



California Sportfishing Protection Alliance

“An Advocate for Fisheries, Habitat and Water Quality”

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September 16, 2014

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Sacramento, CA
commentletters@waterboards.ca.gov
Via e-mail

RE: CSPA, C-WIN and AquAlliance comments on *Draft Order Denying Petitions for Reconsideration and Addressing Objections regarding the Temporary Urgency Change Petitions and Orders for the operation of the Central Valley Project and the State Water Project, 2014.*

Dear Ms. Townsend:

The California Sportfishing Protection Alliance, the California Water Impact Network and AquAlliance (hereinafter “CSPA”) respectfully present these comments on the September 3, 2014 *Draft Order Denying Petitions for Reconsideration and Addressing Objections regarding the Temporary Urgency Change Petitions and Orders for the operation of the Central Valley Project and the State Water Project, 2014* (“Draft Order”).

Since the first Temporary Urgency Change Order (TUCO) was issued on January 31, CSPA has raised concerns about what is properly addressed in the context of a stated emergency and what should be appropriately addressed under non-emergency process. We have also objected to the after-the-fact issuance of orders. We continue to have many of these concerns, and do not believe they are adequately addressed in the Draft Order.

Throughout this response, we thus distinguish among comments on events that have already happened, comments on proposed Board actions and rules in the short term, and comments on longstanding issues that the drought has highlighted and that the Board needs to address with evidentiary process.

Comments on the Draft Order’s findings that the TUCO’s did not unreasonably affect fish and wildlife

The Draft Order states repeatedly that Temporary Urgency Change Orders have not had an unreasonable effect on fish and wildlife. The Order states that the primary effect on Delta

smelt has been due to the drought, not to the TUCO's (p. 11). However, the TUCO's responded to the drought by weakening enforcement of the D-1641 standards that were put in place to protect fisheries during Critically Dry conditions. No objective reasons were provided for this weakened enforcement, and no biological or other metric for decision-making was stated. Evidence submitted by CSPA on May 13, 2014, in support of our Petition for Reconsideration, showed that the conditions for Delta smelt and longfin smelt became catastrophic under D-1641 conditions in 2013 and would become even more catastrophic under the TUCP's emergency conditions in 2014. (*see* http://www.swrcb.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/comments/cspa_shutes051314.pdf, pdf pages 32-43). CSPA's consultant has subsequently determined from summer trawl data that Delta smelt abundance is the lowest in history.

During workshops on the TUCO's, further evidence from several sources reminded the Board that it was during the culminating years of severe droughts that irreversible changes in the Delta (such as the establishment of the Corbula calm) have taken place. Will the end of Delta smelt be the change for 2014? How did the Board make the evaluation that this was not an unreasonable effect on fish and wildlife?

Rather than citing objective evidence, the Board has relied on concurrence from the fisheries agencies to support its decisions. The consultation process has been substituted for the requirements that decisions be based on substantial evidence. The criteria that these agencies have signed off on appear to us to be more political than biological. Although CSPA submitted, also on May 13, a critique of the effects of the April 9, 2014 Drought Operations Plan assembled by DWR and the Bureau, the fisheries agencies and Board staff (*see id.*, pp. 13-31), there has been no response from any of these entities, and in particular no analysis of how fisheries performed under these operations and the emergency measures permitted by the various TUCO's. As is often the case when fisheries agencies recommend measures that are likely to have negative impacts on fisheries, the agencies required various monitoring during the time emergency drought measures were in place. The agencies should now be required to use this monitoring to report to the Board in detail how fisheries actually fared under the emergency conditions.

In the Draft Order of September 3, the Board proposes to require the fisheries agencies, the Bureau and DWR to produce a 2015 Drought Operations Contingency Plan by October 1. This time around, the Board should require these entities to provide specific biological rationales for each of the measures they recommend, rather than simply leave the Board to announce conclusions and concurrence, as was the practice from February through July 1. In particular, the Contingency Plan should address how proposed operations will provide any level of protection whatever for pelagic species such as longfin smelt and Delta smelt.

