



California Sportfishing
Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

AQUALLIANCE

DEFENDING NORTHERN CALIFORNIA WATERS

February 8, 2011

Transmitted by email, paper copies in US Mail

Kari Kyler
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
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Subject: Nov 2010 SJR flow and S. Delta salinity Response

Dear Ms. Kyler:

Thank you for the opportunity to provide additional information and comments concerning the State Water Resources Control Board's continuing review and expected revision of San Joaquin River flow and South Delta salinity objectives associated with the Bay-Delta Water Quality Control Plan. We incorporate by reference a number of past and recent San Joaquin River flow and South Delta salinity comments our organizations have provided.¹

¹ Toward this end, our organizations incorporate into this letter by reference the following previous communications to the Board and the Delta Stewardship Council:

- Letter from the California Water Impact Network and the California Sportfishing Protection Alliance to the Board, dated July 8, 2008, providing comments on the Board's Draft Strategic Workplan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.
- Letter from the California Water Impact Network and the California Sportfishing Protection Alliance to the Board, dated June 10, 2009, providing comments on the Board's 2009 Periodic Review Staff Report on the 2006 Bay-Delta Water Quality Control Plan (which updated the 1995 Bay-Delta Water Quality Control Plan).
- Letter from the California Water Impact Network and the California Sportfishing Protection Alliance to the Board, dated December 6, 2010, providing comments on the Draft San Joaquin River Technical Report by the Board staff, issued October 29, 2010.
- Environmental, Environmental Justice, and Fishing Community Joint Scoping Recommendations for the Delta Stewardship Council, January 25, 2011, providing comments on preparation of an Environmental Impact Report on the Council's state-mandated Delta Plan; and
- Letter from the California Sportfishing Protection Alliance, dated January 28, 2011, to the Delta Stewardship Council, providing comments on preparation of an Environmental Impact Report on the Council's state-mandated Delta Plan.

We refer the Board specifically to additional comments made by Bill Jennings, California Sportfishing Protection Alliance to the Delta Stewardship Council on January 28, 2011, that address water quality problems and difficulties with water supply impact modeling and analysis that come from exclusive reliance on CalSIM software.

It is our understanding that since the passage of SB 1 (Seventh Extraordinary Session, 2009) the State Water Resources Control Board diligently assembled a complete archive of scientific and analytic research and evidence, oral testimony, and workshop presentations that provide the Board with the “best available science” in support of the Board’s now-adopted Delta flow criteria (including San Joaquin River flow criteria). Since that time, the Board has re-engaged its process for revising San Joaquin River flow and south Delta salinity objectives, and collected still more scientific research specific to the San Joaquin River Basin and its tributaries.

As we have made clear over the years, the State Water Resources Control Board’s regulation of the Delta has been deeply disappointing to C-WIN, CSPA and AquAlliance, and for far too long. The 2006 Water Quality Control Plan continued reliance on the San Joaquin River Agreement and its scientific experiment, the Vernalis Adaptive Management Plan (VAMP) from Water Rights Decision 1641 (D-1641, adopted in 2000) and the earlier 1995 Bay-Delta Water Quality Control Plan. The Robie Decision of 2006, the San Joaquin River Agreement and the VAMP were found inadequate to the task of implementing the San Joaquin River flow objectives, and therefore contrary to law. In the ensuing four years, VAMP proved to be a scientific failure for lack of high flows during which to consider salmon survival. The data that were collected are essentially unrepresentative of the San Joaquin River system’s unimpaired hydrograph. A decade when precautionary protections could have been in place, were instead wasted, its signature science experiment found legally and functionally wanting.

On southern Delta salinity objectives, Judge Robie also found in 2006 that south Delta salinity objectives were poorly implemented as well. While the Board had also assigned to the US Bureau of Reclamation and the California Department of Water Resources the responsibility for complying with the south Delta salinity objectives, it was not until 2006 (just before Judge Robie handed down his decision) that the Board took enforcement action, issuing a Cease and Desist Order on February 15, 2006.²

And then, what the Board giveth, the Board also taketh away. In early 2010, the Board modified its 2006 Cease and Desist Order to postpone enforcement of existing south Delta salinity standards until at least 2014. By then, a new Water Quality Control Plan with new south Delta salinity standards would be in place, and DWR hopes to have plans for a new set of permanent operable barriers approved by fisheries agencies. Such an outcome is hardly assured. In the meantime, the Board will have spectacularly underachieved in its responsibility to protect the Delta’s fisheries and its agriculture. The pelagic organism decline documented in the middle of the last decade is still with us, as is the Board’s penchant for delaying justice for the Delta ecosystem.

