. (Wat. Code, § 1410, subd. (b)(2).)

3.0 FACTUAL BACKGROUND

Consistent with Water Code section 1410, the State Water Board held a hearing on July 21, 2008, to receive evidence pertaining to the Auburn Dam Project. The purpose of the hearing

was to receive evidence, testimony, and policy statements concerning whether Reclamation has complied with the Water Code in developing water rights associated with the Auburn Dam Project. Based on the hearing record, the factual background relevant to this decision is set forth below.

3.1 The Auburn Dam Project

The Act of September 2, 1965 (Pub. L. No. 89-161, 79 Stat. 615), authorized the Secretary of the Interior to construct and maintain the Auburn Dam Project. (Copies of the Act were submitted as County of San Joaquin and San Joaquin County Flood Control and Water Conservation District (hereafter San Joaquin County or SJC) Exhibit 16 and Friends of the River, Save the American River Association, and Defenders of Wildlife (hereafter Friends of the River et al. or FOR) Exhibit X-5.) The primary purpose of the project was to supply water for irrigation purposes and other beneficial uses in the Central Valley. Other authorized project purposes were hydroelectric power generation, flood control, recreation, and fish and wildlife enhancement.

The primary components of the project were Auburn Dam and Reservoir, with a capacity of 2,500,000 acre-feet, to be located on the North Fork American River near the town of Auburn. The project also included a hydroelectric plant at Auburn Dam. The 1965 act required the operation of the Auburn Dam Project to be integrated and coordinated with other features of the federal Central Valley Project (CVP), including Folsom Dam and Reservoir and Nimbus Dam, which are located downstream of the proposed Auburn Dam and Reservoir site on the American River. Another feature of the project was the Folsom-South Canal, designed to deliver water from Nimbus Dam south to Sacramento and San Joaquin Counties.

3.2 State Water Board Decision 1356

On February 5, 1970, the State Water Board adopted Decision 1356, which conditionally approved Reclamation's applications to appropriate water in connection with the Auburn Dam Project. Pursuant to Decision 1356, the State Water Board issued permits 16209, 16210, 16211, and 16212 (Auburn Dam Project permits) to Reclamation on April 13, 1971. (Prosecution Team (PT) Exhibit 3, Stipulation to Facts of the PT and USBR (Stip.), ¶ 1.) The permits authorize Reclamation to divert water from the North Fork American River and Knickerbocker Creek tributary to the North Fork American River as shown in Table 1:

Table 1

	Permit 16209 (Application 18721)	Permit 16210 (Application 18723)	Permit 16211 (Application 21636)	Permit 16212 (Application 21637)
Direct Diversion (cubic-feet per second)	100	6,300	600	900
Season of Diversion (Direct Diversion)	November 1 of each year to July 1 of the succeeding year	Year Round	Year Round	November 1 of each year to July 1 of the succeeding year
Storage (acre-feet per annum)	1,700,000	1,700,000	800,000	800,000
Season of Diversion (Storage)	November 1 of each year to July 1 of the succeeding year	November 1 of each year to July 1 of the succeeding year	November 1 of each year to July 1 of the succeeding year	November 1 of each year to July 1 of the succeeding year
Purposes of Use	Irrigation, Municipal, Industrial, Recreational, Incidental Domestic, and Water Quality Control Purposes	Hydroelectric Power Generation, and Incidental Recreational and Domestic Use	Hydroelectric Power Generation	Irrigation, Municipal, Industrial, Domestic, Recreational, Fish and Wildlife Enhancement and Water Quality Control Purposes
Place of Use	CVP place of use of 10,124,700 acres	Auburn Powerplant, Folsom Powerplant and Nimbus Powerplant	Auburn Powerplant, Folsom Powerplant and Nimbus Powerplant	CVP place of use of 10,124,700 acres
Annual Limitation (acre-feet per annum)	2,000,000*	2,500,000**	2,000,000*	2,500,000**

* The combined maximum amount that may be diverted under Permit 16209 and Permit 16211 is 2,000,000 acre-feet per annum (afa).

** The maximum amount that may be diverted under Permit 16210 and Permit 16212 is 2,500,000 afa.

All four permits require that “actual construction work shall begin on or before nine months from date of permit and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted this permit may be revoked.” The permits required 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. (Stip., ¶¶ 1 & 2.)

In Decision 1356, the Board also granted release from priority of state-filed applications 7936 and 7937 in favor of the Auburn Dam Project permits. State-filed applications 7936 and 7937 were filed pursuant to Water Code section 10500, which authorizes the Department of Water Resources to file applications, commonly referred to as state-filed applications, to appropriate water that may be required to carry out a general or coordinated plan for the development, use, or conservation of the water resources of the state. After they are filed, state-filed applications are transferred to and held by the State Water Board. The Board may release from priority or assign all or part of a state-filed application when the release or assignment is not in conflict with a general or coordinated plan or water quality objectives. (Wat. Code, § 10504.)

State-filed applications have a priority as of the date of filing, and until assigned are not subject to the due diligence requirement that normally applies to water right applications. (Wat. Code, § 10500.) Any project proponent who receives a release from priority or assignment of a state-filed application must obtain the Board’s approval of any substantial changes to the project. (Wat. Code, § 10504.5, subd. (a).)

In this case, the Board’s decision to release the priority of state-filed applications 7936 and 7937 in favor of the Auburn Dam Project permits rendered the Auburn Dam Project permits senior in priority to the state-filed applications, despite the earlier priority date of the state-filed applications.² As the recipient of a release from priority of state-filed applications, however, Reclamation was required to obtain Board approval of any substantial changes to the Auburn Dam Project.