In its April 18 Modification, the Board allowed export at levels equivalent to the entire volume of ordered pulse flows in the lower San Joaquin River, even with reduced Delta outflow requirements. The diversion of 100% of the volume of Vernalis pulse flows is at once a past issue and a short term concern for the 2015 Drought Contingency Plan. But above all, it is a long-term issue that must be resolved in the update of the Bay-Delta Water Quality Control Plan. During the workshops for the various TUCO's, we heard once again that during most times of

most years no water from the San Joaquin River makes it to Suisun Bay. Even under D-1641, exports equivalent to the entire volume of Vernalis pulse flows are allowed in Critically Dry years. The Board needs to revisit the need to reduce or eliminate exports during spring fishery releases from the San Joaquin, an effort only timidly applied during VAMP. Allowing export equivalent to the entire flow of the San Joaquin River under reduced outflow requirements, as per the April 18 Modification, simply rubs salt in the wound of a long-festering fisheries disaster.

When the Board considers in the update of the Water Quality Control Plan flows to protect San Joaquin watershed anadromous fisheries, it should also address the issue of spring-run Chinook in more than a footnote, as it does on page 31 of the Draft Order. While it may have been appropriate to not make new findings in an emergency order about the presence of spring-run in the Stanislaus in particular, the standards announced in footnote 17 are unsupported. The most obvious purpose of the Endangered Species Act is to protect species whose abundance is very low. There is a large body of science relevant to the presence and biological significance of spring-run in the San Joaquin and in the Sacramento-San Joaquin watershed as a whole, including how rivers are recolonized once species within them (or once a phenotypic expression within them) are extirpated. In the interim, the Board should be more careful in defining standards about whether spring-run are present today in the Stanislaus or other San Joaquin tributaries. The footnote in the Final Order should flag this as an open issue that the Board will address in the future.

Finally, the export of San Joaquin fishery releases must also be considered by the Board in a water rights context: neither the Bureau nor DWR has water rights to export water originating in the San Joaquin. This water is officially “abandoned water.” How is it then that the Board determined that this water was available for export in preference over the in-Delta needs of riparian and senior water rights holders? Was there adequate water to otherwise meet all of these senior needs? What was the source of the water?

Comments on the Draft Order’s findings that carryover storage targets were not needed in carrying out the TUCO’s

On pages 16-17 of the Draft Order, it states that management of storage under the TUCO’s was adequate, and that a hearing to establish carryover storage requirements, as requested by CSPA, C-WIN and AquAlliance, was not needed.

It is one thing to triage carryover storage in Project reservoirs when these reservoirs are already severely depleted. It is another to let them become depleted in the first place. Even if the Board plans to continue crisis management in the short term, it absolutely must revisit in the update of the Bay-Delta Water Quality Control Plan the management that got us to crisis. The Board cannot simply blame drought conditions on drought conditions every time droughts occur. As CSPA and many others stated in workshops, protests, and petitions relating to the TUCO’s, drought is a recurring condition in California. The Board needs to plan for it. The Draft Order’s response to the South Delta Water Agency on pages 19-20 is stunning:

In late 2013, DWR and Reclamation did not know with certainty whether the drought would persist into 2014, or what the severity of the drought would be. Unfortunately, the

drought continued, and conditions have remained dry through most of 2014. In order to maximize the beneficial use of water during the drought, and achieve a reasonable balance between demands for Project water supplies this year, the need for water to protect water quality in the Delta, and the need to conserve stored Project water in order to meet water supply and water quality needs in the future, DWR and Reclamation have had to adjust Project operations on a real-time basis. Likewise, they have had to request changes to Decision 1641 requirements on a real-time basis.

There is never certainty that drought will persist or what its severity will be when it occurs. Triage may be necessary in battle, but planning to triage after recklessly charging the enemy is not a strategy to win a war. As former Director of DWR Lester Snow stated to the Sacramento Bee on June 1, 2014:

“There’s nothing magical in and of themselves to build a (reservoir) facility,” said Snow, now executive director of the California Water Foundation. “If we had two more surface storage facilities that we built 10 years ago – pick any of the two that people are talking about – they would both be very low right now. There’s a tendency to pull down our surface storage when we get mildly short of water.”

