



Linda S. Adams
*Secretary for
Environmental Protection*

State Water Resources Control Board

Executive Office

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Arnold Schwarzenegger
Governor

NOTICE OF PUBLIC HEARING AND PRE-HEARING CONFERENCE

Auburn Dam Project North Fork American River and Knickerbocker Creek in Placer and El Dorado Counties

The State Water Resources Control Board will hold a
Pre-Hearing Conference and Public Hearing on
Proposed Revocation of Permits 16209, 16210, 16211 and 16212
(Applications 18721, 18723, 21636 and 21637)

United States Bureau of Reclamation

The **Pre-Hearing Conference**
will commence on

Wednesday, June 4, 2008, at 8:00 a.m.

in

the Sierra Hearing Room
Joe Serna, Jr./Cal EPA Building
1001 I Street, Second Floor
Sacramento, CA

The **Public Hearing** will commence on

Monday July 21, 2008, at 9:00 a.m.

and continue, if necessary,

on **Tuesday, July 22, 2008, at 9:00 a.m.**

in

the Coastal Hearing Room
Joe Serna, Jr./Cal EPA Building
1001 I Street, Second Floor
Sacramento, CA

PURPOSE OF HEARING

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence relevant to determining whether Permits 16209, 16210, 16211 and 16212 (Applications 18721, 18723, 21636 and 21637), assigned to the United States Bureau of Reclamation (Reclamation), should be revoked for failure to commence, prosecute with due diligence, and complete the work necessary to appropriate water or apply the authorized water to beneficial use as required by the permits, the Water Code or the rules and regulations of the State Water Board.

California Environmental Protection Agency

BACKGROUND

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-Folsom South Unit of the Central Valley Project (CVP) (the Auburn Dam Project) and granted release from priority of state-filed applications 7936 and 7937 in favor of the Auburn Dam Project applications. Pursuant to Decision 1356, the State Water Board issued Permits 16209, 16210, 16211 and 16212 on April 13, 1971. The permits authorize Reclamation to divert as follows:

- (a) Permit 16209 (Application 18721) authorizes direct diversion of 100 cubic feet per second (cfs) and collection to storage of 1,700,000 acre-feet per annum (afa) from the North Fork American River and Knickerbocker Creek tributary to the North Fork American River. The combined maximum amount that may be diverted under Permit 16209 and Permit 16211 is 2,000,000 afa. The authorized season of diversion is November 1 of each year to July 1 of the following year. The authorized purposes of use are irrigation, municipal, industrial, recreational, incidental domestic, and water quality control purposes within the CVP place of use of 10,124,700 acres.
- (b) Permit 16210 (Application 18723) authorizes direct diversion of 6,300 cfs and collection to storage of 1,700,000 afa from the North Fork American River and Knickerbocker Creek. The maximum amount that may be diverted under Permit 16210 and Permit 16212 is 2,500,000 afa. The authorized season of direct diversion is year-round. The authorized season of diversion to storage is November 1 of each year to July 1 of the following year. The authorized purposes of use are hydroelectric power generation, and incidental recreational and domestic use. The authorized place of use is the Auburn Powerplant, Folsom Powerplant and Nimbus Powerplant.
- (c) Permit 16211 (Application 21636) authorizes direct diversion of 600 cfs and collection to storage of 800,000 afa from the North Fork American River and Knickerbocker Creek. The combined maximum amount that may be diverted under Permit 16211 and Permit 16209 is 2,000,000 afa. The authorized season of direct diversion is year-round, and the authorized season of diversion to storage is November 1 of each year to July 1 of the following year. The authorized purpose of use is hydroelectric power generation at the Auburn Powerplant, Folsom Powerplant and Nimbus Powerplant.
- (d) Permit 16212 (Application 21637) authorizes direct diversion of 900 cfs and collection to storage of 800,000 afa from the North Fork American River and Knickerbocker Creek. The authorized season of diversion is from November 1 of each year to July 1 of the following year. The combined maximum amount of water that may be diverted under Permit 16212 and Permit 16210 is 2,500,000 afa. The authorized purposes of use are irrigation, municipal, industrial, domestic, recreational, fish and wildlife enhancement and water quality control purposes within the CVP place of use of 10,124,700 acres.

Water Code section 1410 provides that a permit may be revoked if work is not commenced, prosecuted with due diligence, and completed or if water is not applied to beneficial use as contemplated in the permit and in accordance with the Water Code and the rules and regulations of the State Water Board. All four permits for the Auburn Dam Project 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 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.

Reclamation commenced construction of the Auburn Dam Project, but construction was delayed for a variety of reasons, including concerns about seismic safety, and the deadline to complete construction expired before construction had been completed. In 1975, Reclamation filed a time extension petition with the Board. Reclamation renewed its request and amended its petition in 1983.

In an order dated May 11, 1984, the Division of Water Rights (Division) approved an extension of time to complete construction and water use. In the order, the Division notes that Reclamation proposes to make changes to the project in light of safety and other issues. The Division determined that the establishment of new deadlines to complete construction and use should be deferred until Reclamation had done more work on certain activities preliminary to resuming construction. 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 Board 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.

