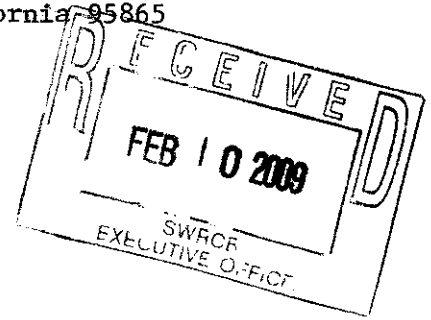


P. O. Box 255516  
Sacramento, California 95865  
Thursday  
February 5, 2009



Ms. Tam Doduc, Chair  
State Water Resources Control Board  
1001 "I" Street, 24th Floor  
Sacramento, California 95814

Re: Enclosed January 31 Letter and Attachment


Dear Ms. Doduc:

Enclosed is my letter dated January 31, 2009, plus its attachment of the same date. These two items were already in draft form when, on January 31, I received the Board's Draft Order from Mr. Lindsay of the Water Rights Division. I thus felt it would be appropriate to use the January 31 date for this correspondence. Unfortunately, getting the letter and attachment from draft into final form, and then completing all the typing, took much longer than I had planned, and I apologize for the delay. Now, with the furlough program starting tomorrow, that may further delay these items reaching you and your staff.

I have not yet decided to what extent I will respond to the Board's Draft Order. I will make the decision tomorrow and will then have this coming weekend to prepare that document. It's my understanding comments and proposed changes have to be in the Board's hands by noon on Tuesday, February 10th. I just wish to emphasize that the items I am sending you today are not my comments on the Draft Order.

Thank you.

Yours very truly,

  
M.-L. Quinn  
Private Citizen  
and Independent Scholar

Enclosures - 2, as stated.

cc: Ms. Victoria Whitney, Deputy Director  
Water Rights Division

P. O. Box 25516  
Sacramento, California 95865  
Saturday  
January 31, 2009

Ms. Tam Doduc, Chair  
State Water Resources Control Board  
1001 "I" Street, 24th Floor  
Sacramento, California 95814

Re: Board Order 2008-0045 --  
Some Observations and Thoughts

Dear Ms. Doduc:

When a group of intelligent people are tracking in the wrong direction, there usually is some reason. Oftentimes, the reason is apt to be something subtle, something like a cognitive construct, or way of thinking, about a particular subject that affects how the group interprets facts, situations, etc. Such a construct can also cause these people to miss the signposts they would otherwise have seen -- signposts that would have kept them headed along the right path.

The State Water Resources Control Board (Board or SWRCB) is a group of intelligent people who were tracking in the wrong direction when they issued Board Order 2008-0045, and a cognitive construct seems to have played a role. In this letter, I will discuss what that construct appears to be, the impact it had on said Board Order, and what the Board's approach to these deliberations should have been.

#### Background

In Attachment "A," I have described several occurrences I either experienced or observed during, and subsequent to, my preparation of a Petition for Reconsideration (Petition) regarding Board Order 2008-0045. That Order revoked the four water rights permits the U. S. Bureau of Reclamation (Reclamation) had held since 1971 and which would have allowed that agency to build a water storage facility commonly referred to as the Auburn Dam Project. The Board had never before revoked permits held by Reclamation,<sup>1/</sup> a federal agency that has been an important developer and, in more recent years, an important manager of California's water resources. Moreover, the Board had never before revoked permits for an undertaking of the size and scope of the proposed Auburn Dam Project.<sup>2/</sup> As a result, this was a very significant decision for the Board, one that broke with past practice.

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<sup>1/</sup>, <sup>2/</sup> As far as I have been able to determine, these two statements are correct. If someone knows this is not the case, however, I'd welcome hearing from him or her.

A Cognitive Construct

What connects the several seemingly disparate occurrences I describe in Attachment "A" is the fact they reflect a cognitive construct, a kind of sentiment or way of thinking, that exists at this agency and seems not to favor the Auburn Dam Project. The existence of this sentiment goes a long way to explain the agency's approach to, and handling of, this permit issue, as well as its ultimate decision.

In the Order, for example, the SWRCB at times gives the impression the four permits are inextricably tied to the Auburn Dam Project, often describing them as the "Auburn Dam Project permits."<sup>3/</sup> Then in Section 5 of the Order, the SWRCB reviewed a number of aspects pertaining to the proposed Auburn Dam Project, further <sup>4/</sup>creating the impression the four permits were married to that particular project.

