



May 19, 2014

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
Sacramento, CA  
Via electronic mail

Re: State Water Resources Control Board May 20, 2014 meeting, agenda item #13, "Workshop to receive comments regarding options for drought related curtailments of post-1914 water rights in the Sacramento-San Joaquin River Delta"

Dear Ms. Townsend:

The California Sportfishing Protection Alliance (CSPA) and the California Water Impact Network (C-WIN) respectfully submit the following comments in response to the State Water Resources Control Board's May 20, 2014 Workshop on drought-related curtailments of post-1914 water rights in the Sacramento-San Joaquin River Delta.

In the description of the Workshop contained on the agenda link for this matter ([http://www.waterboards.ca.gov/board\\_info/agendas/2014/may/052014\\_13.pdf](http://www.waterboards.ca.gov/board_info/agendas/2014/may/052014_13.pdf)), the Board describes four potential approaches to such curtailments. For ease of reference, we refer to each of the four approaches suggested by the Board as follows:

*Curtailments to Protect Senior Rights and Stored Water Releases Based on Reported Water Use Under Existing Authorities:* we refer to this approach as "Reported Use, Existing Authorities."

*Curtailment to Protect Senior Rights and Stored Water Releases Based on Reported Water Use Through Emergency Regulations:* we refer to this approach as "Reported Use, Emergency Authority."

*Curtailment Based on a Term 91 Approach Requiring Diverters in Addition to Reclamation and DWR to Bypass Flows to Provide for Delta Outflows and Water Quality Requirements:* we refer to this approach as "Term 91, Additional Diverters."

*Curtailment Based on an Approach Similar to Term 91 Requiring Reclamation and DWR to Meet Delta Outflow Requirements Without Contributions from Other Diverters:* we refer to this approach as "Term 91, Projects Meet Outflow."

In the description of the Workshop, the Board also asks six questions related to the four alternatives. We shall address this workshop by responding sequentially to each of the six questions.

1. Which curtailment option would be the most effective and enforceable?

The *Reported Use, Existing Authorities* approach will not allow the Board time to enforce curtailments until it is too late. While enforceable over the long term, it would thus not be effective in curtailing junior diversions in summer 2014 when the curtailments matter most.

The *Reported Use, Emergency Authority* approach allows rapid response to junior diverters who divert in spite of curtailments. It rests on an authority in the Water Code (Section 1058.5) that creates the authority for the Board to assert emergency authority “in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act.” In protesting the Temporary Urgency Change Orders relevant to the 2014 operation of the State Water Project and the Central Valley Project (“Projects”), CSPA and C-WIN have contested such proclamations by the Governor in 2014 **as they relate to the operations of the Projects**, on the grounds the Projects irresponsibly drained water from storage and exported too much water in 2012 and 2013. However, we do not contest the appropriateness of the Board’s exercise of emergency authority as regards curtailments, based on the fact that 2014 is a critically dry year preceded by two dry years and thus qualifies under Water Code Section 1058.5.

The Workshop announcement states that the *Reported Use, Emergency Authority* approach would not “result in any curtailments of natural flows needed to meet Delta Outflows and other requirements.” We believe this to be misstated, and that it should read, as stated under the *Reported Use, Existing Authorities* description, that it would not “result in any curtailments **of diversions** of natural flows needed to meet Delta Outflows and other requirements” [emphasis added]. CSPA and C-WIN strongly believe that curtailing diversions of natural flows needed to help the Projects meet Delta Outflows and other Delta requirements would be fundamentally wrong. Decision 1641 clearly places the responsibility for meeting Delta Outflow and water quality standards **on the Projects**. The Projects have two points of control: storage and Delta pumps. The Projects reap huge benefits from such control; D-1641 assigned them a large responsibility attendant to such benefits.

An emergency situation is no time to turn this fundamental aspect of law on its head. This would be back-door rulemaking of the worst sort. It would be even more egregious for the Projects to receive a regulatory windfall after mismanaging storage and exports in 2012 and 2013. It would eviscerate area of origin protections. It would set precedent for increasing exports.

