



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Division of Water Rights
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Arnold Schwarzenegger
Governor

January 29, 2009

M.-L. Quinn
P.O. Box 255516
Sacramento, CA 95865

DRAFT ORDER DENYING PETITION FOR RECONSIDERATION OF STATE WATER BOARD ORDER WR 2008-0045, WHICH REVOKED THE WATER RIGHT PERMITS FOR THE AUBURN DAM PROJECT OF THE UNITED STATES BUREAU OF RECLAMATION, PLACER AND EL DORADO COUNTIES

Enclosed is a draft order in which the State Water Resources Control Board (State Water Board or Board) denies the petition for reconsideration of Order WR 2008-0045 that you submitted on January 2, 2009. This order is tentatively scheduled for consideration by the State Water Board at its Board meeting on February 17, 2009. The Board meeting is scheduled to begin at 10 a.m. in the Byron Sher Auditorium on the second floor of the CalEPA Building at 1001 I Street, Sacramento.

All interested persons and parties to the proceeding will have the opportunity to comment on the proposed order at the State Water Board meeting. All presentations should be limited to three (3) minutes. Comments should be limited to the general acceptability of the order or possible technical corrections. Parties may not introduce evidence at the State Water Board meeting.

Parties must submit in writing comments or changes to the proposed order they wish the State Water Board to consider at the meeting. All written comments must be received by the Board by **12 Noon on Tuesday, February 10, 2009.**

Written comments are to be addressed and submitted to:

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

You may also submit your comments to Ms. Townsend by fax at (916) 341-5620, by email at commentletters@waterboards.ca.gov, or by hand delivery to the following address:

Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828

California Environmental Protection Agency

Draft Order Denying Petition - 2 -
For Reconsideration of Order WR 2008-0045
Auburn Dam Project

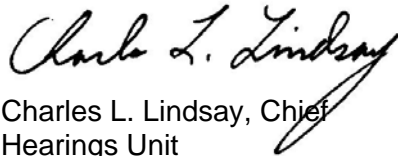
January 29, 2009

Couriers delivering comments must check in with lobby security and have them contact the Executive Office on the 24th floor at 916-341-5600.

Please include in the subject line, "COMMENT LETTER – 2/17/09 BOARD MEETING: AUBURN DAM PETITION DRAFT ORDER." Any faxed or emailed items must be followed by a mailed or delivered hard copy with an original signature.

If you have any questions regarding this notice, please contact Dana Heinrich, Senior Staff Counsel, at (916) 341-5188 or Jean McCue, Water Resource Control Engineer, at (916) 341-5351.

Sincerely,

A handwritten signature in black ink that reads "Charles L. Lindsay". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Charles L. Lindsay, Chief
Hearings Unit

Enclosures: Auburn Dam Project Service List
Draft Order

**WATER RIGHT HEARING REGARDING PROPOSED REVOCATION OF
AUBURN DAM PROJECT PERMITS
REVISED SERVICE LIST**

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Bureau of Reclamation, U.S. Dept of the Interior
James E. Turner, Assistant Regional Solicitor
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95825
rsahlberg@mp.usbr.gov

SWRCB/DWR Prosecution
c/o David Rose
State Water Resources Control Board
Office of Chief Counsel
P.O. Box 100
Sacramento, CA 95812
DRose@waterboards.ca.gov

Auburn Dam Council
c/o Michael R. Schaefer
7050 Walnut Avenue
Orangevale, CA 95662
Mikeret_99@yahoo.com

American River Authority
c/o Christopher D. Williams, Esq.
P.O. Box 667
San Andreas, CA 95249
cwilliam@goldrush.com

California Sportfishing Protection Alliance
c/o Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
mjatty@sbcglobal.net

Friends of the North Fork
c/o Michael Garabedian
7143 Gardenvine Avenue
Citrus Heights, CA 95621
mikeg@gvn.net

Sacramento County/Sacramento County Water
Agency
c/o Sandra K. Dunn
Somach, Simmons & Dunn
813 Sixth Street, 3rd Floor
Sacramento, CA 95814
sdunn@somachlaw.com

Friends of the River, Save the American River
Association, and Defenders of Wildlife
c/o Ronald M. Stork
1418 20th Street, Suite 100
Sacramento, CA 95811
rstork@friendsoftheriver.org

San Luis & Delta-Mendota Water Authority
c/o Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
JRubin@Diepenbrock.com

County of San Joaquin and San Joaquin County
Flood Control and Water Conservation District
c/o Thomas J. Shephard, Sr.
Neumiller & Beardslee
P.O. Box 20
Stockton, CA 95201-3020
tshephard@neumiller.com
dgillick@neumiller.com

Service List continued on next page.