On the other hand, our organizations appreciate the important work the Board completed in its Delta flow criteria report. In our 2008 and 2009 letters (incorporated to this letter above), we placed at the center of

² 136 Cal App. 4th 674, Section I.A.1.a. Simply stated, the State Water Resources Control Board approved the San Joaquin River Agreement and its VAMP with flow targets that were less than those called for in the San Joaquin River flow objectives approved in the 1995 Bay-Delta Water Quality Control Plan. The Board delayed implementation of South Delta salinity objectives at two in-Delta compliance sites (both on Old River) for more than seven years without justification in the Plan. C-WIN, CSPA, and AquAlliance note that this record of delay has been further extended by the Board’s 2009 modification of its 2006 Cease and Desist Order against the Bureau of Reclamation and the Department of Water Resources.

our analysis the problem for the Board of “what flows do fish need?” Under public trust doctrine case law, a rational balancing of the public trust resources is to take into account the answers the Board gave to this question and balance it with the public and private interests and beneficial uses of water in the Delta. Historically, the needs of fish were inadequately accounted for when the state and federal water projects were planned, and sometimes voices supporting fish resources in those days were effectively silenced. It was only when their operations began in the 1950s and 1960s that the consequences for fish and the Delta estuary began coming into focus. But by then the rush was on to complete and operate the projects to their utmost. In other words, little effort was made to balance then.

Since that time, the “balance” clearly struck was more like the peak of a pendulum reaching maximum storage at rim dams and Delta export pumping plants. From 2000 to 2006, four of these seven years saw the combined water exports of these projects from the Delta reached or exceed 6.3 million acre-feet (2000, 2003, 2005, 2006); and in 2005, combined Delta exports reached 6.47 million acre-feet, an all-time high for the coordinated operation of the Central Valley and State Water projects. During this same period, however, a number of Delta listed species crashed in abundance, a condition well-documented in the literature the Board acquired from scientists and interested parties during 2010.

Our organizations recognize that others disagree with such a characterization of the balancing process the Board must engage. Mr. O’Laughlin from the San Joaquin River Group Authority (SJRGGA) charges, in an unsolicited letter to the State Water Resources Control Board dated January 31, 2011, that the Board is tacitly changing the scope of the public process concerned with revising the San Joaquin River flow and South Delta salinity objectives and has allowed many participants in the January 7, 2011, fisheries panel addressed flow issues in the San Joaquin watershed upstream of Vernalis. He asks that the Board re-notice “and officially inform all of the interested parties that information regarding areas upstream of Vernalis is relevant to its inquiry” (p. 4). C-WIN, CSPA and AquAlliance recognize that this could pose a due process issue supporting challenge of the Water Quality Control Plan that is to be adopted in 2012. We make a similar request of the Board, so that the integrity of this process is safeguarded for all concerned, and not undermined by litigation at some point in the future. We are concerned that inaction on this matter would result in otherwise preventable delay for public trust protection of Delta estuary and Central Valley watershed resources. We respectfully suggest that the Board base its reasoning in support of expanding the scope of this process on the need to address flow and habitat evidence contained in the Board’s Delta flow criteria report adopted last August, and more recently obtained scientific evidence supporting increased instream tributary flows.

At the January 7th fish workshop panel before the Board, most fishery agencies’ and NGO scientists stated that flow issues in the South Delta and flow issues in the tributaries are part of the same problem, insofar as San Joaquin basin salmon and steelhead fisheries are concerned. Many written submittals to this proceeding also made this point. Such an expanded geographic scope as the Board has begun working with simply reflects today’s understanding of the biology of these fish. While Mr. O’Laughlin expresses concern that so many participants on that panel addressed themselves to fish, flows, and other conditions in the tributaries of the San Joaquin River, C-WIN, CSPA, and AquAlliance remind the Board that Dr. Mesick, in written testimony submitted on behalf of C-WIN and CSPA in December 2010, also discussed operations in the Delta, and made several conclusions and recommendations regarding exports.

