



14 March 2021

Joaquin Esquivel, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95214

Transmitted via email

RE: Request Immediate Enforcement of Water Rights Order 90-05 and Bay-Delta Water Quality Standards

Dear Chair Esquivel and Members of the Board:

The California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance ("CSPA et al.") request that the State Water Resources Control Board ("State Board" or "Board") take prompt action to enforce Water Rights Order 90-05 and Bay-Delta water quality standards. Immediate action is necessary, given that: 1) California is facing a second dry year; 2) the U.S. Bureau of Reclamation ("Reclamation") has refused to provide information the State Board has repeatedly requested that is necessary for development of a protective Sacramento River Temperature Management Plan; 3) early season water deliveries can adversely affect the volume and stability of cold water in Shasta Reservoir throughout the temperature management season; 4) Reclamation and the California Department of Water Resources ("DWR") have announced plans to deliver more than 5 million acre feet of water to water contractors this year and 5) Reclamation and DWR have acknowledged they are uncertain if they can meet water quality standards later this year.

Fisheries have still not recovered from the egregious failure during the previous drought to protect Shasta cold water and maintain downstream temperature control, as well as from flagrant exceedances of Bay-Delta water quality standards. In 2014 and 2015, Reclamation lost control of water temperatures, resulting in the loss of 77% and 85%, respectively, of endangered winter-run Chinook salmon below Shasta. Bay-Delta pelagic fisheries were also grievously impacted. Given the severely depressed population levels of listed species, these disasters must not be allowed to reoccur.

Throughout 2020, the State Board repeatedly requested information on how operations within Reclamation's control, including water supply operations, hydropower operations, and Trinity River imports, would better protect the Shasta cold water pool and assist in meeting temperature

requirements at downstream compliance points. Many of these elements were also included in the July 17, 2020 settlement agreement between CSPA et al. and the State Board. The State Board sent a copy of this agreement to Reclamation in August 2020. Reclamation explicitly refused to comply. Reclamation's refusal to provide the requested information represents open defiance of the State Board's water rights authority.

However, as we discuss below, the CSPA et al. settlement with the State Board also committed the Board to undertake certain actions. These commitments were included in part in anticipation that Reclamation would continue to refuse Board requests. Among these is the commitment that "The State Water Board will employ staff, with modeling and other relevant expertise, to evaluate the U.S. Bureau of Reclamation's compliance with Order WR 90-05 temperature management requirements, including whether different water supply delivery alternatives may achieve temperature compliance at temperature compliance points Red Bluff Diversion Dam, Bend Bridge, Jelly's Ferry, Clear Creek, and Keswick Dam." The settlement agreement also committed the State Board to providing a transparent public trust analysis in orders taking action on temporary, urgency change petitions.¹

The National Marine Fisheries Service conducted a "Lessons Learned During Drought" review in 2016 and issued a 1 July 2019 jeopardy biological opinion that observes that, "the volume and stability of cold water throughout the temperature management season can be adversely affected not only by April and May deliveries but also by deliveries in June and early July." It is already mid-March, and both Reclamation and DWR will begin significant water deliveries in April. Sacramento River Settlement Contractors have announced plans to increase diversions in mid-April.²

Regardless of whether Reclamation continues to refuse to provide the crucial information requested by the State Board, the Board needs to take immediate action. The State Board should evaluate Reclamation's compliance with WR Order 90-05, conduct a transparent public process and, take urgent action, before the onset of early-April water deliveries. In so doing, the State Board must ensure that Shasta cold water storage is sufficient to maintain temperature control throughout the 2021 season and that end-of-season Shasta carryover storage is adequate should 2022 turn out to be a dry or critically dry year.

Below, we discuss Reclamation's rejection of State Board requests throughout 2020.

Reclamation's Defiance of the State Board's Water Rights Authority During 2020

On 3 April 2020 the State Board wrote a letter to Reclamation regarding Order 90-25 Sacramento River Temperature Management Planning. In that letter, the State Board ordered Reclamation to "submit information to evaluate additional actions within Reclamation's control

¹ Settlement Agreement between CSPA et al. and the State Water Resources Control Board and Thomas Howard, July 2020. <https://calsport.org/news/wp-content/uploads/2020.07.17-CSPA-v.-SWRCB-Settlement-Agreement-Fully-Executed.pdf>

² See slides 8-9, Glen Colusa Irrigation District presentation, 3 March 2021. <https://calsport.org/news/wp-content/uploads/GCID-Meeting-3-March-2021.pdf>

to manage temperatures on the Sacramento River in a manner that would be more protective.”³
The letter pointed out that:

Actions within Reclamation’s control include deliveries of water diverted under Reclamation’s water rights, including deliveries to settlement and exchange contractors. Reclamation should evaluate different water supply delivery assumptions to provide for improved cold water pool maintenance, including evaluation of lower releases from Shasta Reservoir during the spring and summer that meter out the cold water pool resources in order to provide for improved temperature control throughout the temperature control season and improved cold water pool levels going into next year.

