

January 27, 2022

DRAFT

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

**ORDER WR 2022-\_\_\_**

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In the matter of the pending application of

**San Joaquin County (A029657)**

for a permit to appropriate water from the South Fork American River  
at the Freeport Regional Water Facility on the Sacramento River  
in Sacramento County.

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SOURCE: South Fork American River

COUNTY: SACRAMENTO

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**ORDER CANCELING APPLICATION 29657**

BY THE BOARD:

**1.0 INTRODUCTION**

This matter came to the State Water Resources Control Board (State Water Board or Board) as a proposed order prepared by the Board's Administrative Hearings Office (AHO), pursuant to Water Code section 1114, subdivision (c)(1). Pursuant to Water Code section 1114, subdivision (c)(2)(A), the Board adopts the AHO's proposed order in its entirety.

For the reasons described in this order, we cancel Application 29657 pursuant to Water Code sections 1276 and 1335 because the County did not provide information requested by the Division. In the alternative, we deny Application 29657 pursuant to California Code of Regulations, title 23, section 840 because we conclude that the County does not intend to diligently initiate or complete the necessary construction or use of the water contemplated by the application, and because the County will not be able to proceed within a reasonable time.

## **2.0 PROCEDURAL BACKGROUND**

### **2.1 Application 29657**

San Joaquin County (County or Applicant) filed water-right Application 29657 with the Board's Division of Water Rights (Division) on February 9, 1990 (Original Application). (AHO-3.)<sup>1</sup> The Original Application sought a permit to appropriate 620 cubic feet per second (cfs) of water by direct diversion and 190,000 acre-feet per year (af/yr) of water by diversion to storage, with an annual diversion limit of 322,000 af/yr. The proposed season of diversion was December 1 of each year through June 30 of the following year. The proposed uses of water were municipal, industrial, and irrigation within a gross service area of 399,700 acres within San Joaquin County, including municipal water supply for the Cities of Lodi, Stockton, Lathrop, and Manteca.

The Original Application identified two alternative sources of water and sets of proposed points of diversion for the appropriation. Under Alternative A, the County would divert water from the American River at Nimbus Dam through the Folsom South Canal to

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<sup>1</sup> Exhibits from the Division's files that the hearing officer accepted into the evidentiary record are designated by the abbreviation "AHO" and are in the "Division of Water Rights Files (A029657)" folder. Exhibits submitted by the parties are identified by the name or abbreviation for the party that submitted the exhibit and an exhibit number. The parties' exhibits are in subfolders within the administrative record's "Hearing Documents" folder. Citations to documents in the administrative record other than hearing exhibits are identified by the file name in the administrative record. Unless otherwise noted, references to page numbers in documents, including parties' exhibits, refer to the page numbers at the top of the screen reading software used to view the pdf files of these documents.

storage in a proposed Clay Station Reservoir on Laguna Creek. Alternative A included Laguna Creek as an additional source of water. Under Alternative B, the County would divert water from the South Fork American River to storage in a proposed County Line Reservoir on Deer Creek, and in a proposed Clay Station Reservoir on Laguna Creek. Alternative B included Deer Creek and Laguna Creek as additional sources of water (besides the South Fork American River).

Since filing the Original Application, the County has filed four amendments to the application, dated: August 31, 2003 (Amended Application) (AHO-32), April 28, 2005 (Second Amended Application) (AHO-38), October 10, 2007 (Third Amended Application) (AHO-44), and June 27, 2014 (Fourth Amended Application) (AHO-171).

The Amended Application reduced the proposed maximum authorized rate of diversion to 350 cfs, the proposed maximum authorized amount of annual diversions to storage to 147,000 af/yr, and the maximum combined annual diversions to 147,000 af/yr. The Amended Application did not include any of the proposed points of diversion identified in the Original Application and substituted a new proposed point of diversion at the Freeport Regional Water Project Intake Facility (Freeport Facility) on the Sacramento River.

The Amended Application also included various proposed points of rediversion, and storage in a proposed Duck Creek Reservoir on Duck Creek, tributary to the Calaveras River. In an attachment to the application, the County confirmed that it would prepare the water availability studies to assure that its diversions from the Sacramento River would not exceed the amounts of water available at the proposed point of diversion on the South Fork American River identified under Alternative B of the Original Application.

The Second Amended Application retained the revisions of the Amended Application, included the new and revised proposed points of rediversion, and added underground storage in the groundwater basin underlying the proposed place of use in San Joaquin County as a new method and place of storage.

The Third Amended Application added a more-detailed description of the methodology that the County would use to measure the amounts of water placed into and withdrawn from underground storage, added additional proposed points of rediversion, and updated the description of proposed points of rediversion identified in the Second Amended Application.

The Division issued a public notice of the Third Amended Application on January 25, 2008 (AHO-45), and a public re-notice of the Third Amended Application on March 12, 2008 (AHO-51). The Division received 16 protests to the application.<sup>2</sup>

On October 19, 2010, the Division issued an order canceling Application 29657 because the County had failed to provide information requested by the Division, including information necessary to comply with the California Environmental Quality Act (CEQA), and the County failed to diligently pursue the application. (AHO-129.) On November 18, 2010, the County filed a petition for reconsideration of the Division's order canceling Application 29657. (See AHO-146, p. 1.) On June 10, 2011, the State Water Board adopted an order that granted the County's petition for reconsideration and reinstated Application 29657. (AHO-146.) The order remanded the matter to the Division to act on the County's proposed application-development schedule, and directed the Division to cancel Application 29657 if "it becomes apparent that the

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<sup>2</sup> The Division received protests from: California Salmon and Steelhead Association (AHO-47), California Sportfishing Protection Alliance (AHO-68), Contra Costa Water District (AHO-82), Defenders of Wildlife (AHO-69), Department of Fish and Wildlife Bay Delta Region (AHO-66), Department of Fish and Wildlife North Central Region (AHO-67), Department of Water Resources (AHO-61), El Dorado Water and Power Authority (AHO-70), Freeport Regional Water Authority (AHO-53), Friends of the River (AHO-62), Glenn-Colusa Irrigation District (AHO-71), Sacramento County Water Agency (AHO-54), Sacramento Municipal Utility District (AHO-73), San Luis and Delta-Mendota Water Authority (AHO-72), Save the American River Association (AHO-52), and Bureau of Reclamation (AHO-58). The Division counted the joint protest filed by the Department of Fish and Wildlife, North Central Region, and the Department of Fish and Wildlife, Delta Region, as two separate protests. If this joint protest is counted as one protest, the Division received 15 protests to the County's application.

County will not meet the timelines in any Division-approved project schedule.” (*Id.* at p. 3.)

On October 3, 2011, the Division approved the County’s proposed application-development schedule. (AHO-148.) The Division’s approval of additional time for the County to pursue Application 29657 was contingent on the County’s timely completion of all elements of the schedule. The Division informed the County that its failure to meet any of the deadlines in the schedule or its failure to provide requested information could result in cancelation of the application without further notice. The Division modified this approval at the request of the County on December 14, 2011, to extend several deadlines in the schedule. (AHO-151.)

On June 17, 2014, the County submitted the Fourth Amended Application, which removed the proposed Duck Creek Reservoir as a place of storage and removed the proposed points of diversion for the reservoir. (AHO-171.) The Fourth Amended Application added information about proposed underground storage through recharge basins adjacent to the North San Joaquin Water Conservation District’s and Stockton East Water District’s existing and proposed conveyance infrastructure systems. As described in the Freeport Element of the American River Use Strategy: Phase 1 Draft Feasibility Study (Phase 1 Draft Feasibility Study), the County proposes to divert American River water through the Freeport Facility from December through June when East Bay Municipal Utility District (EBMUD) is not fully utilizing the facility’s capacity, which typically occurs in normal, above normal, and wet years. (SJ County-3, p. 40; SJ County-6, p. 272.) The Water Resources Manager for San Joaquin County, Matthew Zidar, testified that the maximum amount of diversion and rate of diversion sought in Application 29657 would be further limited by available diversion capacity at the Freeport Facility, although the County has not amended its application to reduce the diversion limits below 350 cfs and 147,000 af/yr. (2021-09-29 Hearing Afternoon Session Recording 1:23:09-1:23:24; R.T. 179:21-25; SJ County-16, p. 2, ¶ 9.)