In 1988, Reclamation requested an extension of the December 31, 1987 deadline to submit the project to the Board. The Division issued public notice of Reclamation’s request, but did not take action on it. In 1995 and again in 1998, Reclamation renewed its request for an extension. Reclamation’s most recent request was for an extension until December 31, 2008. The Division issued public notice of this request. The California Sportfishing Protection Alliance filed a protest, which has not been resolved. Reclamation’s request for a time extension remains pending.

On January 24, 2008, the Division issued a Notice of Proposed Revocation for Permits 16209, 16210, 16211 and 16212 to Reclamation. A copy of the Notice of Proposed Revocation is enclosed with this notice and can be found on the Division’s website at http://www.waterrights.ca.gov/Hearings/auburn_dam.html. The Notice of Proposed Revocation alleges that Reclamation has not prosecuted construction work with due diligence, completed construction work, or applied water to beneficial use as contemplated by Permits 16209, 16210, 16211, and 16212 and in accordance with the Water Code. The notice also alleges that Reclamation did not satisfy the requirements of the Division’s May 11, 1984 order or diligently pursue its request for a time extension.

By letter dated February 1, 2008, Reclamation requested a hearing on the proposed revocation.

KEY ISSUE

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?

HEARING OFFICER AND HEARING TEAM

State Water Board Vice Chair Gary Wolff, Ph.D., will preside as hearing officer over this proceeding. Other members of the State Water Board may be present during the pre-hearing conference and the hearing. State Water Board staff hearing team members will include Dana Heinrich, Senior Staff Counsel, and Water Resource Control Engineers Jean McCue and Ernie Mona. The hearing staff will assist the hearing officer and other members of the State Water Board throughout this proceeding.

SEPARATION OF FUNCTIONS

A staff prosecutorial team will be a party in this hearing. State Water Board prosecutorial team members will include David Rose, Staff Counsel; Katherine Mrowka, Senior Water Resource Control Engineer; Steve Herrera, Environmental Program Manager; and Jim Kassel, Assistant Deputy Director for Water Rights. The prosecution team will be treated like any other party and all hearing requirements, including the *ex parte* rule discussed below, will apply to the prosecution team.

PRE-HEARING CONFERENCE

The hearing officer will conduct a pre-hearing conference to discuss the scope of the hearing and any other procedural issues on **Wednesday, June 4, 2008 at 8:00 a.m.** The goal of the pre-hearing conference is to ensure that the hearing proceeds in an orderly and expeditious manner. The pre-hearing conference will not be used to hear arguments on, or determine the merits of, any hearing issues, other than procedural matters, unless the parties agree to resolve a hearing issue by stipulation. Following the pre-hearing conference, the State Water Board may, at its discretion, modify the hearing procedures or issues set forth in this notice in whole or in part. **All parties to the hearing must attend the pre-hearing conference.** Failure to attend the pre-hearing conference may result in exclusion from participation in the hearing.

HEARING PARTICIPATION

IF YOU WANT TO TAKE PART IN THE EVIDENTIARY HEARING, you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, parties wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the State Water Board no later than the deadline listed below. Reclamation is a party to the hearing. Failure of Reclamation to submit a timely Notice of Intent to Appear may result in cancellation of the hearing.

Within one week after the deadline for Notices of Intent to Appear, the State Water Board will mail out a list of those who have indicated a desire to participate in the hearing and a copy of all Notices of Intent to Appear that were timely received by the State Water Board. The list is provided in order to facilitate exchange of written testimony, exhibits and witness qualifications in advance of the hearing. Only parties and other participants who are authorized by the

hearing officer will be allowed to present evidence. Copies of witnesses' proposed **testimony, exhibits, lists of exhibits, and qualifications** must be **received** by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than the deadline listed below.

Noon, Friday, May 23, 2008: Deadline for receipt of Notice of Intent to Appear.

Noon, Tuesday, June 24, 2008: Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, and qualifications.

SUBMITTALS TO THE STATE WATER BOARD: Notices of Intent to Appear, written testimony and other exhibits submitted to the State Water Board should be addressed as follows:

Division of Water Rights
State Water Resources Control Board
Attention Jean McCue
P.O. Box 2000
Sacramento, CA 95812-2000

Phone: (916) 341-5351
Fax: (916) 341-5400

Email: wrhearing@waterboards.ca.gov
With Subject of "Auburn Dam Proposed Revocation Hearing"

IF YOU HAVE ANY QUESTIONS

During the pendency of this proceeding and commencing no later than the issuance of this notice, there shall be no *ex parte* communications between State Water Board members or State Water Board hearing team staff and any of the other participants, including members of the prosecution team, regarding substantive or controversial procedural matters within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters should be directed to Jean McCue at (916) 341-5351 or JMcCue@waterboards.ca.gov or to Dana Heinrich at (916) 341-5188 or DHeinrich@waterboards.ca.gov.


