



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

3536 Rainier Avenue, Stockton, CA 95204

T: 209-464-5067, F: 209-464-1028, E: [deltakeep@me.com](mailto:deltakeep@me.com), W: [www.calsport.org](http://www.calsport.org)

15 October 2014

Felicia Marcus, Chair  
Members of the Board  
State Water Resources Control Board  
C/o Jeanine Townsend, Clerk to the Board  
1001 "I" Street, 24<sup>th</sup> Floor  
P.O. Box 100  
Sacramento, CA 95814  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



VIA: Electronic Submission  
Hardcopy if Requested

### **Re: Dry Year Report Comments**

Dear Chair Marcus and members of the Board:

The California Sportfishing Protection Alliance and California Water Impact Network (hereinafter, CSPA) appreciate the opportunity to submit the following comments in response to the Notice of Solicitation Regarding Improvements To The Implementation And Enforcement Of Water Rights During Drought Conditions. The Notice states that the Board is seeking recommendations and information on actions that should be taken to most effectively implement and enforce the water rights priority system in future dry years.

Specifically, the Board requested information related to the following questions.

1. What actions, if any, should the State Water Board take to improve the Board's information and analyses to support determinations on water availability relative to water right priority, including, but not limited to, improvements to supply, demand and watershed specific information and water right priority information?
2. What actions should the Board take to better communicate information about limited water availability relative to water right priorities, including the need and basis for curtailments of water diversions?
3. What, if any, changes should be made to enhance the effectiveness of the State Water Board's curtailment process, including measures to protect the public interest, health and safety and public trust resources?
4. What, if any changes should be made to enhance the effectiveness of the State Water Board's complaint process?
5. Should the State Water Board pursue any additional authorities or policies to more effectively implement and enforce the water rights priority system?
6. How can the Board better assist water users in planning for upcoming dry periods?

7. What additional actions, if any, should the Board take to prepare for the next dry year or series of dry years?

CSPA believes it is fundamental to all seven questions that the Board follow due process procedures and not exclude senior water rights holders and advocates of public trust protection from decision-making proceedings, as it did in 2013. Throughout 2013, the Board coordinated with junior water rights holders (i.e., state and federal projects) and fishery agencies to modify Delta flow and water quality standards that were adopted through extensive evidentiary proceedings. The Board's orders were presented as a *faint accompli* and public input was only allowed after the fact and responses to public comments only occurred months later. Information developed during this "backroom" decision-making was then subsequently used to issue curtailment notices to water rights holders senior to the state and federal projects.

October 2014 is little different than October 2013: the Board is aware that, barring extensive rainfall, serious water shortages will occur. The Board has sufficient time to establish an on-going public process, involving all affected parties, to determine how limited water supplies can be most effectively and fairly allocated, while ensuring that public trust resources and the rights of senior water rights holders are legally protected. Failure to establish a methodical public, preferably evidentiary, proceeding indicates that the Board is more concerned with protecting the state and federal projects than California's water rights system and senior water rights.

CSPA also believes it is fundamental to all seven questions that the Board have sufficient factual information on which to base decisions involving changes to D-1641 standards, protection of public trust resources, curtailments of water rights, water availability relative to water right priority. As CSPA observed during comments on the public workshop regarding Central and Southern Delta Water Availability and Use, the Board must be able to conduct an audit of water in the system. In other words, the Board must quantify:

- Actual Delta outflow as opposed to the Net Delta Outflow Index (NDOI) relied upon by the Board. The NDOI is a calculated guesstimate and seriously overstates Delta outflow during drier periods by several thousand cubic-feet-per-second (cfs), as compared to the tidally filtered flow data collected by the U.S. Geological Survey (USGS) stream flow gages at Rio Vista, Three Mile Slough, Jersey Point and Dutch Slough. The USGS data correlates with salinity changes and the NDOI doesn't. For example, while the NDOI reported average Delta outflow as 3,805 cfs during May 2014, the USGS gages reported that actual Delta outflow was a negative 45 cfs.
- Actual natural inflow as opposed to the calculated guesstimates of "Full Natural Flow" at rim dams the Board has historically relied upon. The Board has never required the comprehensive "gaging" of natural flows. Natural springs in the Sacramento and Feather River watersheds provide millions of acre-feet (AF) of flow throughout the year, even in summer. For example, the Pit River is largely artesian, the McCloud is fed by large springs, Lake Amador on the North Fork Feather River is located atop massive artesian springs and Sierra Valley on the Middle Fork Feather River was once a large lake and is the source of extensive groundwater accretion. The state and federal projects have no