Reclamation directly refused to comply. Reclamation responded to the State Board’s letter on 17 April 2020⁴ by stating:

...Reclamation’s view is that your request for multiple modeling scenarios of actions “within Reclamations control” is inconsistent with Order 90-05, which requires that Reclamation “file an operation plan show [its] strategy to meet the temperature requirement at the new location.” It is also inconsistent with Reclamation’s limited discretion regarding such contracts with senior water users and wildlife refuges.

The State Board sent Reclamation another letter on 29 April 2020⁵ reminding Reclamation that:

When Reclamation proposes a new compliance location, Order 90-05 states that “whether a particular factor is within [Reclamation’s] reasonable control depends on the specific facts and is a matter for the [Deputy Director] or the Board to decide...” (Order 90-05, p. 20). Evaluating scenarios with different water supply delivery assumptions is necessary to inform the State Water Board’s consideration of the Temperature Management Plan ensure that Reclamation develops a plan that satisfies Reclamation’s obligation under WR 90-05, and evaluates actions that are or could be within Reclamation’s “reasonable control.”

In its 29 April letter, the State Board also refuted Reclamation’s claim of limited discretion regarding contract deliveries to senior water users by pointing out that the settlement contractor’s riparian and pre-1914 water rights are limited to natural flow. The State Board stated:

Reclamation’s April 17 letter claims that evaluation of additional scenarios within Reclamation’s control is inconsistent with Order 90-5, because Reclamation claims

³ SWRCB Executive Director Eileen Sobeck to Central Valley Project Operations Manager Kristin White Re: Order 90-05 Sacramento River Temperature Management Planning, 3 April 2020.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/4-03-20%20sactemp_2020planning.pdf

⁴ Operations Manager Kristin White to SWRCB Executive Director Eileen Sobeck, Subject: Order 90-05 Sacramento River Temperature Management Plan, Your Letter Dated April 3, 2020, 17 April 2020.

⁵ SWRCB Executive Director Eileen Sobeck to Operations Manager Kristin White Re: Order 90-05 Sacramento River Temperature Management Planning, 29 April 2020.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/4-29-20%20sactemp_2020planning.pdf

limited discretion regarding contract deliveries to senior water users and wildlife refuges. The State Water Board recognizes that Reclamation's contractual obligations to the Sacramento River settlement contractors are unique because they claim to hold riparian and pre-1914 appropriative water rights, which are not subject to Order WR 90-5 requirements. However, evaluation of alternative operational scenarios with different water supply delivery assumptions is not inconsistent with Reclamation's contractual obligations to the settlement contractors or their senior claims of right, provided that none of the operational scenarios evaluated involve a reduction in deliveries of natural flows to which senior water right holders may be entitled. During much of the temperature management season, releases from Keswick Dam are typically well above natural inflows to Shasta Reservoir, especially in a dry year such as this one, and therefore this is unlikely to be an issue. Moreover, it should be possible to structure the operational scenarios to ensure that releases are not reduced below natural inflows.⁶

On 30 April 2020, Reclamation submitted its 2020 Draft Sacramento River Temperature Management Plan. The cover letter stated:

We are also aware of Ms. Riddle's letter of April 29, 2020 regarding Order 90-05 and Sacramento Temperature Management Planning. We disagree with a number of the assertions in that letter and will respond separately. Please be aware that we have not developed extensive additional modeling scenarios for today. We are unable to provide additional modeling in addition to the extensive modeling already provided within your deadlines provided, especially modeling that does not constitute Reclamation's proposed operations.

