



United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

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IN REPLY
REFER TO:
MP-460
WTR-4.10

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Comment Letter – 12/02/08 Board Meeting: Auburn Dam Project Draft Order
(Applications 18721, 18723, 21636, and 21637, Central Valley Project, California)

"I'm well aware of why David Brower in his literary description of hell placed dams at the center. Rivers are not just channels through which water flows, but are places where lots and lots of living creatures live or, you know, live near. And I understand why a group called Friends of the River or Defenders of Wildlife would want the dam permit revoked."

- Statement of Hearing Officer Wolff near the conclusion of the hearing on the proposed revocation of Reclamation's permits for Auburn Dam (RT, p.206)

Dear Ms. Townsend:

The Bureau of Reclamation is in receipt of the subject draft order of revocation, dated October 21, 2008. Reclamation disagrees with the draft order's conclusions that Reclamation has not proceeded with due diligence as required by Reclamation's water right permits, the Water Code, and State Water Board (Board) regulations and that therefore the permits issued for the subject applications should be revoked. Reclamation also reiterates its point that the Board could, and should, exercise its discretion not to revoke the subject permits and allow the future of the Auburn Dam and its associated water rights to be deliberated by Congress.

In the interest of responding to the Board's request for comments regarding necessary technical corrections to the subject draft order document, Reclamation requests that the Board make the following changes:

1. The Draft Order Should Dispense with Addressing Policy Arguments Inconsistently with the Draft Order's Limited Level of Inquiry

The Board established that the level of inquiry into revocation of Reclamation's water right

permits should be limited to the following:

“It bears emphasis that the decision before us is whether Reclamation’s permits should be revoked for failure to develop the project with due diligence, not whether the Auburn Dam Project itself should be approved or disapproved” (draft order, p.2)

However, after reaching the conclusion in section 4.3 that Reclamation did not proceed with due diligence, the draft order continues in section 5.0 to further explore information contained in the record regarding the merits of the Auburn Dam Project, the rationale for or against revocation, and the benefits to other permit holders following revocation. Section 5.0 of the draft order also acknowledges various arguments made by hearing participants regarding water supply, hydroelectric power generation, flood control, and environmental benefits. It is unclear why the various arguments on these four diverse topics are being included in the draft order and discussed to the extent that they were. In order to be consistent with the limited level of inquiry referred to on page 2 of the draft order, Reclamation requests that section 5.0 of the draft order be corrected to summarily dispense with those arguments.

2. The Draft Order Should Delete Statements Addressing Reclamation’s Failure to Submit a Revised Project Description

The draft order states:

“Although Reclamation contends that Congressional reauthorization is required before Reclamation can proceed with project construction, the evidentiary record contains no evidence that Reclamation could not submit a revised project to the State Water Board prior to Congressional reauthorization.” (draft order, p.15)

Further on, the draft order continues:

“... but Congressional reauthorization was not required in order for Reclamation to conduct studies or meet filing deadlines (Stip., ¶ 16, USBR Exhibit 1, pp. 3,7; RT, pp. 89, 100) Accordingly, the absence of Congressional reauthorization does not excuse Reclamation’s failure to submit a revised project to the State Water Board by the December 31, 1987, deadline, or Reclamation’s failure to provide the information necessary for the Board to process Reclamation’s request for an extension of that deadline.” (draft order, p.18)

The Board appears to fault Reclamation for failing to describe and study a project that yet had to be approved by Congress. Reclamation did not prepare and present to the Board any description of a revised Auburn Dam Project in support of its requests for the extension of the term of its Auburn Dam water right permits because absent the enactment of future federal authorizing legislation, Reclamation would not be able to construct and operate any such revised project. Consequently,

Reclamation felt that it would not be appropriate to advise the Board of Reclamation's desire or intent to construct a revised project until legislation had been enacted authorizing Reclamation to construct and operate such a revised project. Therefore, Reclamation requests that the above quoted language on pages 15 and 18 be deleted.

3. The Draft Order Should Correct Mischaracterizations of Reclamation's Arguments and Statements

The draft order contains mischaracterizations of Reclamation's arguments and position statements that are not supported by the record.

