



California Sportfishing Protection Alliance

“An Advocate for Fisheries, Habitat and Water Quality”

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15 September 2014

Felicia Marcus, Chair
Members of the Board
State Water Resources Control Board
c/o Jeanine Townsend, Clerk to the Board
1001 “I” Street, 24th Floor
P.O. Box 100
Sacramento, CA 95814
commentletters@waterboards.ca.gov

VIA: Electronic Submission
Hardcopy if Requested

Re: Comment Letter – Delta September 2014 Workshop

Dear Chair Marcus and members of the Board:

The California Sportfishing Protection Alliance and California Water Impact Network (hereinafter, CSPA) appreciate the opportunity to submit the following comments in response to the Notice of Public Workshop on Central and Southern Delta Water Availability and Use scheduled for 24 September 2014. Insofar as they’re consistent with these comments, CSPA incorporates by reference the comments submitted on this issue by: Dante John Nomellini, representing Central Delta Water Agency; John Herrick, representing South Delta Water Agency; Jennifer L. Spaletta, representing several Delta landowners; and Jeanne M. Zolezzi, representing Banta-Carbona, West Side, Patterson and West Stanislaus Irrigation Districts.

The Board’s Notice letter for this workshop states, “(t)he purpose of this workshop is to receive comments and discuss the process the State Water Board should use to address recent allegations and legal theories regarding the sources and quantity of water supplies available for diversion and use within the central and southern Delta.” However, attached to the Notice was a Draft Order requiring riparian and pre-1914 appropriative water right claimants within the Legal Delta to provide specific information regarding the type of water right and monthly amounts of water diverted under each claim.

Of itself, the information requested in the Draft Order will not assist the Board in addressing the foundational question of whether water “is, or is not, available to different water rights holders in the central and southern Delta.” (Notice, p. 2) Considerable additional hydrologic information would be required to quantify water availability in the Delta, as we describe below. Therefore, the answer to the third question posed in the Notice is no: the information proposed in the Draft Order, in conjunction with the information submitted pursuant to the Delta TICP Order, is not sufficient “to inform a State Water Board determination on the availability of water for diverters in the central and southern Delta.”

Before undertaking the effort to quantify water availability in the southern and central Delta *and upstream*, the Board should first clearly define the overarching factual and legal questions raised in the documents cited in the Notice, in CSPA's complaint of 12 August 2014 against the Department of Water Resources (DWR) and U.S. Bureau of Reclamation (USBR), as well as other relevant information. Only then, should the Board proceed to determine the process by which it will address these overarching foundational questions, which go to the basis of right and priority.

Limiting the collection of hydrologic evidence to diversions by central and southern Delta diverters prejudicially limits the scope of a potential course of action, prior to receiving comments from affected parties on the issues and the process that should be pursued. We note that both the Notice and Draft Order refer to the general allegations by the DWR and USBR that diverters in the south and central Delta are illegally diverting water beyond a valid water right. However, neither document acknowledges or discusses the 13 August 2014 formal complaint filed by CSPA that specifically alleges that DWR and USBR are illegally exporting water they are not entitled to divert at their Delta pumping facilities and that San Joaquin River riparian flow is being illegally diverted upstream of the Delta. If the Board only collects evidence regarding Delta water users, it will be acting pre-decisionally on the scope of issues to be investigated and decided.

The Notice states that, "evidence regarding these issues and arguments regarding the supporting legal theories should not be submitted, and will not be discussed, at the workshop." In order to determine the facts and relevant legal issues, the Board should conduct an evidentiary hearing that includes expert testimony, cross-examination and rebuttal. Only through such a formal proceeding, conducted under penalty of perjury, can the Board reliably acquire the necessary factual information on which to base the informed findings necessary for a legally adequate decision.

A more economical and, perhaps, less time consuming alternative would be for the parties to stipulate to petition the court for a declaratory relief action to resolve the myriad factual and legal issues. Alternatively, the Board could conduct an evidentiary hearing on the factual issues, subject to appeal, and the parties could stipulate to requesting the court to determine major legal issues like the riparian rights doctrine and the right to divert tidal flows. Regardless of the alternative selected, any proceeding must include the issues identified in CSPA's formal complaint against DWR and USBR.

The Board is reaping the consequences of its historical failure to adjudicate the basins or require explicit and verifiable information on the source, diversions and accretions of all water within the system. None of the approaches suggested by the Board for addressing the allegations of DWR/USBR (public hearing, case-by-case investigation or regulation) can be successful in the absence of a comprehensive water audit of the system. None of the questions posed in the notice can be answered without an extensive fact-finding investigation conducted under rules of evidence.

The Board's quandary is analogous to a store manager, facing allegations of missing inventory, who doesn't know how much inventory is delivered to the store or how much or by what means inventory is removed and who proposes to address the problem by installing a checkout counter for a small subset of customers: in this case, Delta farmers. The situation is compounded by the fact that customer claims are 5.5 times average annual inventory.

