

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

ORDER WR 2022-0176

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In the matter of the pending water-right application (A030531B) of

**The City of Stockton**

for a permit to appropriate water from the San Joaquin River.

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SOURCE: San Joaquin River

COUNTY: SAN JOAQUIN

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**ORDER DENYING AND CANCELING  
APPLICATION 30531B**

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 a hearing officer of the Board's Administrative Hearings Office (AHO) prepared 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 deny water-right Application 30531B pursuant to California Code of Regulations, title 23, section 840, because we conclude that the City of Stockton (City or Stockton) “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” and Stockton “will not be able to proceed within a reasonable time... because of absence of a feasible plan.” In the alternative, we cancel Application 30531B pursuant to Water Code section 1276 because Stockton did not provide the information requested by the State Water Board’s Division of Water Rights (Division).

## **2.0 PROCEDURAL BACKGROUND**

### **2.1 Application 30531**

On April 18, 1996, Stockton filed Application 30531, which asked the State Water Board to issue a water-right permit to appropriate up to 125,900 acre-feet per year (af/yr) through direct diversion, at a maximum diversion rate not to exceed 317 cubic-feet per second (cfs), from the San Joaquin River for municipal and industrial uses. (Stockton-04, p. 1.)<sup>1</sup> The application did not indicate Stockton would divert any water to storage under the requested permit. (*Ibid.*) The sources of water that the City sought to appropriate are treated wastewater discharged into the San Joaquin River at the City's Regional Wastewater Control Facility (RWCF)

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<sup>1</sup> Hearing documents, which include materials in the Board’s Division of Water Rights Records Unit files for Application 30531, and exhibits submitted by the City of Stockton and the AHO, are in the administrative record for this matter. The AHO has posted this administrative record in the AHO folder on the State Water Board’s FTP site. 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.

and rediverted from the river pursuant to Water Code section 1485<sup>2</sup> and San Joaquin River water. (*Id.* at p. 4.) The City asserts that, under Water Code section 11460, the City's permit to divert additional San Joaquin River water would have priority over the permits of the State Water Project and Central Valley Project to divert water from this source. (AHO-02; AHO-06; AHO-08, p. 5; AHO-18, pp. 4-5; AHO-19, pp. 3-5.)<sup>3</sup>

Stockton would develop the water it sought to appropriate under this application as a supplemental water supply for the City's metropolitan area, as part of the City's Delta Water Supply Project (DWSP). (Stockton-06,

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<sup>2</sup> Water Code section 1485 provides:

Any municipality, governmental agency, or political subdivision operating waste disposal plants producing disposal water meeting the requirements of the appropriate regional board, and disposing of said water in the San Joaquin River may file an application for a permit to appropriate an equal amount of water, less diminution by seepage, evaporation, transpiration or other natural causes between the point of discharge and the point of recovery, downstream from said disposal plant and out of the San Joaquin River or the Sacramento-San Joaquin Delta. A permit to appropriate such amount of water may be granted by the board upon such terms and conditions as in the board's judgment are necessary for the protection of the rights of others. Water so appropriated may be sold or utilized for any beneficial purpose. The right to the use of water granted by this section shall not include water flowing in underground streams.

The Legislature finds and declares that the problems incident to the full utilization of the waters of the San Joaquin River and the Sacramento-San Joaquin Delta into which it flows, are unique and that a general law cannot be made applicable thereto.

<sup>3</sup> The AHO exhibits are the materials from the State Water Board's Division of Water Rights Records Unit files, as they existed at the time of the hearing. These exhibits are organized into folders titled A030531; A030531A; and A030531B. The hearing document "2021-11-01 AHO staff exhibit list (City of Stockton)" shows the exhibit number that corresponds to each document. Exhibits AHO-01 through AHO-55 are in the folder marked "A030531." Exhibits AHO-56 to AHO-71 are in the folder marked "Permittee Progress Reports." Exhibits AHO-72 through AHO-98 are in the folder marked "A030531A"; and Exhibits AHO-99 through AHO-113 are in the folder marked "A030531B."

p. 1.) The City would be the California Environmental Quality Act (CEQA) lead agency and prepare all required CEQA documents. (*Ibid.*) The environmental information form that the City filed with Application 30531 contained text that informed applicants that “[p]rocessing of your water rights application cannot proceed until such [final environmental or notice of exemption] documents are submitted.” (*Ibid.*)

On November 13, 1996, the Division asked the City for two items to complete Application 30531: (a) an engineering map, as required by applicable regulations, and (b) “a statement of the relative percentages of the reclaimed wastewater and the additional appropriated water requested in your Application.” (AHO-05.) The Division sent a follow-up letter on July 9, 1997, titled “Cancellation of the City of Stockton’s Application 30531 on the San Joaquin River.” (AHO-06.) In that letter, the Division noted that on “several occasions” Division staff had requested information needed for the City to complete its application and that the City had not transmitted the items requested in the Division’s November 1996 letter. (*Ibid.*) The City responded on July 15, 1997 and on September 23, 1997 by providing modifications to Application 30531, including a “Delta Appropriation Summary,” which included total projected water needs, RWCF wastewater flow projections, and additional amounts of water that the City estimated would be required to meet demands starting in 2010. (AHO-08, p. 5.)

## **2.2 Notice of Application 30531 and Protests**

On December 19, 1997, the Division issued its public notice of Application 30531. (AHO-10.) The United States Department of the Interior, Bureau of Reclamation (Reclamation), the California Department of Water Resources (DWR) and the San Joaquin River Group Authority (SJRGAA) timely filed

protests to Application 30531. (AHO-11–AHO-13.) The Reclamation and DWR protests stated that the State Water Board could dismiss the protests if the Board included in any permit issued on Application 30531: (a) a term ensuring that the City would adequately account for all appropriations of water from San Joaquin River flows derived from the City’s treated wastewater discharges, under Water Code section 1485, and (b) standard Permit Terms 80, 90 and 91 for all diversions of San Joaquin River water that would not be made under Water Code section 1485. (AHO-12, p. 2 [Reclamation]; AHO-11, p. 2 [DWR].)

Following the parties’ stipulations and agreements, the Division dismissed the Reclamation, DWR and SJRGA protests on March 24, 2005, May 17, 2005, and November 16, 2005, respectively. (AHO-48; AHO-50; AHO-55.) The Division’s letters to protestants stated that any permit issued on Application 30531 would include standard Permit Terms 80, 90, and 91 for appropriations of San Joaquin River water, except that these terms would not apply to water diverted under Water Code section 1485. (*Ibid.*)

### **2.3 Bifurcation of Application 30531**

On May 2, 2005, the City issued its CEQA Notice of Completion and Environmental Document Transmittal for the DWSP. (AHO-49.) The Draft Program Environmental Impact Report for the Stockton Delta Water Supply Project contains a project-level impact and mitigation analyses for the initial 33,600 af/yr “Phase I” of the DWSP and a program-level analysis for future

expansion phases of the DWSP, up to the entire 125,900 af/yr requested in Application 30531. (Stockton-06; Stockton-16, p. 74 [p. 1-4]<sup>4</sup>.)

Afterward, staff from the Division and the City met to discuss Application 30531. (AHO-51; AHO-74; Stockton-06, p. 1.)<sup>5</sup> During the meeting, Division staff “expressed concerns” that the Board could not issue a water-right permit for the entire project proposed in Application 30531 because the City’s DPEIR evaluated Phase I of proposed construction at a project level and evaluated later phases only at a programmatic level. (*Ibid.*) Thus, the Division concluded that the Board could use the DPEIR only to evaluate the environmental effects of issuing a permit for the initial 33,600 af/yr for which the City had applied. (Stockton-06, p. 1.) The Division advised that the City would need to produce additional project-level CEQA documentation before the Board could issue a water-right permit for the balance of the amount applied for under Application 30531. (*Ibid.*) The Division suggested the City: (a) conduct a project-level analysis for the full 125,900 af/yr<sup>6</sup> of diversions in the application; (b) request to split the application into two or more applications to cover anticipated phases of development; or (c) conduct no further analysis, receive a permit for 33,600

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<sup>4</sup> For convenience, the actual page numbers printed at the bottom of voluminous documents such as Stockton-16, Stockton-17, and Stockton-19 are provided in brackets. The first listed page in each citation in this order is the pdf page number.

<sup>5</sup> In some circumstances, both the City and AHO have entered the same exhibit into evidence. Where feasible, this order cites both exhibit numbers.

<sup>6</sup> References to this application in some documents, including those cited in this paragraph, use acre-feet per annum (afa) to describe water supply, while other documents use acre-feet per year (af/yr). Unless we are quoting from documents that use “afa”, we use “af/yr.”

af/yr, and in the future, submit new applications for additional permits.  
(*Ibid.*)

On June 1, 2005, the City requested bifurcation of Application 30531 and stated that it would request a permit for the initial phase of the project, with additional permits to follow based on demand. (AHO-72; Stockton-05.) The City confirmed that “[s]ubsequent phases will require additional CEQA compliance by the City as Lead Agency before a permit can be issued by the SWRCB.” (*Ibid.*)

On June 29, 2005, the Division split Application 30531 into Application 30531A and Application 30531B. (AHO-74; Stockton-06.) Under Application 30531A, the City applied for a permit to appropriate up to 33,600 af/yr. (*Id.* at p. 2.) Under Application 30531B, the City applied for a permit to appropriate up to 92,300 af/yr. (*Ibid.*) All other provisions of Application 30531 remained unchanged, including the 317-cfs maximum diversion rate and the proposed points of diversion, place of use, and purposes of use. (*Ibid.*) Application 30531A “calls for the appropriation of Water Code section 1485 water only,” while Application 30531B seeks diversion of water under Water Code section 1485 and other San Joaquin River water that may be diverted under a claim of seniority pursuant to Water Code section 11460. (AHO-77, p. 2.)

## **2.4 Permit 21176**

On December 20, 2005, the Division issued Permit 21176, on Application 30531A, to Stockton. (AHO-80; Stockton-07.) This permit authorizes the direct diversion of water from the San Joaquin River between January 1 and December 31, at a rate not to exceed 317 cfs, with total

annual diversions not to exceed 33,600 af/yr, for municipal and industrial uses within the City's service area. (*Id.* at p. 3.)<sup>7</sup> Term 6 of this permit states that complete application of the water to authorized uses under the permit shall be completed by December 15, 2020. Term 15.a.2. of this permit provides that the 15-day running average of diversions under the permit shall be less than or equal to the 15-day running average of the City's discharges of properly treated effluent into the San Joaquin River. (*Id.* at p. 4.)