The County included an amended application-development schedule with the Fourth Amended Application. (AHO-171, p. 20.) The proposed amended schedule did not

include all elements of the schedule the Division previously approved and proposed postponing some important deadlines in the schedule the Division approved in 2011, including the deadline to prepare and finalize an environmental impact report and the deadline to complete protest negotiations.

The Fourth Amended Application and the proposed amended schedule were the last correspondence from the County in the Division's files for Application 29657 until the Division recommended assignment of this matter to the AHO in 2020.

## **2.2 Administrative Hearings Office Proceeding**

On June 24, 2020, Erik Ekdahl, Deputy Director of the Division, sent a memorandum to Eileen Sobeck, the State Water Board's Executive Director, proposing to transfer Application 29657 to the AHO. (2020-06-24 E. Ekdahl memorandum to E. Sobeck.) On June 24, 2020, Ms. Sobeck issued a memorandum assigning the application to the AHO. (2020-06-24 E. Sobeck memorandum to A. Lilly.)

The AHO hearing officer held a status conference in this matter on March 16, 2021, and issued a Notice of Public Hearing and Pre-Hearing Conference on June 10, 2021. (2021-06-10 Notice of Public Hearing and Pre-Hearing Conference.) The hearing notice set the hearing dates and specified the following hearing issues:

1. Should the Board cancel Application 29657 under Water Code section 1276?
  - a. Has the Applicant failed to provide information requested by the Board to demonstrate that unappropriated water is available for appropriation?
  - b. Has the Applicant failed to provide information requested by the Board to demonstrate compliance with all applicable requirements of the Fish and Game Code and the federal Endangered Species Act of 1973?
  - c. Has the Applicant failed to provide information requested by the Board to comply with Division 13 (commencing with Section 21000) of the Public Resources Code?
  - d. Has the Applicant failed to provide other information requested by the Board that is reasonably necessary to clarify, amplify, correct, or otherwise supplement information required to be submitted under Article 2 (commencing with section 1260) or Article 3 (commencing with section 1270)?

- e. Has the Applicant shown good cause for the Board to allow additional time in which to submit the requested information?
2. Should the Board cancel Application 29657 under Water Code section 1335?
  - a. Has the Applicant failed to provide information requested by the Board that the Board determined is reasonably necessary to attempt to resolve a protest?
  - b. Has the Applicant shown good cause for the Board to allow additional time in which to submit the requested information?
3. Should the Board deny Application 29657 under California Code of Regulations, title 23, section 840?
  - a. Does the Applicant intend to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion?
  - b. Will the Applicant be unable to proceed within a reasonable time because of absence of a feasible plan, lack of required financial resources, or other cause?
4. Should the Board establish a time schedule for the Applicant to submit information necessary for the Division to process Application 29657?

The AHO hearing officer held pre-hearing conferences on July 13, 2021. In its status conference statement and during the pre-hearing conference, San Joaquin County requested a nine-month continuance of the proceedings to allow it to update its water availability analysis. (2021-07-08 San Joaquin County Pre-Hearing Conference Statement, p. 2.) The hearing officer denied the County's request. (2021-07-22 Pre-Hearing Conference Order and Amended Notice of Public Hearing, p. 2.) The hearing officer held a second pre-hearing conference on September 20, 2021, and conducted the hearing on September 29, 2021. Representatives of San Joaquin County, Sacramento County Water Agency, Freeport Regional Water Authority, California Department of Fish and Wildlife, and Friends of the River submitted evidence and

participated in the hearing. Other parties participated in the hearing by cross-examination. Some parties and interested entities submitted policy statements.<sup>3</sup>

### 3.0 FACTUAL BACKGROUND

#### 3.1 History of San Joaquin County Water Needs and Supplies

Local agencies in San Joaquin County have long sought to appropriate water from the American River to meet future beneficial uses in the County and address critical overdraft of the underlying groundwater basin. (2021-10-29 San Joaquin County Closing Brief, pp. 4-5.) The County asserts that it was repeatedly denied access to surface water from the San Joaquin, Stanislaus, and Mokelumne Rivers by the State Water Board and its predecessor the State Water Rights Board (which is also referred to as the Board in this order), and that these entities assured the County that water from the American River, supplied through the Folsom South Canal, would be available to meet the County's needs. (*Id.* at p. 5.) The County argues that, although the Board directed the County to rely on American River water supplies for future development, the Bureau of Reclamation then prevented the County from accessing these American River supplies when the Bureau did not ratify proposed contracts with the County or complete the Folsom South Canal. (*Id.* at p. 6.) These events prompted the County to file Application 29657 to secure a supply of water from the American River. (*Ibid.*) "The

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<sup>3</sup> The AHO received policy statements from the following entities: California Water Service Company (2021-09-28 California Water Service Company Policy Statement to SWRCB), Eastern San Joaquin Groundwater Authority (2021-09-24 SJGWA Policy Statement), North San Joaquin Water Conservation District (2021-09-22 NSJWCD Policy Statement), City of Stockton Municipal Utilities Department (2021-09-22 City of Stockton MUD Policy Statement), Stockton East Water District (2021-09-21 Stockton East Water District Policy Statement on A029657), Bureau of Reclamation (2021-08-26 USBR Policy Statement), City of Folsom (2021-09-28 Policy Statement American River Group), City of Roseville (*Ibid.*), Sacramento Suburban Water District (*Ibid.*), Woodland-Davis Clean Water Agency (2021-09-28 WDCWA Policy Statement), and Save the American River (2021-09-22 SARA Policy Statement). The AHO also received a joint policy statement from City of Sacramento, Contra Costa Water District, Friends of the River, Glenn-Colusa Irrigation District, Kern County Water Agency, Sacramento County Water Agency, San Juan Water District, San Luis & Delta-Mendota Water Authority, Save the American River Association, State Water Contractors, and Westlands Water District. (2021-09-28 Joint Policy Statement.)



County was compelled to submit Application 29657 [] as a direct result of the various decisions made by the United States Bureau of Reclamation, State Water Resources Control Board [] and California Department of Water Resources.” (2021-03-09 San Joaquin County and City of Stockton Joint Status Conference Statement, p. 1.)

In State Water Rights Board Decision 858 (1956), the Board approved a permit for the temporary appropriation by North San Joaquin Water Conservation District of water from the Mokelumne River pursuant to Water Code section 1462. The Board found that additional permanent sources of water would likely be available to the District from the American River through the Folsom South Canal. The decision references a feasibility report for the “Folsom South Unit,” which indicated that the main canal for the project would be located where it could serve “practically all” of the North San Joaquin Water Conservation District “at less cost than by developing supplies from the Mokelumne River.” (Decision 858, p. 51.)