² State-filed application 7936 reserves 2,500 cubic feet per second (cfs) and 831,000 afa for potential future appropriation from the North Fork American River. The combined face value of the application is 2,640,944 afa ((2,500 cfs x 365 days x 1.9835) + 831,000 afa). State-filed application 7937 reserves 831,000 afa for potential future appropriation from the same source. We take official notice of state-filed applications 7936 and 7937 and the formula for converting cfs to afa pursuant to California Code of Regulations, title 23, section 648.2, and Evidence Code section 452, subdivisions (c) and (h).

3.3 Early Construction Work

Reclamation commenced construction of the Auburn Dam Project in 1971, as required by its water right permits, but Reclamation did not complete construction by the December 1, 1975 deadline. By 1975, Reclamation had completed Reaches 1 and 2 of the Folsom-South Canal, and Reclamation had completed construction of a diversion tunnel in order to route water around the dam construction site on the North Fork of the American River. Reclamation also had started excavation and preparation of the foundation of the dam. As of June 30, 1975, Reclamation had expended \$136,982,197 on construction of the Auburn Dam Project. (Stip., ¶ 3.) Then, on August 1, 1975, a 5.7 magnitude earthquake occurred near Oroville, California. The earthquake led to concern about the seismic safety of Auburn Dam. Consequently, Reclamation halted major construction on the project in order to reevaluate the design of the dam. (USBR Exhibit 1, p. 2; FOR Exhibit X-1, p. 4; SJC Exhibit 9, p. 6.) Construction ceased in 1976 and has not resumed since. (USBR Exhibit 1, p. 2.) Reclamation has not applied any water to beneficial use under the permits. (Stip., ¶ 10.)

On August 12, 1975, Reclamation filed a petition with the State Water Board to extend the deadline to complete construction of the Auburn Dam Project until December 1, 1983, and to extend the deadline to complete application of water to beneficial use until 2008. (Stip., ¶ 4.) In 1983, Reclamation amended its petition to request an extension until December 1994 to complete construction and until December 2020 to complete application of water to beneficial use. As discussed below, the Division acted on the amended petition in 1984.

3.4 Cost-Sharing Issues

In 1979, Reclamation determined that Auburn Dam could be redesigned to address seismic safety concerns, but the new design, together with inflation, pushed the cost of the project over the Congressionally authorized cost ceiling. (USBR Exhibit 1, p. 2.) Prior to seeking reauthorization, however, Reclamation sought to obtain non-federal partners to share in the costs of the project, consistent with new federal policy. (FOR Exhibit X-1, pp. 5-10; FOR Exhibit X-10, p. 2; FOR Exhibit X-18, p. 7.)

Under cover of a letter dated January 17, 1984, Reclamation submitted to the State Water Board a revised timetable for project construction that identified a number of activities that Reclamation needed to complete before resuming construction. According to the timetable,

Reclamation proposed to negotiate cost-sharing agreements with non-federal entities in 1985, obtain Congressional reauthorization of the project in Federal Fiscal Year (FFY) 1986 or 1987, complete project design and specifications in FFY 1990, and complete construction in FFY 1995. (Stip., ¶ 6.)

Reclamation's efforts in the 1980's to negotiate adequate cost-sharing agreements with local interests were unsuccessful. (FOR Exhibit X-1, pp. 5-10; FOR Exhibit X-19.) In 1989, negotiations foundered when a key potential customer, the Central Valley Project Water Association, announced that it did not support the project due to concerns that environmental issues would delay if not ultimately kill the project and concerns about the high cost of water from the project. (FOR Exhibit X-19.) Also in 1989, another potential customer, the Sacramento Municipal Utility District (SMUD), announced that it was not interested in participating in the project because the cost of power from the project was significantly higher than power from other sources. (*Ibid.*)

3.5 The Division of Water Rights Order Dated May 11, 1984

In an order dated May 11, 1984, the Division of Water Rights (Division) approved an extension of time to complete construction and water use. The Division noted in its order that Reclamation proposed to make changes to the project, and determined that the establishment of new deadlines to complete construction and use should be deferred until Reclamation had done more work on activities preliminary to resuming construction. (Stip. p. 3, ¶ 7.) In addition, because Reclamation had obtained a release of priority of state-filed applications, any substantial changes to the project would require State Water Board approval in accordance with Water Code section 10504.5. Accordingly, the Division ordered Reclamation to submit the project to the State Water Board prior to submitting the project for Congressional reauthorization and prior to resuming construction, but not later than December 31, 1987, for approval in accordance with section 10504.5 and the establishment of new deadlines to complete construction and water use. (*Ibid.*)

Reclamation met none of the milestones set forth in its timetable for completion of the project, nor did Reclamation meet the December 31, 1987 deadline to submit the project to the State Water Board. In 1988, Reclamation requested an extension until December 1, 1995, to submit

the project to the State Water Board. (Stip., ¶ 11.) The Division issued public notice of Reclamation's request, but did not take action on it.

3.6 The American River Water Resources Investigation

Beginning in 1991, Reclamation and various local agencies conducted an investigation called the American River Water Resources Investigation (ARWRI). The purpose of the investigation was to develop a program to meet the water supply needs of five counties—El Dorado, Placer, Sacramento, San Joaquin, and Sutter—through 2030. (FOR Exhibit X-1, pp. 13-14; FOR Exhibit X-28.)

In 1995, Reclamation renewed and amended its request for an extension of the 1987 deadline to submit the Auburn Dam Project to the State Water Board for the establishment of new deadlines to complete construction and water use. Reclamation stated that it needed more time to complete a Planning Report and Environmental Impact Statement (EIS) for the ARWRI. (Stip., ¶ 13.) Reclamation explained that one of the alternatives being considered was a multi-purpose dam at Auburn. If selected as the recommended plan of action, Reclamation estimated that construction would begin sometime around the turn of the century. (*Ibid.*) Reclamation requested until December 31, 2001, to submit the project to the State Water Board.