Nowhere in the Order does the SWRCB mention or even suggest that, if they decided to let Reclamation retain the permits, the permits could be modified to allow a water project that is different from the one Reclamation originally had proposed. Nowhere in the Order is there evidence the SWRCB considered questions

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<sup>3/</sup> See page 20, for example, where that term appears five times, just on that one page. I realize other participating parties used the same term, including Reclamation. It is a manner of expression, however, the SWRCB in particular should have, and could easily have, avoided.

<sup>4/</sup> Commenting in its November 19, 2008 letter on the Board's Draft of Order 2008-0045, Reclamation stated that Section 5 was not consistent with the "limited level of inquiry" presented on page 2 of the Draft Order, and asked the Board to make changes in Section 5. In response, the SWRCB included in the final Order both the "limited level of inquiry" and also Section 5, the latter with seemingly little or no change. It thus retained the inconsistency Reclamation had noted.

This "limited level of inquiry" is pertinent to this letter, and for that reason, I include it here:

"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." (pg. 2, final Order).

This is an admirable statement, but because of the way the matter was handled, the resulting Board Order actually did both. It directly revoked the permits and indirectly disapproved the Auburn Dam Project.

such as: If we allow Reclamation to retain the permits, are there any important benefits such an action would have for Californians, especially in the long term? Especially in light of the many uncertainties climate change seems to be bringing to our state? If so, do these benefits warrant our excusing Reclamation's shortcomings on the due diligence provision? Are we prepared to accept strong criticism from certain groups if we take such a step?

In presenting its case in the Order, the SWRCB used a narrow approach, focusing on a specially manufactured definition of the term "cold storage" and on Reclamation's administrative missteps, particularly its alleged lack of due diligence. In using such a narrow approach, the SWRCB directed considerable attention to a few of the 'trees,' while overlooking the 'forest.' In other words, hampered by the blinders of a cognitive construct, this state agency missed the Big Picture -- an outcome detrimental to all Californians.

### The Big Picture

California's water resources future is fraught with troubling scenarios. Conflicting social and physical forces are at work, including significant population growth and increasingly serious droughts. But the most important factor that has to be considered is climate change. We simply do not know what the future holds in store for California's water supply. What we do know, however, is that the climate and weather patterns we have depended on so much in the past now seem to be changing and changing in a way that is probably not going to be beneficial for our state's society. As a result, we can no longer look to past records of rainfall and snowfall and gain reliable insight as to what future amounts of precipitation are going to be, when it will arrive, in what form, etc. This situation is worrisome and should be the source of real concern, particularly among the water resources community.

Scientists tell us, for example, that the Sierra Nevada's snowpack is going to gradually diminish, and we are going to receive more of our winter precipitation as rain and less as snow. This means we will have to replace Mother Nature's storage facility (Sierra snowpack) with additional storage facilities of our own (reservoirs). Yet, California now has very few viable sites for constructing storage reservoirs, especially in locations where they are needed to catch substantial amounts of Sierra runoff. One still exists, however, in the American River watershed, a good producer of runoff.

### -- These Permits Are a Valuable Resource.

Water rights permits nos. 16209 through 16212 are an incredibly valuable resource, in and by themselves. They involve a good reservoir site, a large amount of water, and have a very early priority date -- a combination that places them in a very special category. That the five-member Board, in issuing Order 2008-0045, voted unanimously to discard these permits and all they represent is truly mind-boggling.

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Despite its administrative missteps, to which the Board contributed, Reclamation had been a good steward of these permits. Returning them to that federal agency would keep the potential reservoir site, the water, and the early priority date available for future beneficial use by Californians, should that prove necessary. Equally important, however, it would keep open other possible options for responding to the unknowns that climate change is likely to bring to our state. Whether one favors the Auburn Dam Project or opposes it is not, and should not have been, the point here. The point in these deliberations is that, given the tremendous uncertainty of tomorrow's water supply picture, we all have a stake in keeping the United States of America, Bureau of Reclamation the holder of these four valuable permits -- not for eternity but for at least the next fifteen years.

A decade and a half from now, we will have a much better understanding of climate issues and how they are, or are not, affecting our state. Given this new information, perhaps it will have been decided by then that having Reclamation build a storage facility on the North Fork American River will not be useful. If that is the case, then the Board can consider what the fate of these four valuable permits should be. To take that step now, however, is exceedingly unwise and definitely not in the public's best interests.