Though seeking to limit discussion of the tributaries in general, SJRGGA also discussed the tributaries when it found advantage to do so on three occasions. First, Mr. O’Laughlin, in concluding slide 56 of his January 7, 2011 SJRGGA Powerpoint presentation, recommends: “1. Develop a life cycle model in an

open, collaborative process as set forth in SWRCB 2006 Order.” Presumably, that model would include the parts of the life cycle that takes place in the tributaries. Second, Mr. Yoshiyama, presenting testimony on December 3, 2010 and questions for panelists on December 21, 2010, both on behalf of SJRGA member the City and County of San Francisco, provided extensive analysis and proposed numerous questions relating to the San Joaquin tributaries. We note that Mr. Yoshiyama declined to participate in any panels at the January 2011 workshop.

Finally, Mr. Robbins, speaking on behalf of SJRGA member Merced Irrigation District at the conclusion of the January 7, 2011, workshop, expressed concerns over overlapping jurisdictions on the Merced River, and appeared to us to suggest that Merced flow issues would appropriately be addressed in this proceeding and the evidentiary process to follow (rather than the ongoing FERC proceeding, in which Merced Irrigation District has sought to limit to the immediate vicinity of its reservoirs).

From the standpoint of protecting and balancing the public trust with the public interest, it is less important (though not unimportant) to determine the exact causal mechanisms at work in the destruction of a highly altered ecosystem. Because the Board has failed its public trust obligations in the Delta and the Central Valley watershed for decades, the proper balancing needed to recover fish abundances is to swing the pendulum back to reasonable precautions that will protect and recover the ecosystem in fulfillment of the Board’s public trust duties. (See the Environmental Water Caucus letter to the Delta Stewardship Council, cited in footnote 1.) The big projects, operated to their utmost, are destructive to fish and the Delta’s estuarine ecosystem. To back away from the precipice of wholesale native species extinctions in the estuary and its watershed, it will be essential to restrict Delta export pumping, increase tributary and mainstem flows of Central Valley rivers, establish sustainable controls on salinity and contaminant sources upstream in the San Joaquin River basin, and invest in restoring critical floodplain and streambank habitat along the mainstem and the tributaries that fish can use to rear, grow, and survive migration through the Delta to the Pacific Ocean.

Key Questions

C-WIN, CSPA, and AquAlliance believe that the central decision the State Water Resources Control Board will need to make involves the question of balancing protection of the public trust with other beneficial uses of water reliant on the Delta. This question is essentially the same as the Delta Stewardship Council’s state mandate to balance “co-equal goals” in its Delta Plan expected in 2012. The definition of the “coequal” goals of ecosystem protection and water supply reliability begs for further elaboration in the State Board’s Bay-Delta Water Quality Control Plan and Substitute Environmental Document (SED). These goals must be considered in the context of a degraded estuary, existing facilities, the California Water Code and how water is actually put to use in California. For example:

1. How does the State Water Resources Control Board intend to prioritize water use in terms of coequal goals, of public trust balancing?
2. What does water supply reliability mean in an arid state where we have granted rights to far more water than actually exists?
3. Does water supply reliability apply to both public trust resource needs and consumptive uses (i.e., should fish have water rights)?
4. Are statutory requirements to protect water quality and listed species equivalent to water supply reliability for lawns or surplus and non-food crops?
5. Is the standard by which we measure water supply reliability the same for junior and senior appropriators?