Following completion of the ARWRI, however, Reclamation did not select the Auburn alternative as the recommended plan of action. Reclamation completed the Final EIS and Planning Report for the ARWRI in 1997. (FOR Exhibit X-28.) In addition to the Auburn Dam alternative, the EIS and Planning Report evaluated an alternative plan that called for the conjunctive use of surface and groundwater. Reclamation concluded that the cost of water under the two alternative plans was comparable, but the conjunctive use plan was environmentally superior. (*Ibid.*) In a 1998 Record of Decision following completion of the ARWRI, Reclamation stated that it did not propose to initiate any federal action to meet the region's water supply needs. (FOR Exhibit X-1, p. 14; FOR Exhibit X-28.)

3.7 North Fork American River Restoration Work

In 1999, then-Attorney General Bill Lockyer threatened to sue Reclamation for continuing to divert water through the diversion tunnel above the dam site, leaving three-quarters of a mile of

the North Fork American River dewatered and creating a safety hazard that precluded recreational boating for four and one-half miles above the tunnel. (FOR Exhibit X-45.) The Attorney General alleged that Reclamation's diversions violated federal reclamation law, article 10, section 2 of the California Constitution, and the public trust doctrine because the diversions served no beneficial purpose and were causing injury to recreational uses of the water. (*Ibid.*) Subsequently, Reclamation sealed the tunnel and restored the dewatered section of the river. (FOR Exhibit X-1, pp. 18-19; FOR Exhibit X-46; SJC Exhibit 9, pp. 8-9.) Reclamation incorporated the river restoration work into a project to construct a permanent pump station to accommodate Placer County Water Agency's (PCWA) diversions from the North Fork. The project was completed in 2008. Until then, PCWA had been relying on temporary pumps pending completion of the Auburn Dam Project. (FOR Exhibit X-46.)

3.8 The Auburn-Folsom South Unit Special Report, Benefits and Cost Update

In the Energy and Water Development Appropriations Act, 2006 (Pub. L. No. 109-103 (Nov. 19, 2005) 119 Stat. 2247), Congress authorized the Secretary of the Interior to prepare a special report on the Auburn Dam Project. The purpose of the report was to (1) identify project features that are still relevant, (2) update benefit values, (3) assess risks and uncertainties associated with the 1978 design for the dam, (4) update cost estimates, and (5) perform other appropriate analyses to determine whether a full feasibility study is warranted. (SJC Exhibit 9, p. 15.)

In December 2006, Reclamation completed the Auburn-Folsom South Unit Special Report, Benefits and Cost Update (2006 Update). Notably, the 2006 Update concluded that the cost to construct the project would be six to ten billion dollars, which is considerably higher than previous cost estimates. (FOR Exhibit X-1, p. 18; SJC Exhibit 9, p. 16; FOR Exhibit X-42.) The 2006 Update estimated that total annual benefits would range from \$75.7 to \$240.4 million. (SJC Exhibit 9, p. 16.) The 2006 Update estimated that the average annual yield of the project for irrigation, municipal and industrial purposes would be 208,000 afa, almost half the average annual yield of 390,000 acre-feet projected based on a 1963 feasibility study. (FOR Exhibit X-1, p. 18; SJC Exhibit 9, p. 16.)

In the 2006 Update, Reclamation was careful to explain that the cost and benefit estimates were based on a 1978 project design and 1950's project formulation that were outdated. (SJC Exhibit 9, pp. 18-21.) For purposes of the 2006 Update, the project had not been reformulated to reflect

changes in construction technology, or to optimize project operation for multiple beneficial uses based on current information. (*Ibid.*) The cost and benefit estimates probably would change if the project itself were updated. After completing the 2006 Update, however, Reclamation did not propose to reformulate the project or conduct any additional studies. (FOR Exhibit X-1, p. 18; FOR Exhibit X-42.)

3.9 Reclamation's 1998 Request for Time Extension

In 1998, Reclamation submitted a second amendment to its request for an extension of the 1987 deadline to submit the Auburn Dam Project to the State Water Board for the establishment of new deadlines to complete construction and water use. (Stip., ¶ 14.) This time, Reclamation requested an extension until December 31, 2008. The Division issued public notice of this request. The California Sportfishing Protection Alliance (CSPA) filed a protest.

By letter dated August 17, 2001, the Division requested Reclamation to complete a number of actions that would allow the Division to process Reclamation's request for a time extension. Among other things, the Division requested Reclamation to (1) respond to CSPA's protest, (2) document whether Reclamation had completed final project design, obtained funding approval, and could put the water to beneficial use, and (3) provide a schedule for preparation of a CEQA document. (Stip., ¶ 15.) The Division asked Reclamation to complete these actions within six months.

In an October 11, 2001 response, Reclamation stated that construction could not resume unless Congress reauthorized the project, which was beyond Reclamation's control. (Stip., ¶ 16.) Instead of providing a schedule for preparation of a CEQA document, Reclamation stated that it would prepare an environmental assessment pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321-4347) if the project were reauthorized. (*Ibid.*)

In a letter dated December 19, 2001, the Division advised Reclamation that the next step required in order to process Reclamation's request for a time extension was the preparation of a draft CEQA document. (Stip., ¶ 17.) The Division stated that it might be possible to provide a joint document under both CEQA and NEPA, and asked Reclamation to advise the Division when Reclamation commenced preparation of a NEPA document. (*Ibid.*) In response,

Reclamation reiterated that it would not undertake any environmental work unless Congress reauthorized the project. (Stip., ¶ 18.)

In a January 29, 2004 letter, the Division asked Reclamation what actions it had taken since 2001 to provide the information requested by the Division in order to process Reclamation's time extension request. (Stip., ¶ 19.) The Division also requested Reclamation to submit a workplan for the completion of a CEQA document. (*Ibid.*) The Division warned Reclamation that failure to submit the information requested could result in denial of the time extension request and issuance of a notice of proposed revocation for the project permits. (*Ibid.*)

By letter dated March 26, 2004, Reclamation responded that it had done no work on the project since 2001. (Stip., ¶ 20.) Reclamation has confirmed that it has no plans to take any further action to construct the project unless and until the project is reauthorized and Reclamation receives appropriate funding. (Stip., ¶ 21.) Reclamation has not currently proposed any legislation to reauthorize the project or requested the appropriation of funds to resume construction. (*Ibid.*) Reclamation's time extension request remains pending, and CSPA's protest remains unresolved.

