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State Water Resources Control Board

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Arnold Schwarzenegger
Governor

JUN 09 2008

To: Enclosed Service List

WATER RIGHT HEARING REGARDING PROPOSED REVOCATION OF AUBURN DAM PROJECT PERMITS

This letter addresses the procedural issues that were raised during the June 4, 2008, pre-hearing conference and several additional procedural issues.

July 22, 2008, Hearing Day Will Begin at 8:00 A.M.

At the outset, please note that, in light of the number of hearing participants and the length of time the hearing may take, I have decided to move up the start time for the second hearing day. **The hearing will begin on July 21, 2008, at 9:00 a.m. and resume on July 22, 2008, at 8:00 a.m.**

Participation in the Evidentiary Portion of the Hearing

A preliminary issue that was not discussed at the pre-hearing conference is the distinction between the parties to this proceeding and the other hearing participants. In accordance with section 648.1 of the State Water Resources Control Board's (State Water Board) regulations and the hearing notice, the parties to this hearing are the State Water Board Prosecution Team and the U.S. Bureau of Reclamation (Reclamation). Only the parties and other participants authorized by me will be allowed to participate in the evidentiary portion of the hearing. Consistent with section 648.1 and the hearing notice, I have broad discretion to determine whether and under what conditions to allow other participants to present evidence or conduct cross-examination.

In this instance, I find the criteria for third-party intervention contained in chapter 4.5 of the Administrative Procedure Act (APA) to be instructive. Under the APA, a motion to intervene and participate in an administrative hearing shall be granted if two conditions are met: (1) the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding, or the applicant qualifies as an intervenor under statute or regulation, and (2) the hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by the intervention. (Gov. Code, § 11440.50, subd. (b).)

In this case, none of the local agencies or non-governmental organizations (NGO) who have indicated that they intend to participate in the evidentiary portion of the hearing seem to be entitled to intervene and participate as a party under the APA. Although they undoubtedly have

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an interest in this proceeding, none of the local agencies or NGOs have indicated that they hold a legal right, duty, privilege, or immunity that would be substantially affected by the proceeding. (Gov. Code, § 11405.60; Cal. Code Regs., tit. 23, § 648.1.) In addition, none of the agencies or NGOs would qualify as an intervenor under a statute or regulation. The California Sportfishing Protection Alliance (CSPA) would be entitled to intervene in any hearing on Reclamation's pending request for a time extension by virtue of the fact that CSPA filed a timely protest against that request. But the subject of this proceeding is the proposed revocation of Reclamation's permits, not Reclamation's request for a time extension. The Water Code does not provide for any person other than the permit holder to object to a proposed revocation.

Consequently, it would be reasonable to reject the request to participate by all potential parties not named in the hearing notice. However, I believe that it is in the public interest to grant these requests to participate in the evidentiary hearing, provided that such participation is limited to avoid undue delay or disruption in the conduct of the hearing. Accordingly, I will impose shorter time limits on the local agencies and NGOs than I will impose on the two main parties. I may impose additional limitations if warranted.

Participation of South Delta Water Agency

As set forth in the hearing notice, any party who failed to attend the pre-hearing conference may be excluded from participation in the hearing. South Delta Water Agency (South Delta) submitted a notice of intent to appear, but did not attend the pre-hearing conference. In the event that South Delta still intends to participate, South Delta must submit a written explanation showing good cause for the failure to appear by noon on June 16, 2008. If the submittal deadline is met, I will issue a ruling on South Delta's participation no later than June 20th.

Scope of Evidence that May Be Presented

I have decided not to limit the evidence submitted as part of the parties' and other participants' cases-in-chief to the issue of due diligence. In addition, I will not structure the hearing to hear evidence on the issue of due diligence before hearing evidence on the broader issue of whether the State Water Board should revoke the permits for the Auburn Dam Project, assuming cause for revocation exists. Although I will not limit the evidence to the issue of due diligence, I intend to conduct the hearing as efficiently as possible by imposing a number of other procedural restrictions, including the time limits outlined below.

On June 5, 2008, the Prosecution Team and Reclamation submitted a stipulation of facts. I appreciate the parties' efforts in preparing the stipulation. To avoid unnecessary duplication, I will not permit any of the parties or participants to introduce evidence, or to ask questions during cross examination, for purposes of establishing or challenging any of the facts to which the Prosecution Team and Reclamation have stipulated.

Time Limits

I will impose the following time limits on the parties' presentations.

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Policy Statements. As set forth in the hearing notice, policy statements are limited to 5 minutes each.

Opening Statements. The Prosecution Team and Reclamation will be limited to 20 minutes each. The other parties will be limited to 10 minutes each. (Please note that opening statements may be submitted in writing.)

Direct testimony. For oral summaries of direct testimony, the Prosecution Team will be allowed 20 minutes, and Reclamation will be allowed 15 minutes, as they requested. The other parties will be limited to 5 minutes per witness.