6. Does efficient use of water have higher priority over waste and inefficient use?
7. Do we prioritize consumptive use on the basis of economic value?
8. Does health and safety take precedence over certain agricultural uses of water?
9. Are food crops more important than non-food commodities?
10. Is it reasonable that Kern County, representing a fraction of one percent of the state's population and economy should be accorded rights to water equal to the South coast, with almost half the state's population and economy?
11. Is protection of a "national treasure" and one of the world's great estuaries more valuable to society than irrigating impaired soils, that by their nature when irrigated, discharge prodigious quantities of salt and toxic wastes back to our waterways?
12. If an entity discharges pollutants that eliminate "assimilative capacity" and "beneficial use" of downstream waters, should the degraded water be deducted from the water supply provided that entity?
13. Should water supply reliability be conditioned upon specific requirements to maximize reclamation, reuse, conservation and development of alternative local sources of water?
14. Do uses of water that require vast public subsidies have the same priority to uses that don't require subsidy of public funds and are uses that internalize adverse impacts equal to uses that externalize them?

We believe answers to these questions are foundational to resolving California's water conundrum, and must be addressed by the State Water Resources Control Board in its Bay-Delta Water Quality Control Plan and Substitute Environmental Document.

The SED Must Examine a Full Range of Alternatives at an Equal Level of Detail

The fundamental purpose of a SED under the California Environmental Quality Act is to disclose fully and analyze potential impacts and alternatives to a proposed project to enable decision makers to make informed decisions on whether the project will be effective in meeting its stated goals, will comply with regulatory requirements and be in the best interests of society. With that vital public purpose in mind, the Board's SED must evaluate a range of reasonable alternatives.

Given the present degraded condition of the Delta estuary, the over allocation of water rights and the statutory goal of reducing dependence on the Delta, C-WIN, CSPA, and AquAlliance believes the EIR must consider a no export and reduced export alternative, along with evaluation of a range of flows for any new Delta water conveyance facility. Evaluation should be presented at a level of detail common to each alternative and include a broad socio-economic analysis of each alternative, as well as potential effects of each alternative on all beneficial uses.

The California Legislature, in SB-1 (Seventh Extraordinary Session), tasked the State Water Resources Control Board (SWRCB) with gathering the best available science to develop flow criteria for the Delta ecosystem necessary to protect public trust resources, including the volume, quality, and timing of water needed under different conditions. The Legislature also directed the California Department of Fish and Game (DFG) to identify quantifiable biological objectives and flow criteria for species of concern in the Delta. Together, those reports represent the best scientific information on minimum flows and objectives needed to protect the estuary's public trust resources. As such, the SED should analyze and discuss the degree to which each alternative meets these criteria as necessary to protect the estuary.

In addition, California Water Code Section 85021 states that it is now the policy of the state of California to reduce reliance on the Delta as a water source for meeting California's future water supply in favor of development of regional supplies, conservation, and water use efficiency measures.³ The SED's framing of alternatives must also take this legal mandate into account because the San Joaquin River Basin is clearly within the Delta watershed referred to in Section 85021.

The SED Must Address Paper Water in the Delta's Central Valley Watershed

California's modern water code is the result of more than a hundred and fifty years of legislation and legal precedent. Riparian water rights are the most senior and superior rights, followed by pre-1914 appropriative rights and, lastly, post-1914 appropriative rights, as determined by the seniority requirements of first-in-time-and-use. Failure to follow the explicit mandates of the water code has led to a massive, long recognized over appropriation of water in the Central Valley.