PARKING, ACCESSIBILITY AND SECURITY

The enclosed maps show the location of the Joe Serna Jr./Cal-EPA Building and public parking sites in Sacramento. The Joe Serna Jr./Cal-EPA Building is accessible to people with disabilities. Individuals who require special accommodations at the Joe Serna Jr./Cal-EPA Building are requested to contact Catherine Foreman, Office of Employee Assistance, at (916) 341-5881.

Due to enhanced security precautions at the Cal-EPA Headquarters Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Depending on their destination and the building's security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

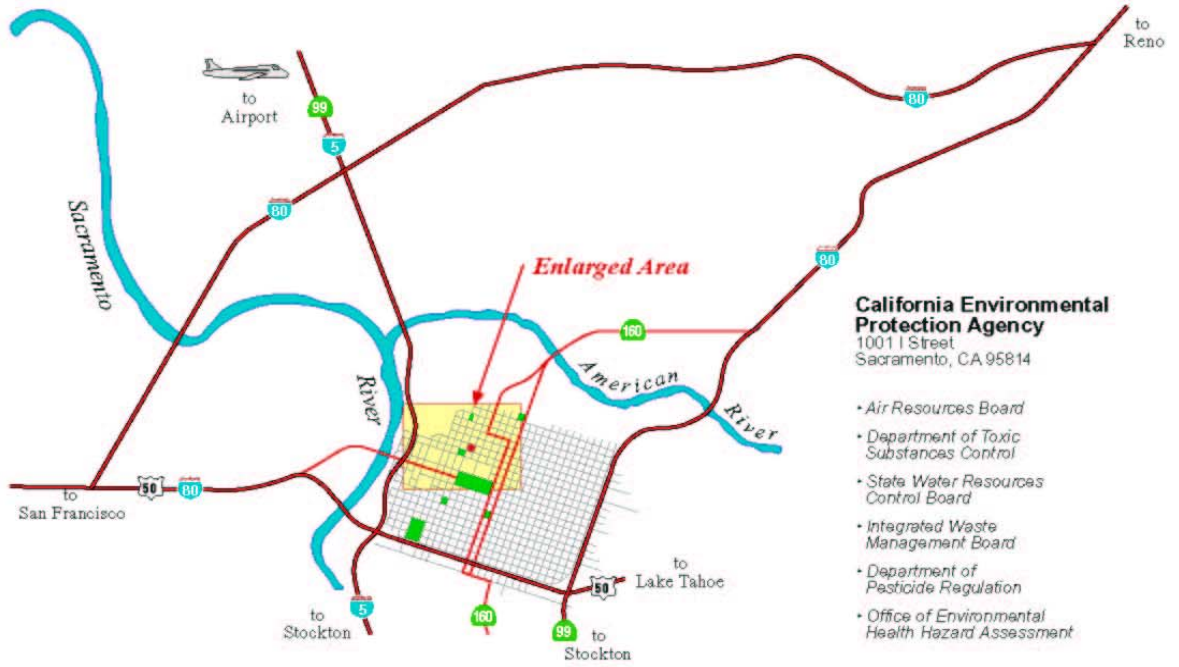
April 28, 2008

Date

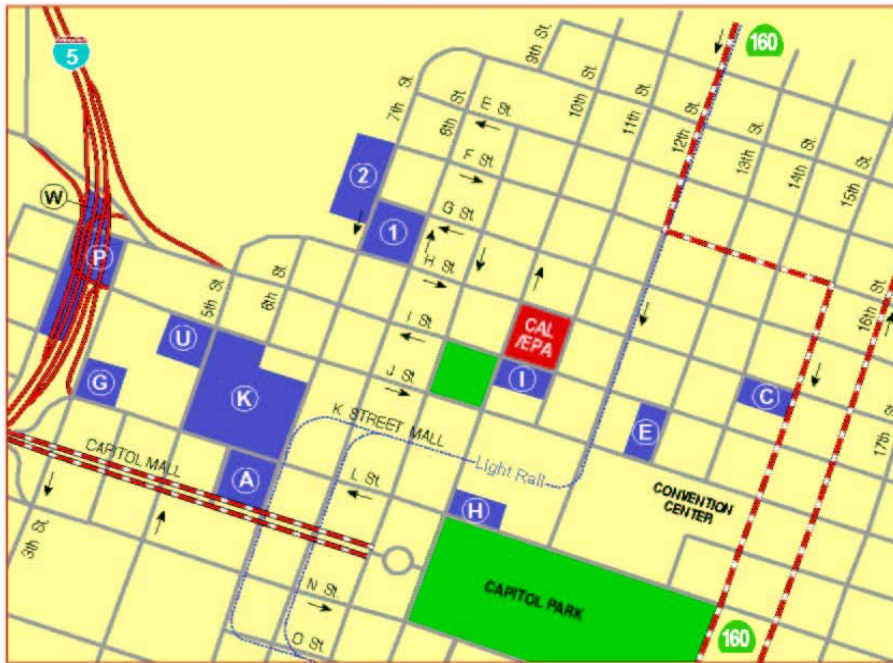


Jeanine Townsend
Clerk to the Board

Enclosures: Map
Notice of Proposed Revocation



Parking Lot Locations



Parking Lot Locations

- Lot 1 (7th & G St.)
- Lot 2 (7th & G St.)
- Lot A (7th & Capitol)
- Lot C (14th & H St.)
- Lot G (3rd & L)
- Lot H (10th & L)
- Lot I (10th & I, 11th & I)
- Lot K (6th & J/L, 7th & K)
- Lot P (2nd & I)
- Lot U (5th & J)
- Lot W (2nd & I St.)

INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

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

1. **HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Board is available upon request or may be viewed at the State Water Board's web site: http://www.waterboards.ca.gov/laws_regulations.

Each party has the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. The hearing officer may extend these rights to a non-party participant or may limit the participation of a non-party participant.

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

2. **PARTIES:** The parties are the United States Bureau of Reclamation and the prosecution team for the State Water Board. Other persons or entities may participate as authorized by the hearing officer. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence.

A person or entity that appears and presents only a policy statement will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. The rules for policy statements are discussed below.

3. **NOTICE OF INTENT TO APPEAR:** Participants in this hearing must file two copies of a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear and exhibits in a timely manner may be interpreted by the State Water Board as intent not to appear.

The Notice of Intent to Appear must state: (1) the name and address of the participant; (2) the name of each witness who will testify on the participant's behalf; (3) a brief description of each witness' proposed testimony; and (4) an estimate of the time (not to exceed 20 minutes) that the witness will need to present a brief oral summary of their testimony. The witness's testimony must be submitted in writing as described in section 4 below. Participants who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear. Participants who decide not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the State Water Board and the other participants as soon as possible.

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

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

4. **WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each participant proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.¹ Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A participant who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each participant shall submit to the State Water Board either: seven paper copies of each of its exhibits; or five paper copies and one electronic copy of each of its exhibits. Each participant shall also serve a copy of each exhibit on every participant on the service list. Participants may serve those parties who agree to electronic service with an electronic copy of exhibits. Participants must serve paper copies of exhibits on those participants who do not agree to electronic service. Hearing participants who intend to make only policy statements are not required to exchange information and will not receive copies of written testimony or exhibits from the parties.

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

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

¹ The hearing officer may make an exception to this rule if the witness is adverse to the participant presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement. In such a case, the hearing officer may allow presentation of the oral direct testimony without requiring written testimony.

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
 - b. The hearing officer have discretion to receive in evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A participant offering an exhibit by reference shall advise the other participants and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the participant relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.
 - c. A participant seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other participants prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a participant waives the opportunity to obtain a copy of the exhibit, the participant sponsoring the exhibit will not be required to provide a copy to the waiving participant. Additionally, such exhibits may be submitted to the State Water Board in electronic form, using a file format readable by Microsoft Office 2003 software.
 - d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
 - e. Participants submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, participants may supply, for the hearing record, a reduced copy of a large format original if it is readable.
5. **ELECTRONIC SUBMISSIONS:** Participants are encouraged to submit the following documents to the State Water Board in electronic form: written opening statements; written policy statements; written testimony; exhibits; and Exhibit Identification Indexes. In addition, the foregoing documents may be served electronically on those participants who have agreed to accept electronic service. Paper copies of all other documents must be submitted to the State Water Board and served on the other parties, unless the hearing officer specifies otherwise.

Any documents submitted or served electronically must be in Adobe™ Portable Document Format (PDF), except for Exhibit Identification Indexes, which must be in a version supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 15 megabytes (incoming mail server attachment limitation) in total size may be sent via electronic mail to: wrhearing@waterboards.ca.gov with a subject of "Auburn Dam Proposed Revocation Hearing." Electronic submittals to the State Water Board of documents greater than 15 megabytes in total size should be sent by regular mail in PDF format on compact disk (CD™) media. Electronic service on participants shall be in the same format as submittals to the State Water Board, and should be submitted to the other participants by mail on CD.

Participants who agree to electronic service may request that specific documents be provided to them in paper copy. Requests should be made to the participant who submitted the document, not to the State Water Board. Participants who receive such a request shall provide a paper copy of the requested document within five days of the date the request is received. The State Water Board will post a list of all exhibits submitted for the hearing on its website at: http://www.waterrights.ca.gov/Hearings/auburn_dam.html.

6. **ORDER OF PROCEEDING:** The State Water Board member serving as hearing officer will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events. The time limits specified below may be changed by the hearing officer, at his discretion, as a result of the pre-hearing conference.
 - a. **Policy Statements Within the Evidentiary Hearing:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not hearing participants. Policy statements will be heard at the start of the hearing, immediately after a hearing officer identifies the parties and other participants. Policy statements are subject to the following provisions in addition to the regulation:
 - i. Policy statements are not subject to the pre-hearing requirements noted above for testimony or exhibits, except that persons wishing to make policy statements are requested to file a Notice of Intent to Appear, indicating clearly an intent to make only a policy statement.
 - ii. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 5, above, for details regarding electronic submittal of policy statements. Oral summaries of the policy statements will be limited to five minutes or such other time as established by the hearing officer.
 - b. **Presentation of Cases-In-Chief:** Each participant may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement provided by the participant, oral testimony, introduction of exhibits, and cross-examination of the participant's witnesses. The hearing officer may allow redirect examination and recross examination. The hearing officer will decide whether to accept the participant's exhibits in evidence upon a motion of the participant after the case-in-chief has been completed.
 - i. **Opening Statements:** At the beginning of a case-in-chief, the participant or the participant's attorney may make an opening statement briefly and concisely stating the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to 20 minutes per participant. A participant may submit a written opening statement. Please see section 5, above, for details regarding electronic submittal of written opening statements. Any policy-oriented statements by a participant should be included in the participant's opening statement.

- ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to 20 minutes to summarize or emphasize their written testimony on direct examination.² Each participant will be allowed up to two hours total to present all of its direct testimony.³
- iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness' oral testimony, and other relevant matters. If a participant presents multiple witnesses, a hearing officer will decide whether the participant's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to one hour per witness or panel of witnesses. The hearing officer has discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Any redirect examination and recross-examination permitted by a hearing officer will be limited to the scope of the cross-examination and the redirect examination, respectively. Witnesses may be cross-examined on relevant subjects that are not covered in the direct testimony. (Gov. Code, § 11513, subd. (b)) Ordinarily, only a participant or the participant's representative will be permitted to examine a witness, but a hearing officer may allow a participant to designate a person technically qualified in the subject being considered to examine a witness. State Water Board members and the State Water Board's counsel may ask questions at any time, and the State Water Board members and staff may cross-examine any witness.
- c. **Rebuttal:** After all participants have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officer will allow participants to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented in another participant's case-in-chief. Rebuttal testimony and exhibits need not be submitted prior to the hearing. Rebuttal evidence is limited to evidence that is responsive to evidence presented in a case-in-chief, and it does not include evidence that should have been presented during the presenter's case-in-chief. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.
- d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times if appropriate, the hearing officer may allow oral arguments or set a schedule for filing briefs or closing statements. If the hearing officer authorizes the participants to file briefs, five copies of each brief shall be submitted to the State Water Board, and one copy shall be served on each of the other participants on the service list. A participant shall not attach a document of an evidentiary nature to a brief unless the document is at the time in the evidentiary hearing record or is the subject of an offer of the document in evidence. Every participant filing a brief shall file a statement of service with the brief, indicating the manner of service.

² The hearing officer may allow additional time for the oral direct testimony of the witness if the witness is adverse to the participant presenting the testimony and the hearing officer is satisfied that the participant could not produce written direct testimony for the witness.

³ The hearing officer may, for good cause, approve a party's request to use more than two hours total to present direct testimony during the party's case-in-chief.

7. **EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications between either State Water Board members or State Water Board hearing team staff and any of the other participants, including the members of the prosecution team, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b)) A document regarding *ex parte* communications entitled, "Ex Parte Questions and Answers" is available upon request or from our website at:
http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.
8. **RULES OF EVIDENCE:** Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

STAFF EXHIBITS TO BE OFFERED INTO EVIDENCE

The following items will be offered, by reference, as staff exhibits at the Auburn Dam Proposed Revocation Hearing:

1. All water right files related to:
 - a. Application 18721
 - b. Application 18723
 - c. Application 21636
 - d. Application 21637

2. Decision 1356 – In the matter of applications 18721, 18722, 18723, 21636, 21637 by the United States Bureau of Reclamation and the request for release from priority of application 7936 in favor of applications 18723 and 21636 and of application 7937 in favor of applications 18721, 18722, and 21637. (available at <http://www.waterrights.ca.gov/hearings/decisions/WRD1356.PDF>)

3. Order amending and affirming, as amended, Decision 1356 (available at <http://www.waterrights.ca.gov/hearings/decisions/ORDER1356.pdf>).

NOTICE OF INTENT TO APPEAR

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

**Proposed Revocation Hearing for Auburn Dam Project
Permits 16209, 16210, 16211 and 16212 (Applications 18721, 18723, 21636 and 21637)
North Fork American River and Knickerbocker Creek in
Placer and El Dorado Counties**

scheduled for
**Monday, July 21, 2008, and continuing,
if necessary, on Tuesday, July 22, 2008**

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

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

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

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

Signature: _____ Dated _____

Name (Print): _____

Mailing Address: _____

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

E-mail: _____

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

DIVISION OF WATER RIGHTS

In the Matter of Permits 16209, 16210, 16211 and 16212
(Applications 18721, 18723, 21636 and 21637)

U.S. Bureau of Reclamation

NOTICE OF PROPOSED REVOCATION

SOURCES: North Fork American River, Knickerbocker Creek tributary to North Fork American River

COUNTIES: Placer and El Dorado

You are hereby notified, pursuant to section 1410 of the California Water Code, that the State Water Resources Control Board (State Water Board or Board) will revoke Permits 16209, 16210, 16211 and 16212 because the Permittee has failed to commence, prosecute with due diligence, and complete the work necessary to appropriate water under Permits 16209, 16210, 16211 and 16212, and has not made beneficial use of the water as contemplated in the permits.