On 11 May 2020, CSPA et al. submitted extensive comments opposing Reclamation's Draft Temperature Management Plan. CSPA et al.'s submittal included a report prepared for CSPA by fishery scientist Thomas Cannon titled "Review of U.S. Bureau of Reclamation's Draft Sacramento River Temperature Management Plan for 2020."⁷ CSPA was also a signatory to the 8 May 2020 NRDC et al. letter requesting rejection of the draft plan.⁸

Reclamation transmitted a Final Temperature Management Plan on 20 May 2020.

The State Board rejected the Final Temperature Plan on 1 June 2020, stating:

State Water Board staff repeatedly requested that Reclamation provide information on operational scenarios other than those proposed in Reclamation's TMP that could allow for better temperature control. Unfortunately, Reclamation has failed to provide the requested information. This information is needed to inform adequate temperature management. Since Reclamation has declined to provide the information, the State Water

⁶ *Id.*

⁷ CSPA et al., Re: Comments on Draft Temperature Management Plan Water Year 2020, 11 May 2020. <https://calsport.org/news/wp-content/uploads/CSPA-et-al-Sac-River-Temp-5.11.2020.pdf>

⁸ NRDC et al., Re: Request that the State Water Resources Control Board Reject the Bureau of Reclamation's draft Temperature Management Plan for Shasta Dam under Water Rights Order 90-05, 8 May 2020). <https://calsport.org/news/wp-content/uploads/NRDC-et-al-letter-to-SWRCB-opposing-Sac-Riv-Temp-Mgmt-Plan-5-8-20.pdf>

Board does not have sufficient information to make a well-informed decision on Reclamation's final TMP. We are therefore unable to approve the TMP, and object to the plan.⁹

The State Board's 1 June letter also specifically addressed Reclamation's rationale for refusing to provide the requested information, observing:

Reclamation has declined to evaluate additional operational scenarios. Reclamation's position is that scenarios with different operational assumptions would be inconsistent with its contractual obligations, and are therefore beyond Reclamation's reasonable control. The State Water Board disagrees. To the extent that Reclamation delivers water under its own water rights, Reclamation's obligation to deliver water to its contractors does not take precedence over its permit obligations. Order WR 90-5 requires Reclamation to reduce releases to the extent reasonable and necessary to control water temperature. This permit condition is not and cannot be nullified by a contractual obligation. Reclamation's water supply contractors are not entitled to more water under their contracts than Reclamation is authorized to deliver consistent with the terms and conditions of its water right permits and licenses. (See *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 145-148; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 806, fn. 54; see also Order WR 92-02, p. 9, fn. 3 [compliance with Order WR 90-5 may require adjustments to water deliveries, which are controllable factors, and water should not be considered available for delivery if it is needed as carryover to maintain an adequate cold water pool].)¹⁰

Reclamation replied by resubmitting its Final Temperature Management Plan with additional modeling scenarios on 23 June 2020. The State Board responded in a 2 July 2020 letter to Reclamation that stated:

As Table 1 demonstrates, if Reclamation holds back 100 TAF of releases, there is expected to be 53 TAF more cold water at the end of September, 100 TAF more carryover storage going into next year, and a significant reduction in estimated winter-run Chinook salmon egg mortality compared to Reclamation's operations as proposed in the TMP.

In light of Reclamation's most recent modeling showing that the end of September cold water pool in Shasta Reservoir has diminished and that retaining additional water will improve protection for endangered winter-run Chinook salmon and other species this year and improve conditions going into next year, changes should be made to the TMP to protect the fishery. Reclamation as the operator is in the best position to identify the additional actions and related modifications to the TMP it will take to ensure it is taking actions within its control to manage the impacts of its operations in compliance with

⁹ SWRCB Executive Director Eileen Sobeck to Ernest A. Conant, Mid-Pacific Regional Director Re: Order 90-05 Sacramento River Temperature Management, 1 June 2020.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/6-01-20_sac_tmp_response_letter.pdf

¹⁰ *Ibid.*, 6.

Water Right Order 90-5, and given the urgency of taking action to make improvements this year, we request that Reclamation respond to this letter within **five days** identifying its proposed modifications to the TMP.¹¹

Reclamation responded to the State Board's 2 July 2020 letter on 9 July 2020, in a follow-up 31 July 2020 letter, and in a July Addendum to the 2020 Temperature Management Plan. Given the lateness of the season, on 4 August 2020, the State Board conditionally approved the Temperature Management Plan, subject to a number of conditions.¹² The State Board's 4 August letter stated:

The State Water Board's June objection to the TMP this year was centered around Reclamation's failure to provide timely information regarding possible alternative operations that could improve temperature management and inform the Board's consideration of the TMP. The Board has requested a protocol for temperature management planning to address these issues in the future. Specifically, the Board has requested a process to consider potential operational adjustments earlier in the year that includes evaluation of scenarios for improved temperature management in drier years. For example, the operational scenarios the Board has requested include reduced releases from Shasta Reservoir, alternative power supply operations, different timing and volume of imports from the Trinity River system, and physical facilities improvements. Reclamation has indicated that it will work with the Board on such a protocol.