3.10 Notice of Proposed Revocation

The State Water Board may revoke a permit only after written notice of the proposed revocation and an opportunity for hearing. On January 24, 2008, the Division issued a Notice of Proposed Revocation for Permits 16209, 16210, 16211, and 16212, alleging that Reclamation had not prosecuted construction work with due diligence, completed construction work, or applied water to beneficial use as contemplated by the permits and in accordance with the Water Code. The notice also alleged that Reclamation did not satisfy the requirements of the Division's May 11, 1984 order or diligently pursue its request for a time extension. (PT Exhibit 4.) By letter dated February 1, 2008, Reclamation requested a hearing on the proposed revocation.

3.11 Public Hearing

The State Water Board issued a Notice of Public Hearing for this proceeding on April 28, 2008. The hearing was held on July 21, 2008. The key issue for hearing was, "Should Permits 16209, 16210, 16211 and 16212 (Applications 18721, 18723, 21636 and 21637) be revoked in accordance with Water Code section 1410? Did Reclamation prosecute with due diligence and

complete construction of the project and apply the water to beneficial use as contemplated by the permits and in accordance with the Water Code and the rules and regulations of the State Water Board?”

In the hearing, a staff Prosecution Team presented the case for revoking Permits 16209, 16210, 16211, and 16212. The parties to the proceeding are Reclamation and the Prosecution Team. The following persons and entities also participated in the hearing: CSPA; San Joaquin County; Stockton East Water District (Stockton East); Friends of the River et al.; Sacramento County and Sacramento County Water Agency (hereafter Sacramento County); Auburn Dam Council; South Delta Water Agency; San Luis and Delta-Mendota Water Authority; Westlands Water District; Friends of the North Fork; and American River Authority. A number of persons and entities submitted or presented policy statements.

The Prosecution Team, Reclamation, San Joaquin County, Stockton East, Friends of the River et al., Sacramento County, and Friends of the North Fork submitted closing briefs by the September 3, 2008 deadline.

4.0 CAUSE EXISTS FOR REVOCATION

Following the hearing and after considering the evidence in the record, we find that cause exists for revoking the water right permits associated with the Auburn Dam Project. Reclamation has failed to construct the project and apply water to beneficial use with due diligence. In addition, Reclamation has failed to diligently pursue an extension of time that might otherwise excuse Reclamation’s delay in constructing the project.

4.1 Reclamation Failed to Construct the Project and Apply Water to Beneficial Use with Due Diligence

Cause exists for revocation of the Auburn Dam Project permits because Reclamation has not prosecuted construction of the project and application of water to beneficial use with due diligence as required by the permits, the Water Code, and the State Water Board’s regulations. Reclamation admits that it did not complete construction by the December 1, 1975 deadline set forth in the permits or apply any water to beneficial use under the permits. (Stip., ¶¶ 4 & 10.) In fact, since Reclamation ceased construction in 1976, the only construction that Reclamation has

performed relative to the project was to restore North Fork American River flows to the former dam site by sealing a bypass tunnel necessary for project construction.

Further, as described above as part of an order issued in 1984 approving a request for extension of time, the Division of Water Rights ordered Reclamation in May of that year to submit project revisions to the State Water Board prior to submitting the project for Congressional reauthorization and prior to resuming construction, but no later than December 31, 1987. New deadlines to complete construction and water use were to be established at that time. This submittal requirement was not conditional upon reauthorization of the project by Congress. Reclamation did not meet the December 31, 1987 deadline to submit project revisions to the State Water Board. Although Reclamation contends that Congressional reauthorization is required before Reclamation can proceed with project construction, the evidentiary record contains no evidence that Reclamation could not submit a revised project to the State Water Board prior to Congressional reauthorization.

4.2 Reclamation Failed to Diligently Pursue an Additional Time Extension Request

After missing the deadlines set forth in the permits and in the extension of time that was granted, it was incumbent on Reclamation to diligently pursue an additional time extension in order to continue to develop its water rights.

In 1988, Reclamation requested an extension of the 1987 deadline to submit a revised project to the Board. In 1995, Reclamation renewed this request and amended it to ask for additional time. Reclamation stated that it needed more time to complete a Planning Report and EIS for the ARWRI. But Reclamation's completion of the Final EIS and Planning Report for the ARWRI in 1997 did not result in the submittal of a reformulated project to the Board.

In 1998, Reclamation again renewed its request for an extension of time and amended it to ask for additional time. This request remains pending because Reclamation has not submitted the required documentation. Moreover, Reclamation does not appear to be any closer to submitting a revised project to the Board today than it was 20 years ago. After completing the 2006 Benefits and Cost Update, which was based on a 1978 project design and 1950's project formulation, Reclamation did not propose to reformulate the project or otherwise proceed with project development.

In addition, Reclamation has not diligently pursued its pending request for a time extension by submitting the information necessary for the Board to consider the request. The Division has informed Reclamation on several occasions that the Board cannot process Reclamation's request for a time extension unless a CEQA document is prepared. (Stip., ¶¶ 15, 17 & 19.) The Division also has advised Reclamation that CSPA's protest of the time extension request must be resolved. (Stip., ¶¶ 15 & 17.) Reclamation has not made any effort, however, to prepare a CEQA document or resolve CSPA's protest. (Stip., ¶¶ 16, 18 & 20.) Instead, Reclamation has made it clear that Reclamation does not intend to do any work in support of its request for a time extension unless and until Congress reauthorizes the Auburn Dam Project. (Stip., ¶ 21.)