South Delta Water Agency
c/o John Herrick
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Jherrlaw@aol.com

Stockton East Water District
c/o Karna E. Harrigfeld, Esq.
2291 W. March Lane, Suite B100
Stockton, CA 95207
kharrigfeld@herumcrabtree.com

Westlands Water District
c/o Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
JRubin@Diepenbrock.com

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-00XX

In the Matter of Permits 16209, 16210, 16211, and 16212
(Applications 18721, 18723, 21636, and 21637) of

UNITED STATES BUREAU OF RECLAMATION

AUBURN DAM PROJECT

SOURCE: North Fork American River and Knickerbocker Creek

COUNT: Placer and El Dorado

ORDER DENYING PETITION FOR RECONSIDERATION OF ORDER WR 2008-0045

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (State Water Board or Board) denies a petition for reconsideration of Order WR 2008-0045 filed by M.-L. Quinn (Petitioner). Order WR 2008-0045 revoked water right Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637) of the United States Bureau of Reclamation (hereafter Reclamation). Permits 16209, 16210, 16211, and 16212 authorized Reclamation to appropriate water in connection with the Auburn-Folsom South Unit of the Central Valley Project (Auburn Dam Project).

For the reasons set forth below, we find that Order WR 2008-0045 was appropriate and proper, and therefore the petition for reconsideration is denied.

2.0 LEGAL AND FACTUAL BACKGROUND

The Water Code and the State Water Board's regulations require appropriative water rights to be developed with due diligence. Accordingly, the State Water Board may revoke a water right permit if the Board finds that the permittee has not constructed the necessary water diversion facilities or applied water to beneficial use with due diligence. (Wat. Code, § 1410.)

On January 24, 2008, the Division of Water Rights issued a Notice of Proposed Revocation for the water right permits associated with the Auburn Dam Project. Reclamation requested a hearing on the proposed revocation, which was held on July 21, 2008. The hearing participants included Reclamation, a State Water Board staff Prosecution Team, and a number of stakeholders with diverse interests in the outcome of the proceeding.

On December 2, 2008, after having considered the evidence and legal and policy arguments presented during the hearing, the State Water Board adopted Order WR 2008-0045. In that order, we found that cause for revocation of the Auburn Dam Project permits existed because Reclamation had not prosecuted construction of the project or applied water to beneficial use with due diligence as required by the permits themselves, the Water Code, and the State Water Board's regulations. We also found that revocation would be in the public interest. Our order explained that the requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law designed to protect the public interest by preventing the "cold storage" of water rights. For purposes of discussion, we defined "cold storage" to mean a situation where an appropriation is initiated, so that the water subject to appropriation is not available to other parties who could potentially put it to beneficial use, but the appropriator is not diligently pursuing development of the water supply, so the water remains unused, contrary to the public interest.

M.-L. Quinn filed a petition for reconsideration of Order WR 2008-0045, which was received on January 2, 2009. Petitioner is an individual who did not participate in this proceeding before filing a petition for reconsideration.

3.0 GROUNDS FOR RECONSIDERATION

Within 30 days of adoption of a State Water Board order or decision, any interested person may file a petition for reconsideration of the order or decision pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768-770. Section 768 of the Board's regulations provides that an interested person may petition for reconsideration upon any of the following causes:

- (1) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (2) The decision or order is not supported by substantial evidence;
- (3) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (4) Error in law.

If reconsideration is requested based in whole or in part on section 768, subdivision (c) of the regulations, the petition must include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the Board and the reason it was not presented. (Cal. Code Regs., tit. 23, § 769, subd. (b).) In addition, the petition must describe the nature of the evidence and the facts to be proved. (*Ibid.*)

On reconsideration, the Board may:

- (1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration;
- (2) Deny the petition upon a finding that the decision or order was appropriate and proper;
- (3) Set aside or modify the decision or order; or
- (4) Take other appropriate action.