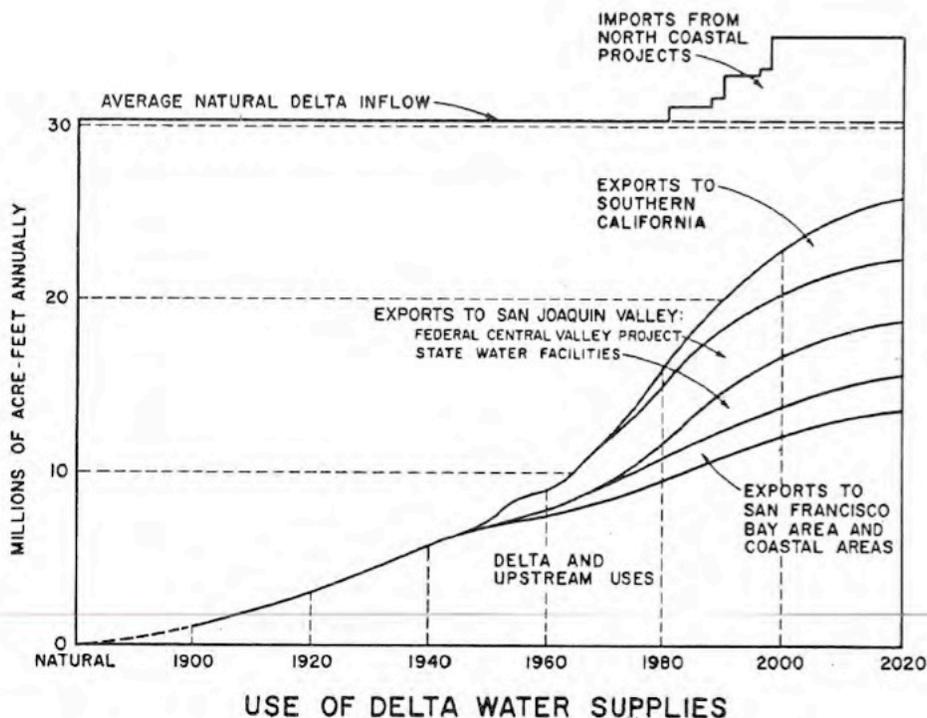
The SED must include a discussion of the water rights system in California, the protections accorded senior users and counties of origin, the extent to which water has been over-appropriated and how these protections and over-allocations relate to the coequal goals of ecosystem protection and water supply reliability.

In the 1930s and 1940s, staff within the Department of the Interior and the old State Water Rights Board advocated an adjudication of water rights prior to construction of the Central Valley Project. Both Governor Earl Warren and State Water Rights Board Chairman Henry Holsinger testified during the Clair Engle's Congressional hearings in 1951 that a complete adjudication of water rights on the Sacramento River should have occurred prior to the completion of the Central Valley Project. In fact, the Engle committee concluded that, "[t]hat for all practical purposes, the developed water supplies of the Sacramento River are overcommitted and oversubscribed." This was prior to approval and construction of the State Water Project. And, as DWR Bulletin 76 in December 1960 stated, the State Water Project was predicated on obtaining some 5,000,000 acre- feet of water annually from north coastal streams (see graph below). With the exception of some Trinity River flows to the Central Valley Project service area, this "surplus" of water to the Delta system never arrived. Adjustments to the State Water Project should have been made earlier, but should have been made, but were not. The result is that the Delta's native aquatic ecosystems have collapsed.

Responding to a request from the Delta Vision Blue Ribbon Task Force in September 2008, SWRCB staff submitted a document briefly discussing water rights and use in the Delta watershed. It stated in part:

- 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 345 million AFA." Our organizations note that 245 million acre-feet of

³ California Water Code Section 85021 states: "The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts."



Source: California Department of Water Resources, Bulletin 76, December 1960, page 13.

face value in water rights were permitted by the Board and its predecessors in the Central Valley watershed (including imported watersheds like that of the Trinity River).

- Face value “does not include pre-1914 and riparian water rights.” Our organizations also note that nor does face value include riparian water rights, which, in the absence of some form of adjudication of a watershed, are unquantified but nonetheless requiring of real, wet water. And,
- That “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.”

The SWRCB has no idea how much water is actually being used. Even accounting for limits on usage because of availability, multiple rights covering the same water (i.e., consumptive vs. non-consumptive uses) or return flows where water is not consumed; it remains indisputable that more rights to water have been issued than exists actual unimpaired runoff in the basin to fulfill them. This massive over-appropriation exists without even addressing the fact that the SWRCB does not know the extent of senior riparian or pre-1914 water rights or the amount of consumptive water rights in permits that have not been exercised (for example, DWR and the Bureau’s pending petitions for extensions of time to put many of their water rights to beneficial use).