Two year later, the State Water Rights Board denied applications by four entities serving San Joaquin County – North San Joaquin Water Conservation District, City of Stockton, East San Joaquin Water Conservation Districts, and California Water Service Company – for permits to appropriate water from the American River from points of diversion at Folsom and Nimbus Dams. (State Water Rights Board Decision 893 (1958).) The Board found that these applicants had not obtained any right of access from the United States for the use of these facilities as points of diversion. The Board concluded that it should deny these applications because the applicants had “no immediate plan or purpose to proceed promptly with construction and/or with the application to beneficial use of the water sought.” (*Id.* at p. 54.) Additionally, the Board observed that “[t]he service areas which those applicants desire to supply may be supplied equally well and with less administrative confusion by contract with the United States. Permits are being issued to the United States to appropriate enough American River water to adequately supply the applicants ....” (*Ibid.*) The Board conditioned its approval of the United States’ application for the Folsom project on deliveries of water diverted under the permits for beneficial use within Placer, Sacramento, and San Joaquin Counties until the needs of those counties were fully met, if the counties

reached agreements with the United States in accordance with federal reclamation laws by July 1, 1968 (Condition No. 14). (*Id.* at p. 72.)

In State Water Board Decision 1356 (1970),<sup>4</sup> the Board approved the application of the United States for appropriation of water for the American River Division of the Central Valley Project at Auburn Dam. The Board imposed a similar condition, which required the counties to reach agreements with the United States for deliveries under the project by December 31, 1975 (Condition No. 19). (Decision 1356, p. 16.) Upon petition for reconsideration by Contra Costa County Water District, the Board deleted Condition No. 19 from the permit because “[t]he counties referred to in the condition are clearly within the area entitled to the benefits of the Watershed Protection Law and, if necessary, can assert their rights independently of any terms in the Bureau’s permits.” (Decision Amending and Affirming, as Amended, Decision 1356 (1970) p. 6.) The County asserts that Decision 1356 reiterated assurances that the County would have access to American River supplies. (SJ County-1, pp. 5-6, ¶ 21.)

Between 1967 through 1971, Stockton East Water District, the Central San Joaquin Water Conservation District, and North San Joaquin Water Conservation District approved contracts with the Bureau of Reclamation for delivery of American River water through the Folsom South Canal. (*Id.* at ¶ 22.) But Reclamation never fully approved or executed any of these contracts. (*Ibid.*)

### **3.2 Watershed Protection Act**

The County argues that it has priority status to appropriate American River water under the Watershed Protection Act (Wat. Code, §§ 11460-11465). Water Code section 11460 states that in the construction and operation of the Central Valley Project:

[A] watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom,

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<sup>4</sup> When citing State Water Board Orders and State Water Board Decisions, on subsequent reference, we use “Order” and “Decision” without the “State Water Board” prefix.

shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

The Watershed Protection Act subordinates the water rights for the Central Valley Project to later appropriations that are reasonably necessary to supply the beneficial needs of areas that are within or immediately adjacent to and can be conveniently supplied from the watershed of origin. The County alleges that it is immediately adjacent to and can be conveniently served from the American River watershed, and therefore should have priority of access to American River water under this Act. (See 2021-10-29 San Joaquin County Closing Brief, p. 3.)

### **3.3 Proposed Use of the Freeport Facility**

The Freeport Facility is a 286 cfs diversion facility on the Sacramento River near the town of Freeport that was constructed by the Freeport Regional Water Authority (FRWA) and its member agencies, Sacramento County Water Agency (SCWA) and EBMUD. (FRWA-1, p. 3, ¶ 4.) The Freeport Facility began operation in 2011. (SJ County-6, p. 272.)

SCWA and EBMUD have dedicated capacity in the Freeport Facility for their exclusive use. (FRWA-1, p. 3, ¶ 6.) Neither member of FRWA has the authority to make any of its dedicated capacity available for use by a third party if the use would interfere with any water right or contractual entitlement of the other member. (*Id.* at ¶ 8.) Any person seeking to use a portion of the dedicated capacity must contract directly with SCWA or EBMUD. (*Id.* at ¶ 9.) FRWA has no authority to negotiate the use of dedicated capacity of either member. (*Ibid.*)

San Joaquin County amended Application 29657 in 2003 to include the Freeport Facility as the proposed point of diversion for the County to appropriate water from the American River. (AHO-32.) The Second, Third, and Fourth Amended Applications retained the Freeport Facility as the proposed point of diversion. (AHO-38, -44, & -171.)

San Joaquin County has been unable to obtain an agreement with SCWA or EBMUD for use of the diversion capacity of the Freeport Facility. (2021-09-29 Hearing Morning Session Recording at 1:09:22-1:09:29; R.T. 57:5-8.).<sup>5</sup>

### **3.4 San Joaquin County Water Supply Conditions and Planning Efforts**

San Joaquin County is currently facing competing demands for water from urban, environmental and agricultural interests. (2021-10-29 San Joaquin County Closing Brief, p. 1.) In Bulletin 118-80, the Department of Water Resources declared the Eastern San Joaquin Groundwater Basin to be “critically overdrafted,” indicating that the current rate of groundwater pumping exceeds the rate of recharge and is not sustainable.” (*Id.* at p. 1.) The Eastern San Joaquin Groundwater Subbasin Groundwater Sustainability Plan (Eastern San Joaquin GSP) concludes that an additional 78,000 acre-feet of supply per year is necessary to offset groundwater use or recharge groundwater supplies to achieve sustainability in the basin. (SJ County-9, p. 27.)

In 2007, the Northeastern San Joaquin County Groundwater Banking Authority (GBA)<sup>6</sup> adopted an Integrated Regional Water Management Plan (IRWMP) to define and integrate water management strategies to implement the San Joaquin Integrated Conjunctive Use Program (ICU Program). (SJ County-6, p. 30.) The objective of the

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<sup>5</sup> The files of the audio+video recording of the 2021-09-29 AHO hearing are in the administrative record in the “Hearing Documents” folder. There is one file for the morning session and one file for the afternoon session. These are the official records of the AHO hearing. This order refers to them as “2021-09-29 Hearing Morning Session Recording” and “2021-09-29 Hearing Afternoon Session Recording.”

There are files of the Zoom-generated transcripts of these hearing sessions. These files are included in case parties want to use them to locate certain testimony or statements in the audio+video Hearing Recording files. The Zoom-generated transcripts are not official records of the AHO hearing.

There is also a file of the transcript of the hearing prepared by a court reporter, referred to in this order as “R.T.” The court reporter’s transcript is not an official record of the AHO hearing.

<sup>6</sup> The GBA is an eleven-member joint powers authority formed in 2001. It was later renamed the Eastern San Joaquin County Groundwater Basin Authority.

ICU Program is to meet water demands, secure a reliable and sustainable water supply, replenish San Joaquin County's overdrafted groundwater basin, and provide opportunities for conjunctive use of water resources. (SJ County-7, p. 11.)

In 2009, the GBA issued a Programmatic Environmental Impact Report (PEIR) for the ICU Program. (SJ County-7.) The ICU Program PEIR included proposed diversions of American River water through the Freeport Facility under Application 29657 in two of the alternative project groups considered in the PEIR, including the environmentally preferred alternative project group. (*Id.* at p. 537.)

In 2011, San Joaquin County completed the Phase 1 Draft Feasibility Study, which compared seven to ten project configurations for a proposed project to divert water from the American River using excess capacity in the Freeport Facility. (SJ County-3, pp. 255-56.) The Phase 1 Draft Feasibility Study estimated that the County's proposed project could yield 44,000 acre-feet per year of water from the American River. (*Id.* at p. 16.) The estimated unit cost of this supply ranged from \$150 to \$480 per acre-foot. (*Id.* at p. 21; SJ County-6, p. 37.) The study estimated an additional cost of \$0 to \$200 per acre-foot for use of the Freeport Facility. (SJ County-3, p. 167; SJ County-6, pp. 37-38.) Fritz Buchman, Deputy Director of Development Services for the San Joaquin County Department of Public Works and the San Joaquin County Flood Control and Water Conservation District, confirmed that his understanding of the per acre-foot cost of diversions of American River water as proposed under Application 29657 was about \$450 to \$750 per acre-foot. (2021-09-29 Hearing Morning Session Recording at 02:20:28-02:20:37; R.T. 113:18-20.) Mr. Zidar testified that "American River water taken through the Freeport Project is more expensive than other alternatives and thus subject to a longer planning horizon as compared to other local sources and projects." (SJ County-1, p. 2, ¶ 5.)