In 2008, the United States Department of the Interior, Fish and Wildlife Service issued conditions on a Biological Opinion on Stockton's proposed DWSP (BiOp). (Stockton-14, p. 7.) Stockton has stated that the BiOp limits the maximum authorized rate of diversions at the City's intake pump station between February and June to protect Delta and Longfin smelt. (*Ibid.*) Similarly, Stockton has stated that California Department of Fish and Wildlife Incidental Take Permit No. 2081-2009-005-03 (ITP) imposes a 50-percent limitation on these diversions during certain times in February and March and in May and June and prohibits any diversions between March 15 and May 20. (*Ibid.*)

On October 2, 2020, the City filed a petition for extension of time for Permit 21176. (AHO-98, Stockton-14.) The petition states that, in 2019, Stockton directly diverted water at a maximum rate of 37.30 cfs, with an annual diversion of 11,246 af. (AHO-98, p. 2; Stockton-14, p. 2.) The City requested an extension of 20 years, until 2040, of the deadline in the permit

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<sup>7</sup> The permit does not contain standard Permit Terms 80, 90 and 91 because the rate of authorized diversions under the permit may not exceed the rate of the City's discharges of treated effluent. (See AHO-48; AHO-50; AHO-55.)



for full diversion and use of water under the permit. (*Ibid.*) The City cited the economic downturn, drought, reduced demand, distribution system restrictions, and diversion limitations to protect endangered species as obstacles to the City's efforts to put the full amount of water authorized for diversion under the permit to beneficial use. (*Id.* at p. 1.)

## **2.5 Division of Water Rights Requests for CEQA Information Regarding Application 30531B in 2007 and 2008**

On September 11, 2007, the Division asked the City to provide a schedule for the City's completion of its project-level CEQA document for Application 30531B. (Stockton-08.) The Division's letter informed the City that the City's schedule should include dates for the preparation of all biological resource studies, preparation of the Draft EIR, responses to comments on the Draft EIR, and certification of the Final EIR. (*Ibid.*) The letter stated: "The EIR should consider all impacts related to diversion of 317 cubic feet per second [the maximum total diversion rate that could occur under Permit 21176 and a permit issued on Application 30531B], not to exceed 92,300 af/yr diverted under a permit issued on Application 30531B.<sup>8</sup> The Division requested this information under Water Code section 1275 and directed the City to submit it within 30 days. The Division noted that failure to timely provide the requested information could result in cancelation of the application under Water Code section 1276. (*Ibid.*)

The City's October 11, 2007 response stated that the City was "progressing in a diligent manner" to perfect the full amount of the appropriation

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<sup>8</sup> 92,300 af/yr is the remaining amount after subtracting 33,600 af/yr under Permit 21176 from the maximum diversion limit of 125,900 af/yr in Application 30531.

authorized under Permit 21176. The City also stated that the timing of the City's pursuit of a permit under Application 30531B "will be dictated by need brought about by a change in Place of Use [related to potential updates to the City's General Plan] or a change in our current supply availability." (Stockton-09, pp. 1, 2.) The City stated that it planned to file a CEQA Notice of Preparation in 2014 and conclude "CEQA work" in 2017. (*Id.* at p. 3.) Finally, the City anticipated that it would expand its DWSP and begin diversions under the permit issued on Application 30531B in 2020 and 2025. (*Id.* at p. 3.)

On December 1, 2008, the Division sent a letter to the City in response to the City's October 11, 2007 letter, stating that "[i]t appears that the City is attempting to cold storage [sic] Application 30531B for later development" and that Division staff was prepared to recommend cancelation of Application 30531B because the "timeline" the City submitted showed a failure to exercise due diligence. (AHO-108.) The letter concluded that the Division would consider any information submitted within the next 30 days. (*Ibid.*)

The Water Board's files do not contain further correspondence with the City, and the City has not provided any document showing that the City submitted any information in response to the Division's December 1, 2008 letter.

## **2.6 Division of Water Rights Requests for CEQA Information Regarding Application 30531B in 2013 and 2020**

On November 7, 2013, the Division sent a letter to the City, following up on the Division's December 1, 2008 letter, requesting that the City document

when the City would use the “full face value” of Permit 21176 and demonstrate that Application 30531B “is being diligently pursued.” (AHO-109, p. 1; Stockton-10, p. 1.) The Division’s letter explained that Permit 21176 authorizes diversion of 317 cfs, the City’s current diversions were 20 cfs, and the City’s treated wastewater discharges that were available for rediversion were 32 cfs. The Division then noted that “[p]rocessing of Application 30531B has been deferred for a number of years” and that, like Permit 21176, “processing of Application 30531B is contingent on ... the volume of wastewater discharge. It does not appear discharge will be sufficient to allow development under Application 30531B at any time in the near future.” (*Ibid.*) The Division asked the City to provide information documenting when the City’s treated wastewater discharges would exceed diversions authorized by Permit 21176 and when diversions under Permit 21176 would be fully developed, as well as a schedule for preparation of the CEQA document for Application 30531B. (*Ibid.*)

On November 26, 2013, the City responded that new projections of when the City’s diversions would exceed the authorized diversion rates under Permit 21176 were later than those originally projected. (AHO-110, pp. 2-3; Stockton-11, pp. 2-3.) Further, Stockton stated that it would need to undertake additional construction to maximize diversions under Permit 21176. (*Id.* at p. 2.) Stockton repeated the language in its October 11, 2007 letter that the City’s timing for use of water under Application 30531B would depend on “need brought about by a change in Place of Use or a change in our current supply availability” and stated that it planned to conclude CEQA work “probably between 2020 and 2025.”

(AHO-110, pp. 2-3; Stockton-11, pp. 2-3.) The City’s letter stated that the City’s forthcoming 2015 Urban Water Management Plan update would more clearly describe the development schedule for Application 30531B. (*Ibid.*)

On June 22, 2020, the Division requested an update regarding the specific actions the City had taken to pursue Application 30531B since 2013, including the status of the City’s preparation of a CEQA document for this application. (AHO-112; Stockton-12.) On August 25, 2020, Stockton replied that physical and regulatory restrictions limited the City’s ability to divert and use water under Permit 21176 and projected that demands for water would not exceed the amounts authorized for diversion and use under Permit 21176 until after 2040. (AHO-113, p. 3; Stockton-13, p. 3.) Therefore, the City projected it might need Application 30531B water<sup>9</sup> “sometime between 2055-2060” or between 2050-2055 if the City obtained amendments to the existing BiOp and ITP pumping restrictions. (*Ibid.*) Regarding the estimated schedule for the City to prepare the CEQA document for Application 30531B, the City stated:

Assuming that current [Endangered Species Act] pumping restrictions for Permit 21176 remain in place, and the City needs the water it has applied for under Application 30531B between 2055-2060, the City estimates that planning and CEQA efforts related to Application 30531B will start between 2040 and 2045.

(AHO-113; Stockton-13.)

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<sup>9</sup> We use “Application 30531B water” as shorthand for the water that would be available for diversion under a permit issued on Application 30531B.

## **2.7 Administrative Hearings Office Proceedings**

On February 17, 2021, Erik Ekdahl, Deputy Director of the State Water Board's Division of Water Rights, sent a memorandum to Eileen Sobeck, the State Water Board's Executive Director, proposing to transfer Application 30531B to the AHO for further proceedings. (2021-02-17 E. Ekdahl memorandum to E. Sobeck.) On February 26, 2021, Ms. Sobeck issued a memorandum assigning the application to the AHO. (2021-02-26 E. Sobeck memorandum to A. Lilly.) The AHO issued a Notice of Assignment in this proceeding on March 29, 2021.

The AHO hearing officer held a status conference on July 15, 2021. The notice for this status conference listed several questions for discussion, including whether the AHO should schedule a public hearing to consider whether the Water Board should cancel, reject, or deny Application 30531B. The City, San Luis & Delta-Mendota Water Authority, Contra Costa Water District, Westlands Water District, and DWR each filed a Notice of Intent to Appear (NOI) to participate in the status conference. The City submitted its status conference statement on June 22, 2021. In this statement, the City explained that it did not believe a hearing on the application was necessary but would like to have one "if the AHO is inclined to cancel Application 30531B," and then presented several arguments in favor of maintaining Application 30531B. (2021-06-22 City of Stockton Status Conference Statement.)

Stockton East Water District (Stockton East or SEWD), which had not filed an NOI, submitted its own status conference statement in response to the City's representations regarding continuation of SEWD's water supply contract with the City. (2021-07-06 Stockton East Water District Status

Conference Statement.) The City objected to Stockton East's participation in the status conference on the grounds that Stockton East had not filed an NOI. (2021-07-09 A. Ferguson e-mail to A. Lilly.) Westlands Water District and San Luis & Delta-Mendota Water Authority also submitted status conference statements. These statements stated that a public hearing was not required to cancel the City's pending application. During the status conference, the hearing officer accepted Stockton East's filing. (2021-08-16 Notice of Public Hearing and Pre-Hearing Conference - City of Stockton (A030531B), p. 5.)

### **2.7.1 Pre-Hearing Conference and Hearing**

On August 16, 2021, the AHO issued a Notice of Public Hearing and Pre-Hearing Conference. This notice summarized the outcome of the status conference and explained the hearing officer's decision to hold a hearing. The notice explained that the hearing would "provide a public process" in which the City and interested parties could participate and submit evidence and information on which the AHO could prepare a proposed order for the Board's consideration. The notice stated that the purpose of the hearing would be to receive evidence relevant to the following issues:

- 1) Should the Board cancel Application 30531B 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 30531B under Water Code section 1335?
- a. Has the Applicant failed to provide information requested by the Board?
  - 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 cancel or reject Application 30531B under California Code Regulations, title 23, section 683?
- a. Has the Applicant failed to provide supplemental information requested by the Board as required in or by the Subchapter known as Article 3, Chapter 2, Division 3, of Title 23 of the California Code of Regulations or Public Resources Code section 21000 et seq.?
  - b. Has the Applicant failed to provide this information within a reasonable time?
  - c. Has the Applicant failed to provide this information in a responsive manner?

- 4) Should the Board deny Application 30531B 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?
- 5) Should the Board establish a time schedule for the Applicant to submit information necessary for the Division to process Application 30531B?

The parties that previously submitted NOIs for the July status conference also submitted NOIs to participate in the hearing. (Stockton East did not file an NOI and did not participate in the hearing.) On September 24, 2021, the AHO hearing officer held a pre-hearing conference with the parties and later issued a Pre-Hearing Conference Order.