(Cal. Code Regs., tit. 23, § 770.)

4.0 DISCUSSION

Petitioner contends that cause for reconsideration exists under all four grounds specified in section 768 of the Board's regulations. Petitioner requests the Board to rescind

Order WR 2008-0045, reinstate Permits 16209, 16210, 16211, and 16212, and return the permits to Reclamation for a minimum of 15 years.

Below we address Petitioner's main arguments and conclude that the petition should be denied. To the extent that any issue raised in the petition is not addressed in this order, we conclude that the issue is not a substantial issue that merits review. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

4.1 Petitioner's Argument Regarding the Definition of "Cold Storage" Lacks Merit

Petitioner's primary argument is that the definition of "cold storage" contained in Order WR 2008-0045 is factually incorrect because, contrary to the definition, the water that was subject to appropriation under Reclamation's permits was not unused. Petitioner argues that the water was not "locked up anywhere" or otherwise inaccessible to the public, but continued to flow downstream, providing water to agricultural and municipal users and providing habitat for aquatic life.

As explained below, it is unclear from the record in this proceeding whether the water that was subject to appropriation under Reclamation's permits was unused, or whether it was needed to satisfy the demands of junior water right holders or to protect instream beneficial uses, as Petitioner claims. Petitioner is correct, however, at least in theory, that placing water rights in "cold storage" does not preclude junior right holders from using the water, or preclude the water from serving to protect instream beneficial uses. But it does not follow from Petitioner's argument that cause for reconsideration of Order WR 2008-0045 exists.

In Order WR 2008-0045, we discussed the concept of cold storage for purposes of explaining why revocation of Reclamation's permits was in the public interest. The Board was not required, however, to find that revocation was in the public interest in order to revoke the permits. Instead, cause for revocation exists if the Board finds that a permittee has not constructed the necessary water diversion facilities or applied water to beneficial use with due diligence. (Wat. Code, § 1410.) Petitioner has not alleged that our finding that cause for revocation existed was not supported by substantial evidence, nor has Petitioner shown that our decision to revoke the permits was based on an error in law.

In addition, notwithstanding the definition of “cold storage” in the order, our finding that revocation would be in the public interest was not predicated on the assumption that all of the water subject to appropriation under Reclamation’s permits was unused. In Order WR 2008-0045, we found that it would be in the public interest to allow current and future water right applicants to appropriate any surplus water made available by revoking Reclamation’s permits, provided that the applicants’ projects were in the public interest and would be developed with due diligence. (*Id.* at p. 20.) But we did not find that revocation necessarily would make surplus water available for appropriation. (*Id.* at p. 26.) Rather, we recognized that all or a portion of the water subject to appropriation under Reclamation’s permits might be needed to satisfy existing junior water right holders or to protect instream beneficial uses. (*Id.* at pp. 19, 20, 26.) Finally, it merits note that, even if all of the water subject to appropriation under Reclamation’s permits was being put to beneficial use, as Petitioner claims, revocation was in the public interest because the existence of the permits fostered uncertainty regarding the continued availability of the water.

Petitioner also advances the related argument that Order WR 2008-0045 is flawed because the order does not address the issue of whether revocation made water available for appropriation, which Petitioner characterizes as a “real water vs. paper water” issue. In Order WR 2008-0045, we did not determine whether or to what extent revocation would make surplus water available for appropriation because such a determination would have required a detailed analysis of current hydrologic information, the extent to which water already had been appropriated, and the flows required to protect instream beneficial uses. As we explained, interested persons had not been put on notice that those issues would be addressed, and the hearing record was not adequate to support a determination of those issues. (Order WR 2008-0045 at p. 26.)

As with Petitioner’s first argument, Petitioner’s argument that the Board should have determined whether revocation of the permits made water available for appropriation does not support Petitioner’s contention that cause for reconsideration exists. Petitioner cannot show, for example, error in law because the Board was not legally required to determine whether revocation made water available for appropriation. (See Wat. Code, § 1410, subd. (b).) Moreover, our decision not to make a water availability determination was appropriate in this case, for the reasons summarized above.