If the Board wants specific information on in-Delta diversions, equity and hydrology demand that the Board also require specific information on all water inputs and outputs to the system. If the Board wants to pursue allegations that Delta farmers are illegally taking water belonging to the state and federal projects (Projects), it needs to first determine whether the water the Projects claim is being taken actually reaches the Delta and whether the projects have legal rights to it. It must quantify the volume and source of commingled water in both upstream waters and the Delta Pool and then sort out the legal rights to that water.

As an initial step, the Board needs to make a factually and legally defensible determination on whether the tides, myriad inflows to the intricate web of Delta channels and the use of Delta channels by the Projects comprise a common Delta Pool. The Board must then proceed to determine the quantity of water in the Delta and the legal rights to that water, taking into account the priority system, the Delta Protection Act of 1959 and Area of Origin statutes.

In-Delta interests began diverting water from the common Delta Pool in the 1800s to early 1900s. Sufficient water for in-Delta use was always available before construction of the Projects. The Projects began diverting from the Delta Pool in the latter half of the 1900s and, according to their own data, a substantial percentage of the water they presently export consists of commingled inflow from the Bay and upstream tributaries, as well as in-Delta discharges.

Prior to construction of the Projects, including USBR's Friant facility, the quality of water available to in-Delta diverters was generally of much higher quality because of substantial riparian flow from the upstream San Joaquin River, winter flushing flows that prevented high salinity water from intruding into the Delta until late summer in all but the driest of years and the absence of the massive Delta export pumps that now draw high salinity water into the central and southern Delta. The Board must determine whether the Projects have complied with their statutory and regulatory requirements to provide effective salinity control, an adequate water supply for Delta users and protection of beneficial uses in the Delta. It must address the illegal diversion of riparian flow from the upper San Joaquin River. To what extent are the alleged improper diversions by Delta users, if any, the result of illegal actions by the Projects?

The Board must also determine whether diversion of water to irrigate Delta lands represents an increase in water demand over the channel losses that would naturally occur in the absence of in-Delta diversions. In reality, Delta channel losses would be similar and possibly significantly greater in the absence of Delta farming operations. Delta islands are below sea level and have an extremely shallow water table. Seepage under and through levees and rising groundwater would transform Delta islands into wetlands and open waters if Delta farmers ceased pumping water back to the channels. As wetlands have significantly greater evapotranspiration rates than farming operations, channel losses would likely increase.

To reach a factually defensible decision sufficient to justify any potential enforcement action against Delta diverters, the Board must quantify:

- Actual Delta outflow as opposed to the Net Delta Outflow Index (NDOI) relied upon by the Board. The NDOI is a calculated guesstimate and seriously over states Delta outflow during drier periods as compared to the tidally filtered flow data collected by the U.S. Geological Survey (USGS) stream flow gages at Rio Vista, Three Mile Slough, Jersey Point and Dutch Slough. The USGS data correlates with salinity changes and the NDOI doesn't. For example, while the NDOI reported average Delta outflow as 3,805 cubic feet-per-second (cfs) during May 2014, the USGS gages reported that actual Delta outflow was a negative 45 cfs.
- Actual natural inflow as opposed to the calculated guesstimates of "Full Natural Flow" at rim dams the Board has historically relied upon. The Board has never required the comprehensive "gaging" of natural flows. Natural springs in the Sacramento and Feather River watersheds provide millions of acre-feet (AF) of flow throughout the year, even in summer. DWR/USBR have no storage rights for these artesian flows that are commingled in upstream reservoirs when downstream riparian and appropriative demands exist.
- Actual accretions of water to the Delta and reaches of streams tributary to the Delta, including return flows, discharges and other inputs, as opposed to the calculated guesstimates of accretions the Board has historically relied upon. For example, return flows from the Colusa Basin Drain at Knights Landing, Butte Creek/Butte Slough/Sacramento Slough and the Natomas Basin Cross Canal are unknown because of an absence of flow gages. All accretions, whether from return flows, discharges from wastewater treatment facilities, groundwater, etc. are subject to the water rights priority system.
- Actual channel losses in the Delta and reaches of streams tributary to the Delta, as opposed to the calculated guesstimates historically relied upon by the Board. For example, the Board must identify and quantify losing reaches of streams tributary to the Delta and make an effort to identify the causes. Are losing reaches of streams the result of illegal diversions or adjacent pumping of groundwater for local use or substitution for water transferred via project facilities?
- The "abandoned water" in the Delta and the legal rights to it in accordance to the priority system. Riparian and return flows, accretions and compliance flows that reach the Delta are considered "abandoned" flow when the Delta is in balance. The rights to abandoned water by DWR/USBR must be in accordance with the rights of senior appropriators.
- Commingled water from all sources that are drawn from the Sacramento watershed into the San Joaquin watershed, as the result of export pumping by the state and federal projects. By statute and precedent, it is the responsibility of the party causing a commingling of water from one watershed to another to ensure that the water rights of existing parties is not diminished or impaired. The Board must determine whether in-

Delta diverters are actually taking stored Project water, whether the Projects are storing water they're not entitled to store and whether the Projects commingling of water is adversely impacting the right of Delta water users from exercising their legal entitlements.