4.3 Lack of Finances does not Excuse Reclamation's Lack of Diligence

Reclamation's primary argument in support of its position that the Auburn Dam Project permits should not be revoked is that Congress's failure to reauthorize and fully fund the project excuses Reclamation's lack of due diligence in developing the project. Reclamation argues further that the Board should refrain from revoking the permits in deference to Congress, which will continue to debate the future funding and construction of the project until it is either reauthorized or deauthorized.³ As explained below, Reclamation's argument is inconsistent with federal reclamation law and state water right law, including our regulations, and it is not fully supported by the record.

As set forth in section 2.2, above, our regulation governing time extension petitions expressly provides that "[l]ack of finances, occupation with other work, physical disability, and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay." (Cal. Code Regs., tit. 23, § 844.)⁴ The regulation does not include an exception for permittees, such as Reclamation, who lack finances because they rely on an outside source of funding, such as a legislative appropriation.

³ In essence, Reclamation's argument is that Congress is accountable for the lack of progress in developing the Auburn Dam Project. We reject this argument, but note that if it were true, Congress has not acted diligently, as demonstrated by statements in the record by Reclamation and others.

⁴ Although this regulation applies to time extension petitions, not revocation proceedings, the due diligence requirement is common to both revocation and extension proceedings. Accordingly, factors that inform our determination regarding diligence in an extension proceeding may also inform our decision whether to revoke a water right permit for lack of diligence. (See Wat. Code, § 1398, subd. (b) ["After any hearing on a [time extension petition], the board may revoke the permit].)

In addition, Reclamation's argument that a lack of finances excuses a failure to exercise due diligence would create an exception that swallows the rule. Many water right applicants and permittees – including federal and state agencies, private companies, and individuals – depend on legislative appropriations or other outside sources to finance their projects. Reclamation would create a broad exception to the due diligence requirement for applicants and permittees who rely on outside sources of funding. The creation of such an exception finds no support in state water right law. Moreover, if the due diligence requirement and our regulations are to have meaning and effect, applicants and permittees must be held responsible if they fail to secure adequate financing to promptly develop their projects, even if they depend on an outside source for financing.

Reclamation's argument that the lack of due diligence in this case is excused by Congress's failure to reauthorize and fund the Auburn Dam Project is also contrary to federal reclamation law. Pursuant to section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), Reclamation must comply with state water right law, including the due diligence requirement, when appropriating water for purposes of a reclamation project, such as the Auburn Dam Project. (*California v. United States* (1978) 438 U.S. 645, 674-675; *Westlands Water District v. United States* (E.D.Cal. 2001) 153 F.Supp.2d 1133, 1171-1173.) If the State Water Board were to accept Reclamation's argument, Reclamation could reserve water rights indefinitely for *any* reclamation project that has not been authorized or funded and may never be built, in direct contravention of the due diligence requirement and the Congressional directive to comply with state water right law when appropriating water.

Similarly, Reclamation's argument that the Board should defer to Congress in this case instead of requiring Reclamation to comply with state law defeats the purpose of section 8 of the Reclamation Act, which ensures that federal reclamation projects abide by state water right law. While federal supremacy could allow a Congressional directive to supplant state water right law, nothing in the Act of September 2, 1965, displaces section 8 of the Reclamation Act of 1902, nor does any language in the Act of September 2, 1965, evince an intent to override section 8 of the Reclamation Act or state water right law.

Finally, even if Congress's failure to reauthorize and fully fund the project were a valid excuse for Reclamation's lack of diligence, the record does not support the claim that Reclamation's

lack of diligence in this case was entirely attributable to the absence of Congressional reauthorization. The record indicates that Congressional reauthorization may have been required in order for Reclamation to proceed with project construction, but Congressional reauthorization was not required in order for Reclamation to conduct studies or meet filing deadlines. (Stip., ¶ 16; USBR Exhibit 1, pp. 3, 7; RT, pp. 89, 100.) Accordingly, the absence of Congressional reauthorization does not excuse Reclamation's failure to submit a revised project to the State Water Board by the December 31, 1987 deadline, or Reclamation's failure to provide the information necessary for the Board to process Reclamation's request for an extension of that deadline.

In summary, Reclamation's failure to complete construction and water use by the deadlines in the permits, failure to meet the 1987 deadline to submit a revised project to the Board, and failure to diligently pursue an extension of the 1987 deadline constitute a failure to exercise due diligence in appropriating water under Reclamation's permits. The absence of Congressional reauthorization does not excuse Reclamation's failure to develop the project with due diligence as required by state law. Accordingly, cause for revocation exists.

5.0 POLICY CONSIDERATIONS

Reclamation and a number of other hearing participants argue that the Board should not revoke the Auburn Dam Project permits, even if cause for revocation exists, because the Auburn Dam Project would provide important water supply, hydroelectric power generation, flood control, and environmental benefits. Conversely, other participants support revocation because of the potential environmental impacts of the project.

It is important to recognize that even if the permits were not revoked, Reclamation would have to obtain a time extension from the Board before Reclamation could proceed with project development. (PT Exhibit 1, p. 4; Reporter's Transcript (RT), p. 51.) Conversely, revoking the permits will not necessarily preclude the project from being built. If Congress ever reauthorizes

and funds the project, Reclamation could file applications for new water right permits. (RT, p. 61.)⁵ In addition, it is conceivable that other parties could file new water right applications for storage or direct diversion projects. The hearing participants appear to assume that there is a significant difference between these two regulatory paths, but that is not the case.

Our review of a time extension request for this project would be substantially the same as our review of new applications. Processing either a request for a time extension or new applications probably would entail preparing an Environmental Impact Report (EIR) pursuant to CEQA and holding an evidentiary hearing. (See PT Exhibit 1, p. 5; RT, pp. 51, 56-67; Stip., ¶¶ 17 & 19.) In addition, the CEQA analysis would be essentially the same in either case because the project has not yet been constructed and no water has been applied to beneficial use under the permits. Accordingly, approval of a time extension, like approval of new applications, would amount to approval of the entire project. Although a water availability analysis is not legally required in order for the Board to process a time extension request, it is difficult to see how the Board could accept as adequate an EIR that did not perform much of the same analysis.