storage rights for these artesian flows that are commingled in upstream reservoirs when downstream riparian and appropriative demands exist and are not being met.

- Riparian flow in the upper San Joaquin River that is commingled and/or diverted by the U.S. Bureau of Reclamation at Friant Dam and other upstream diverters. As we have previously discussed, the Board, USBR, Exchange Contractors or other entities do not have a legal right to deprive riparian landowners on the lower San Joaquin River of their rightful share of riparian flows from the upper watershed. The rights of riparian landowners on the lower San Joaquin extend to the winter flows necessary to maintain the streambed between Gravelly Ford and the confluence of the Merced River.
- Actual accretions of water to the Delta and reaches of streams tributary to the Delta, including return flows, discharges and other inputs, as opposed to the calculated guesstimates of accretions the Board has historically relied upon. For example, return flows from the Colusa Basin Drain at Knights Landing, Butte Creek/Butte Slough/Sacramento Slough and the Natomas Basin Cross Canal are unknown because of an absence of flow gages. The state and federal projects lose title to water that leaves project facilities and is transferred to north of Delta contractors. Authorized discharge capacity from municipal and industrial wastewater treatment facilities into the Delta watershed exceeds two million AF annually. Annual discharges from irrigated agriculture are extensive but unknown. All accretions below project facilities, whether from return flows, discharges from wastewater treatment facilities, groundwater, etc. are subject to the water rights priority system.
- Actual channel losses in the Delta and reaches of streams tributary to the Delta, as opposed to the calculated guesstimates historically relied upon by the Board. The Board must identify and quantify losing reaches of streams tributary to the Delta and make an effort to identify the causes of channel losses. For example, recent information suggests that, during drier periods, the Sacramento and Feather Rivers below project facilities are losing reaches. Are losing reaches of streams the result of illegal diversions or adjacent pumping of groundwater for local use or substitution for water transferred via project facilities?
- The “abandoned water” in the Delta and the legal rights to it in accordance to the priority system, as opposed to the guesstimates relied upon by the Board. Riparian and return flows, accretions and compliance flows that reach the Delta are considered “abandoned” flow when the Delta is in balance. However, the rights of senior appropriators to abandoned water take precedence over the rights of the state and federal projects.
- Commingled water from all sources in both state and federal project reservoirs and in the Delta including Sacramento watershed water drawn into the San Joaquin watershed, as the result of export pumping by the state and federal projects. By statute and precedent, it is the responsibility of the party causing a commingling of water from one watershed to another to ensure that the water rights of existing parties is not diminished or impaired. The Board must determine whether in-Delta diverters are actually taking stored Project water, whether the Projects are storing water they’re not entitled to store and whether the

Projects commingling of water is adversely impacting the right of Delta water users from exercising their legal entitlements.

With respect to commingled water within the Delta, the Board needs to make a factually and legally defensible determination on whether the tides, mixing of the myriad inflows to the intricate web of Delta channels and the use of Delta channels by the state and federal projects comprise a common Delta Pool. The Board must then proceed to determine the quantity of water in the Delta and the legal rights to that water, taking into account the priority system, the Delta Protection Act of 1959 and Area of Origin statutes. In the absence of a Delta Pool, the state and federal projects have illegally diverted millions of AF of water they have no legal right to divert.