The facts and conclusions upon which the proposed revocations are based are as follows:

- A. Permittee has not Appropriated Water under Permits 16209, 16210, 16211 and 16212 within the Terms of the Permits.
1. On February 5, 1970, the State Water Board adopted Decision 1356, which conditionally approved the United States Bureau of Reclamation's (Reclamation or Permittee) applications to appropriate water in connection with the Auburn-Folsom South Unit of the Central Valley Project (CVP) (the Auburn Dam Project). Pursuant to Decision 1356, the State Water Board issued Permits 16209, 16210, 16211 and 16212 on April 13, 1971. The permits authorize Reclamation to divert as follows:
 - (a) Permit 16209 (Application 18721) authorizes direct diversion of 100 cubic feet per second (cfs) and collection to storage of 1,700,000 acre-feet per annum (afa) from the North Fork American River and Knickerbocker Creek tributary to the North Fork American River. The combined maximum amount that may be diverted under Permit 16209 and Permit 16211 is 2,000,000 afa. The authorized season of diversion is November 1 of each year to July 1 of the following year. The authorized purposes of use are irrigation, municipal, industrial, recreational, incidental domestic, and water quality control purposes within the CVP place of use of 10,124,700 acres.
 - (b) Permit 16210 (Application 18723) authorizes direct diversion of 6,300 cfs and collection to storage of 1,700,000 afa from the North Fork American River and Knickerbocker Creek. The maximum amount that may be diverted under Permit 16210 and Permit 16212 is 2,500,000 afa. The authorized season of direct diversion is year-round. The authorized season of diversion to storage is November 1 of each year to July 1 of the following year. The authorized purposes of use are hydroelectric power generation, and incidental

recreational and domestic use. The authorized place of use is the Auburn Powerplant, Folsom Powerplant and Nimbus Powerplant.

- (c) Permit 16211 (Application 21636) authorizes direct diversion of 600 cfs and collection to storage of 800,000 afa from the North Fork American River and Knickerbocker Creek. The combined maximum amount that may be diverted under Permit 16211 and Permit 16209 is 2,000,000 afa. The authorized season of direct diversion is year-round, and the authorized season of diversion to storage is November 1 of each year to July 1 of the following year. The authorized purpose of use is hydroelectric power generation at the Auburn Powerplant, Folsom Powerplant and Nimbus Powerplant.
 - (d) Permit 16212 (Application 21637) authorizes direct diversion of 900 cfs and collection to storage of 800,000 afa from the North Fork American River and Knickerbocker Creek. The authorized season of diversion is from November 1 of each year to July 1 of the following year. The combined maximum amount of water that may be diverted under Permit 16212 and Permit 16210 is 2,500,000 afa. The authorized purposes of use are irrigation, municipal, industrial, domestic, recreational, fish and wildlife enhancement and water quality control purposes within the CVP place of use of 10,124,700 acres.
2. All four permits required 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.
 3. According to annual progress reports submitted by Reclamation, Reclamation commenced construction in 1971, as required by the permits. By June 30, 1975, Reclamation had expended \$136,982,197 on construction of Auburn Dam, Auburn Powerplant, the Folsom-South Canal, and related facilities.
 4. On August 15, 1975, Reclamation filed a petition for extension of time for the four permits until December 1, 1983 to complete construction and 2008 to complete application of water to beneficial use. Reclamation stated that a diversion tunnel and Reaches 1 and 2 of the Folsom-South Canal had been completed and work was progressing on dam excavation, foundation, and related facilities. Reclamation explained that revisions to the original financial appropriation schedule, updating project costs, and obtaining new appropriations had resulted in major construction delays. Reclamation explained further that minor delays were due to litigation and environmental hearings concerning the Auburn-Folsom South Unit.
 5. In an October 21, 1983 letter, Reclamation renewed its request for time extension. Reclamation updated its pending petition and requested until December 1994 to complete construction and December 2020 to complete application of water to beneficial use. In addition to the work completed by 1975, Reclamation stated that excavation and construction of the foundation for the originally planned arch dam had been completed, a major bridge had been constructed, and seven miles of road had been relocated, bringing total construction costs to \$227,512,000.
 6. Under cover of letter dated January 17, 1984, Reclamation submitted an estimated timetable for construction. The timetable indicated that federal reauthorization of the project was required in order to raise the cost ceiling, authorize minimum flow releases, and approve additional facilities. According to the timetable, Reclamation would: (1) seek Congressional authorization for non-federal financial participation in construction in late Federal Fiscal Year (FFY) 1984; (2) complete cost-sharing arrangements in early 1985; (3) prepare drafts of contracts with non-federal partners in FFY 1985; (4) obtain required reauthorization in FFY 1986 or 1987; (5) complete designs and specifications in FFY 1990; and (6) complete construction in FFY 1995.