Finally, if we were to approve either new applications or a time extension request, the conditions of approval in either case are likely to be similar. The Board has broad authority to impose any conditions on the approval of a time extension request that the Board determines are in the public interest. (Wat. Code, § 1398, subd. (a); Cal. Code Regs., tit. 23, § 844; see also State Water Board Order WR 2001-02, pp. 5-6 [directing the Division of Water Rights to consider whether it would be in the public interest to approve a time extension petition, or to condition approval of the petition, in light of potential impacts to fishery resources].) Where a project has not been constructed and water has not been put to beneficial use, any conditions to protect the public interest and the public trust are likely to be similar for a time extension and for a new application. Thus, in processing a time extension request, we could take into consideration any of the issues that would be relevant to our consideration of new applications, and condition our approval accordingly. In summary, it is speculative to assume that obtaining a time extension

⁵ Admittedly, the Board could find that water is no longer available for appropriation, especially if Reclamation were to file new applications after a long period of time and the Board were to approve other applications in the interim. It would be contrary to long-standing precedent and would not be in the public interest, however, to put any meritorious water development projects on hold indefinitely pending Congressional reauthorization of the Auburn Dam Project at some unknown future date, if ever, as discussed in section 5.1, below.

for the existing permits would necessarily be easier or result in less restrictive conditions of approval than obtaining new permits.

5.1 Water Supply Implications

Reclamation and some of the other hearing participants, including members of California's Congressional delegation, argue that the Auburn Dam Project permits should not be revoked because the project would supply water needed for agricultural and municipal purposes, as well as hydroelectric power generation. It is important to recognize, however, that revocation of the permits will not reduce available water supplies. Rather, revocation may redistribute the available supply by making water available to junior right holders and applicants for new water rights.

Demand for surface water supplies in the American River watershed is high, and it is unlikely that any water made available by revoking Reclamation's permits will not be applied to beneficial use. Uncontroverted evidence from State Water Board Revised Staff Exhibit 4 shows that there are 28 permits and licenses with priority dates junior to the Auburn Dam Project permits that are located upstream and downstream of the project. The holders of these permits and licenses may benefit from revocation of the Auburn Dam Project permits to the extent that water supplies are insufficient to meet the demands of both the project and the junior right holders under certain hydrologic conditions.

In addition, Revised Staff Exhibit 4 shows that there are three pending applications to appropriate a total of 587,810 afa from locations above and below the project, two applications filed by SMUD and an application filed by San Joaquin County. In addition, there are three junior state-filed applications that reserve a total of 51,459 afa for potential future appropriation. Further, state-filed applications 7936 and 7937 reserve a total of 3,471,944 afa for potential future appropriation from the North Fork American River. State-filed applications 7936 and 7937 are not listed on Staff Exhibit 4 because they are senior to the Auburn Dam Project permits. Ordinarily, the holder of a senior water right would not benefit from the revocation of a junior right because the senior right holder has a paramount claim to the available water supply anyway. In this case, however, the State Water Board in Decision 1356 reversed the priority as between state-filed applications 7936 and 7937 and the Auburn Dam Project permits. The

revocation of the Auburn Dam Project permits would therefore make more water potentially available for appropriation under the state-filed applications.

Sound public policy strongly supports allowing current and potential future applicants to appropriate any surplus water that is made available by revoking the Auburn Dam Project permits, provided that the applicants' projects are in the public interest and will be developed with due diligence, instead of allowing Reclamation to reserve its water rights in "cold storage" indefinitely. In addition, allowing the water rights for a large project like the Auburn Dam Project to remain in limbo creates uncertainty that complicates water supply planning efforts, including ongoing efforts to address water supply and environmental problems in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay/Delta). (RT, p. 208.)

5.1.1 Water Supply Implications for San Joaquin County

Another policy consideration presented in this proceeding is the water supply implications for San Joaquin County (the county) of revoking the Auburn Dam Project permits. Although the county has a pending application to appropriate water originating in the South Fork American River via a diversion from the Sacramento River, both the county and Stockton East oppose revocation of the permits because they would like three years to negotiate with Reclamation for a water supply contract or the acquisition of the permits.

Pursuant to its pending application, the county seeks to appropriate 147,000 afa originating in the South Fork American River via a point of diversion on the Sacramento River near the town of Freeport. The county proposes to use any unused capacity in facilities that are currently being constructed by the East Bay Municipal Utility District (EBMUD) and Sacramento County Water Authority. (SJC Exhibit 7, p. 2.) The county has determined that there will be unused capacity available during normal, above normal, and wet years. (*Ibid.*) The county's proposed Freeport diversion is one of several projects that the county is considering as part of its plan to increase its surface water supplies and reduce groundwater overdraft in the Eastern San Joaquin County Groundwater Basin. (SJC Exhibit 1, pp. 12-13; SJC Exhibit 6.) Critical overdraft in this groundwater basin is causing saline intrusion, which could render groundwater in the western portion of the county unsuitable for municipal and agricultural uses. (SJC Exhibit 1, p. 5.)

If the county were to acquire the Auburn Dam Project permits, the county does not propose to construct Auburn Dam or otherwise change the county's proposal to divert from the Sacramento River at Freeport (except, necessarily, to change the source of the proposed appropriation from the South Fork American River to the North Fork American River). Instead, the county desires the permits because they are senior in priority to the 1990 priority date of the county's pending application, and the authorized season of diversion for the permits includes the additional month of November.⁶ The county posits that more water might be available under the permits due to their senior priority of right and longer season of diversion.⁷ The county and Stockton East argue that they are entitled to the senior priority date of the permits because in past decisions the Board and Reclamation have denied them the right to divert from other sources and directed them to seek surface water supplies from the American River, and because they are intended beneficiaries of the Auburn Dam Project.