<http://www.sacbee.com/2014/06/01/6448005/should-california-use-taxpayer.html>

Since the Projects have shown no inclination or ability to self-police, the Board needs to set conditions in the Water Quality Control Plan that require greater restraint. The Board will absolutely need to hold evidentiary hearings in order to determine operating rules that improve success in protecting public trust resources. To succeed, the Board will need to get into the specifics of these operations on a level that it has never taken the effort to understand or regulate in the past. In implementing the updated Plan, the Board must also develop its own independent operational expertise and not just keep asking the operators of the Projects and the fisheries agencies to bring the Board more new rocks to try on for size. The Board cannot rely on the operators of the Projects or the fisheries agencies to provide assurances, let alone tell the Board how the Projects should be operated. The Board cannot effectively regulate what it hasn’t technically mastered.

Comments on the Draft Order’s findings that it was reasonable to allow transfers through CVP and SWP Delta facilities when the TUCO’s were in effect

The Draft Order on pages 26-27 respond to CSPA, C-WIN and AquAlliance’s objection that allowing transfers during conditions of reduced outflow would cause unreasonable effects to fish and wildlife. The Draft Order accurately summarizes the argument:

CSPA, AquAlliance, and CWIN further argued that any limited protective function of reducing exports to health and safety needs of 1,500 cfs would be reduced in proportion to the volume of any water transfers that were allowed to take place, and that the fishery impacts caused by water transfers would become more severe when Delta outflow approaches the temporary minimum of 3,000 cfs.

In response, the Draft Order ducks the issue:

This objection is misplaced to the extent that it is directed at any transfers that have been or will be effectuated under water rights that are not held by DWR or Reclamation because the TUCP Order did not approve any such transfers. Any transfers effectuated under a third party's permitted or licensed right would require a separate approval process. The public and the fisheries agencies are provided an opportunity to protest or comment on proposed water transfers.

It is true that the TUCO's do not address any particular transfers. Rather, they address in relevant part the general conditions in which those transfers take place. There is no opportunity in protesting or commenting on any particular transfer to address general Delta standards or the implementation of these standards, or to address the cumulative effects of multiple transfers. There is no other venue to address these concerns. The objection is not misplaced in the slightest. The Draft Order states on p. 26: "... the changes were mitigated to some extent by the limitations on exports which also provided for reduced entrainment and salvage of listed species." The TUCO's simply changed the label of the exported water, and as stated this protective function within the Delta was reduced.

In discussing transfers, the Draft Order on p. 27 clutches at straws to find some benefit to water transferred through the Delta pumps:

In addition, while increased exports from transfers may lead to increased entrainment of fish at the export facilities, those impacts are mitigated to some extent by increases in inflows from the transfers, including carriage water. Increased flows from transfers provide some benefits to fish and wildlife from the point where the water was not diverted to the Delta. Some of the transfers this year were also specifically timed to provide fisheries benefits. Finally, export of transfer water is still subject to other constraints on Project operations, including the modified DCC Gate closure requirements, Export to Inflow constraints and other ESA provisions designed to protect fish and wildlife.

This sad logic harks back to the rationalizations of the discredited "Environmental Water Account," which paid upstream entities for transfer of water called "environmental" when the alleged environmental benefits were simply ancillary to the primary purpose of selling water for export. The impacts of the 2014 transfers *at the pumps* are not mitigated in the slightest: any benefits of transit benefit species that are generally different than those entrained at the pumps, and universally in locations that are different. The idea that import-export requirements are protective is equally unsupportable: from July through January, when the reduced outflow requirements took practical effect, the export limit is 65% of inflow. If under the emergency order an NDOI of 3000 cfs must be maintained for outflow, this would allow exports of up to 5571 cfs before any additional water were required to provide the appropriate ratio of Delta outflow. Since the amount of water available for transfer did not reach this level (even with the 1500 cfs of stored Project water exported at the same time), the transferred water was completely outside the scope of any Delta mitigation measures. Adding still more insult, the transferred water was largely sourced from Project reservoirs, sold by settlement contractors who in water year 2014 got most of the available water.