7. The Division of Water Rights (Division) approved an extension of time to complete construction by Order dated May 11, 1984. The Division found that determination of new dates within which construction work and use of water should be completed should be deferred until more work on activities preliminary to resuming construction was completed. The Division also noted that third parties had expressed concern with regard to the effect of the proposed Auburn Project on unregulated spring outflow of the Sacramento and American Rivers and the Sacramento-San Joaquin Delta, and therefore Reclamation should include in its studies concerning reformulation of the Auburn Project the effects of the project on unregulated spring outflows.
 8. The conditions of the May 11, 1984 Order are 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).
 9. The Water Code requires that a permitted project be constructed and the water put to beneficial use with due diligence, in accordance with the terms of the permit, and specifies that permits remain in effect only as long as the water appropriated under the permits is put to beneficial use.
 10. The Water Code authorizes the State Water Board to extend the dates for construction and use for good cause. Under the delegation of authority in effect when the Division approved the May 11, 1984 Order, Resolution No. 83-86, the Division had delegated authority to approve extensions "for up to a total of ten years' time." Neither the Water Code nor Resolution No. 83-86 authorizes the removal or indefinite extension of the dates in the permit, and the Division did not have delegated authority to extend the date for completing construction beyond December 1, 1985. To properly extend the dates for completing construction or applying the water to beneficial use, Reclamation would have to comply with the terms of the May 11, 1984 Order, including submittal of the required information by the December 31, 1987 date specified in the Order, and obtain State Water Board approval of new dates for completing construction and applying the water to beneficial use.
 11. The Division's records indicate that Reclamation has not diverted any water under Permits 16209, 16210, 16211 and 16212.
 12. Since 1983 Reclamation has not submitted annual Progress Reports of Permittee summarizing water use and project status as required by conditions in the permits.
- B. Permittee has not Diligently Pursued Its Petition for Extension of Time.
1. By letter dated April 15, 1988, Reclamation requested that the May 11, 1984 Order approving an extension of time be amended to permit Reclamation to submit the Auburn Dam Project to the State Water Board not later than December 1, 1995, rather than December 31, 1987. The stated reason for the request was an increase in public interest in construction of Auburn Dam since the flood of February 1986. This led to preparation of a July 1987 Auburn Dam Report that analyzed various alternatives for storage facilities at the Auburn site, and the initiation of a Corps of

Engineers feasibility level American River Watershed Investigation to evaluate a single purpose (flood control only) facility at the Auburn site. The watershed investigation was scheduled for completion in the latter part of 1990. The focus of these studies was the need to provide 100-year and 200-year flood protection for the Sacramento metropolitan area. The April 15 letter stated that Reclamation did not expect a decision to be made on the construction of Auburn Dam in the near future.

2. The Division issued public notice of the request for a time extension on May 12, 1988. No protests to approval of the time extension request were filed with the State Water Board. No further action was taken on the time extension request.
3. By letter dated March 27, 1995, Reclamation requested further time extension until December 31, 2001. The extension request stated that additional time was needed to complete the American River Water Resources Investigation, initiated in 1991 and scheduled to be completed in 1996 with the release of a Final Planning Report/ Programmatic EIS/EIR. Among the alternatives being considered in the EIR/EIS was a multi-purpose dam at Auburn. If construction of a multi-purpose dam was selected as the recommended plan of action, Reclamation estimated that construction would begin sometime around the turn of the century. The March 27 request was not noticed.
4. By letter dated June 11, 1998, Reclamation modified the time extension request to December 31, 2008. The State Water Board issued public notice of this request on July 16, 1998. The California Sportfishing Protection Alliance protested approval on a number of grounds, including: (a) failure to exercise due diligence, (b) the need to reevaluate project impacts in light of legal and factual changes that had occurred since the State Water Board issued water right permits for the project, and (c) potential impacts to water availability and water quality in the Bay-Delta estuary.
5. By letter dated August 17, 2001, Division staff requested that Reclamation complete the following actions within the next six months:
 - (a) Respond to the protest: In responding to the protest, Division staff asked that Reclamation document whether it had completed final project design and obtained funding approval to proceed with project development, and whether it could put the water to beneficial use.
 - (b) Provide a time schedule for preparation of a CEQA document: Division staff stated that the CEQA document must describe the impacts of the incremental increase in water use that may occur during the time extension period, using the unbuild current condition as the baseline.
 - (c) Provide the information required by the May 11, 1984 Order Approving Extension of Time, conditions 2 and 3 (listed above in Items 8 (b) and (c) of the present order).
6. By letter dated October 11, 2001, Reclamation responded to the Division's August 17 letter. Reclamation asserted that it had exercised due diligence notwithstanding unavoidable obstacles beyond its control. Reclamation stated that of the five proposed reaches of the Folsom South Canal, two had been completed, and construction of the three remaining reaches had been deferred pending studies of the interaction of maintaining minimum flows in the Lower American River and satisfying other Reclamation water supply commitments.

As for the Auburn Dam, Reservoir and Powerplant, Reclamation explained that a major design change had been made after the initial Congressional authorization of the project in 1965. In 1975, Reclamation halted further construction of the dam due to concerns regarding seismic safety after an earthquake occurred near the State of California's Oroville Dam. Reclamation undertook a four-year re-analysis of the design of Auburn Dam and determined in 1979 that a safe dam could be built on the site by means of a further design change. However, inflation and increased costs of proposed design changes pushed the estimated cost of the project over the

Congressionally authorized cost ceiling. Congress had not yet enacted the necessary reauthorization legislation. Reclamation stated that further construction was contingent on the enactment of new legislation, which was entirely beyond the control of Reclamation.