Further exacerbating the issue is the fact that climate change is likely to alter the timing and reduce the volume of runoff. PG&E’s Chief Hydrologist, Gary Freeman has documented the shift in runoff timing and the annual decrease of 264-279 TAF of water in the Feather River watershed. Add the increased cold

water pools necessary to maintain water temperatures below rim dams to the estimates by the SWRCB and Department of Fish and Game of the increased inflow and outflow necessary to protect rivers and the Delta public trust resources and it becomes clear that the obligation to achieve a public trust balancing of water supply reliability with fish and ecosystem survival cannot be defined as maintenance of existing levels of supply from the Delta.

The SED must discuss the public trust balancing and proposed alternatives in the context of the vast over appropriation of water, legal requirements of the water code, public trust doctrine and legal precedent.

SED Scoping of Alternatives

We believe the paper water problem in the San Joaquin River Basin may be effectively addressed with proper scoping of the SED's Alternatives analysis. In the meantime, Mr. O'Laughlin proposes an unworkable analytical framework for the SED:

The SJRGA understands that the SWRCB will have to look at the tributaries and other areas upstream of Vernalis as part of its Substitute Environmental Document ("SED"). However, an evaluation of impacts after the flow objectives have been established is radically different from looking at the alleged benefits that the new flow objectives may have upstream of Vernalis, or worse, using such alleged benefits as justification for the new flow objectives in the first place. The SWRCB should not seek, receive or consider any information concerning the areas upstream of Vernalis until it has identified the various SJR flow alternatives it will consider for protection of beneficial uses found within the Delta. (SJRGA "unsolicited" letter to the State Water Resources Control Board, January 31, 2011, page 4).

The problem with this formulation is that the environmental impacts of a flow requirement cannot be evaluated without knowing what the flows in each of the tributaries are going to be. For example, a flow regime for Vernalis that meets the vast majority of its requirements using water from New Melones and the Stanislaus alone (clearly SJRGA's preferred alternative) will have far different effects (and benefits) in the Basin than one that meets Vernalis flows with significant increases in flows from each of the tributaries.

C-WIN, CSPA, and AquAlliance believe that each proposed flow regime for Vernalis should be analyzed under the following CEQA alternatives:

- 1) A determined large percent of Vernalis flows is met from New Melones;
- 2) Responsibility for Vernalis flows is divided among the Stanislaus, Tuolumne and Merced proportional to unimpaired flows from each tributary; and
- 3) Responsibility for Vernalis flows is divided among the Stanislaus, Tuolumne, Merced and the upper San Joaquin proportional to unimpaired flows.

Embedded within this analysis, the SED should discuss alternatives for how water rights priorities will be allocated: will priorities govern on the one hand throughout the San Joaquin River Basin, or on the other hand apply strictly to priority within each tributary's watershed? Our organizations also urge the SWRCB to include a full accounting of water rights that would be affected (including pre-1914 and riparian right holders), including their order of priority.

Finally, and following on this recommended alternatives approach, C-WIN, CSPA, and AquAlliance reiterate our observation about the Draft Technical Report omitting instream flow contributions from the Upper San Joaquin River in C-WIN and CSPA's December 6, 2010, letter to the Board. We have reviewed the San Joaquin River Restoration Program Settlement Agreement and find nothing in it that precludes its participation in a large regulatory framework for addressing San Joaquin River flow and South Delta objectives. The parties to the Stipulation of Settlement between Natural Resources Defense Council, et al and the US Bureau of Reclamation, et al, acknowledge (in paragraph 16(a)(2)) that the water recirculation plan in the Agreement "shall not be relied upon in connection with any request or proceeding relating to any increase in Delta pumping rates or capacity beyond current criteria existing as of the Effective Date of this Settlement [p. 20]." (Presumably, the Settlement could be relied upon, perhaps even by the State Water Board during a proceeding that might involve decreasing Delta pumping rates or capacity.) The Settlement also requires the Secretary of the Interior to "comply with all applicable federal and state laws, rules and regulations...as necessary [p. 35]." This would include the California Water Code, the California Constitution, and the Public Trust Doctrine. Parties to the Settlement also stipulate that no restoration or interim flows give rise to any property takings claim (paragraph 43, p. 38).

Thank you for considering our views of these issues, including those incorporated by reference. C-WIN, CSPA, and AquAlliance intend to continue participating in this process.

Sincerely,



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Attachments