



California Sportfishing Protection Alliance

“An Advocate for Fisheries, Habitat and Water Quality”

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Mr. Steven Herrera
Manager, Division of Water Rights Permitting Section
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95814-2000
Via e-mail and surface mail

Re: CSPA protest, Applications 30358A and 30358B, Davis-Woodland

Dear Mr. Herrera:

This letter is in response to your letter of December 23, 2009, requesting “documentation showing the circumstances when adverse cumulative impacts to fisheries would occur” should Applications 30358A and 30358B be permitted. You state that if CSPA fails to provide this information, CSPA’s protest of these applications will be dismissed.

CSPA respectfully refers to our protest of October 31, 1994. The basis of that protest is not limited to fisheries impacts, and also states, in Statement of Facts, point 3 (page 8) that the proposed project “has the potential to have direct and cumulatively adverse impacts to fresh water flowing into and through the Bay Delta Estuary.” Also, in Statement of Facts, point 1 (page 3): “We believe that the San Francisco Bay – San Joaquin – Sacramento Delta is fully appropriated and in fact over appropriated.”

On page 17 of our protest, we state that, “on review of the Final EIR, the CSPA will submit dismissal terms or require a hearing before the Board.” While we recognize that we cannot “require a hearing,” we can request a hearing for good cause and do so at this time.

Water in the Sacramento River system is already limited, and will likely be limited further by increased Delta flow requirements

We have reviewed the EIR that the applicants have completed for their proposed new water supply project. Pages 3.2-33 to 3.2-46 present figures that show that on a percentage basis, the effect of the proposed new diversion would have small, largely de minimis impacts on various hydrologic and biological parameters in the Delta, assuming *Delta outflow standards that are in existence today*. Overall Delta outflow would be

reduced by an average of 33,000 afy. The environmental analysis suggests in Volume II, page 5-25 that the diversions from the project could move the X2 line as much as 1.1 KM eastward, and label this in its EIR an “unavoidable significant impact.”

It is difficult to quantify the incremental effects on fisheries of any single diversion the size of that proposed by applicants. Indeed, it is difficult to quantify the cumulative effects of all Central Valley diversions on fisheries, and hearings on the effect of demand in the Sacramento-San Joaquin system in relation to the Bay-Delta and its fisheries have been conducted by the Board at numerous times since 1987. It is also difficult to determine how to address responsibility for public trust responsibilities in the Bay-Delta. In Decision 1641 (as modified by WRO 2000-02) the Board “on an interim basis” assigned that responsibility to the Central Valley Project and the State Water Project, but announced its intention to re-evaluate that responsibility among Sacramento River diverters for Delta flow requirements in “Phase 8” hearings.¹ Those hearings have never taken place.

While the resolution of this situation is very much open to question and debate, the condition of Bay-Delta fisheries is not. “Adverse *cumulative* impacts to fisheries” occur all the time, 365 days a year. Bay-Delta fisheries have crashed, and no one denies it. Delta Vision and the Bay Delta Conservation Plan were established in large measure to respond to this crash, and numerous other processes are underway at the State Board to address it.

A new informational proceeding that addresses Delta outflow but also to some measure inflow, in the wake of the Delta Pelagic Organism Decline and the crash of Central Valley salmon and steelhead and other anadromous fish populations, has just commenced as a result of SB X7 1.² Evidentiary hearings at the Board on San Joaquin flow and salinity standards are scheduled for November of 2010, and further evidentiary hearings that may bear on Delta inflow and outflow in 2011 and 2012 have been contemplated in Board publications.

CSPA participated in all of the past processes and is participating in those currently underway. However, to ask CSPA to effectively determine *today* the outcome of Delta flow requirements and the responsibility that may be assigned for meeting them to any existing upstream diversions or any *new* diversions in the Sacramento River watershed is unreasonable.

¹ Cite to D-1641 pp. 131-132.