On November 9, 2021, the AHO held its hearing on this matter. The City, Contra Costa Water Agency, DWR, Restore the Delta, San Luis & Delta-Mendota Water Authority, and Westlands Water District made appearances. During the hearing, an attorney for the San Luis & Delta-Mendota Water Authority presented a policy statement and stated that the “AHO is certainly within its authority to cancel the City’s application and good public policy supports that it do so.” (2021-11-09 City of Stockton Hearing Recording,9:30-9:45.) Westlands Water District joined in this statement. A policy analyst from Restore the Delta presented a policy statement supporting the City’s application. No other party presented a policy statement, and the City was the only party that presented an opening



statement, called witnesses, or submitted a closing brief. No party cross-examined Stockton's witnesses, although the hearing officer and AHO staff asked questions.

On March 14, 2022, the AHO circulated a draft of its proposed order to the parties for their review and comments. San Luis & Delta-Mendota Water Authority and Westlands Water District filed joint comments by April 14, 2022. The City of Stockton also filed comments on the draft proposed order by the deadline. The AHO amended the draft proposed order and added Attachment A to address the parties' comments. (Attachment A is incorporated into this order by reference and is part of this order.) The AHO transmitted its proposed order to the Clerk of the Board on July 5, 2022.

### **3.0 FACTUAL BACKGROUND**

#### **3.1 Stockton's Estimated Water Needs and Current Conditions**

##### **3.1.1 Stockton's Service Area and Facilities**

Stockton has three water service areas: north (primarily residential uses), central (residential uses and the Diamond Walnut processing facility), and south (residential, industrial, and agricultural uses). (Stockton-19, p. 30 [p. 3-2]; Stockton-01, ¶ 21.) The City of Stockton Municipal Utilities Department (COSMUD) serves the north and south Stockton service areas, which have a total population of about 184,000, and provides water through a wheeling agreement to part of the central service area. Cal Water, an investor-owned utility, serves the remaining residential customers in central Stockton. (Stockton-01, ¶ 21; see also Stockton-19, p. 30 [p. 3-2].)

The San Joaquin River flows from the south along the southwestern edge of the City before the river turns west and terminates in Suisun Bay, which is part of the Sacramento-San Joaquin Delta. The City diverts and treats water from the Delta through the DWSP facilities. (Stockton-01, ¶ 16.) Dr. Mel Lytle, the director of the City’s Municipal Utilities Department, explained that the City began construction of the first half of the DWSP in 2009 and “sized the DWSP intake structure and raw water pipeline to accommodate water use greater than that authorized in Permit 21176.” (*Ibid.*) The City finished this construction in 2012. (Stockton-01, ¶ 15.) The intake and raw water pipeline can divert and convey up to 60 mgd. (*Ibid.*) An 80 mgd intake pump station diversion works (intake facility) houses four 250-horsepower pumps and fish screens. (AHO-98, p. 1; Stockton-14, p. 1; Hearing Recording, 34:28-45:10.) The intake facility has the capacity to pump at a rate of 124 cfs.<sup>10</sup>

The City conveys water from the intake facility approximately 13 miles east along Eight Mile Road to the City’s Drinking Water Treatment Plant (DWTP), which is located on 60 acres off Lower Sacramento Road. (Stockton-01, ¶ 16; see also attached Fig. 1.) The DWTP includes ozone pre-treatment, settling basins, membrane ultra-filtration processes, followed by chloramine disinfection and distribution. (Stockton-01, ¶ 16; Hearing Recording, 35:53-36:27.) The City conveys the treated water west to a treated-water line. (Stockton-01, ¶ 16.)

Dr. Lytle explained that there was a “purposeful intention to oversize the facility to allow for additional water for Part B [Application 30531B]” and that

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<sup>10</sup> This is calculated using the conversion for mgd to cfs, which is 1.547 cfs/mgd. 80 mgd X 1.547 cfs/mgd = 123.76 cfs.

the “treatment plant itself is designed to increase its treatment works as well.” (Hearing Recording, 36:50-37:26.) “There can be the addition of settling basins, additional membranes...the City spent an extra \$25 million on that portion alone to help prepare the City as Part B was granted going forward so we didn’t have to go back and expand the pumping station and put in a raw water line, we can do that on the fly.” (*Id.* at 37:26-38:17.)

After residents in the service area and outside the service area use water, the City collects the wastewater associated with such uses in its RWCF. (Stockton-19, p. 30 [p. 3-2].) The City discharges the wastewater treated there into the San Joaquin River at a point in the southern part of the City, approximately 8 miles upstream of the DWTP intake pumping station. (*Ibid.*; Fig. 1.) The RWCF has the capacity to treat up to 55 mgd and, as of 2020, treated 33 mgd of average dry weather flow. (Stockton-19, p. 30 [p. 3-2].) In 2020, the RWCF treated and discharged 26,111 af. (Stockton-19, p. 72, tbl. 6-8 [p. 6-16].)

### **3.2 Current City Water Supplies and Demands**

The City’s existing water supplies include:

- 1) Surface water from the San Joaquin River diverted at the DWSP intake facility pursuant to Permit 21176 (Stockton-02, ¶ 8 [citing Stockton-07]);
- 2) Treated surface water from SEWD, conveyed from the New Melones Reservoir (Stanislaus River) and New Hogan Reservoir (Calaveras River) pursuant to a 1987 agreement (Stockton-02, ¶ 8 [citing Stockton-23]);

- 3) Surface water from the Mokelumne River, diverted and conveyed by Woodbridge Irrigation District (WID) pursuant to a 2008 agreement, which the City treats at the DWTP (Stockton-02, ¶ 8 [citing Stockton-22]; Stockton-19, p. 6-11); and
- 4) Groundwater the City pumps from City-owned and operated wells in north and south Stockton from the underlying Eastern San Joaquin Subbasin (Stockton-02, ¶ 8.)

For the first source of water, the City's 2020 Urban Water Management Plan (UWMP) explains that diversions at the City's intake facility are subject to pumping restrictions under the BiOp and ITP. (Stockton-19, p. 35 [3-7].) When the restrictions are in place, the City supplements with water from WID. (*Ibid.*) Dr. Lytle explained that the City is considering whether to re-analyze the Permit 21176 conditions to determine if the impacts to the fish population near the pump station are "truly evident", but Stockton has not "taken a step to do that" because of the pending request for extension of time (discussed in section 2.4.) (Hearing Recording, 1:08:54-1:11:33.) In 2020, the City diverted 9,970 af under Permit 21176. (Stockton-19, p. 68 [p. 6-12].)

The City purchases water from the second and third sources listed above. Stockton's 1987 agreement (Second Amended Contract) with SEWD expires on April 1, 2035. (Stockton-23, p. 14.) The City understands that this contract provides for extensions of the contract term and continued service upon existing terms if Stockton and SEWD do not agree to a renewal. (Stockton-02, ¶ 9.) The City has completed planning and design of, and "has begun implementing," the North Stockton Pipeline Hypochlorite

Facility Project. (Stockton-19, p. 79 [p. 6-23].) This would convey SEWD water supply to north Stockton, where the water would be combined with the water supply from the DWTP. (*Ibid.*)

Consultant Robert Granberg, who was formerly the assistant director of COSMUD, explained in his written testimony that Stockton must consider “contingency plans for the loss of SEWD water in 2035” as the City’s position is that “SEWD assumes that as of 2035 it will not deliver water to the City under the Second Amended Contract.” (Stockton-02, ¶ 9.) This view is based solely on Stockton’s review of SEWD’s 2020 Urban Water Management Plan. (Hearing Recording, 1:36:44-1:137:24.) In a note accompanying tables showing future water supply and demand, the SEWD plan’s authors state that “the District’s contract with the Urban Water Suppliers ends in 2035. Hence, no sales to the Urban Contractors are shown from 2035 to 2045.” (Stockton-24, p. 24 [p. 5-3].)

In 2020, the City purchased 6,939 af of treated surface water from SEWD under the Second Amended Contract. (Stockton-19, p. 61, tbl. 6-1 [p. 6-5].) This was about 20 percent of the COSMUD total supply. (*Id.* at p. 60 [p. 6-4].) The City projects that it will need to purchase 24,300 af from SEWD in 2025 and 2030. (*Id.* at p. 61, tbl. 6-2 [p. 6-5]; see also Stockton-02, ¶14, tbl. 1.)

The City purchases water from WID to augment the City’s water supply to the DWTP when diversions from the San Joaquin River water are not available due to environmental restrictions. (Stockton-19, p. 6-4.) The 2008 contract with WID includes an option to purchase an additional 6,500 af/yr when the City annexes additional lands and the lands start

being used for purposes besides agriculture. (Stockton-02, ¶ 11.) Mr. Granberg testified that the reliability of the additional 6,500 af/yr is “uncertain” and that the terms for renewal of this contract in 2048 may be “unworkable.” (*Ibid.*) In 2020, the City purchased 8,657 af from WID under the 2008 contract. (Stockton-19, p. 61, tbl. 6-1 [p. 6-5].)

Finally, the City pumps groundwater through City-owned and operated wells in north and south Stockton from the underlying Eastern San Joaquin Subbasin. (Stockton-19, p. 57 [p. 6-1].) The City uses these groundwater wells “conjunctively to meet peak summer demands or during dry years when available surface water supplies may be limited.” (Stockton-19, p. 61 [p. 6-5].) The 2020 UWMP states that Stockton has determined that the sustainable groundwater yield is 0.75 af/yr/ac. (Stockton-19, p. 63 [p. 6-8].) In 2020, COSMUD pumped 8,662 af from the groundwater basin, which was about 25 percent of the City’s total water supply. (*Ibid.*)

In 2020 COSMUD’s total demand for non-potable and potable water was 34,404 af. (Stockton-19, p. 25 [p. 4-3].)

### **3.3 Current Groundwater Conditions**

DWR has identified the Eastern San Joaquin Subbasin as a basin in a state of critical overdraft. (Stockton-19, p. 62 [p. 6-6].) Groundwater levels in some portions of the Subbasin have been declining for many years, while groundwater levels in other areas of the Subbasin have remained stable or increased in recent years. (Stockton-17, pp. 149-150 [pp. 2-61–2-62].) The City has partnered with 15 other groundwater users through the Eastern San Joaquin Groundwater Authority to manage the groundwater basin. (Stockton-19, p. 62 [p. 6-6].) In November 2019, GWA completed

its groundwater sustainability plan (GSP) to achieve groundwater sustainability in the Subbasin by 2040. (*Id.* at p. 62 [p. 6-6]; Stockton-17.)

