

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. BOX 2000, Sacramento, Ca. 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterrihts.ca.gov>

**PROTEST – (Petitions)**

**BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS**  
**Protests based on Injury to Vested Rights should be completed on other side of this form**

**APPLICATION: 14313 PERMIT: 8816**

**I, Chris Shutes, FERC Projects Director, California Sportfishing Protection Alliance, 1608 Francisco St., Berkeley, CA 94703.** (Name and address of Protestant)

have read carefully a notice relative to a petition for an extension of time of California Water Service Company, under Application 14313 for Permit 8816 to appropriate water from **Bear Gulch Creek, tributary to San Francisquito Creek.**  
(Name of Source)

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

- (1) not be within the State Water Resources Control Board’s (SWRCB) jurisdiction
- (2) not best serve the public interest** **x**
- (3) be contrary to law** **x**
- (4) have an adverse environmental impact** **x**

**State Facts, which support the foregoing allegations:**

Petitioner seeks to extend the time to put its permitted rights to full use. However, petitioner also states that:

The site of Bear Gulch Reservoir 2 was made unavailable with the construction of Interstate 280 (Junipero Sera [sic] Freeway). Cal Water is pursuing other options to develop this source of supply. Construction of additional facilities to accommodate higher flows will be installed as the costs are justified by the price and availability of alternate supplies. As an investor owned utility Cal Water is regulated by the California Public Utilities Commission, and as such all expenditures must be approved by the commission. The reliability of supplemental water for the San Francisco Public Utilities Commission is a growing concern to Cal Water and other regional water interests. Thus, this local supply will provide an increasingly important portion of future demands. (Petition, page 1).

Petitioner has never put any of the permitted water to beneficial use, despite issuance of the permit 51 years ago. Petitioner says that additional facilities will be installed as costs are justified, and, apparently, if and when scarcity of other supply makes such an endeavor economically feasible.

In Water Rights Order 2008-0045, the Board revoked the water rights of the Bureau of Reclamation, citing the principle that water rights may not be put into “cold storage” (page 1). The Board also referenced the requirements for the exercise of diligence by a water right holder:

In accordance with the due diligence requirement, a water right application must set forth, among other things, the time within which the applicant proposes to begin construction of any necessary facilities, the time required to

complete construction, and the time required to complete application of the water to the proposed use. (Wat. Code, § 1260, subs. (g), (h) & (i).) The State Water Board will deny an application if the Board determines that the applicant does not intend to develop the project with diligence, or if the applicant will not be able to proceed with diligence for any reason, including the lack of a feasible plan or the required financial resources. (Cal. Code Regs., tit. 23, § 840; see, e.g., State Water Board Decisions 1083 (1963) and 893 (1958).)

The Board continues, citing the requirements for granting an petition for the extension of time:

The Board's regulations provide that the Board will grant a petition for an extension of time only upon such conditions as the Board determines to be in the public interest, and only upon a showing that (1) due diligence has been exercised, (2) failure to comply with previous time requirements was caused by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension is granted. (Cal. Code Regs., tit. 23, § 844.)

Petitioner's overriding reason for failing to put water permitted to beneficial use appears to be economic. The scenario discussed in the petition is that the cost of water may increase as existing supplies become less reliable, thus justifying expenditure for infrastructure. Storage or new diversion facilities, other than a rebuild of an existing diversion, are discussed with no detail at all: petitioner simply says that it is "pursuing other options."

It is not in the public interest, and is contrary to law, for a permit holder to extend its time to put to use based on speculation. There are two speculative aspects to this petition: one, regarding the reliability of existing supplies, the other regarding the prospective increase in the cost of water.

The incident cited, where the construction of the Junipero Serra Freeway eliminated a potential reservoir site, took place some thirty years ago. Given the timeframe, this does not qualify as "an obstacle which could not reasonably [have been] avoided." Petitioner does not meet the diligence requirement of an extension of time. Therefore, on the face of the petition and the documentation submitted, the petition for the extension of time should be denied.