² The Board’s December 15, 2009 Notice for this Proceeding states in part on Page B-3: “The available information indicates that further review and change of Delta outflow objectives may be required. Changes to Delta outflow patterns have likely contributed to the POD and are likely having an impact on the abundance of other species of concern. Actions taken under the federal ESA are already changing outflow requirements for the SWP and CVP and additional species protection actions are imminent. Additional Delta outflow recommendations are likely to come from the BDCP and other planning efforts currently under way. Based on current scientific information, recent regulatory actions, and expected recommendations from agencies and stakeholder groups, staff recommends the State Water Board conduct a detailed review of the Delta outflow objectives for possible revisions to the Bay-Delta Plan. Any revisions should also consider the need for Delta inflows.”

The Board should evaluate water availability in the Sacramento-San Joaquin system after the outcome of these processes is known, not before. The water availability analysis that was conducted for the Project EIR was based on modeling assumptions developed for conditions in 2004, prior to the widespread publicity of the POD and to the crash in salmon and steelhead populations in the Central Valley. It is based on assumptions from the Biological Assessment that supported the 2004 Biological Opinions for Delta smelt and for ESA-listed salmonids and green sturgeon;³ the 2004 Biological Opinions were overturned as unprotective of these species in 2008, and new B.O.'s have been issued. The EIR's water availability analysis also assumes the existence of the Environmental Water Account which is no longer extant, at least in the form it was in 2004, and also assumes numerous requirements of the inadequate, unprotective D-1641.⁴

While Davis and Woodland have agreed to the inclusion of Standard Permit Terms 80 and 90 as part of their settlements with various in-basin and export diverters, what that does not tell us is the amount of water that will be needed to recover Delta fisheries. It also does not make known the frequency with which new Delta requirements will create conditions where water that can be captured by the CVP and SWP as senior diverters to project partners will need to be released from storage or bypassed for the in-basin purpose of meeting Delta outflow requirements. This in turn will require the project partners to seek alternative sources of water during unknown but potentially greatly increased numbers of days each year.

Moreover, this will likely in turn create conditions where there is greater competition between exporters and other entities on the one hand and project partners on the other for available water that is offered for sale or transfer from the Sacramento Valley, as well as likely increasing the cost of any water that is so offered for transfer.

In 2009, Delta salinity standards were violated for the majority of the year. Restrictions against Joint Points of Diversion were violated throughout April. Other parameters were also violated with frequency. Granting permits for new diversions in conditions of chronic and repeated violation of flow-driven water quality standards, to the point where violations consistently go unenforced and where revision of the standards is being considered because of consistent failure to meet them, will only create systemic pressure to further violate or weaken Delta water quality standards.

Under these acknowledged circumstances, with grave consequences that have been acknowledged by the Board, the Board needs to show that water is available to support this new diversion of up to 44,000 afy. It is on the specific issue of water availability that CSPA requests a hearing.

³ DEIR Appendix 2 p. 3-3.

⁴ See e.g. DEIR, Volume 2, Modeling Technical Appendix, p. 3-19.

In resolving other protests, applicants explicitly accepted the role of junior diverter except in relation to exports

Your letter of December 23, 2009 notes that CSPA attended several settlement meetings with the applicants and with representatives from the California Department of Fish and Game. During those meetings, CSPA suggested to applicants that if they could make their diversions volume-neutral in terms of withdrawal of water from the system, CSPA would consider dismissal of its protest. However, while there was conceptual discussion of some offset through re-use of wastewater at Conaway Ranch, there did not appear to CSPA to be serious consideration of offsetting anything near the entire proposed diversion.

In previous settlements with exporters and with in-basin diverters, applicants agreed to the inclusion of Terms 80 and 90, which say that the Board may modify permit terms generally (Term 80) or in any given year (Term 90) reducing or even eliminating the season of diversion during which applicant may divert water. Previously, applicants had agreed to Term 91 provisions within their permit, thus that they would not divert during times when water released from storage by the State Water Project and/or the Central Valley Project was being released to maintain Delta water quality and outflow, and other “in-basin entitlements.”