4.2 The Board's Finding regarding Due Diligence was Supported by Substantial Evidence

Petitioner also takes issue with our finding that Reclamation did not exercise due diligence in developing its water rights. Petitioner contends that, viewed objectively, the events of the last four decades demonstrate that Reclamation exercised due diligence. Similarly, Petitioner faults the State Water Board for not having been more diligent in enforcing the terms and conditions of Reclamation's permits, and suggests that the State Water Board may have been at least partly to blame for Reclamation's lack of diligence.

Petitioner's arguments concerning our due diligence finding do not support the contention that cause for reconsideration exists. On reconsideration, the issue is whether the State Water Board's finding that Reclamation did not exercise due diligence in developing its water rights is supported by substantial evidence in the administrative record. The issue is not whether the evidence, viewed another way, might have supported a different finding, or whether the Board was diligent in taking enforcement action against Reclamation. As stated earlier, Petitioner has not alleged that our due diligence finding was not supported by substantial evidence, nor has Petitioner provided any support for such an allegation. In addition, the record does not support Petitioner's suggestion that the Board contributed to Reclamation's lack of diligence by not taking enforcement action earlier.¹

4.3 Petitioner's Argument regarding "Real World" Considerations Lacks Merit

Petitioner argues that in deciding whether to revoke Reclamation's permits, the State Water Board did not take into account what Petitioner characterizes as "real world" considerations, including the State's future water supply needs, concerns about the Delta, current drought conditions, the economic recession and climate change.

¹ Even though the Board had not previously taken an enforcement action concerning Reclamation's permits for Auburn Dam, it does not follow that the Board should have refrained from the enforcement action that was the subject of Order WR 2008-0045.

As with Petitioner's other arguments, this argument does not support the contention that cause for reconsideration exists. Petitioner has not explained how our alleged failure to take public interest considerations into account shows that the decision to revoke Reclamation's permits was not supported by substantial evidence or constituted error in law. In addition, contrary to Petitioner's argument, we did take into account a number of the public interest considerations that were raised by the hearing participants. In Order WR 2008-0045, we expressly addressed the water supply and environmental implications of revocation, including implications for water quality in the Delta. (Order WR 2008-0045 at pp. 18-26.)

4.4 Reconsideration is not Warranted due to a Procedural Irregularity or the Existence of Additional Evidence

As explained above, Petitioner has not shown that Order WR 2008-0045 was not supported by substantial evidence or contained an error in law. Accordingly, cause for reconsideration does not exist pursuant to section 768, subdivisions (b) or (d) of the Board's regulations. In addition, Petitioner's contention that cause for reconsideration exists pursuant to subdivisions (a) and (c) of section 768 lacks merit, as explained below.

With respect to subdivision (a), Petitioner asserts generally that an unspecified irregularity in the proceedings and abuse of discretion prevented all persons, whether they directly or indirectly participated, from having a "thorough", and therefore fair, hearing. Assuming for the sake of argument that the Board's regulations permit Petitioner, who did not participate in the hearing, to seek reconsideration on the grounds that other interested persons were denied a fair hearing, Petitioner has not provided any support for the allegation that there was any irregularity in the proceedings or abuse of discretion that prevented any hearing participant from having a fair hearing.

With respect to subdivision (c) of the regulations, Petitioner asserts that relevant evidence supporting a decision not to revoke Reclamation's permits exists, and that evidence would have been produced if revocation had been viewed in a broader context. Petitioner speculates that the nature of the evidence might concern a number of policy considerations, such as climate change, its impact on California's snowpack, and the need for new storage facilities. Pursuant to subdivision (c), however, the issue is not whether additional evidence could have been produced. To the contrary, the issue is whether relevant evidence exists which, in the exercise

of reasonable diligence, could *not* have been produced. Petitioner has not met her burden, as required by the Board's regulations, of specifying what additional relevant evidence exists, and explaining under penalty of perjury why it could not have been presented to the Board earlier.

5.0 CONCLUSION

For the foregoing reasons, we find that Order WR 2008-0045 was appropriate and proper. Therefore, M.-L. Quinn's petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that Order WR 2008-0045 is affirmed, and M.-L. Quinn's petition for reconsideration is denied.

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 February 17, 2009.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT
Jeanine Townsend
Clerk to the Board