We recognize the significant problem with groundwater overdraft and saline intrusion in the Eastern San Joaquin Groundwater Basin, and are generally supportive of the county and Stockton East's efforts to address the problem. There are a number of flaws, however, with the county and Stockton East's argument that they should be given the opportunity to acquire the Auburn Dam Project permits. Preliminarily, the county has mischaracterized our past decisions. Contrary to the county's implication, the Board has not denied the county the right to divert from

⁶ It is unclear why the county excluded the month of November from its 1990 application. The State Water Board has determined in the Declaration of Fully Appropriated Streams that the American River and its tributaries are fully appropriated from July 1 through October 31. (State Water Board Order WR 98-08, Exhibit A, p. 40.) (In addition, any application to appropriate water from the Lower American River would be subject to the restrictions contained in the California Wild and Scenic Rivers Act year-round. (*Ibid.*)) Accordingly, the Declaration of Fully Appropriated Streams would not have precluded the county from including the month of November in its application. Indeed, the County could apply for a permit for the month of November. Although it is not necessarily the case that water is available for appropriation in November, it seems plausible that water may be available, especially if revocation occurs.

⁷ In its closing brief, San Joaquin County cited to Staff Exhibit 4 in support of the claim that 30 permits, with a combined face value of over 265,000 afa, were issued during the time period between issuance of the Auburn Dam Project permits (in 1959 and 1964) and when San Joaquin County filed its application (in 1990). In fact, Staff Exhibit 4 lists 26 permits, with a combined face value of 104,478 afa, that were issued during that time period, some of which may be for non-consumptive uses.

other sources on the grounds that water would be supplied to the county from the American River.⁸

In Decision 893, the State Water Rights Board found that it would be in the public interest to allow the counties of Sacramento, San Joaquin and Placer (the counties) a specified period of time to negotiate water supply contracts with Reclamation before water from the Folsom Unit of the CVP could be delivered outside those counties. (State Water Board Decision 893 (1958) pp. 52, 72.)⁹ In Decision 1356, the State Water Board made a similar finding with respect to the Auburn Dam Project. (State Water Board Decision 1356 (1970) p. 16.)¹⁰ We reaffirm that there is a public interest in supporting efforts of San Joaquin County to obtain adequate water supplies.

However, these findings did not guarantee water supply contracts to the counties, or otherwise confer upon San Joaquin County or Stockton East an entitlement to water from the American River under a senior priority of right. Ultimately, San Joaquin County and Stockton East were unsuccessful in their efforts to obtain water supply contracts for American River water, for reasons that are not explained in this proceeding. (SJC Exhibit 10, p. 11.)

This leads to another problem with the county's and Stockton East's argument against revocation, namely that Reclamation has given no indication that it would be willing to enter into a water supply contract or transfer its permits. Over 30 years ago, the county and Stockton

⁸ Decision 858 is the only decision cited by the county in which a San Joaquin County entity was denied the right to divert from another source. In that decision, the State Engineer denied North San Joaquin Water Conservation District's (NSJWCD) application to appropriate water from the Mokelumne River in favor of EBMUD's competing application because there was insufficient unappropriated water to grant both applications, and EBMUD's application was entitled to municipal preference pursuant to Water Code section 1460. (State Water Board Decision 858 (1956) pp. 68-71, 79.) The State Engineer found that American River water would be available to NSJWCD via the Folsom-South Canal, but this finding was not the basis for the decision to deny NSJWCD's application, and the State Engineer did not direct NSJWCD to obtain water from the American River.

⁹ In Decision 893, the State Water Rights Board granted Reclamation's applications to appropriate water in connection with Folsom Dam and Reservoir, and for two reasons denied applications to appropriate American River water that had been filed by the City of Stockton, NSJWCD, and the Stockton and East San Joaquin Water Conservation District. One reason for the denial was that the applicants had no immediate plans to proceed promptly with construction and application of water to beneficial use. (State Water Board Decision 893 (1958) pp. 54-55.) In addition, the applicants proposed to divert water at Folsom and Nimbus Dams, but they did not have access to those facilities. The State Water Rights Board found that the applicants could be served with less confusion pursuant to a water supply contract with Reclamation. (*Id.* at p. 54.)

¹⁰ On reconsideration, the Board deleted this finding so that it would not be construed as an interpretation of, or limitation to, area of origin protections. (State Water Board Decision Amending and Affirming, As Amended, Decision 1356 (April 2, 1970).)

East were unable to obtain contracts with Reclamation for American River water. There is no evidence in the record that would support the belief that a contract would be forthcoming now, or that Reclamation would be willing to transfer its permits to the county or Stockton East. Moreover, even if the county or Stockton East were to obtain either a contract or the permits, the basic problem remains that Reclamation has not been diligent in developing its rights, and for that and other reasons it is uncertain whether Reclamation, the county, or Stockton East could obtain a time extension for the permits at all, or without time-consuming legal challenges.

A third problem with the county's and Stockton East's argument against revocation is that the record does not contain any evidence that more water would be available to the county under the Auburn Dam Project permits than would be available under the county's pending application. A witness for the county testified that the amount of water that the county will be able to divert at Freeport will be limited by the capacity of the pipeline, not the amount of water available under the 1990 priority of the county's application. (SJC Exhibit 1, p. 15; RT, p. 149; see also SJC Exhibit 7, pp. 23-25.) In response to questions posed by Vice Chair Gary Wolff, the county's witness conceded that the county assumed but had not actually analyzed whether or to what extent any additional water would be available under the Auburn Dam Project permits. (RT, pp. 150-154.)

5.2 Flood Control Implications

In support of their position that the permits should not be revoked, hearing participants also point to the fact that the Auburn Dam Project would protect the Sacramento region from flooding from the American River. The record indicates, however, that the project may not be necessary in order to provide adequate flood control for the region.