However: the circumstances surrounding this petition are more complex than meet the eye in reading the notice, petition, and environmental documentation. Working with the Department of Fish and Game and National Marine Fisheries Service, Cal Water is voluntarily moving the point of diversion of a sizeable portion of a pre-1914 right downstream from what is known as the "Upper Diversion" on Bear Gulch downstream to a diversion point on Bear Creek known as "Station 3," in order to benefit steelhead in the watershed. In addition, Cal Water is instituting a bypass flow regime at the Upper Diversion, and installing a fish screen and a fish ladder at the Upper Diversion. Cal Water is installing a fish screen at Station 3; no ladder is required to provide upstream passage at that point of diversion. Finally, a new bypass flow regime, replacing a bypass flow instituted under a 1985 agreement with DFG, is being proposed by Cal Water as part of its right at Station 3. A Biological Opinion for modifications at Station 3, and increased diversions under the pre-1914 right to a maximum of 9 cfs, was issued by NMFS on September 27, 2007; since changes at the Upper Diversion are contemplated to take longer to institute, a second BO for that site is contemplated in the existing NMFS document.

A letter from attorneys from Cal Water to Steven Herrera, SWRCB Division of Water Rights, was sent on February 28, 2008, seeking both Division approval of the change in point of diversion and clarification of the relation between pre-1914 rights and rights granted under Permit 8816. Neither of these documents was provided with the environmental documentation for the present petition for an extension of time.

The February 28, 2008 letter states that under the proposed change in the point of diversion, "total diversions from the stream system will not be increased." However, this does not line up with the Biological Opinion,

which suggests that the maximum diversion at the Upper Diversion under the pre-1914 right will continue to be 12.4 cfs, even as the maximum diversion at Station 3 will increase to 9 cfs. (see BO, page 19). The BO specifically contemplates a diversion at Station 3 of up to 4.7 cfs under license 5441, with the 4.3 cfs balance of the new 9 cfs capacity of the Station 3 Diversion to come from permit 8816, rather than from the pre-1914 right.

It is altogether unclear from the documentation provided by petitioner, therefore, which water right in what quantity is being proposed for use at which diversion. It is also unclear what the proposed capacity of new diversion works at the Upper Diversion shall be. While the February 28, 2008 letter from Cal Water to the Division promised that total diversions would not be increased, this could only hold true if the capacity of the new Upper Diversion were reduced by the proposed 4.3 cfs increase in the capacity of the Station 3 diversion works. In such case, there would be no need for additional water under permit 8816.

CSPA has no desire to prevent completion of a project that will provide passage and habitat for steelhead where none heretofore existed. Cal Water's mitigation of its existing Station 3 diversion is to be commended, as is its plan to mitigate its Upper Diversion. However, the documentation provided is incomplete, and available documentation that should have been provided is incomplete, confusing, and in places contradictory.

#### **Under what conditions may this protest be disregarded and dismissed?**

Petitioner should be required to re-submit its petition with complete documentation and a clear narrative of its plan. If petitioner does in fact proposed to increase total diversions from the combined Bear Gulch and Bear Creek diversion points, it needs to say so, and explain what water rights it proposes to employ where, and in what sequence. It needs to specify a detailed plan and a timeline for new diversion works at Upper Diversion, and needs to describe interim operations while such a plan is being carried through. Petitioner needs to enter into formal consultation regarding its plan with NMFS; if indeed petitioner does seek to increase overall diversions, it must demonstrate to NMFS and DFG that so doing will be protective of steelhead and other relevant biota in the stream system. Petitioner must also complete environmental documentation that shows no negative impacts of its proposed project. In short, petitioner must show a bona fide plan to put additional water to beneficial use in a reasonable time, in accordance with the diligence requirement under the Water Code, and in accordance with applicable law under the Endangered Species Act, the Fish and Game Code, and the California Environmental Quality Act.

The Division of Water Rights should determine, in its immediate response to this petition, whether the appropriate action in this case is for the petitioner to relinquish its present water right (or else have it revoked), and apply for a new right based on present circumstances, or whether an extension of the old right is appropriate.

A true copy of this protest has been served upon the petitioner by mail.

(Personally or by mail)

Date March 5, 2009 Chris Shutes, FERC Projects Director,  
California Sportfishing Protection Alliance

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Attachment: Letter from Cal Water to Steven Herrera, February 28, 2008.