The GSP describes three levels of projects at various stages of development. (Stockton-17, pp. 300-305 [pp.6-2 – 6-7].) Project 20, “Mobilizing Recharge Opportunities,” is a “longer-term/conceptual project” in the “early conceptual planning phase” for which “[t]he initiation and completion dates ... are undetermined” and “identification of a water source will occur as [the] project develops.” (Stockton-17, pp. 300 [p. 6-2], 304 [p. 6-6].) Dr. Lytle stated that Project 20 would “benefit from additional surface water supplies,” which includes Application 30531B water. (Stockton-01, ¶¶ 19-20; see also Hearing Recording, 1:22:10-1:23:31.)

The City has asserted that Application 30531B water could help with both groundwater recharge plans and demand management plans for two reasons. (Stockton Closing Br., pp. 4-5.) First, Dr. Lytle explained that when demand is low in the winter, the City could divert water under Permit 21176 and Application 30531B to recharge basins for subsequent use in north Stockton. (Hearing Recording, 1:12:52-1:15:29.) The City is preparing to “complete hydrogeology [of a potential recharge site] so that we can investigate the capability of the site as far as a recharge basin.” (*Id.* at 1:15:29-1:15:50.) Second, Dr. Lytle explained that the City’s 2020 UWMP sets a maximum groundwater production target of 0.6 af/yr/acre, equivalent to a groundwater yield of 23,100 af/yr, to maintain sustainable groundwater conditions. (Stockton-01, ¶ 22 [citing Stockton-19, p. 63 [p. 6-7].) Dr. Lytle stated that given water supply uncertainties, “additional surface water supplies may be needed to meet the City’s groundwater production target of 0.6/af/ac/year.” (*Ibid.*)

### **3.4 Projected Supplies and Projected Demand**

Stockton's witnesses explained the City's projected water supply is subject to: (a) uncertainties about water suppliers renewing contracts in 2035 and 2048; and (b) potential voluntary reductions in groundwater pumping to either 10 percent of demand (0.1 af/ac/yr) or to pumping at the groundwater production target identified in the 2020 UWMP (0.6 af/ac/yr). (Stockton-02, ¶ 14; see also Stockton-01, ¶ 22.) Mr. Granberg explained that assumptions about the City's projected water supplies and the need for Application 30531B water are based on a "worst case scenario," if negotiations fail or SEWD or WID reduces the amount of water it supplies to the City. (Hearing Recording, 1:36:39-1:37:03.)

Under either scenario for use of Application 30531B water, the City first would divert and use "additional water," which would not be diverted under Water Code section 1485 because of limitations in the amounts of the City's treated wastewater discharges, and then, between 2065 and 2070, when the City's treated wastewater discharges had increased, the City would "begin taking a portion of its Section 1485 supply" under a permit to be issued on Application 30531B. (Stockton-02, ¶ 14, tbl. 1, n.1.) Under a third scenario, the City would need additional surface water, to be diverted and used under a permit to be issued on Application 30531B, in 2055 or 2060, or between 2050 and 2055 if the City obtains amendments to the BiOp and ITP. (Stockton-13, p. 3.)

To estimate the City's projected water demands, the City used the 2020 UWMP projections through 2045 and then projected an increase of 1.44% per year at an average per capita use of 0.16 af/yr. (Stockton-02, ¶ 14,



tbl. 1, n.3.) The City projected that demand in 2035 would be 43,161 af/yr and demand in 2050 would be 52,786 af/yr.

Based on these assumptions, the City projects it might need additional surface water supplies of 845 af in 2035 to meet its estimated demand of 43,161 af/yr. (Stockton-02, ¶ 14, tbl. 1 [43,161 (projected demand)-25,000 (Permit 21176)-13,000 (WID)-4,316 (groundwater) = 845 af/yr].) This projection assumes the City no longer will have a contract with SEWD and that the City will voluntarily reduce groundwater pumping to 0.1 af/ac/yr.

Alternatively, the City projects it might need additional surface water supplies of 2,240 af in 2050 to meet its estimated demand of 52,786 af/yr, if it no longer has a contract with SEWD or with WID and it limits groundwater pumping to 0.6 af/ac/yr. (Stockton-02, ¶ 14, tbl. 1 [52,786 (projected demand)-27,446<sup>11</sup> (Permit 21176)-23,100 (groundwater) = 2,240 af/yr].)

The 2020 UWMP contains different estimates of Stockton's projected supplies. This analysis projects "reasonably available volume" to meet the City's demands through 2045 without considering Application 30531B water. Under this analysis, the City would have total water supplies that would exceed total projected demands through 2045:

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<sup>11</sup> The City explained in its comments on the draft proposed order that in 2050, population projection and per capita water use would require a demand of 78,913 af/yr, so the City would divert 27,446 af/yr under Permit 21176. (2022-04-14 City of Stockton Comments on Draft AHO Order [Stockton's Comments], p. 6.)

| <b>Water Supply</b>  | <b>2025</b> | <b>2030</b> | <b>2035</b> | <b>2040</b> | <b>2045</b> |
|--|-------------|-------------|-------------|-------------|-------------|
| SEWD purchased or imported water                             | 24,300      | 24,300      | 24,300      | 24,300      | 24,300      |
| WID purchased or imported water                              | 6,500       | 13,000      | 13,000      | 13,000      | 13,000      |
| [Permit 21176] surface water (under Water Code section 1485) | 23,400      | 24,800      | 25,000      | 25,000      | 25,000      |
| Groundwater  | 23,100      | 23,100      | 23,100      | 23,100      | 23,100      |
|  |             |             |             |             |             |
| <b>Total Supplies</b>  | 77,300      | 85,200      | 85,400      | 85,400      | 85,400      |
| Project Demands  | 34,789      | 37,878      | 43,161      | 48,444      | 49,144      |
| <b>Estimated Excess Supplies</b>                             | 42,511      | 47,322      | 42,239      | 36,956      | 36,256      |

(Stockton-19, p. 81 [p. 6-25], tbl. 6-14; Stockton-02, ¶ 14, tbl. 1 [data for Project Demand row].)

The table in the 2020 UWMP has two footnotes, which indicate that: (a) the estimate of the amount of water that the City would receive from SEWD is based on the terms in the 1987 contract, whereby contractors are entitled to continued service and to extend or renew the terms of the contract and (b) that “[b]ecause of uncertainty of the impacts of the Bay-Delta Water Quality Control Plan Amendment, projected SEWD supplies are assumed to remain at the current reasonably available volume.” (*Ibid.*)

## 4.0 DISCUSSION

### 4.1 Should the Board Deny Application 30531B under California Code of Regulations, Title 23, Section 840?

As discussed in sections 2.5 and 2.6 of this order, beginning in 2007, the Division requested from the City evidence of the City's diligence in pursuing Application 30531B. Although Stockton's earlier position was that it would not need Application 30531B water until 2055, the City now has stated it could use Application 30531B water in 2035 or 2050. However, the City has not offered sufficient evidence to show the City will initiate construction of the works required to divert and use that water within a reasonable time under any of the City's scenarios for using Application 30531B water. Further, it appears that the City will not be able to proceed within a reasonable time due to lack of a feasible plan.

The City's projections for when it would begin to divert and use Application 30531B water include: (a) 2035, if certain "worst case scenario" conditions are met (Hearing Recording, 1:36:39-1:37:03); (b) 2050, if groundwater pumping is not restricted to 10 percent of the City's overall demand (Stockton-02, ¶ 14); and (c) 2055, if modifications to the BiOp and ITP allow increased pumping.<sup>12</sup> (Stockton-13, p. 3.) The City's equivocal

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<sup>12</sup> In its comments, Stockton stated that modifications to the ESA would allow Stockton to use more Permit 21176 water and "exceed the 33,600 af/yr limit in Permit 21176 sooner than under current restrictions." (Stockton's Comments, p. 6, citing Stockton-13, p. 4 [Table 1], comparing columns entitled "Available P21176 Diversions w/ESA" and "Available Diversions w/ESA mods".) Table 1 lists 29,681 af available under Permit 21176 diversions with Endangered Species Act (ESA) restrictions and 31,924 af available under Permit 21176 with ESA modifications, neither of which matches the 27,446 af provided in Stockton-02, ¶ 14. We assume the differences in these figures reflect updated projections from August 2020 (Stockton-13) to October 2022 (Stockton-02).

responses about timelines for use of Application 30531B water, and the City's silence about schedules for related construction and plans, reflect a lack of diligence in pursuing Application 30531B. We conclude that the City's pending Application 30531B is the type of "reservation of water for a development at an indefinite and uncertain time in the future" that the State Water Board has historically prohibited. (See Decision 893 (1958), p. 54.)

Since 1869, the importance for potential water users to proceed with diligence when attempting to perfect 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 to prevent others from diligently pursuing their own plans to use the water. (Order WR 84-04, p. 3.)<sup>13</sup>

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<sup>13</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.

California law requires potential water-right appropriators to act with diligence even before obtaining a permit to appropriate water. By filing an application for a water-right permit, the applicant secures a priority date, essentially reserving a place in line for future water use. (See Wat. Code, § 1450.) To maintain that priority date, 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 (1958), 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 (1968), 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 (1958), 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 (1958), p. 54; see also Decision 907 (1958), p. 7.] “[A]n

attempt to reserve water for future use where there is no intent to proceed promptly cannot be countenanced.” (Decision 893 (1958), p. 57.)

California Code of Regulations, title 23, section 840, applies the principle of diligence to water-right applications 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.

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>14</sup>

During the hearing, Stockton’s witnesses testified about possible scenarios for when the City might start using Application 30531B water. This testimony makes it clear that Stockton does not intend to initiate construction of the works required to use the water sought under Application 30531B within a reasonable time, that Stockton does not intend to prosecute construction and use of the water, and that Stockton cannot proceed within a reasonable time due to a lack of feasible plan.

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<sup>14</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.”

#### **4.1.1 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 for a water-right permit must demonstrate the ability to “proceed promptly and diligently to perfect the appropriations proposed in its [application].” (Decision 896 (1958), 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 (1962), p. 6; see also Decision 884 (1958), 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 start as is reasonably possible, without distraction by other business, including other water projects.” (Decision 1083 (1962), p. 6.) “If he is not ready to assume such responsibility, his application is premature and must be denied.” (*Ibid.*; see also Decision 1159 (1963), 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 (1958), p. 71.) Absent such a showing, the Board will deny the application.