#### Conclusions

Returning the four water rights permits to Reclamation would likely be contrary to the Board's now much stricter interpretation of the due diligence provision. Yet, the Board has the discretion to take such an action, and the extraordinary nature of the problems our state currently faces warrants doing so. Moreover, reinstating the permits would inflict harm on no one and would continue a situation that has actually been very beneficial both to the environment and to many people.

Thank you for taking the time to read this letter. All observations and thoughts are offered in good faith and with one goal in mind -- to have these four permits reinstated and returned to Reclamation.

Yours very truly,



M.-L. Quinn  
Private Citizen  
and Independent Scholar

Enclosure - 1, Attachment "A".

Note: I have not sent copies to the Service List. If you think I need to do so, however, please let me know.

January 31, 2009

ATTACHMENT "A"

Occurrences Experienced or Observed That Relate  
to Board Order 2008-0045, dated Dec. 2, 2008.

Introduction:

Described in this Attachment are several occurrences I either experienced or observed during, and subsequent to, my preparation of a Petition for Reconsideration (Petition) which was submitted to the State Water Resources Control Board (Board or SWRCB) on January 2, 2009. That Petition was in response to the Board's Order No. 2008-0045, which revoked four water rights permits that had been held by the U. S. Bureau of Reclamation (Reclamation). When originally sought and later granted, these permits were to allow Reclamation to build a water storage facility, commonly referred to as the Auburn Dam Project, in the American River drainage basin.

The occurrences discussed here consist of the following:

- (1) Information not posted on the Board's web site devoted to the permit issue under consideration;
- (2) Statements and behavior of a Board staff person with whom I interacted; and
- (3) A quoted statement that appeared in (at least) two articles, the source of which was a Board staff person.

When read for the first time, these sound like disparate occurrences that would probably not warrant being the subject of a document such as this. In the discussion that follows, however, I will identify what these occurrences indicate when viewed collectively and how this unifying theme relates, in turn, to the December 2 Board Order.

The Occurrences:

-- No. (1). Information Not Posted...

It was on Friday, December 12, that I learned the Board had issued an Order revoking four of Reclamation's water rights permits. The following Monday, I called the Board and a staff person gave me the Board's web site where information on the matter was posted. At the library the next day, I visited that web site and downloaded the Board Order. On December 17, I again called a Board staff person and asked if there was a review period for the public to comment on the Order. That person told me there was a 30-day period during which a party could prepare and submit a document called a petition for reconsideration. Again, this was on December 17, which meant that half of the review period had already passed.

A few days later, I rummaged through a stack of publications in my bookcase and, thanks to a stroke of luck, located my old copy of the California Water Code. Under Article 2.5, I found Section 1357., which reads in part:

"The board may order a reconsideration of all or part of a decision or order on the board's own motion or on petition of any person interested in any application, permit, or license affected by the decision or order. The petition shall be filed within 30 days after adoption by the board of a decision or order." (page 50).

Why wasn't information about this 30-day review period posted on the Board's web site? It wouldn't have helped me too much, but it would have helped other interested parties to at least consider their options.<sup>1/</sup> Is there a rule, regulation, or policy that prohibits such a posting? If not, and given the importance of this particular Board Order, is there any chance it may have been hoped this omission would discourage submissions and thereby hasten the official closure of this permit issue?

-- No. (2). Statements and Behavior...

Battling the clock, I called the Board on Monday, December 29, and asked a staff person if the January 2 due date for the Petition could be extended until Monday, January 5. After conferring with another individual, the staff person called me back and said a time extension was not possible.

With the deadline rapidly approaching, I called the Board again two days later (December 31), and asked if an extension was truly impossible. I hoped that, because of the holidays, a modest extension might be allowed. This time, I was told to take up my question with the individual who works directly for the five-member board, so I immediately called that staff person. I said who I was, that I was preparing a petition on the Board's Auburn Dam decision, and that I wished to request an extension of time. This staff person very emphatically stated that (and this is close to a direct quote):

The Auburn Dam issue is closed and the Board will be taking no further action on the matter.