Currently, Reclamation and the U.S. Army Corps of Engineers, in partnership with the Central Valley Flood Protection Board and the Sacramento Area Flood Control Agency (SAFCA), are implementing improvements to Folsom Dam, including the construction of an auxiliary spillway. (FOR Exhibit X-1, p. 17; FOR Exhibit X-41; RT, p. 182.) In addition, SAFCA is carrying out projects to strengthen downstream levees so that they can contain increased flows in the event of a flood. (FOR Exhibit X-39; RT, p. 190.)

Once completed, these projects will provide greater flood control protection than the Auburn Dam Project as originally designed. (FOR Exhibit X-1, p. 17; FOR Exhibit X-7; FOR Exhibit X-39; RT, p. 182.) The Auburn Dam Project was designed to control a flood on the American River with a peak inflow to Folsom Reservoir of 460,000 cfs. (FOR Exhibit X-7.) Once the improvements to Folsom Dam and downstream levees are completed, the system will be able to control a flood with a peak inflow to Folsom Reservoir in excess of 500,000 cfs, which exceeds the extrapolated estimates of the 200-year flood. (FOR Exhibit X-1, p. 17; FOR Exhibit X-39; FOR Exhibit X-41.) More importantly, the system will be capable of handling the standard project flood, which is the worst-case flood estimated for flood control planning purposes. (RT, pp. 182, 189-190.)

Although additional flood control protection may have some value, the evidentiary record does not provide a strong enough flood control rationale against revocation of the Auburn Dam Project permits to offset the water supply rationale in favor of revocation.

5.3 Environmental Implications

A final policy consideration is the environmental implications of revoking the Auburn Dam Project permits. A witness for the Auburn Dam Council asserted that the permits should not be revoked because the project would assist in meeting instream flow and temperature requirements in the Lower American River, and would help maintain water quality in the Bay/Delta. (Auburn Dam Council Exhibit 1, p. 2.)

On the other hand, CSPA, Friends of the River et al, Save the American River Association, Defenders of Wildlife, and Friends of the North Fork support revocation on the grounds that the Auburn Dam Project would adversely affect the environment. Witnesses for CSPA and Friends of the River et al. testified that the project would reduce flows in the Lower American River, Sacramento River, and Bay/Delta and adversely affect fishery resources and water quality. (CSPA Exhibit 1, p. 5; CSPA Exhibit 3, pp. 2-5; FOR Exhibit X-1, p. 8.) In addition, the project would inundate more than 30 miles of river canyon above the dam site. (SJC Exhibit 9, p. 6.) The segments of the North and Middle Forks of the American River immediately above the project site are eligible for designation under the federal Wild and Scenic Rivers Act, and the land above the project site is eligible for designation as a National Recreation Area. (FOR Exhibit X-1, pp. 10, 12; FOR Exhibit X-21; FOR Exhibit X- 26.)

The evidentiary record in this proceeding is inadequate to fully evaluate these claims. Nonetheless, the record does support the conclusion that the environmental benefit rationale against revocation of the Auburn Dam Project permits does not offset the water supply rationale in favor of revocation.

5.3.1 Implications for Lower American River Instream Flow Requirements

Sacramento County did not support or oppose revocation on environmental grounds, but expressed concern that revocation could undermine the Water Forum's efforts to update instream flow requirements for the Lower American River by making water available for appropriation outside of the American River watershed. Sacramento County is a member of the Water Forum, which is comprised of a diverse group of stakeholders from Sacramento, Placer, and El Dorado Counties. The Water Forum has reached an agreement that is intended to provide a reliable and safe water supply for the region to the year 2030 and to preserve the fishery, wildlife, recreational, and aesthetic values of the Lower American River. (Sacramento County (SC) Exhibit 2, p. 1; SC Exhibit 4, p. 1.) The Water Forum is currently negotiating with Reclamation concerning the implementation of updated instream flow requirements for the Lower American River. (SC Exhibit 2, p. 2.) Sacramento County requested the Board to preserve any water made available by revoking Reclamation's permits to facilitate the implementation of updated instream flow requirements on the Lower American River and for other public trust and beneficial uses within the American River watershed.

We cannot fulfill Sacramento County's request as part of this decision. Upon revocation of a permit, the Board may declare the water subject to appropriation. (Wat. Code, § 1410, subd. (b)(2).) In this case, however, determining whether and to what extent revocation will make water available for appropriation, and whether and to what extent any water otherwise available for appropriation should be dedicated to instream beneficial uses, would require a detailed examination of current hydrologic information, the extent to which water has been appropriated by other water right holders, and the flows required to protect instream beneficial uses. Interested persons were not put on notice that these issues would be addressed in this proceeding, and the hearing record is not adequate to support a determination of these issues. Instead, these issues should be resolved in future proceedings to determine whether water is available for appropriation pursuant to new water right applications, or proceedings to determine whether to amend existing water rights to protect instream beneficial uses.

6.0 CONCLUSION

In summary, Reclamation has not prosecuted construction of the Auburn Dam Project and application of water to beneficial use with due diligence as required by Reclamation’s water right permits, the Water Code, and Board regulations. Accordingly, cause for revocation of the permits exists.

In addition, we find revocation of the Auburn Dam Project’s water right permits is in the public interest. The public policy of maximizing the beneficial use of the water resources of the state would be furthered by revoking Reclamation’s permits and allowing any water that is made available, and that is not required to protect instream beneficial uses, to be put to beneficial use by junior appropriators or new applicants who are prepared to develop their projects with due diligence. Allowing Reclamation to keep its water rights in “cold storage” indefinitely would be contrary to long-standing precedent and sound public policy. For the foregoing reasons, the Auburn Dam Project permits should be revoked.

ORDER

IT IS HEREBY ORDERED THAT Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637) are revoked.

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CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 2, 2008.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board