In Decision 884, the Water Board denied without prejudice part of Application 12092 and all of Application 15145 by United Water Conservation District for permits to appropriate water from the Santa Clara River, Piru Creek, and Sespe Creek in Ventura County. (Decision 884 (1958), pp. 3, 6, 85 & 95.)<sup>15</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 file new applications when “ready and able to proceed 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 Placer County Water Agency’s five applications for permits to divert and store water from the Middle Fork American River and other sources. The applications sought permits to

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<sup>15</sup> The Water Board issued an “Order Rescinding Portions of Decision D 884” (Order) 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, which set aside parts of this Decision related to priority, approval of some applications, and issuance of permits. This Board Order did not affect the parts of Decision 884 regarding denial of applications that are discussed here.



appropriate water for the third phase (Unit C) of a series of projects that would be completed in phases or “units.” (Decision 1083 (1962), p. 3.) Units A and B were 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 adopted 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 of these applications on the grounds that, among other factors, the applicants were not able to proceed with construction work within a reasonable time. (Decision 893 (1958), 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 two proposed reservoirs described in its applications but intended to wait until a state or federal agency constructed them. (*Id.* at pp. 56-57.) The record contained

“no indication” as to when construction of either reservoir 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.)

#### **4.1.2 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?**

Besides demonstrating an intent and ability to complete the construction of necessary works within a reasonable time, an applicant for a water-right permit also must demonstrate that the applicant has a feasible plan and the necessary resources to perfect the proposed appropriation. (See e.g., Decision 1159 (1963), pp. 20 & 22 [granting application of 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 had 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 water-right 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 due to the lack of any specific plan to proceed with the project. (Decision 984 (1960), 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 cost 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<sup>16</sup> a water district’s application for a permit 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

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<sup>16</sup> The Board used the word “cancel” to describe the action it took on the application, even though a lack of due diligence, at least under section 840, requires denying an application.

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, as a result, the Board canceled the application.

#### **4.1.3 Stockton’s Lack of Diligence**

During the hearing, Stockton offered two alternative potential dates for when it may start diverting and using Application 30531B water without any commitment to construction schedules or construction plans to support either date. This indicates to us that, currently, Stockton does not have any specific plan to diligently pursue this application. (Stockton-02, ¶ 14, tbl. 1; Stockton’s Closing Br., pp. 6-7.)<sup>17</sup>

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<sup>17</sup> From August 2020 through June 2021, Stockton told the Division that the City might need water it has applied for under Application 30531B in 2055 or 2060 if the current BiOp and ITP pumping restrictions for Permit 21176 remain in place *and* the City needs this additional water. (Stockton-13; 2021-06-22 City of Stockton Status Conference Statement, p. 2 [*Italics added*].) We focus here on the two scenarios Stockton offered

The Division's notice of Application 30531B lists two sources of water, Stockton's own wastewater discharged under Water Code section 1485 and San Joaquin River water, which Stockton would divert under a claim of priority over the rights of the State Water Project and Central Valley Project pursuant to Water Code section 11460. (Stockton-02, ¶ 14, tbl. 1, n.1; Hearing Recording, 23:34-25:30.) However, as shown in the following two sections, Stockton did not offer evidence during the hearing of *what facilities* need to be constructed to use either source of Application 30531B water or *when* Stockton would initiate construction of such facilities. Dr. Lytle explained during the hearing that, because of previous construction efforts, the "project itself is ready to go as demand increases." (Hearing Recording, 38:38-38:49.) More specifically, Dr. Lytle explained that additional construction would be needed at the DWTP, and "at full buildout," the plant would require "new tooling" at the actual intake station, an additional raw water line and expansion of treatment works, which would be done over many years. (Hearing Recording, 38:50-39:17.) Mr. Granberg explained that in 2070, additional treatment and pumping capacity would be needed. (Hearing Recording, 56:36-57:30.) But beyond these general statements, Stockton has not offered specific evidence of its plans.

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during the hearing, although Stockton's earlier position is equally untenable. It is possible that Stockton would not need Application 30531B water until after 2055 or 2060. This is because the City is considering attempting to remove the current BiOp and ITP pumping restrictions (to enable more pumping under Permit 21176). Stockton has offered no evidence of construction plans for Application 30531B water use in 2055, except that "planning" and CEQA efforts could start between 2040 and 2045. (*Ibid.*)

#### **4.1.4 Lack of Construction Schedule and Feasible Plan to Put Application 30531B Water to Use in 2035**

Mr. Granberg stated that Stockton might need Application 30531B water in 2035 if: (a) the Second Amended Contract with SEWD expires and the parties cannot negotiate renewal terms, despite the right of renewal and the maintenance of service provisions in the agreement, or if SEWD's supplies become uncertain, and (b) Stockton restricts groundwater pumping to a total amount substantially below the sustainable yield, either voluntarily or if the Eastern San Joaquin Groundwater Authority implements demand management measures. (Stockton-02, ¶¶ 9-10, 14.)

Mr. Granberg explained that the City expects SEWD to be a source for urban water in the future, that Stockton is a "willing party", and that Stockton contemplates a continuation of the Second Amended Contract with service under the agreement continuing during renewal negotiations. (Hearing Recording, 1:32:04-1:37:03.) Nonetheless, he is concerned about a "worst case scenario." (*Ibid.*) However, if Stockton were concerned about this "worst case scenario," then it would have developed a schedule for construction of the facilities that will be necessary to divert and use Application 30531B water. It has not done this. Moreover, Stockton's concern about continuity of SEWD's supply is contrary to evidence that Stockton is in the process of constructing the North Stockton Pipeline Hypochlorite Facility Project, which would "allow SEWD water to be conveyed to the North Stockton system.". (Stockton-19, p. p. 79 [p. 6-23].)

Further, the City argued in its closing brief that the City's projections for water use in 2035 or 2050 do not reflect "the estimated 5,100 af/yr in potential demand for groundwater recharge." (Closing Br., p. 9.) However,

Stockton cited to its petition for extension of time on Permit 21176 as support for this argument and offered no evidence of specific plans for how Application 30531B surface water would help meet this demand for groundwater recharge. Also, Application 30531B does not contain any provisions for groundwater storage. (Stockton-04, p. 1.) Instead, the City only cites to GSP Project 20, a “theoretical” project, and Dr. Lytle explained that the development of groundwater storage is part of a second phase of the DWSP as described in the 2005 DPEIR that the City will “at some time execute.” (Hearing Recording, 1:13:17-1:13:43.) The City has not indicated what facilities would need to be constructed for groundwater recharge or when the facilities would need to be constructed.

While Stockton argues its water supplies suffer from uncertainties, Stockton also has not acknowledged the provisions in the 2020 UWMP indicating that the City will have adequate water supplies through at least 2045. (See section 3.2.) Stockton argues it *could* divert up to 845 af/yr<sup>18</sup> in 2035 under a permit issued on Application 30531B. However, the circumstances do not show that the City would *need* to or that the City *intends* to do this. Even if the City’s diversions under Permit 21176 were limited to 25,000 af/yr and Stockton does not extend its agreement with SEWD, the City still would have the capacity to pump up to 23,100 af/yr of groundwater, which would be enough to meet the City’s projected demand until 2050. This pumping amount would be within the sustainable groundwater yield target in the GSP. (Stockton-19, p. 63 [p. 6-7].)

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<sup>18</sup> This is calculated based on 43,161 af/yr (projected demand) – 25,000 af/yr (Permit 21176) – 13,000 af/yr (WID) – 4,316 af/yr (groundwater pumping at 10 percent of demand) = 845 af/yr.

Also, the City's projection that it will need Application 30531B water in 2035 relies on the assumption that diversions under Permit 21176 will be limited to 25,000 af/yr. (Stockton-02, ¶ 14, tbl. 1.) Permit 21176 authorizes diversions up to 33,600 af/yr, although the City stated that it is unable to divert the full amount because of BiOp and ITP pumping restrictions at its intake facility. Potential diversions under a permit issued for Application 30531B would use the same intake facility as those diversions under Permit 21176, and the City does not explain how an additional permit would allow the City to pump more water at the same facility (which would be subject to the same BiOp and ITP pumping restrictions).

#### **4.1.4.1 Lack of Construction Schedule and Feasible Plan to Put Application 30531B Water to Use in 2050**

Stockton asserts that it might need Application 30531B water in 2050 if its contract with WID is not renewed, despite the City's right to renew this contract, and if the City limits its groundwater pumping to 0.6 af/ac/yr (which would produce 23,100 af/yr). (Stockton-02, ¶¶ 9-10, 14.) Stockton's asserted concern about its ability to renew its contract with WID is inconsistent with Stockton's plan to double its water supply from WID starting in 2030. Moreover, if Stockton successfully removes or reduces the BiOp and ITP pumping restrictions, which it is attempting to do, Stockton's maximum authorized diversion under Permit 21176 (33,600 af/yr) combined with its groundwater supply (23,100 af/yr) would be 56,700 af/yr, which would be enough to meet the City's estimated demand of 56,697 af/yr in 2055 without any Application 30531B water. (Stockton-02, ¶ 14, tbl. 1.) As with its earlier scenario for Application 30531B water use in



2035, Stockton has not offered any construction timeline or a feasible plan to construct the works necessary to use Application 30531B water in 2050.

When applicants have offered similarly vague information about construction, or have not offered any information, the Water Board has canceled applications and invited applicants to file new applications when they are ready to proceed without delays. Here, as in Decision 884, Stockton has offered a “highly speculative plan” to use Application 30531B water, based only on estimated future demands without any construction schedule. (See Decision 884 (1958), pp. 72-73.) Stockton is “not prepared to undertake construction of the works” in the application. (See Decision 1083 (1962), p. 7.) Finally, Stockton has offered no “definite evidence” for a construction date under any of its potential water-use scenarios, and certainly no date for construction within 10 years or less. (Decision 1159 (1963), p. 30.)

#### **4.1.4.2 Stockton’s Arguments About Past Construction Projects and a Feasible Plan to Use Water Are Unavailing**

Stockton offers two arguments related to construction of the facilities that would be necessary to divert Application 30531B water and apply it to beneficial use. First, Stockton argues that its ability to construct the DWSP, which it completed in 2012, shows it will diligently prosecute future construction projects. (Closing Br., p. 3.) However, evidence of past construction does not satisfy the legal standard here. Section 840 requires the applicant to show, prospectively, that it is “ready, willing, and able” to begin construction “within a reasonable time after receiving a permit.” (Decision 1083 (1962), p. 6.) Dr. Lytle also stated during the hearing that

this project is “ready to go.” (Hearing Recording, 38:38-38:49.) But it is difficult to believe no construction would be needed to use Application 30531B water in 2035 or 2050.

