



State Water Resources Control Board



Alan C. Lloyd, Ph.D.
Agency Secretary

Division of Water Rights
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Arnold Schwarzenegger
Governor

NOV 21 2005

In Reply Refer
to: 334:KDM:26306

Emerson Investment Inc.
c/o Jack Frost
P.O. Box 496014
Redding, CA 96049-6014

Dear Mr. Frost:

TIME EXTENSION PETITIONS ON PERMITS 19164 AND 19165 (APPLICATIONS 26306 AND 26307) – SHASTA RIVER IN SISKIYOU COUNTY

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) has been corresponding with you regarding the time extension petitions for Permits 19164 and 19165 of Emerson Investment Inc. (Permittee). The time to complete full, beneficial use under the permits ended on December 31, 1995. The Division's December 28, 2004 letter requested that you address the 2001 Department of Fish and Game (DFG) protest to the time extension petition that asserts the following: 1) the Permittee has had 16 years to comply with the permit terms requiring installation of measuring devices and development of a record of actual beneficial use, 2) to protect steelhead and federally listed threatened coho salmon an adequate fish passage facility must be installed, and 3) a screen to prevent fish from being diverted into the irrigation canal must be installed.

Measuring Devices and Record of Actual Beneficial Use:

In your February 14, 2005 letter, you indicate that there has been a measuring device at each diversion facility since 1977 and the devices have been used by the Watermaster to apportion the water being diverted. The Watermaster uses a Parshall flume at the points of diversion to keep track of water used under the adjudication. Division staff conducted a compliance inspection of these water rights on August 23, 2002 and found that the proper measuring device required by the permits had not been installed. Division staff was aware of the Parshall flume, but did not find that the flume satisfied the measuring device requirement of the permits. The 2002 inspection report states that the design for the measuring device was faxed to the ranch manager after the inspection and photographs showing the installation of the proper measuring device were subsequently submitted to the Division. In 2002, there had been no water to serve the permits during the past four years.

The need for the Permittee to submit actual records of water diversion and use for these permits was identified during Division site inspections in 1990, 2000 and 2002. The diversion works are used to divert water under the Permittee's higher priority adjudicated rights, in addition to these permits. Consequently, numeric data is required. Division staff conducted a June 13, 2000 licensing inspection and found that the project could not be licensed because (a) there were no measuring devices and (b) no records of the amount of water diverted under each permit had been kept. The Division could not calculate the rate of diversion and the total acre-feet diverted.

The Division's May 7, 1990 licensing inspection documented that there were no records of water use. The inspection found that the Permittee had installed a staff gage, Parshall flume and Stevens recorder. The Division granted a time extension by Order dated May 3, 1991 for the purpose of documenting diversions under the permit.

Since the Division has been unable to document that water is available to serve the permits, the Division's November 16, 2004 letter requested that you provide a showing of water availability.

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Emmerson
Exhibit 39

Your February 14 letter included a re-submittal of the 2003 water year data. In the Division's December 28 letter, Division staff advised you that the 2003 information did not indicate whether water was used under the Permittee's adjudicated right or the permits. Division staff requested that you identify the quantities used pursuant to each basis of right. The Division has not received the requested information.

Your February 14 letter included 2004 diversion data showing that the Permittee violated the Permit 19164 direct diversion limit of 5 cubic feet per second (cfs) and the annual diversion limit of 400 acre-feet.

The following comments evaluate the water availability analysis that you provided with the February 14 letter. The following problems are noted:

1. The analysis does not include the fish bypass flows for the permits in the analysis (see page two of cover letter).
2. The analysis indicates that water is available for diversion under the permits when the Shasta River gage at Montague shows a discharge of more than 25 to 35 cfs, and also states that there is an instream loss of 5 to 15 cfs downstream of the Montague gage in conveying water to prior right holders due to unexpected withdrawals and system loss that might occur between your diversions and the gage near Montague. This totals 50 cfs. The line depicting when water is available on Figures 4 through 12 is drawn at 35 cfs. The line should be drawn at 50 cfs.
3. The analysis does not state how much flow is required to serve prior rights downstream of the Montague gage and deduct the water to serve those rights. Moreover, the analysis does not provide a listing of the prior rights upstream and downstream of Montague.
4. The analysis does not evaluate water availability at the points of diversion for Permits 19164 and 19165. Onsite water availability could be less than water available at Montague.
5. The monthly data in the analysis does not correspond to the actual water supply situation. The Division's 2002 compliance report documents that no water was available for Permits 19164 and 19165 in 1999, 2000, 2001 and 2002, yet the analysis shows available water during these years.
6. The analysis uses the flows at Yreka to determine the flows at the Montague gage due to lack of data for the Montague gage. The drainage basin at Yreka is 793 square miles. The drainage basin at Montague is 673 square miles. The analysis utilizes the Yreka data as valid for Montague, without pro-rating for the difference in basin size. For example, Figure 3 claims to represent water year classifications for Montague but all of the data is for the Yreka gage.
7. The analysis indicates that the data for the Yreka gage shows a good correlation to the data at Montague without providing substantiation. The data for the Montague gage was not provided. The U.S. Geological Survey (USGS) and the Department of Water Resources web sites do not have data for the Montague gage for the years that you reported. Therefore, you must provide the data. Division staff reviewed the USGS data for 2002 and 2003 and finds that the gages show roughly a 20 percent difference in the flows at these two sites.

The water availability analysis is not acceptable. Accordingly, the Permittee has not yet shown that water is available under the priorities of Permits 19164 and 19165.

Fish Passage Facility and Fish Screen:

The February 14 letter acknowledges that the fish screens at both diversions are not adequate to prevent fish from potentially getting into the irrigation delivery system. The Permittee is exploring three options to remedy this situation, all of which include upgrading the screens: 1) moving the point of diversion so that all water currently taken at the downstream diversion will be diverted at the gravity-fed upstream diversion. This requires approval of a change petition by the State Water Board. The Permittee has not submitted a change petition. 2) Keeping the point of diversion the same but modifying the facility to eliminate the need to impound water with a check dam which may block fish movements; and 3) keeping the point of diversion and the existing facility but incorporating a means for fish to surmount the obstacles, i.e., some sort of fishway or ladder.

The February 14 letter states that the Permittee cannot commit to completing any of these alternatives. You suggest filing quarterly progress reports regarding pursuing options to resolve the problem of potentially impeding fish movements in lieu of addressing the protest issue. Your November 22, 2004 letter indicates that the Permittee is trying to develop other options in lieu of spending the estimated \$216,878 to \$250,628 cost for replacing the existing structure.

Any California Environmental Quality Act (CEQA) document for the petitions must address potential impacts to public trust resources and threatened and endangered species and fully mitigate for any impacts. The CEQA document must fully evaluate diversion of 18 cfs under the permits. You indicate that the Permittee is amenable to paying for preparation of a CEQA document but you have adequate in-house talent to prepare the document. The State Water Board is the lead agency for preparation of the CEQA document and has not authorized any applicants/petitioners to prepare their own CEQA document. A acceptable third party contractor must prepare the document.

The grounds for approving a time extension are set forth in title 23, California Code of Regulations, (CCR) section 844:

An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.

The diversion works have been in place since permit issuance. The Division is unable to document that water is available to serve this permit and the quantity put to beneficial use. Failure to document diversion and beneficial use of water is not a valid basis for granting time extension.

The time extension request asked for three years to document water diversions. The three years requested

California Environmental Protection Agency

ran from December 31, 1995 (date time to complete beneficial use ended in the permit) until December 31, 1998. Irrespective of whether you are able to address the protest, the Division cannot extend the permits past the time requested. Division staff intends to recommend that the petitions be denied because (a) the basis for requesting additional time does not meet the requirements of CCR section 844, and (b) the requested time has already elapsed.

If the petitions are denied, this matter will be referred to the Division's licensing unit to determine whether the permits can be licensed or should be revoked. Any information submitted within 30 days from the date of this letter will be taken into consideration.

I can be contacted at (916) 341-5363 if you require further assistance.

Sincerely,

ORIGINAL SIGNED BY:

Katherine Mrowka, Chief
Watershed Unit 3

cc: Jane Vorpapel
Department of Fish and Game
601 Locust Street
Redding, CA 96001

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