Despite these relatively high per-unit costs, the Phase 1 Draft Feasibility Study identified the proposal to divert American River water through the Freeport Facility as a "primary component of the IRWMP/ICU Program." (SJ County-3, p. 38.) Mr. Zidar testified that Phase II of the Freeport Study, which was expected to include a project-specific

environmental impact report, was delayed due to lack of funding and project costs, ongoing negotiations with EBMUD, and development of the East San Joaquin Groundwater Sustainability Plan as required by the Sustainable Groundwater Management Act. (SJ County-1, p. 10, ¶ 38.)

In 2013, San Joaquin County and EBMUD entered a cost-sharing agreement to develop a groundwater recharge and extraction project. (SJ County-1, p. 13, ¶ 46.) As developed, the project is an in-lieu recharge project described in the Demonstration Recharge, Extraction and Aquifer Management (DREAM) Project Summary Report dated March 15, 2017. (SJ County-5.) The purpose of the DREAM Project is to establish the feasibility of storing available wet year water supplies in the groundwater aquifers underlying San Joaquin County and extracting a portion of these banked supplies for use in dry years. (*Id.* at p. 9.) The project is a short-term demonstration to deliver up to 1,000 acre-feet of EBMUD surface water from the Mokelumne River through the south distribution system of the North San Joaquin Water Conservation District. (*Ibid.*) Participating landowners use the surface water in lieu of pumping groundwater, reducing groundwater overdraft. (*Ibid.*) The first deliveries under the project were made in 2019 and the first extractions are expected to occur during the fall or winter of 2021-22. (SJ County-17, p. 2, ¶ 9.) The DREAM Project Summary Report does not reference Application 29657 or diversions of water from the American River, although the County asserts that one purpose of the project was to demonstrate that American River water could be recharged and banked for subsequent beneficial use. (SJ County-1, p. 13, ¶ 45.)

In 2014, the GBA completed the 2014 IRWMP, which is an update and expansion of the 2007 IRWMP for the Eastern San Joaquin Region. (SJ County-6.) The 2014 IRWMP evaluates an updated list of ongoing and proposed projects, programs, and studies for water management in the region. (*Ibid.*) This updated list of proposed projects includes the proposed project to divert American River water through the Freeport Facility, although Mr. Zidar explained that “[t]he local planning process has prioritized investment in the least cost alternatives that yielded new water with the intent of making best use of other available supplies and in the interest of keeping local costs and rates down.” (SJ

County-1, p. 4, ¶ 12; SJ County-6, p. 46.) The 2014 IRWMP also observes that “limited progress has been made in negotiating for use of the [Freeport] facilities.” (SJ County-6, p. 38.) The GBA amended the 2014 IRWMP in 2019, but this amendment is not included in the evidentiary record for this proceeding. (SJ County-1, p. 10, ¶ 40.)

On November 26, 2014, San Joaquin County, EBMUD, North San Joaquin Water Conservation District, Stockton East Water District, Central Delta Water Agency, and South Delta Water Agency executed a protest dismissal agreement (2014 Protest Dismissal Agreement). (SJ County-12.) The agreement addresses protests to the County’s Applications 29657 (American River) and 29835 (Mokelumne River) and protests to other pending change petitions and petitions for extension of time filed by the other parties for their respective water rights. (*Ibid.*) The 2014 Protest Dismissal Agreement states that EBMUD, in its role as a member of the FRWA, will “support the dismissal of FRWA’s protest against County Application 29657. EBMUD shall assist County by facilitating meetings between County and the Sacramento County Water Agency aimed at resolving issues between those agencies concerning the use of FRWA facilities.” (*Id.* at p. 14.)

In 2019, the Eastern San Joaquin Groundwater Authority adopted the Eastern San Joaquin GSP. (SJ County-9.) The Eastern San Joaquin GSP identifies “planned projects,” “potential projects,” and “longer-term/conceptual projects” to enhance water supply and achieve groundwater sustainability. (SJ County-9, p. 29.) This list of projects does not include proposed diversions of American River water through the Freeport Facility pursuant to Application 29657, although San Joaquin County argues that groundwater recharge using American River supplies is included within GSP Project 20, “Mobilizing Recharge Opportunities,” even though the document does not explicitly identify the American River as a source of supply for the project. (SJ County-1, p. 15, ¶ 52; SJ County-2, p. 2, ¶ 8.) Project 20 is identified as a “longer-term/conceptual project” in the “early conceptual planning phase” for which “[t]he initiation and completion dates ... are unknown” and “identification of a water source will occur as [the] project develops.” (SJ County-9, pp. 304 & 330.)





## 4.0 DISCUSSION

### 4.1 Should the Board cancel Application 29657 under Water Code sections 1276 or 1335?

#### 4.1.1 Legal Standards

Water Code sections 1275 and 1276 authorize the Board to request additional information after the applicant has perfected an application for a permit to appropriate water, and to cancel an application if the applicant fails to provide the information. The Board “may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted under Article 2 (commencing with Section 1260) or Article 3 (commencing with Section 1270).” (Wat. Code, § 1275.) This additional information may include, but is not limited to: (a) information demonstrating that unappropriated water is available for appropriation; (b) information demonstrating compliance with applicable requirements of the Fish and Game Code or the federal Endangered Species Act of 1973; and (c) information demonstrating compliance with Division 13 (commencing Section 21000) of the Public Resources Code. (*Ibid.*)

The Board must provide a reasonable period of time for the applicant to submit this additional information (*ibid.*), but if the applicant fails to submit the additional information within the time provided, the Board must cancel the application “unless for good cause shown the board allows additional time in which to submit the requested information.” (Wat. Code, § 1276.)

Water Code sections 1334 and 1335 authorize the Board to request additional information from an applicant or a protestant that the Board determines is reasonably necessary to attempt to resolve a protest to a water-right application, and to cancel an application or protest if the applicant or protestant fails to provide the information. The Board must allow a reasonable period of time for the applicant or protestant to submit the information and may allow additional time upon a showing of good cause. If the applicant or protestant fails to submit the requested information within the time provided, the Board may cancel the application or protest. Water Code section 1335 is

substantially similar to section 1276, except that the Board's decision to cancel an application if the applicant fails to submit the information within the time provided is discretionary.

The State Water Board has canceled applications for permits to appropriate water pursuant to Water Code section 1276 when the applicant failed to respond to the Division's requests for additional information within a reasonable time. Although not precedential and therefore not binding on our decision with respect to this application, the following orders are examples of the Board's past reliance on section 1276.<sup>7</sup>

In Order WR 2006-0019-EXEC, the Executive Director denied a petition for reconsideration after the Division canceled a water-right application because the applicant failed to respond to inquiries by the Division about whether the applicant intended to continue to pursue its application. The applicant initially responded that it was pursuing a different basis of right for the project and did not respond to a letter and a phone message from the Division sent on July 23, 2003, and November 5, 2003, respectively. The Division's July 23, 2003 letter informed the applicant that the Division would cancel the application in accordance with Water Code section 1276 if the applicant did not respond by September 23, 2003. On July 14, 2006, the Division canceled the application because of the applicant's failure to submit information requested by the Division pursuant to section 1276.

In Order WR 2007-0004-EXEC, the Executive Director denied a petition for reconsideration after the Division canceled a water-right application because the applicants failed to submit a water availability analysis and a memorandum of understanding for the preparation of required environmental review documents under

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<sup>7</sup> The State Water Board has designated all decisions or orders adopted by the Board at a public meeting as precedent decisions except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the Board. (Order WR 96-1, p. 17, fn. 11.) The State Water Board's Executive Director issued the orders discussed in this section with delegated authority. Because the Board did not adopt the orders at public meetings, the orders may not be expressly relied on as precedent. (Gov. Code, § 11425.60, subd. (a).)