Second, Stockton argues that given the lower anticipated demand for Application 30531B water (compared to the amount identified in Application 30531), it would like the Board to maintain the application but limit the maximum authorized annual diversion under Application 30531B to 33,600 af/yr. (Stockton-02, ¶¶ 20-21.) This way, the City could “divert up to 60 mgd when water becomes available pursuant to any permit issued on Application 30531B, thereby ensuring that the City can maximize use of its existing 60 mgd raw and finished water pipeline capacities” and will thus avoid being left with a “stranded asset.” (Closing Br., p. 10 [citing Stockton-02, ¶¶22-23].) However, Stockton may address these concerns by filing a new water-right application. Stockton may do so when it is ready to provide a construction schedule and CEQA documentation, and to start diverting and beneficially using the water.

Stockton also argues it has a feasible plan for use of Application 30531B water based on its 2005 CEQA document and its plans for groundwater recharge. (Stockton Closing Br., p. 4.) Neither of these arguments is persuasive. As discussed in section 2.3 of this order, Stockton’s 2005 DPEIR contains only a program-level analysis for diversion and use of Application 30531B water. (See also Stockton-16, p. 74 [p. 1-3]; Closing Br., p. 4.) The lack of a project-level analysis of the environmental impacts of diversions and use of Application 30531B water is the same problem the Division asked Stockton about beginning in 2007. (Stockton-07.) Stockton has not made any efforts to work on the new CEQA document since 2009.

(Hearing Recording, 1:19:31-1:20:26.) Stockton therefore cannot rely on the 2005 DPEIR as evidence of a feasible plan for construction projects under Stockton’s proposed scenarios for potential use of Application 30531B water.

Regarding Stockton’s plans to store Application 30531B water, Stockton argues that “[c]onsistent with Project 20” in the GSP, the City is “actively planning” a groundwater project that “could use as much as 5,100 af/yr” (Stockton Closing Br., p. 4) and cites to the City’s petition for extension of time for Permit 21176 for information about this recharge project. (See also Hearing Recording, 1:22:06-1:23:43.) However, Stockton has offered no plan or timeline for how Application 30531B water would be used for recharge in 2035 or 2050.

In conclusion, Stockton has offered testimony and evidence that, assuming existing water suppliers stop providing water and the City chooses to reduce its groundwater pumping, Stockton might need some amount of Application 30531B water starting sometime between 13 and 33 years from now. Stockton has not presented adequate evidence of actual start dates for construction of necessary infrastructure or submitted the feasible plans that are required to maintain Application 30531B. Accordingly, we deny Application 30531B, pursuant to section 840.

#### **4.2 Should the Board Cancel Application 30531B under Water Code Section 1276?**

As discussed in sections 2.5 and 2.6 of this order, the Division requested additional information from Stockton related to Application 30531B in 2007, 2008, 2013, and 2020. It appears that Stockton did not respond to the

request in 2008 and either deferred a response or offered only a vague timeline for completion of the necessary CEQA work for this application in other responses. Stockton still has not provided the Board a “schedule for completion of the project-level [CEQA] document for Application 30531B,” which would include a schedule for “preparation of all biological resource studies, preparation of the Draft Project Environmental Impact Report (EIR), [and] responses to comments and certification of the Final EIR,” even though the Division first requested that information in September 2007. (Stockton-08.)

Water Code sections 1275 and 1276 authorize the Board to request additional information after the applicant has filed an application for a permit to appropriate water and to cancel an application if the applicant fails to provide the requested 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 (CEQA). (*Ibid.*)

The Board must provide a reasonable period for the applicant to submit this additional information (*ibid.*), but if the applicant fails to submit the requested 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.)

The State Water Board has canceled water-right applications pursuant to Water Code section 1276 when the applicant failed to respond to the Division’s requests for additional information within a reasonable time.

In Order WR 2000-04, the Board denied a petition for reconsideration after the Division canceled a water-right application because the applicant failed to respond to the protests to the application or to submit a detailed workplan to complete required actions directed by the Division. The applicant filed two applications to appropriate water on September 25, 1997. The Division issued a public notice of the applications and set a deadline for the applicant to respond to the protests that the Division received. The applicant requested an extension until October 31, 1998 to respond to the protests, and the Division granted this request. By letter dated April 12, 1999, the Division directed the applicant to submit a workplan by October 1, 1999, to complete actions the letter stated would be necessary for the Board to act on the applications. These actions included completion of a water availability analysis and documentation of the applicant’s attempts to resolve the protests. The applicant requested an extension of time to submit the workplan, and the Division denied that request. On February 29, 2000, the Division canceled the applications in accordance with Water Code section 1276 because the applicant had failed to submit the information the Division had requested. In Order WR 2000-04, the Board denied the applicant’s petition for reconsideration. The Board found that the applicant failed to explain why it could not have complied with the October 31, 1998 deadline to respond to

the protests or the October 1, 1999 deadline to submit a workplan and had not provided sufficient assurance that it would diligently complete the actions identified in the Division's April 12, 1999 letter.

Although not precedential and therefore not binding on our decision on the County's Application 29657, the following orders are examples of Executive Directors' past reliance on section 1276 to deny petitions for reconsideration of Division decisions canceling water-right applications.<sup>19</sup>

In Order WR 2006-0019-EXEC, the Executive Director denied a petition for reconsideration after canceling a water-right application because the applicant failed to respond to inquiries by the Division about whether it 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 July 23, 2003 Division letter or a November 5, 2003 Division phone message. (Order WR 2006-0019-EXEC, p. 4.) The Division had informed the applicant in its July 23, 2003 letter that it would cancel the application under Water Code section 1276 if the applicant did not respond by September 23, 2003. (*Ibid.*) On July 14, 2006, the Division canceled the application pursuant to section 1276. (*Ibid.*)

In Order WR 2007-0004-EXEC, the Executive Director denied a petition for reconsideration after the Division canceled a water-right application

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<sup>19</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 a public meeting, the orders may not be expressly relied on as precedent. (Gov. Code, § 11425.60, subd. (a).)

because the applicants failed to submit a water availability analysis and a memorandum of understanding for the preparation of required CEQA documents. The Division initially requested the information by letter on September 13, 2002. (Order WR 2007-0004-EXEC, p. 2.) On March 4, 2003, the Division directed the applicants to submit the information by April 3, 2003 and stated that the Division would cancel the application if the applicants did not submit this information by this deadline. In a May 31, 2006 letter, the Division requested evidence of the applicant's diligence by the end of June. (*Id.* at p. 3.) In August 2006, the Division canceled the application after the applicants' agent requested cancelation. The applicants later claimed that the agent submitted the request in error. (*Ibid.*) In Order WR 2007-0004-EXEC, the Executive Director upheld the cancelation of the application pursuant to Water Code section 1276, regardless of whether the applicants intended to cancel it, because the applicants had failed to submit the information the Division requested by the applicable deadlines.

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 engineer drawings of the dam proposed in the application. The Division requested this information from the applicant by letters in 2002, 2003, and 2007. (Order WR 2009-0029-EXEC, pp. 3-4.) After receiving no responses, the Division canceled the application in 2008 pursuant to Water Code section 1276. (*Id.* at p. 4.)

#### **4.2.1 Stockton Has Failed to Provide Supplemental CEQA Information**

When the City requested bifurcation of Application 30531, it confirmed that for Application 30531B, “[s]ubsequent phases will require additional CEQA compliance by the City as Lead Agency before a permit can be issued by the SWRCB.” (AHO-72; Stockton-05.) Dr. Lytle explained during the AHO hearing that the City had submitted plans to the Division as the plans were known at the time, as well as “anticipated schedules.” (Hearing Recording, 22:17-22:33.) But, since the Division’s initial request for supplemental CEQA documentation related to Application 30531B in September 2007, the City has: (a) deferred a substantive response to a date 10 years later (2007); (b) failed to answer at all (2008); (c) suggested CEQA work would conclude in 7 to 12 years and referred the Division to the UWMP that would be prepared two years later (2013); and (d) stated that CEQA work might begin 20 years in the future (2020). (Sections 2.5–2.6.)

Now, nearly 15 years after the Division first requested a schedule for completion of the project-level CEQA document for Application 30531B and listed the specific studies and events the schedule should include, Stockton still has not provided a timeline for CEQA compliance. Stockton now states it might start using Application 30531B water in 2035 or 2050 but has provided no date to either begin or complete any environmental document required by CEQA under either scenario. Notwithstanding Stockton’s promises to provide the Division with substantive responses in the future, the Board still does not have adequate information about a schedule for the City’s CEQA compliance that is necessary for the Board to act on



Application 30531B. Accordingly, we cancel Application 30531B pursuant to Water Code section 1276.

## **5.0 CONCLUSION**

For the reasons stated in this order, we deny Application 30531B without prejudice pursuant to California Code of Regulations, title 23, section 840 because we conclude that Stockton does not intend to initiate the construction necessary for diversions and use of Application 30531B water within a reasonable time, or to diligently prosecute such construction or such use of water, and because Stockton does not have a feasible plan for development or construction of the project. We cancel Application 30531B without prejudice pursuant to Water Code section 1276 because Stockton did not provide the information the Division requested that was necessary to support the City's application.

Our denial and cancelation of Application 30531B does not prevent Stockton from filing a new application for a permit to appropriate water. Stockton may do this when Stockton has a feasible plan for development or construction of the project and is ready and able to proceed with construction of works and beneficial use of the water it seeks to appropriate.

We are aware that unanticipated declines in Stockton's economy after the bifurcation of Application 30531 and issuance of Permit 21176, likely affected the City's ability and need to diligently pursue Application 30531B. The subprime mortgage crisis from 2007 to 2009 significantly slowed population growth and corresponding projections for water demands within the Stockton's municipal utility district service area. (AHO-98, p. 22.) The

drought and related state-mandated conservation measures from 2013 through 2015 further reduced demands for water within the district service area. (Id., at pp. 5 & 21.) As a result of these reductions, total water demand within the district service area in 2020 remained less than water demand within the district in 2005, with associated declines in district revenues. (Stockton-19, pp. 44-45; AHO-98, p. 21.) We also recognize that the City of Stockton consists almost entirely of disadvantaged and severely disadvantaged communities in which the median household income is less than 60 to 80 percent of the statewide annual median household income. (Stockton-17, p. 46.)