Given the improved conditions, the Bureau's agreement to prepare a protocol for future temperature planning efforts, and to facilitate use of Stage 2 JPOD for water transfers this year, the Board approves the TMP subject to the following conditions:

- JPOD diversions shall not adversely affect Sacramento River temperature management or Shasta Reservoir storage conditions;
- Reclamation shall develop a draft protocol by September 30, 2020, that meets the criteria identified by the State Water Board;
- By September 15, 2020, Reclamation shall provide additional information concerning fall operations, including the volume and timing of releases and deliveries each month through December.

After receiving the information requested, the Board may revisit its approval of the TMP. In the event that Reclamation does not submit an adequate draft protocol and the information requested concerning fall operations, the State Water Board's approval of the TMP will no longer be effective, and the Board will consider other options, including

¹¹ SWRCB Executive Director Eileen Sobeck to Ernest A. Conant, Mid-Pacific Regional Director Re: Order 90-05 Sacramento River Temperature Management, 2 July 2020.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/7-02-20_signed_es_sac_temp_response_6-22_usbr_ltr_final.pdf

¹² SWRCB Executive Director Eileen Sobeck to Kristin White, Central Valley Projects Operations Manager Re: Sacramento River Temperature Management, 4 August 2020.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/sactmp_re_sp_070920usbr.pdf

updates to Order 90-5 to clarify needed temperature management planning, evaluation, and implementation actions.

On 31 August 2020, the State Board provided Reclamation with detailed specific requirements for the draft Sacramento temperature management protocol it expected by 30 September 2020. The transmittal stated:

As part of the State Water Board's conditional approval of Reclamation's 2020 Temperature Management Plan (TMP), Reclamation is required to develop an initial draft protocol by September 30, 2020. The State Water Board will hold a public workshop this fall in coordination with Reclamation to receive public comment on the initial draft protocol to inform its completion. Once public comments are received, the Board intends to work with Reclamation to refine and finalize the protocol before the beginning of the next temperature planning and water supply allocation season in February 2021. The Board has requested that the protocol include the elements specified in the settlement agreement with the California Sportfishing Protection Alliance, et al., which the Board recently forwarded to Reclamation. This letter provides additional detail regarding issues that should be addressed as part of the protocol.¹³

It should be noted that the protocol elements the State Board agreed to request from Reclamation in the CSPA et al. 17 July 2020 settlement agreement were essentially items that the State Board had long requested from Reclamation. See State Board 3 April, 29 April and 1 June 2020 letters to Reclamation, as cited above.

Reclamation replied to the State Board's 31 August 2020 letter in a 30 September 2020 letter that essentially rejected the requested specific temperature protocol elements and characterized the settlement agreement by stating:

This settlement involved multiple provisions that potentially affect Reclamation's water rights through 90-05, yet were not adopted after a thorough administrative process, including a public hearing. While the State Water Board staff has represented that the settlement does not impose substantive obligations on Reclamation, its subsequent letters have requested the protocol, as outlined in the settlement provisions, as a requirement in order to comply with 90-05. Good faith interactions are challenging when separate agreements are made in isolation purportedly to affect CVP operations without Reclamation's involvement or review. Reclamation does not consider a state court voluntary settlement. To which Reclamation is not a party, as valid, enforceable legal requirements imposed on Reclamation.¹⁴

¹³ SWRCB Executive Director Eileen Sobek to Kristin White, Central Valley Projects Operations Manager Re: Sacramento River Temperature Management, 31 August 2020.