Paragraph 4.3 erroneously states the following:

"Reclamation's primary argument in support of its position that the Auburn Dam Project permits should not be revoked is that Congress's [sic] failure to reauthorize and fully fund the project excuses Reclamation's lack of due diligence in developing the project." (draft order, p.16)

Reclamation never referred to any "failure" by Congress, presented any "excuse" argument, or admitted having not proceeded with due diligence. The record reflects that Reclamation clearly stated:

"Reclamation has proceeded with due diligence within the limitations on construction of the project imposed by Congress". (testimony of Ray Sahlberg, USBR, 1).

"Reclamation reiterates its position that it has proceeded with reasonable due diligence to construct the project and apply the water to beneficial use within the limitations on construction of the project imposed by Congress". (USBR Closing Brief, 1)

In addition, the Draft Order also erroneously states that Reclamation argued the following:

"In essence, Reclamation's argument is that Congress is accountable for the lack of progress in developing the Auburn Dam Project. We reject this argument, but note that if it were true, Congress has not acted diligently, as demonstrated by statements in the record by Reclamation and others". (draft order, FN3, p.16)

Reclamation would like to remind the Board that the key issue identified for the hearing notice and again in the draft order is the following:

"Did Reclamation prosecute with due diligence and complete construction of the

project and apply the water to beneficial use as contemplated by the permits and in accordance with the Water Code and the rules and regulations of the State Water Board?" (draft order, pp.13-14) (emphasis added)

Reclamation, not Congress, was mentioned and held accountable for due diligence in the Board's key issue statement. Congress was not even a party to the hearing. Any claim that Congress is held accountable is attributable to Mr. Jackson during cross-examination, and not to Reclamation.

MR. JACKSON: And you've indicated that the cost cap that Congress set is not sufficient to build it; is that correct?

MR. SAHLBERG: That's correct.

MR. JACKSON: Okay. Is the lack of activity on the Auburn project all Congress's fault, or does Reclamation share any of the burden?

MR. SAHLBERG: I'm uncomfortable with assigning blame to Congress on this issue. (RT, p.89)

Therefore, Reclamation requests that Footnote 3 be deleted in its entirety.

Finally, the draft order also states the following:

"Similarly, Reclamation's argument that the Board should defer to Congress in this case instead, or requiring Reclamation to comply with state law defeats the purpose of section 8 of the Reclamation Act, which ensures that federal reclamation projects abide by state water rights law." (draft order, p.17)

However, the record reflects that Reclamation said:

"In issuing these permits pursuant to the language of the Supplements to the Applications, it would appear that the State Board was aware of and took into consideration the fact that the actual date for completion of construction of the Auburn Dam Project and the actual date by which the appropriated water would be put to beneficial use would be subject to the power of Congress and not within the unlimited control of Reclamation". (testimony of Ray Sahlberg, 5-6) (emphasis added)

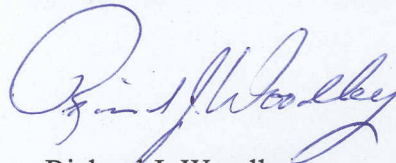
"Contrary to assertions made at the hearing by the California Sportfishing Protection Alliance and Friends of the River, Reclamation is not requesting that the Board apply a different set of rules and regulations to the Federal Government." (USBR Closing Brief, 2)

“ ... the State Board should exercise the discretion provided by [Water Code] section 1410 and not revoke these permits at this time in order to allow Congress time to make a final decision on the future of Auburn Dam...” (testimony of Ray Sahlberg, 1)

Therefore, Reclamation never argued that it should not be required to comply with state law regarding the Auburn Dam Project, or that federal projects should not abide by state law. Reclamation pointed out the major role that Congress to this day has played and continues to play in the actual construction of the Auburn Dam Project and that at the time of issuing the permits for the Auburn Dam Project the Board must have been aware of that fact. Consequently, Reclamation simply requested that in light of the need for future authorizing legislation the Board exercise its discretion granted under state law not to revoke the Auburn Dam permits.

Any questions you or the Board members have on this subject may be presented to Mr. Bob Colella, Water Rights Specialist, at 916-978-5256.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard J. Woodley", written in a cursive style.

Richard J. Woodley
Regional Resources Manager

cc: Electronic Service List