The State Water Board is committed to the human right to water as a core value, and it is a priority of this Board to assist communities like the City of Stockton to obtain water supplies necessary to meet the needs of its citizens. The information presented by Stockton in this proceeding leads us to conclude, however, that Stockton does not have a current need or immediate plan to develop the water supplies that it seeks to appropriate. It is our intent that Board staff will continue to be available to assist Stockton, if needed and as appropriate, in furtherance of a new application for a permit to appropriate water when Stockton reasonably anticipates a demand for the water and is ready and willing to pursue an application. But absent a demonstrated demand for the water sought, diligent pursuit of the necessary planning and other actions necessary to complete the appropriation, and an immediate intent to put the water to beneficial use, California law requires that we deny Stockton's application.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Board denies Stockton’s Application 30531B, pursuant to California Code of Regulations, title 23, section 840.
2. In the alternative, the Board cancels Stockton’s Application 30531B, pursuant to Water Code section 1276.

**CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 3, 2022.

AYE: Chair E. Joaquin Esquivel  
Vice Chair Dorene D’Adamo  
Board Member Sean Maguire  
Board Member Laurel Firestone  
Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None

Courtney Tyler for  
Jeanine Townsend  
Clerk to the Board

## Attachment A

### RESPONSES TO PARTIES' COMMENTS ON DRAFT PROPOSED ORDER

As discussed in section 2.7.1 of this order, the AHO circulated a draft proposed order to the parties on March 14, 2022. The AHO received comments by April 14, 2022. This attachment summarizes and responds to comments the City of Stockton and San Luis & Delta-Mendota Water Authority and Westlands Water District submitted on the draft proposed order.

#### Stockton's Comments

1. Stockton's Comment: Stockton has exercised reasonable diligence and provided timely responses to information requests. (2022-04-14 City of Stockton Comments on Draft AHO Order [Stockton's Comments], p. 2.)

In 2007, the Division requested a schedule of dates for preparation of studies and the EIR, and Stockton argues it is "unrealistic and unreasonable to assume Stockton did not exercise diligence with respect to Part B by not having a schedule for certification of a Final EIR for Part B when it had just been awarded its Part A water right." (*Ibid.*)

Response: California Code of Regulations, title 23, section 840 requires the Board to examine whether an applicant is prepared to begin construction of 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 other cause.

If Stockton could not provide a schedule in 2007 for use of water under Application 30531B — 11 years after Stockton filed Application 30531 — Stockton was not prepared to begin construction of necessary works within a reasonable time and was not able to proceed due to a lack of planning. Stockton also did not respond meaningfully to the Division’s inquiries in 2008, 2013, and 2020. (See sections 2.5 & 2.6.)

2. Stockton’s Comment: Stockton needs to make only “minor additional facility modifications...to exercise a substantial portion of A30531B” and therefore has “initiated” construction of facilities necessary to put water to beneficial use. (Stockton’s Comments, pp. 2-3.)

Stockton argues it has shown future supply would be used with existing infrastructure, a CEQA project-specific supplement, and “minor water treatment plant modifications that require no additional land or permits.” (*Ibid.*)

Response: An applicant must “continue steadfastly” to proceed to “as early a construction start as is reasonably possible” and if the applicant “is not ready to assume such responsibility, his application is premature and must be denied.” (Section 4.1.1, citing Decision 1083 (1962), p. 6.) Even if Stockton’s construction modifications are “minor,” Stockton still has not identified when it would make these modifications. Moreover, despite being informed by the Water Board in 1996 that “processing of your water rights application cannot proceed until such [final environmental or notice of exemption] documents are submitted,” and confirming this again in 2005

(Stockton-06, p.1; AHO-72; Stockton-05), Stockton has not stated when it will complete the CEQA project-specific supplement. As explained in sections 4.1.4 and 4.2.1, Stockton's failure to provide a construction schedule and feasible plan to use water, as well as its inability to provide a schedule for CEQA completion, render its application premature at this time.

3. Stockton's Comment: The draft order relies on "non-binding and inapplicable decisions". (Stockton's Comments, p. 3.)
  - a. Stockton argues the AHO cites orders of the Executive Director that involved "private party requests for minor diversions and did not implicate the long-term water supply planning for a major metropolitan area" and that by contrast to the parties in those orders, Stockton has: (1) certified a programmatic EIR that addressed Application 30531B; (2) invested \$223 million in ratepayer funds to construct adequately sized facilities to divert a portion of Application 30531B water; and (3) responded to the Division's requests for information and participated in the hearing.

Response: The Board orders cited in section 4.2 of this order, except Order WR 2000-04, are non-precedential orders that are not binding on the Board. We include summaries of these non-precedential orders as examples of the Executive Director's reliance on Water Code section 1276 to cancel water-right applications. Although non-precedential orders are not binding on the Board, the Board is not precluded from considering and discussing them in its precedential orders. "[T]he agency should be permitted, as all courts

are, to review its nonprecedential decisions to gain a greater understanding of how the law has been viewed and issues resolved in the past.” (*Malaga County Water Dist. v. State Water Resources Control Bd.* (2020) 58 Cal.App.5th 447, 475.)

The AHO modified section 4.2 of the draft proposed order to include discussion of Order WR 2000-04, a precedential Board order in which the Board denied a petition for reconsideration of an order canceling an application under Water Code section 1276 because the applicant failed to satisfy the Division’s requests for information. These decisions demonstrate the principle, in many contexts, that water-rights applications must be diligently pursued. The applicant must commit to action.

Finally, while Stockton has responded to most of the Division’s correspondence, its responses have not been meaningful. (See section 4.2.) The City still has not provided the information the Board needs to move forward to process this application.

- b. Stockton’s Comment: Stockton could not evaluate the relevance of certain decisions cited in the draft proposed order because it could not locate such decisions on the Water Board’s website. As an example, the draft order does not discuss the Water Board’s reasoning in Decision 1159 for relying on a 10-year construction timeline, which could be unrealistic given “modern permitting considerations.” (Stockton’s Comments, p. 4, fn. 4.)

Response: Decisions are available on the Water Board’s website at [https://www.waterboards.ca.gov/board\\_decisions/](https://www.waterboards.ca.gov/board_decisions/) and then by

clicking on the link for “Adopted Orders” and then the link for “Water Rights Decisions” and then on the link for the decision number.

Decision 1159 (1963) is on the Water Board’s website at

[https://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/](https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/). Water Board orders and decisions are also available on Westlaw.

Decision 1159 concluded that, even when an applicant promises to initiate construction in 10 years’ time, if there is “no definite evidence to conclude that the project will start even this far in the future,” the Water Board may deny this application. (Decision 1159 (1963), p. 30.) Here, Stockton could not commit to *any* date for construction. Therefore, following the analysis in Decision 1159, the Water Board may deny the application.

4. Stockton’s Comment: “Rather than cancel the application, the Water Board should accept the City’s request [to] limit the application to an amount commensurate with the amount that can be used with the City’s existing facilities.” (Stockton’s Comments, p. 10.)

Response: The Water Board is bound by the requirements that an applicant demonstrate diligence. The problem with the City’s proposal to limit the City’s application to an amount commensurate with the amount that can be used with the City’s existing facilities is that the City’s application would still be pending for at least another 15 years (until 2035, when Stockton might use some of the water for which it has applied). The City still has not stated clearly when it would use this water, even if the application were amended to limit the subsequent permit amount. “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 (1958), p. 71.) The City’s offer to reduce the application amount does not justify further delay by the Board in acting on this application because the City has not demonstrated the intent or ability to proceed immediately with the application. We cancel Application 30531B without prejudice so Stockton can file a new application when it has a definite plan to divert and use the water. The City may file a new application for a permit to appropriate water after the City’s planning efforts are complete, the City has determined when it will use the water, the City has a specific plan and schedule to complete the required CEQA documentation, and the City has a construction schedule in place for the additional improvements that will be used to divert Application 30531B water.

5. Stockton’s Specific Comments:

- a. Stockton’s Comment: The AHO should delete footnote 4 on page 4 “so that [the footnote] may not be read to suggest the City improperly used the word ‘revised’ to try to cover up a failure to provide information that Board staff requested.” (Stockton’s Comments, pp. 4-5.)

Response: The AHO was merely showing that Stockton’s original application did not contain a table titled “Delta Appropriation Summary” and that the “revised Delta Appropriation Summary” contained additional information that was not included in the original application. Nevertheless, the AHO deleted this footnote from the

draft proposed order when the AHO prepared its final proposed order.

- b. Stockton's Comment: The AHO should delete the word "apparently" from a sentence describing the BiOp on page 6. (Stockton's Comments, p. 5.)

Response: The AHO revised this sentence. (See section 2.4.)

- c. Stockton's Comment: The AHO should delete the sentence that states, "The Water Board's files do not contain a response from the City, and the City has not provided any document showing a response to the Division's 2008 letter" from page 8. (Stockton's Comments, p. 5.) Stockton requests deletion because the sentence "improperly suggests that the City failed to provide information" following a Board request.

Response: The AHO revised this sentence. (See section 2.5.)

- d. Stockton's Comment: Stockton clarified that in footnote 12 on page 19, there is a basis for Stockton projecting 2050 diversions of 27,446 af/yr because of increased demand due to population projection and per capita water use. (Stockton's Comments, p. 6.)

Response: Stockton still has not provided *testimony* about this calculation, as reflected in the AHO's footnote, but the AHO nonetheless revised footnote 12 to reflect Stockton's clarification. (See section 3.4, fn. 12.)

e. Stockton's Comment: Stockton has provided evidence, in the form of Table 1 in Stockton-13, to address footnote 13 on page 20 of the proposed order. Table 1 of Stockton-13 "demonstrates that by modifying current ESA pumping restrictions, it is possible to use more Permit 21176 water and exceed the 33,600 af/yr limit in Permit 21176 sooner than under current restrictions." (Stockton's Comments, p. 6.)

Response: Table 1 in Stockton-13 does not match the projections in Table 1, Stockton-02. Stockton-13 shows higher projected demands than Stockton-02, with available diversions under ESA modifications exceeding Permit 21176 between 2050 and 2055. The AHO modified footnote 13. (See section 4.1.)

f. Stockton's Comment: Stockton maintains that footnote 17 of the proposed order "appears to fault the City for not stating definitely that it will use Application 30531B water between 2055-2060," the AHO's "opinion" is that removal of the current pumping restrictions would delay the construction of the works necessary to use Application 30531B water, and Stockton could "use more Permit 21176 water and exceed the 33,600 af/yr limit in Permit 21176 sooner than without modification of the restrictions." (Stockton's Comments, p. 6.)

Response: The AHO removed language about delays in construction from this footnote but otherwise left the footnote

unchanged because the AHO addressed Stockton's arguments in section 4.1.3.

