

77045-34518

*DeeAnne Gillick*

509 WEST WEBER AVENUE  
FIFTH FLOOR  
STOCKTON, CA 95203

POST OFFICE BOX 20  
STOCKTON, CA 95201-3020

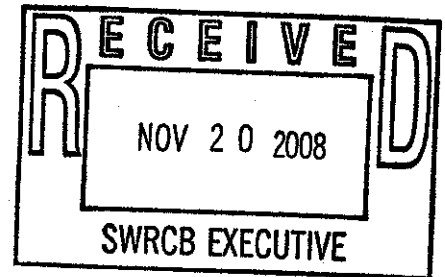
(209) 948-8200  
(209) 948-4910 FAX

FROM MODESTO:  
(209) 577-8200  
(209) 577-4910 FAX

November 20, 2008

*Via E-Mail to [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov) and  
Overnight Mail to Jeanine Townsend, Clerk of the Board*

Chair Tam Doduc and Members of the State Water Board  
c/o Jeanine Townsend, Clerk of the Board  
Executive Office  
State Water Resources Control Board  
Cal/EPA Headquarters  
1001 "T" Street, 24th Floor  
Sacramento, CA 95814-2828



**Re: COMMENT LETTER - 12/02/08 BOARD MEETING:  
AUBURN DAM PROJECT DRAFT ORDER**

Dear Chair Doduc and Members of the State Water Board:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control (collectively hereinafter the "County"), we submit the following comments on the Draft Order revoking water right permits 16209, 16210, 16211 and 16212 for the Auburn Dam Project held by the United States Bureau of Reclamation (Draft Order).

The County has reviewed the Draft Order and appreciates the State Water Board's careful consideration of the issues and information presented at the hearing. The County is disappointed that its request is not granted in this Draft Order; however, it is not opposing the Draft Order but requests that the Draft Order is amended to reflect the following points of clarification and minor amendments.

1. On page 20 of the Draft Order there is a discussion in the third paragraph of section 5.1 regarding Water Supply Implications on the priority of the State-filed applications 7936 and 7937. The third paragraph appears to include confusing and contradictory statements and should be reviewed and revised appropriately. For example, the Draft Order contains the following statement: "State-filed applications 7936 and 7937 are not listed on Staff Exhibit 4 because they are senior to the Auburn Dam Project permits." Then the Draft Order states to the contrary by accurately reflecting that the State Water Board reversed this priority of the State-filed applications and the Auburn Dam Project permits

stating: "In this case, however, the State Water Board in Decision 1356 reversed the priority as between state-filed applications 7936 and 7937 and the Auburn Dam Project permits."

The County recommends a modification of this paragraph by staff to clarify the status of the State-filed applications and the pending Auburn Dam Project permits.

2. Footnote 7 on Page 22 of the Draft Order discusses the State Exhibit 4 and the number of pending applications which have a priority date after the Auburn Dam Project permit but prior to the County's pending application 29657 with a priority date of February 9, 1990. The County cannot reconcile the Draft Order statement by staff that 26 permits were issued during that time period compared to the County's previous statement that 30 permits are at issue. Perhaps additional staff explanation could clarify this misunderstanding. The County recognizes 26 traditional permits during this time period; however, staff exhibit 4 also lists 4 applications based on State-filed applications. It is the County's understanding that these State filed applications have priority over the County's pending application, but may not have priority over the Bureau's Auburn Dam Project permits at issue in this proceeding. Therefore, the total applications with a priority over the County's application 29657 but not the Auburn Dam Project permits could be 30. A clarification of staff exhibit 4 which lists 30 applications is requested.

The Draft Order should be amended to clarify this issue. The County recommends that footnote 7 be amended to state only the following: "Staff Exhibit 4 lists \_\_\_ permits with a combined face value of \_\_\_ afa that have a priority date between the Auburn Dam Project permits (1959 and 1964) and the county's application (1990)." The correct number of permits and combined acre-foot of water should be inserted by staff following staff's review of staff exhibit 4 based on the County's requested clarification.

3. On page 23 the Draft Order discusses past State Water Board decisions which impacted the County and water supply to the County. The County requests minor modification to the first partial sentence on page 23 and the last sentence of footnote 8. Both the County and the State Water Board have characterized past decisions by the State Water Board related to the County. The Draft Order states that the County was not "directed" to obtain water from the American River. Although the 1956 Decision 858 did not use the words that the County was "directed" to the American River, a reasonable interpretation of the findings and statements within Decision 858 is that the County was "directed" to the American River. The following is a review of these important statements within Decision 858.