CEQA. The Division initially requested the information by letter dated September 13, 2002. In a letter dated March 4, 2003, the Division directed the applicants to submit the information by April 3, 2003, and stated that the Division otherwise would cancel the application. In a letter dated May 31, 2006, the Division requested information from the applicants by June 30, 2006, showing that they were diligently pursuing the application. The Division canceled the application in August 2006 after the applicants' agent submitted a request to cancel the application. The applicants later claimed that the agent's request to cancel the application was submitted in error. The Board upheld the cancellation of the application pursuant to Water Code section 1276 regardless of whether the applicants intended to request cancellation because the applicants failed to submit information requested by the Division.

In Order WR 2009-0029-EXEC, the Executive Director denied a petition for reconsideration after the Division canceled a water-right application because the applicant failed to submit engineered drawings of the dam proposed in the application. The Division requested this information from the applicant by letters sent in 2002, 2003, and 2007. The Division canceled the application in 2008 pursuant to Water Code section 1276.

In Order WR 2008-0018-EXEC, the Executive Director reinstated a water-right application following a petition for reconsideration of the Division decision to cancel the application. The Division canceled the application because the applicant failed to submit a signed memorandum of understanding for the preparation of an environmental review document required by CEQA. The Division sent a letter in March 2005 requesting the information from the applicant and setting a six-month deadline for submission of the information. In 2007, the Division canceled the application because it had not received a response from the applicant. The applicant claimed in its petition for reconsideration that it never received the 2005 letter and included with its petition copies of a signed memorandum of understanding as requested by the Division. The Executive Director rescinded the cancellation order because there was insufficient evidence in the Division's files that the 2005 letter had been mailed and because the

applicant had submitted the requested information after the Division notified the applicant of the request.

#### 4.1.2 Requests for Information to Support Application 29657

The Division's files for Application 29657 show that the Division has been requesting additional information from San Joaquin County necessary to support and clarify Application 29657 for the last 30 years. (AHO-7 [November 5, 1992 letter from SWRCB to San Joaquin County]; AHO-15 [December 28, 1998 letter from SWRCB to San Joaquin County]; AHO-17 [April 22, 1999 letter from SWRCB to San Joaquin County]; AHO-26 [April 4, 2002 letter from SWRCB to San Joaquin County]; AHO-28 [June 14, 2002 letter from SWRCB to San Joaquin County]; AHO-33 [July 16, 2003 letter from SWRCB to San Joaquin County]; AHO-36 [December 30, 2003 letter from SWRCB to San Joaquin County]; AHO-39 [September 8, 2005 letter from SWRCB to San Joaquin County]; AHO-109 [July 23, 2008 letter from SWRCB to San Joaquin County]; AHO-113 [November 5, 2008 letter from SWRCB to San Joaquin County]; see also SCWA-10 [April 13, 2009 letter from SWRCB to San Joaquin County].)

On October 19, 2010, the Division issued an order canceling Application 29657 because San Joaquin County had not submitted sufficient information to demonstrate the availability of unappropriated water, protests to the application remained unresolved, and the applicant had not completed a project-level environmental impact report. (AHO-132.) Order WR 2011-0014-EXEC, issued on June 10, 2011, reinstated the application, but directed the Division to cancel Application 29657 if it became "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." (*Id.* at p. 3.)

On October 3, 2011, the Division sent a letter to San Joaquin County requesting eighteen categories of information to supplement the information in its application and to attempt to resolve protests to the application, consistent with Water Code section 1275 and 1334. (AHO-148.) The requested information included information about water availability, anticipated impacts to water quality and temperatures, access to property

and facilities for the proposed diversion and conveyance including access to the proposed point of diversion at the Freeport Facility, consultation with National Marine Fisheries Service and United States Fish and Wildlife Service under section 7 of the Endangered Species Act, anticipated impacts to wetlands and plant species, and completion of a draft and final environmental impact report to comply with CEQA. The deadlines set by the Division for San Joaquin County to submit the information ranged from 180 days from the date of the letter through December 31, 2014. The Division modified the schedule by letter dated December 14, 2011, but the final deadline of December 31, 2014, for San Joaquin County to submit the requested information remained the same. (AHO-151.)

On August 21, 2013, the Division sent a letter to San Joaquin County documenting the status of each category of information requested by the Division. (AHO-165.) This letter indicates that the County submitted a modified water availability analysis on April 2, 2012, but did not respond to most of the remaining requests for information. The Division also requested additional clarifying information about the water availability analysis in its August 21 letter, to which the County responded by letter dated September 26, 2013. (AHO-167.)

The last correspondence in the State Water Board's files from the County in response to the Division's requests for information is the Fourth Amended Application, which the County filed on June 27, 2014. (AHO-171.) There is no evidence that the County submitted significant categories of information requested by the Division in its October 3, 2011 letter, including documentation that the County had: obtained access to the point of diversion at the Freeport Facility, completed consultation with National Marine Fisheries Service and United States Fish and Wildlife Service under section 7 of the Endangered Species Act, completed a wetlands delineation for all project elements suitable for submittal to the United States Army Corps of Engineers, circulated a draft project-level environmental impact report, or completed a final project-level environmental impact report. According to the timeline set by the Division, the County was required to submit this information by December 31, 2014. To date, the County has not satisfied these requests for information.

The information the Division requested in its October 3, 2011 letter was reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted with an application. Water Code section 1275 explicitly states that the Division may request information needed to demonstrate that unappropriated water is available, to demonstrate compliance with applicable requirements of the Fish and Game Code and the federal Endangered Species Act, and to demonstrate compliance with CEQA. The Division's requests for information about consultation with the National Marine Fisheries Service and United States Fish and Wildlife Service under section 7 of the Endangered Species Act and for draft and final environmental impact reports are within these categories.

The other information the Division requested in its letter was also reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted with an application. An application must include the location and description of the proposed headworks, ditch canal, and other works, the proposed place of diversion, the time within which the applicant proposes to begin construction, and the time required for completion of construction. (Wat. Code, § 1260, subds. (d), (e), (g), & (h).) The Board also is authorized by regulation to require satisfactory evidence of the applicant's ability to secure the necessary right of access to occupy property or use existing works not owned by the applicant. (Cal. Code Regs., tit. 23, § 775.)

Information demonstrating that San Joaquin County has obtained access to the proposed point of diversion and related facilities and that the County has conducted a wetlands delineation for the proposed project works is reasonably necessary to establish access to diversion facilities necessary to complete the appropriation and to determine a time for the applicant to begin and complete construction of any necessary works.

The information sought by the Division in its October 3, 2011 letter also was reasonably necessary to attempt to resolve protests to Application 29657. The protests raised objections to the application based on the potential for the proposed project to adversely affect fish species, impact instream flows that support public trust resources, and cause other potential environmental impacts, as well as San Joaquin County's lack of legal

access to diversion facilities at the Freeport Regional Water Project. (AHO-47, -52-54, -58, -61-62, -66-73, & -82.) The information requested by the Division from San Joaquin County would have addressed these issues.

The Division allowed San Joaquin County a reasonable time to submit the information requested in the Division's October 3, 2011 letter. The deadline of December 31, 2014, for the County to submit all of the requested information provided the County more than three years from the date of the Division's request to complete the necessary documentation and submit the information, in addition to the many extensions of time that the County had already received from the Division since the County filed its application. Yet, as of the date of this order, the County still has not submitted substantial categories of information requested by the Division more than ten years ago that are necessary for the Board to act on the County's application. Although the County points to other water-supply planning processes that it has conducted in the intervening years, the documents produced from these processes do not provide the information requested by the Division to support Application 29657.