- g. Stockton's Comment: Stockton disagrees with the sentence that "if Stockton were concerned about this 'worst case scenario,' then it would have developed a schedule for construction of the facilities that will be necessary to divert and use Application 30531B water. It has not done this." (Stockton's Comments, p. 7.)

Stockton argues there is no authority explaining why it is necessary to develop a schedule for construction of "facilities that may be needed 13 years from now," and even if it could be reasonable to develop construction schedules in advance, Stockton "only became aware of this potential 'worst case scenario' on May 12, 2021 when it received a copy of SEWD's Urban Water Management Plan." Stockton did not have time from May 12 to the time it drafted testimony for this hearing to develop such a schedule. (*Ibid.*)

Response: An applicant for a water right must be "ready, willing and able to" begin construction after receiving a permit. (See Decision 884 (1958), pp. 74, 85, 95; Decision 1083 (1962), p. 6.) The final proposed order relies on Board decisions and orders cautioning applicants against waiting to build until the demand for water arises (Decision 884, pp. 72-73); urging applicants to proceed with "reasonable promptness" (Decision 1083, p. 7); and to proceed with construction work within a reasonable time. (Decision 893 (1958), pp. 56-57.) Stockton's assertion that it did not have enough time to develop a construction schedule before the hearing is unconvincing.

Stockton has not provided any plan that would show that Stockton has diligently pursued, or will diligently pursue, this application on a schedule that would lead to the Board issuing a permit on it by 2035 or 2050 or another date. We encourage planning efforts, but those efforts must be accompanied by evidence of diligence. Stockton has not provided that evidence here.

- h. Stockton's Comment: Stockton objects to the AHO's characterizations on pages 28 and 29 about the development of a water line as part of the North Stockton Hypochlorite Facility Project to bring SEWD supply into the City. (Stockton's Comments, pp. 7-8.)

Response: The AHO has revised this text. (See section 4.1.4.)

- i. Stockton's Comment: The AHO observed on page 29 of the draft proposed order that, despite testimony about planned groundwater recharge, Application 30531B does not contain provisions for groundwater storage. Stockton argues it could file a change petition to add underground storage to any permit issued on Application 30531B. (Stockton's Comments, p. 8.)

Response: The AHO did not change this text. We are required to act on the application before us and not on a hypothetical alternative project. Stockton has not offered any testimony that it has any specific plan to supplement or amend its application to make provisions for groundwater storage.

- j. Stockton's Comment: The AHO noted that Stockton has not acknowledged the adequacy of its water supplies through at least 2045, and Stockton argues SEWD's decision not to offer water supplies after 2035 may require the City to reevaluate its water supply projections. (Stockton's Comments, p. 9.)

Response: Stockton has argued that SEWD may not provide supplies to Stockton after 2035 based solely on one sentence in SEWD's UWMP and not on any further conversations with SEWD or any other information. In fact, Stockton expects the contract to be renewed. Also, even if SEWD does not renew this contract, Stockton still will have adequate supplies by pumping groundwater within the sustainable yield target in the applicable GSP. (See section 4.1.4.1.)

- k. Stockton's Comment: Stockton may not be able to pump additional groundwater because "it may be necessary for those groundwater users that have supplies other than groundwater to reduce groundwater pumping in order to bring the basin into balance." (Stockton's Comments, p. 9.)

Response: Although the Board fully supports efforts to reduce groundwater pumping through the reuse of treated wastewater, Stockton has not presented evidence of a specific plan to develop these additional surface water supplies. If Stockton does develop such a plan, then Stockton may file a new application. Absent such a plan and the City's demonstration that it will be able to put the

water to beneficial use within a reasonable period, the Board cannot grant the City's application and issue a permit.

- I. Stockton's Comment: Stockton has offered a March 4, 2022 letter from Aaron Ferguson, Stockton's attorney, to Michael Meza with the Board's Division of Water Rights, regarding the City's efforts to evaluate conditions in and around the DWSP that would in turn allow the City to modify its pumping (by removing ESA restrictions). (Stockton's Comments, p. 9.)

The letter relates to Stockton's Petition for Extension of Time on Permit 21176, describes draft larval delta smelt studies, and explains that the studies "indicate the City initiated efforts to assess potential impacts on delta smelt associated with the DWSP." (Stockton's Comments, p. 17.) The City "will once again retain a biologist to assist the City in developing a plan" to address one of the Permit 21176 terms, then will consult with fishery agencies on this plan and will report back to the Division. (*Ibid.*)

Response: Stockton did not offer this letter as evidence during the AHO hearing (because this letter post-dated the hearing). Without authentication, the letter is not part of the evidentiary record for the hearing in this proceeding. However, even if we were to consider this letter, it does not change our conclusion that we should deny and cancel Application 30531B. The letter does not provide the specific dates or plans for development of Application 30531B water that the law requires.

m. Stockton's Comment: Stockton has spent \$230 million to build the DWSP<sup>20</sup> "within 5 years of the Order approving Application 30531 Part A" and the City will be able to "accomplish the minor modifications necessary" within a reasonable time after receiving a permit. Further, the Water Board's own website states processing new water right applications can take four years or more. (Stockton's Comments, pp. 9-10.)

Response: Stockton has not identified the minor modifications that it would need to complete to use Application 30531B water, nor has Stockton offered a construction timeline for completion of these modifications. Stockton's Application 30531B has been pending since 1996. Stockton has not met the diligence standard described in section 840 and has no plan for completing the CEQA document that would be necessary for the Board to act on this application. Accordingly, Stockton has not shown it can begin construction as required.

## **San Luis & Delta-Mendota Water Authority and Westlands Water District's Comments**

1. San Luis & Delta-Mendota Water Authority and Westlands Water District's Comment: These two agencies disagree with how the AHO characterized the Authority's policy statement during the hearing in the proposed order and ask that the order state that the Authority "recognized the authority of the AHO to cancel the City's application,

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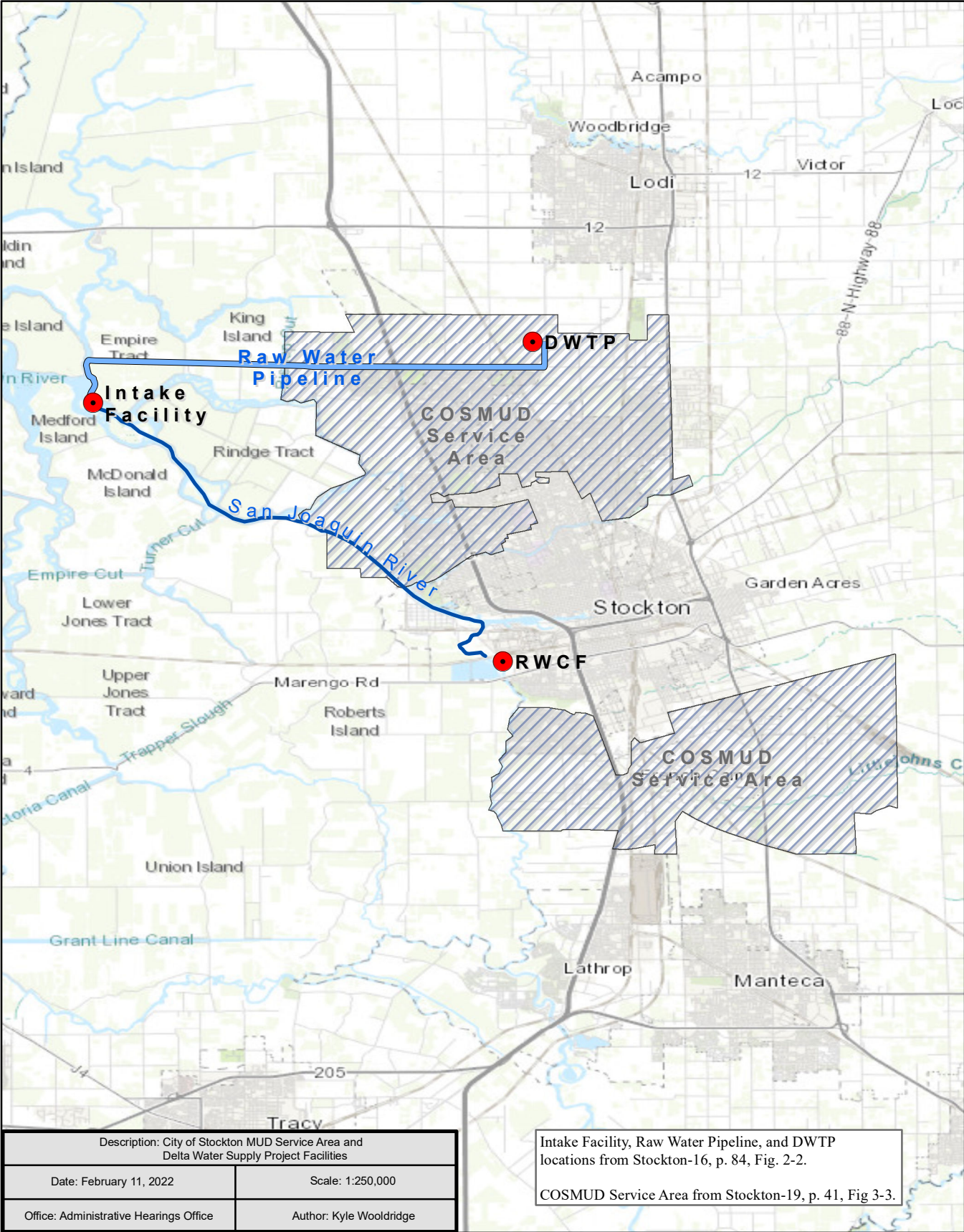
<sup>20</sup> The City's comments referred to the "SWSP," but we assume this should be "DWSP." (Stockton's Comments, p. 9.)



and that good public policy supports that it do so.” (2022-03-25 San Luis & Delta-Mendota Water Authority and Westlands Water District Comments on Draft Proposed Order.)

Response: The AHO’s original text explained that the Authority’s policy statement “urged the Board to cancel the City’s application.” (See section 2.7.1.) The AHO has modified this statement to better reflect the Authority’s comments and notes that the AHO does not have the authority to cancel a water-right application. The AHO prepares proposed orders that the Board may then adopt.

# Figure 1 - Area and Facilities Map



Description: City of Stockton MUD Service Area and Delta Water Supply Project Facilities

Date: February 11, 2022

Scale: 1:250,000

Office: Administrative Hearings Office

Author: Kyle Wooldridge

Intake Facility, Raw Water Pipeline, and DWTP locations from Stockton-16, p. 84, Fig. 2-2.

COSMUD Service Area from Stockton-19, p. 41, Fig 3-3.