While California Department of Fish and Game initially, during settlement meetings, stated concern with net diversions from Delta inflow, it subsequently settled with applicants without addressing that issue. CSPA considers this to be a political and not a biologically or hydrologically based decision.⁵

The State Board has acknowledged the overallocation of Central Valley water

In a letter to Delta Vision dated September 26, 2008, the Board stated that water rights have been granted for far more water than exists in the Central Valley watersheds. In a section titled Water Use vs. Water Rights, the Board stated in part:

The mean annual unimpaired or full natural flow in the Delta Watershed between 1921 and 2003 was 29 million acre-feet per annum (AFA), with a maximum of 73 million AFA in 1983. Unimpaired flow is flow that would be expected in the Delta watershed in the absence of storage and other human developments. In contrast, the total face value of the approximately 6,300 active water right permits and licenses within the Delta managed by the State Water Board, including the already assigned portion of state filings, is approximately 245 million AFA. There are 100 rights with a face value of 500,000 AFA, or more that account for 84% of

⁵ See for example DFG’s November 2, 2009 protest of Central Valley Project petitions for extension of time, Application 5625 et al, p. 2: “Considering that there may not be water to supply current levels of diversion, the Department is concerned that Reclamation has not provided any data or analysis demonstrating that water is available for additional needs.” See also letter from Sandra Morey, DFG, to Victoria Whitney, December 11, 2008: “While effects of proposed diversions under water right application 30358 may be individually limited, any additional reductions in the fresh water contribution from the Sacramento River to Delta habitat have the potential for cumulatively significant impacts.” (p. 1).

the total face value of the water rights within the Delta watershed. The Central Valley Project and State Water Project hold 75 permits and licenses within the Delta watershed that account for 53% of the total face value of the water rights within the watershed. The total face value of the unassigned portion of state filings for consumptive use (excluding state filings for the beneficial use of power) within the Delta watershed is approximately 60 million AFA. This does not mean that this 60 million AFA is hydrologically available for appropriation. Prior to assignment of a state filing, the State Water Board will require that an applicant provide evidence that water is available to support the assignment. Clearly, actual use must be only a small fraction of the face value of these water rights, particularly since face value does not include pre-1914 and riparian water rights.⁶

CVP and SWP have extensive water rights that may have priority over applicants' permits

On September 3, 2009, the State Board noticed a series of petitions for extension of time for a series of Central Valley Project permits (1272 et al) with a face value for consumptive diversions of Sacramento River water alone of about 18 million acre-feet per year. The CVP has filed petitions for extension of time on these permits through 2030, and has stated that it may seek change places of use for the permits. Any use of this water for in-basin purposes, including Delta outflow, would be senior to the rights of applicants. The Bureau of Reclamation has stated that it does not know where it might ultimately seek to use these rights, or how much of these rights might be used during build-out.⁷ The Bureau has also stated that it cannot assign specific usage amounts to any given permit, but rather must have its permits considered en bloc when evaluation for permit extension and ultimately licensing takes place.

In addition, there are millions of acre-feet of permitted rights in the Trinity, American and Stanislaus river systems that are jointly operated in coordinated fashion with the CVP's Sacramento Division. When any water from these other divisions of the CVP is being released from storage to meet Delta water quality needs, Davis and Woodland would be precluded from diverting under Term 91. As more and more of the American and Stanislaus water is diverted before it reaches the Delta, particularly under County of Origin state filings which are senior in priority both to the applicants' right and to those of the CVP, the time period when Term 91 applies can only increase.