CSPA and C-WIN have supported efforts to require non-Project dam operators in the Sacramento – San Joaquin watershed to bypass spring inflow to storage reservoirs to help meet winter and spring inflow to the Delta and Delta outflow. This will be appropriately addressed in the update of the Water Quality Control Plan. Until the Water Quality Control Plan is updated through appropriate process, D-1641 is the law. In any case, we see a winter-spring outflow bypass requirement of non-Project storage reservoirs as fundamentally different from allowing the Projects to use natural flow in the summer dry season to meet in-basin diversions.

The *Term 91, Additional Diverters* approach is unacceptable for the reasons noted immediately above. The solution to maintaining water in storage in Project reservoirs is to reduce exports to levels needed for health and safety, and to not allow transfers of water by Settlement Contractors.

The *Term 91, Projects Meet Outflow* avoids the error of supplementing Project releases with natural flows to the benefit of the Projects, as discussed above. However, it seeks to extend the problematic Term 91 construct where it is not needed. We do not anticipate a situation where there will be a lot of natural flow available for appropriation, or that this will change significantly over the summer and into the fall. The Board can and should order curtailments as soon as it can administratively do so, and not hold out false hopes that water will appear in order to limit the need for curtailments. The Board can and should monitor flow and diversions carefully this summer, first of all to assure compliance. But trying to adjust and fine-tune curtailments week by week is unrealistic and likely to create a whole new arena of controversy.

2. Are there any other curtailment options that should be considered?

We tentatively support the general approach taken by the Board on Mill, Deer and Antelope creeks to protect spring-run Chinook salmon and Central Valley steelhead resources in those watersheds. What we like about the approach is the choice of a defensible flow requirement to protect public trust resources as a starting point for flow within those watersheds. Without necessarily supporting the details of this approach, we believe that specifying a reasonably protective flow in a tributary watershed may be replicable in other watersheds. In watersheds such as the Mokelumne and the Yuba where operators are able to meet specified Critically Dry year instream flow requirements, we of course recommend meeting those requirements.

3. How can human health and safety needs be addressed under the various approaches to curtailments?

The Board should be consistent. In our May 13 Protest of the TUCO for the Projects, we have asked the Board to make findings on the April 8, 2014 document entitled “Updated Report to SWRCB on Export Amounts to Maintain Health and Safety during Drought.” The Board seemed to back-burner this issue after its first revised TUCO for the Projects on February 8. This decision has not served the Board well. The Board needs to make a reasonable but sober determination of water needed for health and safety needs for multiple purposes related to the drought.

4. How can the State Water Board ensure that Delta needs will be met? The needs of fish and wildlife? The needs to maintain adequate end of month storage levels?

The Board should limit exports to levels needed for health and safety. The Board should require the Projects to meet D-1641 Critically Dry Delta outflow and salinity requirements. The Board should not allow transfer of water by Settlement Contractors; this water is in Project

storage. If Settlement Contractors can do with less water, they should forego it, and the saved water should be stored.

5. How can voluntary water-sharing agreements be accommodated? What criteria should be used to determine whether voluntary agreements are viable alternatives to mandatory curtailments?

CSPA and C-WIN's overriding concern is that voluntary agreements not reduce the amount of water in rivers. All too often, water users agree on meeting one another's needs at the expense of instream resources.

The Board should start by making curtailments. Water users who wish to make agreements among themselves should be required to do so within the instream and other requirements of the curtailments. The Board should be extremely active in monitoring water use throughout the state, and should require real-time reporting from those whose voluntary agreements lead them deviate from required curtailments in any way.

6. Which curtailment option would be the most responsive to changing conditions?

We don't foresee conditions changing for the better until autumn at the earliest. We don't see a lot of gray area in the meantime, where decisions might be held in abeyance pending further determination of how much water is present at any point in the system. Therefore, we don't believe that tailoring a curtailment option to changing conditions should be an overriding consideration at this time.

Thank you for the opportunity to comment on curtailments as described in the Workshop description.

Respectfully submitted,



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/s/ Michael Jackson

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