In response to Division staff's request for a CEQA timetable, Reclamation stated that, should Congress decide to reauthorize the Auburn Dam Project, Reclamation would have to prepare an environmental assessment to determine the significance of the impacts of the construction and operation of the reauthorized project to comply with NEPA.

7. The Division's December 19, 2001 letter of response informed Reclamation that the next step in processing the petition for extension of time was to prepare a CEQA document. Division stated that the environmental documentation that Reclamation would prepare to comply with NEPA if the Auburn Dam Project were reauthorized might be adequate to serve as a joint document under both CEQA and NEPA if it met all CEQA requirements. The Division asked Reclamation to advise the Division when Reclamation commenced preparation of its document under NEPA to enable coordination of the preparation of a joint environmental document.

The Division advised Reclamation that, due to the existence of an unresolved protest against Reclamation's time extension petition, the State Water Board was required to hold a hearing before acting on the petition. The Division stated that the Board would not hold a hearing until a draft environmental document had been prepared and circulated under CEQA.

8. By letter dated January 18, 2002, Reclamation advised the Division that until such time as Congress reauthorized the Auburn Dam Project, Reclamation would not be undertaking any environmental work.
9. The Division, by letter dated January 29, 2004, requested that Reclamation document what actions it had taken from 2001 to the present to provide information required by the Division to complete processing of the petition. Reclamation was also requested to produce a Work Plan documenting that it would proceed with the petitions with due diligence. The Division specified that, to be acceptable, the Work Plan must provide a timeline, with dates for completion of each task, showing when Reclamation would (a) obtain funding to prepare the requisite environmental document, (b) initiate and complete all studies needed for inclusion in the environmental document, (c) issue a Notice of Preparation, (d) issue a Draft EIR/EIS, and (e) issue a Final EIR/EIS. The Division requested that a response be submitted by March 30, 2004. The Division advised Reclamation that failure to timely submit the material might result in denial of the petition without further notification and issuance of a Notice of Proposed Revocation for each permit.

C. Permittee has not put Water to Beneficial Use under Permits 16209, 16210, 16211 and 16212.

In its March 26, 2004 letter of response, Reclamation stated that it had no plans to complete the project, and since 2001 Reclamation had done no work on the project. However, since Congress had not de-authorized the project, Reclamation stated that it wished to preserve the subject water right permits so that it could promptly implement any future Congressional direction regarding the project.

Based on the above facts and the conclusions set forth below, cause exists for revocation of Permits 16209, 16210, 16211 and 16212 pursuant to Water Code section 1410, subdivision (a).

Reclamation has not prosecuted construction work with due diligence, completed construction work, or applied water to beneficial use as contemplated by Permits 16209, 16210, 16211 and 16212 and in accordance with the Water Code. Although Reclamation obtained an Order that could have provided the basis for extending the December 1, 1975 deadline to complete construction and the December 1, 2000 deadline to apply water to beneficial use, Reclamation did not satisfy the requirements of that Order. Reclamation did not meet the December 31, 1987 deadline to submit the Auburn Dam Project to the State Water Board for establishment of new deadlines to complete construction and apply water to beneficial use. In addition, Reclamation has not submitted any evidence that it has completed any of the

activities preliminary to resuming construction that it proposed to complete prior to December 31, 1987, including entering into cost-sharing agreements and obtaining Congressional reauthorization of the project.

Reclamation has not diligently pursued its time extension petition for the four permits. Reclamation has requested three extensions of the December 31, 1987 deadline, most recently until December 31, 2008. In the interim, while Reclamation has conducted several studies, it has not prepared the CEQA documentation necessary for the State Water Board to process the pending time extension petition. Moreover, Reclamation has stated that it has not performed any work on the project since 2001 and has no intention of performing any work unless Congress reauthorizes the project.

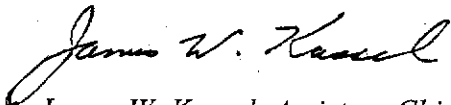
Because Reclamation has not diverted and used water beneficially under Permits 16209, 16210, 16211 and 16212, Reclamation is not in compliance with Water Code section 1390, which provides, "A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division [of the Water Code], but no longer."

Reclamation has violated term 13 of Permits 16209, 16210, 16211, and 16212, which requires that "Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Resources Control Board until license is issued."

As required by Water Code section 1410.1, Reclamation is notified that, unless a written request for a hearing signed by or on behalf of Permittee is delivered or mailed to the Board within 15 days after receipt of this notice, the Board may act upon the proposed revocation of the permit without a hearing. Any request for a hearing may be made by delivering or mailing the request to the Board at the address given on the cover letter for the notice.

Based on the above facts and conclusions, the State Water Board will revoke Permits 16209, 16210, 16211 and 16212 after the passage of fifteen days upon Permittee's receipt of this notice, unless by that date the State Water Board receives a written request for a hearing signed by or on behalf of the Permittee.

STATE WATER RESOURCES CONTROL BOARD



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

Dated: January 24, 2008