I was stunned to hear this individual make such a statement -- a statement I

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<sup>1/</sup> In his January 27, 2009 letter to Board Chair, Ms. Doduc, for example, Mr. Joe Sullivan, of Sullivan and Associates, wrote, in part:

"...I had not heard that Petitions for Reconsideration were permitted, and it appears others opposed to the decision did not know either, as no one other than Ms. Quinn filed. Had I known, you would certainly have heard from me."

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knew was incorrect and which this staff person would have had to know was incorrect as well. I then mentioned to her the 30-day period following the issuance of a Board order during which an interested party can file a petition. To that statement, this individual said I had already had 30 days to complete the petition, a comment she repeated several times during the conversation.

Without agreeing or disagreeing, I repeated again that I would now like to request an extension of time. In reply, the staff person told me I would have to e-mail my extension request to the Board Chair, adding the Board Chair was not in the office that day. I told her I didn't have a home computer nor access to e-mail. In that case, continued this individual, I would have to hand-deliver a written request to the Board's office. To this statement, I asked (and this is also close to a direct quote):

Couldn't I send in my request by fax?

Without any hesitation, the staff person said yes, and gave me the fax number to use. I thanked her, wished her a Happy New Year, and concluded the conversation.

I then quickly considered the pros and cons of submitting a written request for an extension. Time was very short, I would have had to prepare the request, drive some distance to Kinko's to fax it, and then drive home to await a telephone call from the Board -- a call it seemed almost certain, given the staff person's comments, would have denied the request. I decided my time would be better spent working on the petition itself, and that is what I did.

Why did this Board staff person (who occupies an important position) work so hard to discourage my submitting a time extension? Was she having a 'bad hair day'? Or did her first statement and her overall behavior reflect a sentiment within this state agency that is essentially an anti-Auburn Dam sentiment and was she, too, striving to hasten the official closure of the matter?

-- No. (3). A Quoted Statement...

In the weeks following my January 2nd submission of the Petition, I had an opportunity to do some background reading on various aspects related to the Board Order. Articles I read included one by Chris Bowman in the December 3, 2008 Sacramento Bee and another by Dan Bacher dated December 2 that I found on the web site for the group, Sacramento for Democracy. In Mr. Bowman's piece, there's a statement--referring to the Board Order, that appears exactly as follows:

"This is a death certificate," board spokesman William Rukeyser said following the 5-0 vote.

A sentence in Mr. Bacher's article includes the same first five words spoken by



Mr. Rukeyser but includes some additional wording as well. It appears exactly as follows:

"This is a death certificate for the Bureau's water rights for Auburn Dam," said William Rukeyser, board spokesman.

Equating Board Order 2008-0045 to a death certificate for the Auburn Dam -- it's hard to imagine a statement that more dramatically reflects the existence of a sentiment opposed to that project. Both articles describe Mr. Rukeyser as "board spokesman," and he does, in fact, work in the Board's Public Affairs Office. Thus, one must conclude he was speaking for this state agency as a whole, which, of course, includes the five-member board.

Based on the board's spokesman's 'death certificate' statement, it is not unreasonable to ask: To what extent did an anti-Auburn Dam sentiment influence the work of the Board's staff on this permit issue? Actually, the existence of such a sentiment would help explain the "we're-the-good-guys-and-they're-the-bad-guys" tone that pervades Board Order 2008-0045. I have read many other Board decisions and orders and have never before encountered such a tone. And if the Board staff's work reflected such a sentiment, it would have been extremely difficult for the five-member board to escape its influence.

#### The Unifying Theme:

I have tremendous respect for the State Water Resources Control Board; that is, the five-member board and its staff, and especially the staff in the water rights division. These are good, competent people, and I take no pleasure in disagreeing with them. Yet, when intelligent people such as these are going in the wrong direction on an important issue, one is compelled to try and find some explanation.

For whatever reason, a cognitive construct (or way of thinking) that does not favor the Auburn Dam Project seems to have become established at this state agency. The occurrences discussed above not only indicate, but also reflect, its existence. As a result of this construct, the SWRCB pursued an uncharacteristically narrow focus in its handling of this water permits issue and, in the process, missed the broader context in which the issue should have been considered. That is to say, the Board missed the Big Picture.

\* \* \* \* \*

Note: This Attachment "A" is to accompany my January 31, 2009 letter to Ms. Tam Doduc, Board Chair.

Prepared by:

M.-L. Quinn  
Private Citizen  
and Independent Scholar