
State Water Resources Control Board

TO: Eileen Sobeck
Executive Director
State Water Resources Control Board

FROM: Erik Ekdahl 
Deputy Director
Division of Water Rights

DATE: June 24, 2020

SUBJECT: TRANSFER OF APPLICATION 29657 OF SAN JOAQUIN COUNTY TO
THE ADMINISTRATIVE HEARINGS OFFICE

The Division of Water Rights (Division) proposes to transfer pending water right application 29657 submitted by San Joaquin County to the Administrative Hearings Office (AHO) for resolution. As described below, San Joaquin County has been pursuing application 29657 for the last 30 years with little to no progress, even after the State Water Board issued a reconsideration Order mandating completion of the required California Environmental Quality Act documents and resolution of protests. Given the history of the application, the large quantity of the proposed diversion, and the project location in the complex Bay Delta watershed, this application would be aided by the AHO's role in ensuring water rights matters are resolved in a timely manner.

Application 29657

San Joaquin County (Applicant) filed a water right application with the Division of Water Rights on February 9, 1990, requesting the right to directly divert 620 cubic feet per second (cfs) and to collect to storage 190,000 acre-feet per year (afy), with an annual diversion limit of 322,000 afy. Two alternatives for the source of water were proposed. In Alternative A, water would be diverted from the American River and Laguna Creek. In Alternative B, water would be diverted from Laguna Creek, South Fork American River and Deer Creek.

On August 31, 2003, an amendment to the application was submitted which reduced the maximum rate of diversion to 350 cfs. The collection to storage quantity was set at 147,000 afy, and the combined annual diversion limit was reduced to 147,000 afy. The water source was changed to the Sacramento River and several other points of diversion were abandoned.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

On April 28, 2005, the application was amended for a second time with a proposed diversion rate of 350 cfs from the Sacramento River at the Freeport Regional Water Authority facility at Freeport. The Freeport facility is owned by East Bay Municipal Utilities District and Sacramento County. The Applicant also sought to divert 147,000 afy from the Sacramento River for offstream storage in (a) the proposed Duck Creek Reservoir on Duck Creek, tributary to Calaveras River and (b) underground storage in the groundwater basin underlying the place of use boundary of Application 29657. The application was noticed on January 25, 2008, and there are 16 protests that remain unresolved.

Protestants include the California Salmon and Steelhead Association, California Sportfishing Protection Alliance, Contra Costa Water District; Defenders of Wildlife, Department of Fish and Wildlife Bay Delta Region, Department of Fish and Wildlife North Central Region, Department of Water Resources, El Dorado Water and Power Authority, Freeport Regional Water Authority, Friends of the River, Glenn-Colusa Irrigation District, Sacramento County Water Agency, Sacramento Municipal Utility District, San Luis and Delta-Mendota Water Authority, Save the American River Association, and United States Bureau of Reclamation.

On October 19, 2010, the Division cancelled Application 29657. The basis for cancellation was (a) failure to complete a project-level Environmental Impact Report (EIR), (b) inadequate showing of unappropriated water, (c) unresolved protests, and (d) failure to obtain approval from another public agency, specifically failure to obtain access to the Freeport point of diversion. Additionally, a further time extension did not appear warranted because the Applicant did not comply with its 2002 work plan, and there was no change in status to support a finding that progress would be made in accordance with a proposed 2009 work plan.

On November 18, 2010, the Applicant requested reconsideration. The reconsideration Order (Order WR 2011-0014-EXEC, attached) remanded the matter to the Division to determine the appropriateness of the Applicant's most recently submitted project schedule. In the findings, the reconsideration order states that the Applicant must still complete the required California Environmental Quality Act document and respond to all outstanding protests prior to issuance of a permit on Application 29657. The Applicant likewise must secure access to its currently proposed point of diversion.

On October 3, 2011 and as modified on December 14, 2011 the Division approved a proposed application development schedule (work plan schedule) submitted by the Applicant. A time extension to pursue the application was approved, contingent on timely completion of all elements of the Division's approved schedule. The Applicant was informed that failure to timely comply with any of the short-term and long-term goals and provide the requested information may be basis for application cancellation without further notice.

Since the work plan schedule was approved, there has been correspondence between the Applicant and the Division regarding the workplan and the Applicant's actions toward accomplishing the goals set forth in the workplan. The last correspondence from the Applicant was on June 27, 2014 when the Applicant requested to amend the application again (fourth amendment).

In the amendment, the applicant proposed to remove the Duck Creek Reservoir from consideration, together with all points of diversion for the reservoir. Instead, water would be stored underground in recharge basins adjacent to the North San Joaquin Water Conservation District and Stockton East Water District existing and proposed conveyance infrastructure systems. The diversion rate would remain 350 cfs, with a 147,000 afy limit. In addition, 147,000 af would be collected to storage. The combined diversion limit is 147,000 af. The amended application also included a new timeline which appears to deviate from the intent of the reinstatement order's work plan schedule. The amended timeline provided by the Applicant appears to eliminate short-term and long-term goals established by the Division in order to document whether the Applicant is diligently pursuing the application.