In every dry year, transfers happen. The Board has made no effort to treat them systematically or to address them on anything longer than a year-by-year basis. Transfers have become the phantoms of the exports. Their exclusion from the requirements of environmental review is as slick an end-around past CEQA as we have seen. Year in and year out, they have impacts, but no additional mitigations are required to address these impacts. In the short term, for purposes of this Order, transfers should be counted, and mitigations should account for them and for their real effects. To start, transfers should not be allowed while the conditions in D-1641 (before modification) are not being met. In the longer term, the Board should include in the update of the Water Quality Control Plan adjustments to account for the added impacts of transferred water, so that the beneficiaries of transfers (both buyers and sellers) are required to mitigate for the effects of their actions, and not just hitch a free ride on the already inadequate mitigations required of the Projects at the expense of the public trust. A good default starting point would be to consider a requirement that the import-export ratio in effect at the time that each transfer is made apply to each individual transfer.

Comments on the ordering sections of the Draft Order

Ordering paragraph 6 requires DWR and the Bureau to consult weekly with the fisheries agencies and Board staff regarding operational decisions, and to prepare technical information to inform operational decisions. It further requires DWR and the Bureau to make this information available to the Board on request of the Board or fisheries agency staff. The requirement should clarify that this information must be written, and not simply presented in oral form. Further, this information should also be made available to the public on a dedicated page on the Board's website or through a link on a dedicated page of the Board's website. Ordering paragraph 6 also requires DWR and the Bureau to report to the Board monthly concerning these operations. DWR and the Bureau's monthly report should also be written, and published a week in advance of these presentations to the Board, so that the public and the Board can be prepared to comment on these materials at the Board meeting in question.

The paradigm prevalent this year, in which the Board routinely approved information and operations plans and then announced its decisions to the public after the fact, must end. We still emphatically disagree that this was necessary and appropriate in the past. It is inexcusable in the future. In addition to the steps outlined above, the Board should make every effort to encourage meaningful public access to information and participation in the decision-making process.

As stated above, the fisheries agencies need to provide evidence to show how fisheries fared under TUCO-required operating conditions in 2014. When DWR and the Bureau make their first monthly report to the Board, the fisheries agencies should be required to provide the written results of their 2014 monitoring at the same time. Further, ordering paragraph 6 should be expanded to require the fisheries agencies to make their own written monthly updates. The simple perfunctory affirmation that consultation with fisheries agencies occurred is not acceptable. The public deserves to know what the fisheries agencies considered and how they evaluated and balanced the various resources with which they are entrusted.

Ordering paragraph 11 requires DWR and the Bureau, in consultation with the fisheries agencies, to:

... develop a water year 2015 drought contingency plan for operations in the Delta and the associated Project reservoirs in the event that water supplies remain inadequate to satisfy the Projects' water right permit and license requirements and other uses. The drought contingency plan shall identify planned minimum monthly flow and storage conditions that consider Delta salinity control, fishery protection, and supplies for municipal water users related to projected flow and storage conditions

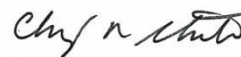
The paragraph should be amended to require, in addition, discussion of how DWR and the Bureau will comply with the water rights priority system to the greatest degree possible, consistent with *El Dorado v SWRCB (142 Cal.App.4th 937)*. Specifically, the contingency plan should describe how the Projects will respect the priority of riparian and other senior diverters, particularly in the Delta, including if necessary the need to bypass natural inflows to storage reservoirs needed to meet the needs of senior diverters when abandoned and natural flows are insufficient.

Further, the Board must act now to define how the drought contingency plan should deal with curtailments of post-1914 appropriative rights in the Sacramento – San Joaquin watershed. DWR and the Bureau need to know when they are going to be allowed to start storing water in their Project reservoirs. If indeed it is in the public interest to lift or modify curtailments for the Projects to allow them to store water during any fall storm events that may occur, the Board needs to make such a finding now and lift or modify curtailments as appropriate. Additionally, if the Board makes such a finding for the Projects, it should consider, as a matter of equity, how it will address non-Project storage reservoirs in the watershed.

While we do not yet know what the drought contingency plan will recommend, we urge the Board to prioritize storage in upstream Project reservoirs, flows to meet ESA protections, and flows to meet the needs of senior in-basin diverters. Exports should be restricted to the amounts needed to meet health and safety requirements.

Thank you for the opportunity to submit these comments.

Respectfully submitted,



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