The Board is in a quandary of its own making. It lacks the information necessary to effectively and legally implement and enforce the water rights priority system during periods of water shortage because of its historical failure to require the projects and other water users to account for and accurately quantify the sources of their water, diversions, return flows, channel losses, accretions, Delta outflow, etc. Without this crucial information, the Board cannot issue legally defensible curtailment notices to senior water rights users, while allowing diversions by junior water rights holders. As we've pointed out, the Board is in the situation of a store manager facing inventory shortages who doesn't know how much inventory is delivered or how much or by what means inventory is removed. Broad generalizations or guesstimates are legally insufficient justification to restrict the rights of senior water rights users. The situation is compounded by the fact that legal claims to water in the Central Valley are 5.5 times average unimpaired flow and this excludes water necessary to protect public trust resources.

Given the enormous over-appropriation of water, which CSPA believes to be a root cause of both California's present water crisis and the collapse of the Central Valley's pelagic and anadromous fisheries, a commitment to adjudicate Central Valley waters is fundamental to all seven questions. Millions of Californians mortgaged their dreams and pocketbooks on the illusion of an adequate and reliable water supply. Many are now grievously suffering because they were induced to build farms, businesses and homes on promises of paper water.

As we've previously discussed, there have been ten multi-year droughts of large-scale extent in the last one hundred years, spanning forty years. Climate change will further reduce limited water supplies. Drought is an integral part of normal conditions.

Water rights in the San Joaquin and Sacramento basins were oversubscribed before the California legislature passed the Water Commission Act of 1914, which established today's permitting process. They were oversubscribed before the 1927 state filings to reserve unappropriated water, the basis for the claimed water rights of the state and federal export projects, before the Legislature passed the Central Valley Project Act in 1933 and many decades before the state and federal projects began Delta diversions.

Colorado adjudicated its water rights in the 1970s and established a continuing adjudication system that addresses groundwater, as well as surface water. Idaho recently completed a

comprehensive adjudication of 158,000 water right claims in the Snake River Basin that covers 85% of the state and also addresses both surface and groundwater.

Parallel to adjudication, the State Water Board should undertake a comprehensive socio-economic benefit/cost analysis of water use and how limited water supplies can most effectively be employed to meet multiple beneficial uses. It should also initiate a public trust proceeding, similar to the Mono Lake hearings in the early 1990s, to determine how the common property rights of the people to healthy rivers and fisheries can best be protected. In 2010 the State Board identified the flows needed to protect the public trust resources of the Delta. It should now proceed to balance those ecosystem requirements against consumptive needs.

In closing, there are numerous factual and legal determinations that must be addressed before the Board can make any legally supportable decisions regarding water availability, diversion curtailments and protection of public trust resources. If current necessity demands that decisions be made on the basis of insufficient information, it is essential that the process be methodical and fully open to participation by all involved parties. It is also essential that the Board make a commitment and begin the process to gather the information necessary to fully audit water supply and use in the Central Valley, commence a formal adjudication of water rights, conduct a comprehensive socio-economic benefit/cost analysis and initiate a public trust balancing.

In any case, the Board needs to develop and implement near-term requirements for reservoir carry-over storage volumes to ensure that minimum flows for fisheries and water supply are available if the drought continues. The Board should remember that the present inadequate flow and water quality standards contained in D-1641 were developed for drought conditions during evidentiary proceedings that followed the severe six-year 1987-92 drought. Given the precarious state of Central Valley fisheries, further relaxation of Delta standards should be a last alternative.

CSPA notes that previous efforts of the Board, the state and federal projects and fishery agencies have failed and have chaperoned the long-developing water supply crisis and fisheries collapse. Only by conducting a proceeding open to all affected parties in accordance with due process and by making an irrevocable commitment to ultimately address the underlying factual and legal issues and to finally resolve the enormous imbalance between water supply and water demand, in accordance with 150 years of water law and precedent, can the Board secure the support to undertake near-term emergency decision-making based upon the present inadequate information. Otherwise, the Board is simply opening Pandora's box to another generation of water wars.

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,



Bill Jennings, Executive Director  
California Sportfishing Protection Alliance