The County's failure to meet the Division's reasonable deadlines is a sufficient and appropriate basis to cancel Application 29657. In past orders, the Board's Executive Director has upheld the Division's decisions to cancel applications after significantly shorter delays in applicants' responses to the Division's requests for information than that demonstrated by the County over the last 30 years. Here, the County's delays continued to occur even after the Division had canceled, and the Executive Director then reinstated, the County's application. Since then, the County has continued to defer responding to the Division's requests and to delay the application process. We conclude that the County has not met the reasonable deadlines to submit information requested by the Division and has not made any demonstration of good cause to support a further extension of time to comply with these requests. For these reasons, we cancel Application 29657 pursuant to Water Code sections 1276 and 1335. The cancellation is without prejudice to the County's right to file a new application for this proposed project or a similar project if, in the future, the County is in a position to submit the information necessary to support its application.

#### 4.2 Should the Board deny Application 29657 under California Code of Regulations, title 23, section 840?

In addition to failing to address the Division's many requests for information, the County has displayed a general and ongoing lack of diligence in pursuing its application. At this time, more than 30 years after the County submitted Application 29657, the County still has not satisfied the prerequisites necessary for the Board to issue a permit because the County has not completed an environmental impact report as required by CEQA or obtained a right of access to its proposed point of diversion. Nor has the County committed to any reasonable timeline or plan to satisfy these requirements and move its application towards resolution. The County also has failed to demonstrate that it would exercise diligence in putting the water it seeks to appropriate to beneficial use if the Board were to approve the County's application and issue a water-right permit. Based on all indications from the evidence presented during the hearing, we conclude that the County intends to continue to defer any development of this project until the County has explored other lower-cost alternatives for water supplies. The County's attempt to maintain its application in reserve without any definite plan of action while exploring other water-supply projects is prohibited by the Water Code and the general principles of diligence that pervade California's system of water rights.

Since 1869, the importance of acting with diligence when pursuing a right to appropriate water has been part of California water-rights law. "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." (Hutchins, *The California Law of Water Rights* (1956) 116-117 [citing *Nevada County v. Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 314].)

Diligence is one aspect of the requirement in article X, section 2 of the California Constitution that the state's water resources "be put to beneficial use to the fullest extent of which they are capable." (Cal. Const., art. X, § 2.) A person seeking the right to appropriate water must "proceed with 'due diligence' to construct necessary works and to put water to beneficial use," and may not reserve water for future use so as to



prevent others from diligently pursuing their own plans to use the water. (Order WR 84-04, p. 3.)

California law requires potential water-right appropriators to act with diligence even before obtaining a permit to appropriate. By filing an application for a permit, the applicant secures a priority of right, essentially reserving a place in line for future water use. (See Wat. Code, § 1450.) To maintain that priority of right, the applicant must “have a definite project in mind and display not only the ability but also the intent to proceed with reasonable diligence with the construction work and application of the water to the proposed uses.” (Decision 918, p. 4 [citing Decisions 884, 893, and 907].)

Basic to the law of water rights is the principle that an appropriator of water must pursue the development of his project from its inception to completion with due diligence in order to claim priority over subsequent appropriators. Priority of right as of the date an application is filed continues only so long as the provisions of law and the regulations of the Board are followed by the applicant.

(Decision 1309, p. 4.)

An applicant for a permit to appropriate water must have a plan to diligently pursue beneficial use of the water. (See Order WR 84-04, p.3.) “One who does not propose to proceed immediately with development of a project cannot make a reservation of water for future needs by the expedient of filing an application.” (Decision 884, p. 71.) Where there is “no immediate plan or purpose to proceed promptly with construction and/or with the application to beneficial use of the water sought. ... the Board has little choice in the action to be taken since it is a settled principle that an application to appropriate is not a proper instrument to make a reservation of water for a development at an indefinite and uncertain time in the future.” (Decision 893, p. 54; see also Decision 907, p. 7 [same].) “[A]n attempt to reserve water for future use where there is no intent to proceed promptly cannot be countenanced.” (Decision 893, p. 57.)

California Code of Regulations, title 23, section 840, applies the principle of diligence to applicants by providing that the Water Board must deny an application if the Board finds that the applicant is not prepared to begin construction of any necessary works within a

reasonable time or is unable to proceed towards perfection of the appropriation within a reasonable time due to lack of planning, finances, or another cause. California Code of Regulations, title 23, section 840, states:

An application will be denied when it appears after hearing or a proceeding in lieu of hearing that (a) the applicant does not intend to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion, or (b) the applicant will not be able to proceed within a reasonable time, either because of absence of a feasible plan, lack of the required financial resources, or other cause.<sup>8</sup>

We conclude based on the evidence presented at the hearing conducted by the AHO that San Joaquin County does not intend to diligently prosecute the construction and use of water necessary to perfect its appropriation, and that the County would not be able to proceed with its appropriation within a reasonable time because it lacks a feasible plan, the project is not cost-effective relative to other water-supply projects, and the County has been unable to obtain a right of access to the proposed diversion works and conveyance facilities.

**4.2.1 Does the Applicant intend to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion?**

An applicant must demonstrate the ability to “proceed promptly and diligently to perfect the appropriations proposed in its [application].” (Decision 896, p. 15). This is because the applicant must be “ready, willing, and able to” begin construction “within a reasonable time after receiving a permit.” (Decision 1083, p. 6; see also Decision 884, pp. 74, 85, 95 [“ready and able to proceed with diligence”].)

The applicant must “apply himself at once and with diligence” to overcome obstacles to beginning construction and “continue steadfastly to press toward as early a construction

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<sup>8</sup> California Administrative Code, title 23, section 776 was renumbered in 1987 as California Code of Regulations, title 23, section 840. Section 840 is identical to superseded section 776, except for the addition of the phrase “or a proceeding in lieu of hearing.”

start as is reasonably possible, without distraction by other business, including other water projects.” (Decision 1083, p. 6.) “If he is not ready to assume such responsibility, his application is premature and must be denied.” (*Ibid.*; see also Decision 1159, p. 30 [denying application of water agency with proposed construction date 10 years from date of hearing, stating “there is no definite evidence to conclude that the project will start even this far in the future”].) “If actual construction must be delayed pending completion of preliminary work or the removal of obstacles incident to the enterprise, there must be a present purpose and intent to proceed steadily and resolutely toward the ultimate goal without unnecessary delay.” (Decision 884, p. 71.) Absent such a showing, the Board will deny the application.

In Decision 884, the Water Board denied without prejudice two applications filed by a water district for a permit to appropriate water for domestic, municipal, industrial and irrigation uses and to generate hydroelectric power from a river and two creeks in Ventura County. (Decision 884, pp. 3, 6, 85, 95.)<sup>9</sup> The applicant provided a construction schedule to the Board, but only “after attention had been called to the necessity therefor.” (*Id.* at p. 72.) The Board observed that the applicant’s “highly indefinite and speculative” plans to construct facilities to appropriate water did not show the applicant was “proceeding promptly and diligently with these developments.” (*Ibid.*) Instead, the applicant proposed to “wait for an extensive period of years until such time as there is need for the water .... The construction schedule is not based upon the time required to complete engineering investigations and studies and other preliminary work but is based upon estimates of when additional water will be required to meet anticipated economic expansion within the district.” (*Id.* at pp. 72-73.) The Board denied the applications but held that the applicant could refile when “ready and able to proceed

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<sup>9</sup> The Water Board issued an “Order Rescinding Portions of Decision D 884” following a Ventura County Superior Court judgment in *United Water Conservation District et al. v. State Water Rights Board of the State of California*, No. 45406 and No. 45407, that set aside parts of this Decision related to priority, approval of some applications, and issuance of permits. The Board’s order did not affect the denial of applications discussed here.

with diligence to construct the necessary works and complete beneficial use of water for such purpose.” (*Id.* at pp. 85-86, 95.)