Decision 858 specifically finds in its summary and conclusion as follows:



6. Additional sources of water will be available to North San Joaquin Water Conservation District and East Bay Municipal Utility District from the Folsom South Canal, the Feather River Project, and other sources, some of which may be less expensive to develop than the projects on the Mokelumne River. Decision 858, page 77. (SJC Exhibit 13.)

The discussion section of Decision 858 states on page 51 as follows:

Studies of the U.S. Bureau of Reclamation, the **Division of Water Resources** and the State Water Resources Board are sufficiently advanced to indicate with a degree of certainty that from the physical and engineering standpoints, **there are no obstacles to prevent water from other sources being made available within the next few years** to areas within the Mokelumne River Basin and to the East Bay Municipal Utility District. (SJC Exhibit 13. Emphasis added.)

This statement within Decision 858 states that the Division of Water Resources has conducted these studies. Decision 858 was issued by the State Engineer and Chief of the Division of Water Resources; thus, a reasonable interpretation of this statement within Decision 858 is that the predecessor to the State Water Board conducted such studies and made such conclusions. Thus the State Water Board concluded that there were no obstacles to prevent water from other sources which referred to the American River, as identified in the following quotation from Decision 858, being made available to serve San Joaquin County rather than supply from the Mokelumne River

Decision 858 continues after this statement to describe the other sources of available water referenced in the studies to include the American River. The Folsom South Canal would provide water "from the American River at Folsom southerly to a point 63 miles southeast to Stockton." (SJC Exhibit 13 at page 51.) The Decision indicates that "the location of the Main Canal of the Folsom South Canal would be located such that practically all of the North San Joaquin Water Conservation District would be served from this source at less cost than by developing supplies from the Mokelumne River." (SJC Exhibit 13 at page 51.)

The County does acknowledge that East Bay Municipal Utility District was granted a prior right to water in Decision 858 due to the fact that East Bay Municipal Utility District's proposed use was for municipal purposes (Decision 858, SJC Exhibit 13 at page 79); however, a complete reading of Decision 858 also indicates that the State Water Board clearly relied upon the apparent facts at the time that "with a degree of certainty" there were "no obstacles" to prevent County entities from obtaining water from the American River.

To clarify the summary of Decision 858 in the Draft Order the County respectfully requests that the Draft Order be modified as follows:

(a) Amend the last sentence on page 22 which continues onto page 23 as follows:

“Contrary to the county’s implication, the Board has not denied the county the right to divert from other sources *solely* on the grounds that water would be supplied to the county from the American River. Fn 8.”

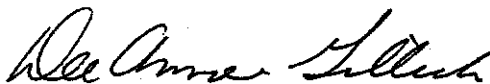
(b) Amend the last sentence of footnote 8 as follows:

~~“In addition, the State Engineer found that American River water would be available to NSJWCD via the Folsom-South Canal, but this finding was not the *sole* basis for the decision to deny NSJWCD’s application. and the State Engineer did not direct NSJWCD to obtain water from the American River.”~~

4. Page 24 of the Draft Order indicates that the county witnesses did not analyze whether or to what extent any additional water would be available under the Auburn Dam Project permits and that Vice Chair Gary Wolff questioned the county witnesses regarding this amount. The County contends that additional water would be made available to the County relying on the Auburn Dam Project permits as compared to the County’s pending application 29657; however, because the County did not provide this analysis as evidence in the proceeding by the deadline of June 24, 2008, the County was not able to present this information at a later time within this proceeding and in response to Vice Chair Wolff’s inquiry.

The County appreciates this opportunity to comment on the Draft Order regarding the Auburn Project Permits. The County respectfully requests that prior to approving the Draft Order the State Water Board make the minor modifications and amendments provided in this letter. I will also be present at the State Water Board meeting on December 2, 2008 if additional clarification is needed regarding the County’s requested amendments to the Draft Order.

Very truly yours,



DeeAnne Gillick  
Attorney at Law

DMG/cmp

cc: Auburn Dam Project Service List  
C. Mel Lytle  
James C. Hansen