Cross-examination. The Prosecution Team and Reclamation will be limited to 30 minutes each per witness or panel of witnesses. The other parties will be limited to 10 minutes each per witness or panel of witnesses. The time limits on cross-examination are guidelines. I may allow additional time upon a showing of good cause, or cut short cross-examination that does not conform to the scope described below.

Opening Statements for Parties with No Case-in-Chief

The purpose of an opening statement is to provide an overview of a party's case-in-chief and describe what the evidence that will be introduced during the case-in-chief is intended to establish. Accordingly, I will not permit the participants who will not be presenting a case-in-chief to make an opening statement. I will, however, permit those participants to make a policy statement.

Order of Presentation

Opening statements and cases-in-chief will be presented in the following order:

The Prosecution Team
The U.S. Bureau of Reclamation
The California Sportfishing Protection Alliance
County of San Joaquin and San Joaquin County Flood Control and Water Conservation District
Stockton East Water District
Friends of the River, Save the American River Association, and Defenders of Wildlife
Sacramento County and Sacramento County Water Agency
Auburn Dam Council
South Delta Water Agency, if they are permitted to participate

Scope of Cross Examination

At the pre-hearing conference, Reclamation asked about the scope of cross-examination. A witness may be cross-examined on subjects outside of his or her direct testimony. Cross examination is not limited to the scope of direct testimony. (Cal. Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (b).) Cross-examination should, however, be limited to the factual issues in dispute. I will not permit the parties to attempt to make legal or policy arguments during the evidentiary portion of the hearing, through cross-examination, the presentation of direct testimony, or otherwise. In addition, the scope of cross-examination of any redirect or

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rebuttal testimony that I allow will be limited to the scope of the redirect or rebuttal testimony, respectively.

Timing of Rebuttal

Any rebuttal will be heard after all the parties and participants have presented their cases-in-chief.

Closing Statements and Briefs

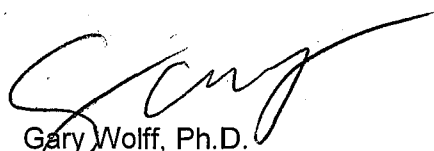
I will not allow oral closing statements, but I will allow written closing statements or briefs. I will set the deadline for written closing statements or briefs at the end of the hearing.

Ex Parte Communications

The State Water Board has received two ex parte communications in the form of letters from Joe Sullivan and the Orange Vale Water Company. As required by Government Code section 11430.50, the letters will be made a part of the record in this proceeding. The letters will be treated as policy statements, and posted on the web page for this hearing. I would like to take this opportunity to remind the parties that ex parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to me, the other Board Members, or the hearing team.

Thank you for your continued cooperation. If you have any non-controversial, procedural questions, please contact Dana Heinrich at (916) 341-5188 or dheinrich@waterboards.ca.gov or Jean McCue at (916) 341-5351 or jmccue@waterboards.ca.gov.

Sincerely,



Gary Wolff, Ph.D.
Hearing Officer

cc: Joe Sullivan
Sullivan & Associates
4825 Agree Court
Sacramento, CA 95842

Sharon L. Wilcox
Orange Vale Water Company
Post Office Box 620800
Orangevale, CA 95662-0800

**HEARING REGARDING PROPOSED REVOCATION OF AUBURN DAM PROJECT
PERMITS 16209, 16210, 16211 AND 16212 (APPLICATIONS 18721, 18723, 21636
AND 21637), UNITED STATES BUREAU OF RECLAMATION,
SCHEDULED TO COMMENCE ON JULY 21, 2008**

**SERVICE LIST
(May 29, 2008)**

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Sacramento County/Sacramento County
Water Agency
c/o Sandra K. Dunn
Somach, Simmons & Dunn
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SWRCB/DWR Prosecution
c/o David Rose
State Water Resources Control Board
Office of Chief Counsel
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California Sportfishing Protection Alliance
c/o Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
mjatty@sbcglobal.net

American River Authority
c/o Christopher D. Williams, Esq.
P.O. Box 667
San Andreas, CA 95249
cwilliam@goldrush.com

Auburn Dam Council
c/o Michael R. Schaefer
7050 Walnut Avenue
Orangevale, CA 95662
Mikeeret_99@yahoo.com

Friends of the North Fork
c/o Michael Garabedian
7143 Gardenvine Avenue
Citrus Heights, CA 95621
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San Luis & Delta-Mendota Water Authority
c/o Jon D. Rubin
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400 Capitol Mall, Suite 1800
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Friends of the River, Save the American River
Association, and Defenders of Wildlife
c/o Ronald M. Stork
920 20th Street
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County of San Joaquin and San Joaquin County
Flood Control and Water Conservation District
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Bureau of Reclamation, U.S. Dept of the Interior
James E. Turner, Assistant Regional Solicitor
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South Delta Water Agency
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