⁶ See State Board to Delta Vision, September 26, 2008, pp. 2-3.

http://deltavision.ca.gov/BlueRibbonTaskForce/Oct2008/Response_from_SWRCB.pdf

⁷ See e.g. Letter to from the Bureau of Reclamation to Victoria Whitney, January 15, 2010, in response to CSPA protest to CVP petitions re application 5625 et al: "it may be necessary to request the State Board for adjustments in order to conform the authorized CVP places of use to match water use demands anticipated to exist at the time of build-out" (p. 3). Additionally, "Any request for additional permit-specific diversion information, that is, water diversion and use information beyond the type and format provided in Reclamation's Permittee Reports for CVP water rights, is not practical and inconsistent with the nature of integrated CVP operations..." (p. 2).

Moreover, Term 91 itself was held by the Board in WRO 81-15 to be provisional, awaiting a water availability analysis for the Central Valley as a whole: “The provisions of Term 91 are interim in nature until replaced by the results of the Board’s Water Availability Study for the Sacramento-San Joaquin Delta watershed or other Board action. The Board’s adoption of this order is not intended to be a final determination on any of the issues that may be addressed in the Water Availability Study or other Board actions.”⁸

The State Water Project has about 3.7 million acre-feet of storage capacity in the Sacramento watershed of and 23,000 cfs in direct diversion rights.⁹ The State Water Project (SWP) also provides large quantities water to exchange contractors in the Sacramento Valley. Rights for water used in-basin are also senior in priority to those of Davis and Woodland. State Water Project water is also to meet Delta water quality requirements. Under coordinated operations of the SWP and CVP, water released from storage from the SWP’s major storage facility, Oroville Reservoir, is sometimes used to meet Delta water quality standards. When this takes place, Term 91 conditions apply, and Davis and Woodland are precluded from diverting from the Sacramento River.

Actual quantities of water diverted from the Bay-Delta watershed are unknown

The State Board frankly admits that it does not know how much water is diverted in the state:

There are two basic categories of surface water rights: post-1914 appropriative; and pre-1914 appropriative and riparian. The State Water Board has very limited information on water use for either of these classes of water rights, and the little information it does have has not been synthesized and is not maintained electronically. The State Water Board has no information on groundwater use in the Delta watershed.¹⁰

Actual use under existing water rights is clearly a better metric to compare with unimpaired flows than is face value but the State Water Board has limited information on actual use. Comprehensive review and synthesis of the State Water Board’s paper files would however provide only a crude estimate of actual historic and current use because of gaps in reporting and unreliability of the data already collected.¹¹

The State Board must consider the nature of the permits being sought, and the dependence of applicants on the outcome for wastewater decisions

⁸ WRO 81-15, ¶ 20, p. 10.

⁹ D-1630, p. 51.

¹⁰ Board letter to Delta Vision, September 26, 2008, p. 1

¹¹ Ibid, p. 4

Applicants seek permits for Municipal and Industrial use. Reliability is critical for this type of permit. While groundwater is available as an alternative or back-up supply, the EIR states that a large motivation for the project is to allow applicants to meet wastewater discharge requirements, particularly for salt, that are currently either not being met or in danger of not being met.¹² Moreover, the requirements are likely to become more stringent going forward, and some action involving CSPA and the standards in the discharge permits for each of the project partners is ongoing before the Central Valley Regional Quality Control Board.

The project partners are likely to make important and substantial investments in wastewater infrastructure in the next ten years or less. Those investments will be dependent on assumptions about the reliability of the surface water supply available from the proposed diversions. Investment in less costly wastewater solutions that rely on surface water may potentially become stranded assets should surface water not be available as planned, and may lead to a condition of NPDES non-compliance.

Conclusion

For the reasons and because of the conditions enumerated above, CSPA maintains that water is not available for diversion to service the proposed permits. CSPA requests a hearing on these permits on grounds of lack of available water.

Respectfully submitted,



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¹² DEIR, Vol. 1, p. 2-8, 2-11, 3.3-11. Other constituents of particular concern include selenium and total dissolved solids. (p. 3.3-13).