Summary of applicant's current proposal for Application A029657 (June 2014)

<u>Source</u>	American River above Folsom, with use of American and Sacramento Rivers as conveyance and take possession of the water at the Freeport Diversion Facility.
<u>Season of Diversion</u>	December 1 to June 30
<u>Amount</u>	Up to 147,000 acre-feet per year, at a maximum rate of 350 cubic feet per second
<u>Point of Diversion</u>	Freeport diversion: Point of direct diversion and diversion to underground storage in the San Joaquin Groundwater Basin Various points of re-diversion including areas between Mokelumne River, Calaveras River, Mormon Slough and Bear Creek.
<u>Purposes of Use</u>	Municipal, Industrial, Irrigation
<u>Place of Use</u>	399,700 acres within the San Joaquin Flood Control and Water Conservation District

Since the June 27, 2014 letter, the application file shows that no additional correspondence or records have been added to the file, indicating that no progress has been made by the applicant on the project.

Proceeding before the Administrative Hearing Office

The State Water Board generally has two options when processing an application that is not progressing towards completion due to lack of action by the applicant:

(1) intervention to promote action by the applicant such as setting new deadlines for

interim actions involved with application development, or (2) pursuing cancellation of the application from lack of due diligence. In this case, the Division has initiated both of these actions and the Applicant still has not made progress to complete the required California Environmental Quality Act documents and resolve the protests. Referring this matter to the AHO will provide a neutral, fair, and efficient forum for resolving issues that may arise during future water rights proceedings.

If you have any questions regarding this memo, please contact Amanda Montgomery, Manager of the Permitting Section at 916-341-5438 or by email at Amanda.Montgomery@waterboards.ca.gov.

cc: Amanda Montgomery, Program Manager, Division of Water Rights
Jule Rizzardo, Assistant Deputy Director, Permitting and Enforcement Branch

Attachment: Order WR 2011-0014-EXEC

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0014-EXEC

In the Matter of Petition for Reconsideration of
SAN JOAQUIN COUNTY
Regarding Order Canceling Application 29657

ORDER GRANTING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On September 30, 2010, the State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division) issued an order canceling Application 29657 held by San Joaquin County (County). The order was signed by Victoria Whitney, then Deputy Director of the Division. Barbara Evoy became Deputy Director of the Division on October 1, 2010. To facilitate management review, mailing of the order was delayed until October 12, 2010.

Because the period for requesting reconsideration of an order lapses 30 days after the date of order issuance, at the request of the County's counsel, the September 30, 2010 order was rescinded and replaced by the order canceling Application dated October 19, 2010 (Order). On November 18, 2010, the County submitted a petition for reconsideration requesting the Order be rescinded and the County's request for extension of time to be approved.

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs.,

¹ State Water Board Resolution 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of an order denying change and time extension petitions falls within the scope of the authority delegated under Resolution 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

tit. 23, § 768.)² The legal bases for reconsideration are: (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (b) the decision or order is not supported by substantial evidence; (c) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; or (d) error in law.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

The County suggests several facts relied upon by the Division in canceling Application 29657 are in error and provides a basis for the application to be reinstated. Specifically, the County points to page 5 of the Order where the Division recites some comments by protestants to Application 29657, including a comment that "San Joaquin County is not entitled to area of origin protection." The County suggests that the Order "assumes and accepts the comments made by protesting parties... [and that it] is entitled to area of origin protection and therefore the Order is based on an error in law." Because it is not clear on the face of the Order whether the Division in fact concluded that the County is not entitled to area of origin protection or merely noted the comments of protestants, it is unclear whether the Division's conclusion, if any, was correct or incorrect and whether it would be an appropriate reason for canceling Application 29657.

Also somewhat related to the area of origin question, there is some dispute between the County and the Division as to the source of water for Application 29657 after the County moved its proposed point of diversion from the American River to the Freeport Regional Water Project on the Sacramento River. This disagreement appears to be an important factor in the Division's conclusions regarding the adequacy of the County's water availability analysis, specifically as to

² All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

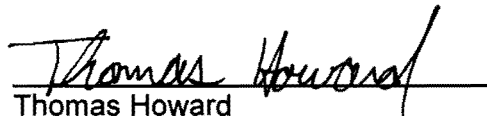
the amount of water that would have been available at the originally proposed point of diversion after taking into account prior rights and regulatory requirements. Although the County changed its point of diversion to the Sacramento River, the County has steadfastly argued that the water source for Application 29657 remains the American River. As part of the 2003 Application revisions, it was agreed that the County would prepare water availability studies necessary to ensure that diversions from the Sacramento River not exceed the amounts of water that would otherwise be obtainable by the County at the original point of diversion #3 on the South Fork American River, so as to ensure that the change would not in effect initiate a new right. The County highlights a factual dispute regarding whether the 2009 water availability analysis in fact meets this criterion. The Division should resolve this disagreement prior to either approving an extension of time for the County to pursue Application 29657 or canceling the application.

The County must also still complete the required CEQA document and respond to all outstanding protests prior to issuance of a permit on Application 29657. The County likewise must secure access to its currently proposed point of diversion. This order does not excuse the county from the requirement for diligent progress towards completion of these goals.

ORDER

IT IS ORDERED that the County's petition for reconsideration of the October 19, 2010 Order Canceling Application 29657 is granted, and this matter is remanded to the Division to determine the appropriateness of and take action on the County's most recent submitted project schedule. Such action may include approval of the most recent proposed project schedule, approval of a modified schedule, or cancellation of Application 29657 if it becomes apparent that the County will not meet the timelines in any Division-approved project schedule or does not timely provide an acceptable modified project schedule upon request.

Dated: JUN 10 2011


Thomas Howard
Executive Director