In Decision 1083, the Board denied without prejudice Placer County Water Agency’s five applications to divert and store water from the Middle Fork American River and other sources. The applications described projects that would be completed in phases, or “units”. (Decision 1083, p. 3.) Unit A was a system of works on the Middle Fork American River and tributaries for development of hydroelectric power and other uses that was planned to provide some of the financing for other projects, including Unit C. (*Id.* at pp. 3-4.) The evidence showed that “Unit C is not planned for construction until after Units A and B have been developed,” that construction of Units A and B depended on many factors, and that construction would take five and a half years from when the contracts were awarded. (*Id.* at p. 4.) These uncertainties in project development prevented the agency from providing an estimate of the date that it would begin construction and the Board could not specify one based on the record. (*Id.* at pp. 4, 7.) Ultimately, the Board decided that “the applicant is not prepared to proceed with development of the projects described in the applications with reasonable promptness and due diligence,” and denied the applications. (*Id.* at p. 7).

The Board issued Decision 893 after holding 33 days of hearings on the status of 63 applications by various agencies and cities to appropriate water from the American River. The Board denied in whole or in part all but 11 applications, without prejudice, on the grounds that, among other factors, the applicants were not able to proceed with construction work within a reasonable time. (Decision 893, pp. 53-58.) The Board denied applications by Sacramento Municipal Utility District (SMUD) because the Board concluded that SMUD did not itself intend to construct the proposed Auburn or Coloma reservoirs, but intended to wait until a state or federal agency constructed the project. (*Id.* at pp. 56-57.) The record contained “no indication” as to when construction of either facility by another agency might begin. (*Ibid.*) The Board denied 12 other applications because “the applicant counties and district are evidently unable or indisposed to proceed with development under any of their applications at the present time.” (*Id.* at p. 58.) The Board denied the applications without prejudice so that the applicants could

file new applications “at such time as these applicants are ready and able to proceed with construction of works and beneficial utilization of the water which they seek to appropriate.” (*Id.* at p. 58.)

**4.2.2 Will the Applicant be unable to proceed within a reasonable time because of absence of a feasible plan, lack of required financial resources, or other cause?**

In addition to demonstrating an intent and ability to complete the construction of necessary works within a reasonable time, the applicant must demonstrate that it has a feasible plan and necessary resources to perfect the proposed appropriation. (See e.g., Decision 1159, pp. 20, 22 [granting application to water district upon showing that it had spent almost \$500,000 in preliminary studies, and, by contrast, denying application of another district for lack of diligence because applicant retained engineers but lacked funding to pay them, so there were no “final plans or hydrology studies to determine the power and/or water yield”].)

In Decision 984, the Board denied applications due to the “questionable feasibility” of a plan for power generation for mining and metal production using water that would have been diverted from creeks in Plumas County and the lack of a specific plan to proceed with the project. (Decision 984, pp. 1, 8, 13.) The Board noted the record was “devoid of any operation study for the project,” that no corporation or individual had committed to lease the mining properties, finance construction of the proposed refining plants, pay for the processed ore, or pay for the power that would have been consumed in the plants. (*Id.* at pp. 7-8.) “[T]he engineering plans and specifications have either not been prepared, or have been lost or destroyed, and such basic problems as the availability of construction materials for the dams have not been solved.” (*Id.* at p. 11.) There was no evidence of the amounts of the various estimates of the projects or how those projects would have been funded, the applicant’s financial capability was uncertain, and the applicant had not obtained access to the project sites. (*Id.* at pp. 9-11.) The Board concluded that the applicant had “no definite construction schedule and only a very general plan for proceeding with the construction of the project,” and, for these reasons, denied the applications. (*Id.* at p. 11.)

In Order WR 84-04, the Water Board canceled a water district's application to appropriate water in San Diego County for irrigation and municipal uses. (Order WR 84-04, p. 9.) Water Board staff had advised the district of the need to submit environmental documents and explained that "no work has ever been initiated" on those documents. (*Id.* at p. 5.) The district responded that it planned to prepare environmental documents after completing a water availability study. The Board based its decision to cancel the application in part on its finding that, although Water Board staff had advised the district that it was the CEQA lead agency and the district had acknowledged the proposed project could have adverse environmental effects, the district had not taken "even the initial steps for assessing the scope and magnitude of potential environmental impacts." (*Id.* at pp. 7-8).

The Board explained:

Due diligence requires more of an applicant than merely filing an application to appropriate water. Even at the date of the hearing—nearly four years after an amended application was accepted for filing—the District has still not spent funds either for a water availability study or for environmental documentation...the [d]istrict does not know whether any unappropriated water is available for a project and whether any project is feasible.

(*Id.* at p. 7.)

The district's delay in beginning the necessary studies was "so dilatory as to warrant the inference that the District is unconcerned about a water supply development project and [the application]." (*Id.* at p. 8.) The Board concluded that the applicant failed to act with due diligence and canceled the application.

#### **4.2.3 San Joaquin County's Lack of Diligence**

San Joaquin County's own evidence leads us to the conclusion that the County does not intend to diligently prosecute the necessary construction or the use of water under any permit that might be issued on Application 29657, and that the County will be unable to proceed with the proposed project within a reasonable time. Among other obstacles, the County has been unable to obtain a right of access to the proposed

diversion works, the County does not have a project-specific plan to construct the project or a project-specific environmental impact analysis necessary to obtain permits to construct the project, and the project is not as financially feasible as other water-supply alternatives.

Although the Freeport Facility is the sole proposed point of diversion in Application 29657, the County does not have an agreement with the owners of the facility to use it to divert water, and the County has no immediate intent to pursue negotiations to obtain such a right of access. (2021-09-29 Hearing Morning Session Recording at 1:09:22-1:09:29; R.T. 57:5-8.) Absent an agreement to utilize the Freeport Facility, the County will be unable to complete the proposed appropriation.

The County identified the Freeport Facility as the sole proposed point of diversion for its Amended Application in 2003. (AHO-32.) Since that time, the Division has repeatedly directed the County to submit information showing that it has obtained a right to use the Freeport Facility for diversions. (SCWA-04 [December 30, 2003 letter from SWRCB to San Joaquin County], SCWA-08 [November 5, 2008 letter from SWRCB to San Joaquin County]; SCWA-10 [April 13, 2009 letter from SWRCB to San Joaquin County]; SCWA-15 [October 3, 2011 letter from SWRCB to San Joaquin County].) In these letters, the Division informed the County that the County's failure to provide the requested information might result in cancelation or denial of its application. One of the bases on which the Division canceled Application 29657 in 2010 was the County's lack of any right of access to the proposed diversion facilities. (AHO-129, p. 6.) The Executive Director's June 10, 2011 order reinstating the application directed the County to "secure access to its currently proposed point of diversion," and reminded the County that reinstatement of the application did not "excuse the county from the requirement for diligent progress toward completion of these goals." (Order WR 2011-0014-EXEC, p. 3.) Nevertheless, in 2013, the County switched its focus from obtaining an access agreement for use of the Freeport Facility to developing a groundwater sustainability plan and pursuing the DREAM Project. (SJ County-16, ¶ 15; 2021-09-29 Hearing Afternoon Session Recording 01:39:28-01:39:42; R.T. 192:8-14.)