In sum, the Board must determine, among other things: whether DWR and USBR have legal rights to all of the water they claim or have stored; whether the flows Delta diverters are accused of improperly taking actually reach the Delta; whether the Project's operations and commingling of water have deprived Delta water users of entitled water supplies; whether Delta diverters are entitled to tidal flows in a common Delta Pool and whether DWR and USBR are claiming abandoned water that is subject to the priority system. The Board cannot credibly make the necessary findings based solely on information regarding Delta water rights and diversions requested in the Draft Order.

These questions would likely have been answered a half-century ago had California undertaken the adjudication that California Water Rights Board Chairman Henry Holsinger and Governor Earl Warren testified was necessary prior to operation of the Central Valley Project. They must be answered before the Board can make required findings of improper diversion against Delta water users. We note that Idaho recently completed an adjudication of 158,000 water right claims in the Snake River Basin. Colorado conducted an adjudication in the 1970s.

The Notice includes three questions or sets of questions and requests input from the public. The first question states:

Is any of the previously stored water in Sacramento River watershed reservoirs that DWR and USBR release from storage (including releases for exports from the Delta or salinity control and public trust protection, or stored water that is transferred through the Delta from purchase points north of the Delta to points of delivery south of the Delta) available for appropriation by diverters in the central and southern Delta?

This question is essentially a misleading *red herring* that distracts and confuses the issue. As discussed above, there are numerous factual and legal determinations that must be addressed before any supportable conclusions regarding water availability in the Delta can be made.

The second set of questions asks:

Does the connection of the Delta to the ocean provide additional water to satisfy water right demand in central and southern Delta? If so, is this water subject to, or available for, appropriation or riparian right? Are there other sources of water available for appropriation or riparian right in the central and southern Delta, other than contributions from Sacramento-San Joaquin watersheds?

The answer is generally, yes. The commingling of water in the common Delta Pool is a reality and both the Projects and in-Delta users divert varying combinations of water from the ocean,

upstream and downstream tributaries, as well as return flows and wastewater discharges within the Delta. However, answers to a number of factual and legal questions must precede any final determination regarding water availability for southern and central Delta users.

For example, have the Project's upstream diversions and export operations increased seawater intrusion and reduced inflows that Delta water users are entitled to divert? What are the resulting physical and legal consequences? What is the extent of return, artesian and non-Project flows, as well as other accretions in the watershed, which reach the Delta and become available for diversion subject to the priority system? Authorized discharge capacity from municipal and industrial wastewater treatment facilities into the Delta watershed exceeds two million AF annually. Annual discharges from irrigated agriculture are extensive but unknown. Preoccupation with the legal rights of Delta diverters deflects attention from the germane question: is there sufficient water available for valid Delta water diverters? That answer can only be arrived at by examining the availability of water and the rights to water in the entire Delta watershed.

The third question asks:

Will the required diversion information proposed in the attached draft Order, in conjunction with the information submitted pursuant to the Delta TUCP Order, be sufficient to inform a State Water Board determination on the availability of water for diverters in the central and southern Delta?

The answer is an emphatic no! As our preceding comments illustrate, there are numerous additional factual and legal determinations that must be made before the Board can make any decision on the availability of water for central and southern Delta diverters.

With respect to the information requested in the Draft Order, we observe that it is unlikely that the requested information could be provided within five days, the Board should already have sufficient information on Delta water rights from statements on file and its extensive investigation and inspection of Delta water diversions over the last three years and information on water use must be reported by diverters on their triennial reports.

In the short term, the Board should not adopt the Draft Order as written. CCR §879(c), adopted by the Board on 2 July 2014, states:

Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director *may issue* an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year. (emphasis added)

The important word is “may,” The Deputy Director has discretion on whether to order water rights holders to provide additional information. The Deputy Director should exercise that discretion because Finding #3 of the Draft Order is not true. As noted above, the Board will not be able “to determine the merits of the allegations made in the letters [from DWR and USBR]” solely on the basis of “information on the diversions made under a riparian or pre-1914 basis-of-right for users in the central and southern Sacramento-San Joaquin Delta, as well as other portions of the Delta.”

In place of the existing Finding #3, the Draft Order should substitute a new Finding that states:

The California Sportfishing Protection Alliance has filed a formal complaint against the Department of Water Resources and the Bureau of Reclamation questioning the basis of right and the observance of priority of certain diversions by these entities from their export facilities in the south Delta.

The ordering paragraphs of the Order should then be re-cast to order an evidentiary hearing regarding the issues raised in this letter, CSPA’s 12 August Complaint against DWR and USBR and other relevant issues that have been previously raised or that may be raised at the 24 September workshop.

Thank you for considering these comments. If you have questions or require clarification, please don’t hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings". The signature is fluid and cursive, with the first name "Bill" being more prominent.

Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Cc: SWRCB Board Members
Tom Howard, Executive Director