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/8-31-20_signed_es_sac_temp_order_90-5_protocol_request.pdf

¹⁴ Central Valley Projects Operations Manager Kristin White to SWRCB Executive Director Eileen Sobek Re: Order WR 90-05 Sacramento River Temperature Management Plan, Letter Dated August 31, 2020, 30 September 2020. <https://calsport.org/news/wp-content/uploads/Sept-30-2020-USBR-to-SWRCB-Sac-River-Temp-Management-Plan.pdf>

We reiterate that the provisions in the settlement agreement that the State Board agreed to request from Reclamation long preceded the settlement agreement. We also point out that there are specific provisions in the settlement agreement that are directly applicable to the State Board regarding the assessment of alternatives in temperature management plans and temporary urgency change petitions. For example, the settlement agreement provides that:

The State Water Board will employ staff, with modeling and other relevant expertise, to evaluate the U.S. Bureau of Reclamation's compliance with Order WR 90-5 temperature management requirements, including whether different water supply delivery alternatives may achieve temperature compliance at temperature control points Red Bluff Diversion Dam, Bend Bridge, Jelly's Ferry, Ball's Ferry, Clear Creek, and Keswick Dam.

We further point out that the settlement agreement also committed the State Board to providing a transparent public trust analysis in orders taking action on temporary, urgency change petitions.¹⁵

While Reclamation's cooperation in the evaluation of Order 90-05 temperature management requirements would greatly facilitate matters, the State Board is still obligated to conduct WR 90-05 compliance, including evaluation of different water delivery alternatives, in the event of Reclamation's refusal to cooperate.

Urgent Action is Required by the State Board to Avoid a Repeat of the Previous Drought

We have been down this road before and are painfully aware of the grievous consequences of failing to take prompt action. Throughout 2013-2015, CSPA et al. (and other environmental organizations) participated in numerous State Board meetings and workshops and submitted myriad comment letters, protests, petitions and complaints that predicted and chronicled the unfolding disaster. In painful detail, we described the history and repercussions of excessive water deliveries under assumptions that the next year would be wet. Events established that we were correct and, as the Board had to subsequently admit, changes in drought planning and response are necessary to protect fish and wildlife and prevent species from going extinct.¹⁶

The Board's failure to respond to formal complaints CSPA filed against it for violations concerning public trust, temperature control on the Sacramento River¹⁷ and Bay-Delta standards¹⁸ resulted in a long, contentious lawsuit.¹⁹ State Board staff have endeavored to comply with the requirements of the resulting settlement agreement to no avail. Reclamation has blatantly refused to comply with repeated staff requests for necessary information. These

¹⁵ CSPA – State Board Settlement Agreement, *op. cit.*

¹⁶ Water Rights Order 2015-0043, at p. 39.

https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2015/wro2015_0043.pdf

¹⁷ COMPLAINT: Against SWRCB and USBR for Violations of Central Valley Basin Plan, WR Order 90-05, Clean Water Act, Endangered Species Act, Public Trust Doctrine and California Constitution, 2 August 2015.

<https://calsport.org/news/wp-content/uploads/CSPA-Complaint-Temperature-1.pdf>

¹⁸ COMPLAINT: Against SWRCB, USBR and DWR for Violations of Bay-Delta Plan, D-1641 Bay-Delta Plan Requirements, Clean Water Act, Endangered Species Act, Public Trust Doctrine and California Constitution, 21 July 2015. <https://calsport.org/news/wp-content/uploads/CSPA-Complaint-Bay-Delta.pdf>

¹⁹ Second Amended Complaint, CSPA et al. v. State Water Resources Control Board, Tom Howard, 2016.

<https://calsport.org/news/wp-content/uploads/Second-Amended-Complaint-CSPA-et-al.-v.-SWRCB.pdf>

refusals are nothing less than open defiance and rejection of the State Boards water rights authority.

The hour is late. Failure to take prompt action now to reduce April and May water deliveries will compromise the ability to conserve cold water pools necessary to comply with critical temperature and Bay-Delta water quality standards later in the season. It will limit the ability to ensure adequate end-of-season carryover storage should 2022 be dry. It will likely devastate fisheries, public trust resources and the communities that depend upon healthy riverine and Bay-Delta ecosystems.

Regardless of whether Reclamation continues to refuse to provide alternative operational scenarios, including reductions in water deliveries, adjustments to Trinity River imports and hydropower bypasses by 31 March 2021, we urge the Board to immediately direct staff to evaluate Reclamation's compliance with WR Order 90-05, convene a public meeting, and take prompt action, before the onset of early April water deliveries. Such immediate action is necessary to protect public trust resources and the communities that depend on compliance with Sacramento River temperature standards and the Bay-Delta Water Quality Control Plan.

Thank you for your immediate attention to these urgent issues.

Respectfully submitted,



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