According to the testimony of its witnesses, the County is waiting to complete the DREAM Project to determine whether the proposed diversions of water to underground storage are conceptually feasible before pursuing further negotiations for access to the Freeport Facility. (2021-09-29 Hearing Afternoon Session Recording at 01:45:17-01:45:48; R.T. 196:13-22.) Mr. Buchman, the Deputy Director of Development Services for the San Joaquin County Department of Public Works, testified that the County would be in a position “in a couple of years” to “assess the feasibility of the concept.” (2021-09-29 Hearing Afternoon Session Recording at 01:47:21-01:47:39 & 02:08:31-02:09:06; R.T. 198:1-5 & 211:20-212:2.) Mr. Buchman further testified that the County would be unlikely to conduct further negotiations for access to the Freeport Facility within the next few years while awaiting the results of the DREAM Project. (2021-09-29 Hearing Afternoon Session Recording at 2:08:23-2:10:00; R.T. 212:3-15.)

Although County representatives met with SCWA representatives a few times in 2013 through 2015, Mr. Zidar, the Water Resources Manager for San Joaquin County, confirmed that the County’s representatives did not present a substantive proposal for access to the Freeport Facility or a proposed operational plan to support the negotiations. (2021-09-29 Hearing Afternoon Session Recording at 1:52:40-1:57:40; R.T. 190:10-19.) Mr. Zidar also admitted that the County had not requested EBMUD’s assistance pursuant to the 2014 Protest Resolution Agreement to facilitate meetings between the County and SCWA about access to the Freeport Facility. (2021-09-29 Hearing Afternoon Session Recording 01:42:08-01:42:29; R.T. 194:7-15.) Mr. Zidar stated that the County is “prepared to have a dialog” with SCWA about the use of the Freeport Facility “when agreements and costs need to be finalized and the issue is ripe for resolution.” (SJ County-16, ¶ 16.) Although the Division has repeatedly directed the County over the last 18 years to enter into an access agreement for the proposed diversion facilities or risk cancelation or denial of Application 29657, the County still argues that the issue is not yet “ripe for resolution.” (*Ibid.*)

In addition to its failure to obtain a right of access to the diversion facilities, the County has not completed the project-specific planning and analysis that are necessary to obtain permits for, and to implement, the project proposed in Application 29657 within a



reasonable time. To date, the County has completed only high-level feasibility planning with respect to Application 29657. The Phase 1 Draft Feasibility Study included the project proposed in Application 29657 and detailed the alternatives considered in the study to a conceptual engineering level adequate to perform an estimate of costs, land requirements, and required environmental assessment. (SJ County-3, p. 133.) Phase II of the Freeport Study would have included a project-specific environmental impact report but was delayed due to lack of funding, the high costs of the project, and a change in the County's focus to other planning processes. (SJ County-1, p. 10, ¶ 38.) At this time, the County does not intend to prepare a draft or final project-specific environmental document or engage in other project-specific planning until it has completed the DREAM Project and further assessed the feasibility of diversions from the American River. (2021-09-29 Hearing Afternoon Session Recording 01:47:21-01:47:58; R.T. 198:1-14; see also SJ County-1, p. 4, ¶ 14 ["Additional time is needed for further planning, engineering, and review."].)

One of the reasons the County has not prioritized further planning to pursue Application 29657 is the relatively high estimated per-acre-foot cost of the project associated with this application. Instead, "[t]he local planning process has prioritized investment in the least cost alternatives that yielded new water." (SJ County-1, ¶ 12.) "[T]he American River water delivered through Freeport is not as cost effective as compared to the other proposed projects and local sources." (SJ County-2, ¶ 8; see also 2021-09-29 Hearing Morning Session Recording 0:54:16-054:58 & 01:40:05-01:40:20; R.T. 45:3-11 & 82:13-17.) Diversion of American River water as proposed under Application 29657 is a "lower priority" because of "some of the factors, including cost." (2021-09-29 Hearing Morning Session Recording 02:19:11-02:19:23; R.T. 112: 21-24.)

Upon cross-examination, Mr. Zidar could not provide a specific date or range of dates when the County might begin construction of necessary works specific to Application 29657, likely because the County has not advanced beyond the early planning phases and there are potentially insurmountable obstacles to further pursuit of the project associated with the application. (2021-09-29 Hearing Morning Session Recording, 01:36:59-01:37:15; R.T. 80:9-12.) Instead, Mr. Zidar responded that "there is a broad

horizon with which to move this forward to a decision. And [Application 29657 is] a longer range thing ...” (2021-09-29 Hearing Morning Session Recording 01:57:41-01:58:01; R.T. 95:21-96:6.) Mr. Buchman confirmed that delivery of water under Application 29657 is not one of the planned projects identified in the Eastern San Joaquin Subbasin GSP that are to be completed and online by 2040. (2021-09-29 Hearing Morning Session Recording, 2:21:17-2:21:47; R.T. 114:6-12.)

Based on the evidence, we conclude that the County has, with good reason, focused its attention and resources on more cost-effective water-supply projects instead of the relatively higher-cost proposal to divert water from the American River. This focus on other projects does not, however, excuse the County from the requirement that it diligently pursue Application 29657. Like the applicants involved in the Board’s Decisions 884 and 1083, San Joaquin County’s “highly indefinite and speculative” plans are insufficient to show that it is “proceeding promptly and diligently,” and the County is unable to identify a date on which it will begin construction of the necessary works or perfect the proposed appropriation. (Decision 884, p. 72.)

The County is also in a similar position to the applicant involved in the Board’s Decision 984, because there is a similarly high level of uncertainty about the feasibility of the proposed project. The proposed diversions from the American River may not be financially feasible, the County may be unable to obtain a right of access to the diversion facilities, and the County lacks project-specific planning that is necessary to proceed with the project.

Finally, the County’s lack of a project-specific environmental document to comply with CEQA is alone a sufficient basis to deny the application. After 30 years, the County still has no immediate plan to develop a project-specific environmental impact report to support its application. In Order 84-04, the Board concluded that the applicant’s failure to initiate preparation of an environmental review document four years after it filed amendments to its application demonstrated a lack of diligence and supported denial of the application. In this matter, the County has delayed almost twice as long since it filed its most-recent amendments to Application 29657, and the County admits that

additional years will pass before it will take any further action towards developing a project-specific environmental impact report.

Because the County is “evidently unable or indisposed to proceed with development under [its] application[] at the present time,” we deny Application 29657. (Decision 893, p. 58.) This denial is without prejudice to the County’s right to file a new application for this proposed project or a similar project if, in the future, the County is “ready, willing, and able” to develop and construct the proposed project within a reasonable time. (Decision 1083, p. 6.)

## 5.0 CONCLUSION

We cancel Application 29657 pursuant to Water Code sections 1276 and 1335 because the County did not provide information requested by the Division necessary to support its application. The County failed to provide this information after repeated requests by the Division and after being informed that failure to provide the information by the deadlines could result in cancellation of Application 29657.

In the alternative, we deny Application 29657 pursuant to California Code of Regulations, title 23, section 840 because we conclude, based on the evidence, that the County does not intend to initiate construction within a reasonable time or diligently prosecute the construction and use of water, and because the County will not be able to proceed with its appropriation within a reasonable time because it lacks a feasible plan for development, financing, or construction of the project, and the County has been unable to obtain a right of access to the proposed diversion works and conveyance facilities.

Throughout this proceeding, San Joaquin County has argued that it was directed by state and federal agencies to pursue the American River as a source of water to supply the County and that the County has priority status to appropriate American River water under the Watershed Protection Act. The County “presumed” that American River water would be available to it “to meet future beneficial uses and address critical overdraft.” (2021-10-29 San Joaquin County Closing Brief, p. 4.) We want to make

**January 27, 2022**

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clear that our cancelation of Application 29657 does not prevent the County from filing a new application for a permit to appropriate water and continuing to seek priority status to appropriate American River water, if and when the County determines that such a project is feasible and the County is in a position to diligently pursue its application.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. San Joaquin County's Application 29657 is canceled.
2. In the alternative, San Joaquin County's Application 29657 is denied.