

May 23, 2013

Via Hand Delivery and Electronic Mail (wrhearing@waterboards.ca.gov)

Jean McCue
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, California 95814

Re: Objections by Monterey County Water Resources Agency to May 14, 2013 Notice of Rescheduling of Public Hearing Permit 11043 (Application 13225), Monterey County Water Resources Agency Salinas River, Monterey County

Dear Ms. McCue:

On May 14, 2013, the State Water Resources Control Board (the "SWRCB") issued a Notice of Rescheduling of Public Hearing (the "Revised Notice") for the proposed revocation of Permit 11043, which is held by Monterey County Water Resources Agency (the "Agency"). The Revised Notice adds a new key issue ("Key Issue 3") for consideration by the SWRCB during the hearing:

"(3) Did Monterey County Water Resources Agency meet all of the dates set forth in Paragraph 3 of Board Order WR 82-13? If Monterey County Water Resources Agency did not meet the dates specified in Paragraph 3 of Board Order WR 82-13, did Monterey County Water Resources Agency petition the Board for an extension of time prior to the date in question, and did the Board find good cause for a time extension?"

For the reasons described below, the Agency hereby objects to the inclusion of Key Issue 3 in the Revised Notice and respectfully requests that the SWRCB delete Key Issue 3 from the Revised Notice.

Water Code section 1410(a) governs the revocation of permits and states: "There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the board." Thus, the plain language of the

relevant statute allows the SWRCB to revoke a permit if either: (i) the work under a permit is not commenced, prosecuted with due diligence and completed; or (ii) water is not placed to beneficial use as contemplated in the permit and as allowed by law. Key Issues 1 and 2 effectively restate these requirements and so are proper.

By contrast, Key Issue 3 inserts into the Revised Notice the SWRCB Prosecution Team's view of what constitutes "due diligence" under Water Code section 1410(a). The legal standard of "due diligence" is intentionally broad and gives the SWRCB great latitude to consider a variety of factors. By focusing on whether the Agency met specific milestones or took specific administrative actions as the sole indicator of "due diligence," Key Issue 3 ignores other relevant factors, such as the SWRCB's longstanding support for the Agency's efforts in working with stakeholders in Monterey County or the many millions of dollars that the Agency has expended to develop the water appropriated in Permit 11043. Including key issues that only reflect one party's view of a case calls into question the SWRCB's role as the impartial factfinder and is not consistent with the SWRCB's past practice. Consequently, the Agency requests that Key Issue 3 be deleted from the Revised Notice.

As an impartial factfinder, moreover, the SWRCB need not – and should not at this stage of the proceedings – take a position on what may or may not constitute "due diligence." Instead, the proper course for the SWRCB is simply to identify the relevant statutory standard and let the parties present evidence and argument during the hearing as to whether the Agency has met that standard. "Where a statutory remedy or proceeding is specially provided it cannot be enlarged by construction, nor made available except on the statutory construction; that is, by strictly following the directions of the act." *Eaton v. State Water Rights Bd.* (1959) 171 Cal. App. 2d 409, 415 (holding that a permit remains in force until revoked in the manner prescribed by section 1410). Such an open and fair proceeding is consistent with the SWRCB's general charge from the Legislature, which is to administer the water rights system for the benefit of the people of California, considering all of the many factors that may advance the public interest.

For the foregoing reasons, the Agency respectfully requests the SWRCB to delete Key Issue 3 from the Revised Notice. In the alternative, it may be appropriate for the SWRCB to consider this matter during a pre-hearing conference that is scheduled sufficiently far in advance of the deadline for the submission of testimony to allow the parties to address this issue during their presentations at the hearing.

Very truly yours,



David R.E. Aladjem

cc: Service List

1318179.1

**SERVICE LIST OF PARTICIPANTS TO EXCHANGE INFORMATION:
MONTEREY COUNTY WATER RESOURCES AGENCY
PROPOSED REVOCATION HEARING**

**SERVICE LIST
(REVISED January 16, 2013)**

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.)

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