



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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Water Rights Division
State Water Resources Control Board
1001 I Street Sacramento, CA 95214
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Transmitted via email

RE: CSPA Comments on April 19, 2022 Revisions of Water Unavailability Methodology

The California Sportfishing Protection Alliance (CSPA) respectfully comments on the Notice of Availability of Refinements to the Water Unavailability Methodology and Draft Emergency Curtailment and Reporting Regulation for the Delta Watershed. These comments also respond, in part, to Water Rights Order WR 2022-0147-EXEC.

I. Introduction

Order WR 2022-0147-EXEC (Order) explains that the Water Unavailability Methodology (Methodology) assumes that the State Water Project (SWP) and Central Valley Project (CVP) are entirely responsible for water quantity and quality needed to protect public trust resources in the Delta. The Order states at p. 56:

[T]he Methodology does not estimate supplies based on the Delta outflow and other flow-dependent water quality requirements that DWR and Reclamation are required to meet. Accordingly, temporary changes to those requirements did not affect the estimate of the natural and abandoned flows used to determine water unavailability for purposes of curtailment. In addition, the approval of the TUCP did not change DWR's or Reclamation's obligation to comply with orders to curtail their own water rights based on a lack of water unavailability.

The April 2022 revision of the Methodology reaffirms this position in section 3.2 (p. 60), which is effectively identical to section 3.2 in previous versions.

At the same time, the updated Water Unavailability Methodology does not include an assessment of how the Board's approval in the April 4, 2022 Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives (April 4, 2022 Order) of 1500 cfs human health and safety diversions from the Delta by the State Water Project and Central Valley Project affects availability of water for

diversion by more senior water rights holders¹ or how it affects the assumption that the SWP and CVP will effectively protect public trust resources.

The Methodology thus leaves a gap that fails to protect the public trust. First, the Methodology assumes that the SWP and CVP exclusively will protect public trust resources in the Delta and downstream of SWP and CVP dams. Second, it effectively exempts deliveries under SWP and CVP contracts from curtailment. Third, it allows the SWP and CVP to operate under an Order that weakens protections for public trust resources. Finally, it allows up to 1500 cfs of Delta exports for health and safety purposes without backfilling those exports with curtailments, either of SWP or CVP contractors or of non-SWP and non-CVP diverters, choosing instead to backfill these exports by reducing flows previously dedicated to the environment by the Board in the Bay-Delta Water Quality Control Plan.

II. Previous protests and comments on unreasonable effects on fish and wildlife are incorporated by reference.

We incorporate by reference the following protests and comments on the unreasonable effects of the Board's approval of the temporary urgency change petitions on fish and wildlife, and the previous comments of California Water Research on an earlier version of the Methodology.

- A. CSPA et al., Protest, Objection, Petition for Reconsideration of 2022 TUCP of Permit 16478 et al. of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315 et al. of the Bureau of Reclamation, and Responding Order (April 4, 2022)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2022/20220406_Protest_CSPA.pdf
- B. CSPA et al., Protest, Objection, Petition for Reconsideration of 2021 TUCP of Permit 16478 et al. of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315 et al. of the Bureau of Reclamation, and Responding Order (June 4, 2021)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2021/20210604_shutes_objection_petition%20for%20reconsideration.pdf;
- C. California Water Research, Comments on the Water Unavailability Methodology: Need to consider the issue of diversion by the Sacramento Settlement Contractors under Reclamation's CVP Permits. (May 5, 2021): <https://cah2oresearch.com/wp-content/uploads/2021/06/CWR-comments-re-WUA-and-Sacramento-Settlement-Contractors.pdf>

III. The Water Unavailability Methodology is contrary to the public trust doctrine.

Public trust uses are superior to uses under a water right, including senior rights and riparian rights. This principle is clearly spelled out in *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1485 (2014) [173 Cal.Rptr.3d 200]:

¹ The same holds for the Board's June 2021 Order approving a TUCP for Delta operations.

This case, moreover, involves more than traditional water rights. As the Supreme Court held in *Audubon Society*, no party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has "an affirmative duty" to take the public trust into account in regulating water use by protecting public trust uses whenever feasible. (*Audubon Society*, supra, 33 Cal.3d at pp. 446--447.) Although the *Audubon Society* court considered the public trust doctrine only in relation to permitted appropriative water rights, subsequent decisions have assumed the doctrine applies as well in the context of riparian and pre-1914 appropriator rights. (*United States*, supra, 182 Cal.App.3d at p. 106 [in *Audubon Society*, "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado*, supra, 142 Cal.App.4th at p. 966 ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].)

The Methodology fails in the Board's "affirmative duty" to protect the public trust. By its own admission in Section 3.2, the Methodology does not account for or consider Delta inflows and outflows. Instead, it punts protection of the public trust to the SWP and CVP for a separately considered evaluation. However, the SWP and CVP never field the punt. The "affirmative duty" becomes an afterthought that is buried in a distinct process. In that distinct process, the April 4, 2022 Order has already weakened protections for public trust resources, without ever having considered whether or how curtailments, including those of SWP and CVP contractors, could allow additional flows or improved storage management that would protect or better protect public trust resources.

IV. Changes to the Coordinated Operations Agreement in 2018 and other changes reduce the likelihood that the State Water Project can meet regulatory requirements to protect public trust resources in the Delta in dry and critically dry years.

Water Rights Decision 1641 relied heavily on 1986 Coordinated Operations Agreement (1986 COA)² between the Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) for the assumption that the SWP and CVP would meet Delta flow and water quality requirements in dry and critically dry years.

Article 6(c) in the 1986 COA provided:

(c) Sharing of Responsibility for Meeting Sacramento Valley Inbasin use With Storage Withdrawals During Balanced Water Conditions: Each party's responsibility for making available storage withdrawals to meet Sacramento Valley inbasin use of storage withdrawals shall be determined by multiplying the total Sacramento Valley inbasin use of storage withdrawals by the following percentages:

² US Bureau of Reclamation and California Department of Water Resources, *Agreement Between the United States of America and the Department of Water Resources of the State of California for Coordinated Operation of the Central Valley Project and the State Water Project*, November 24, 1986. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/petitioners_exhibit/glenn/gcid_1.pdf.

<u>United States</u>	<u>State</u>
75%	25%

The 25% to 75% ratio of obligations for storage releases in the 1986 COA was roughly proportional to the SWP and CVP's respective proportions of reservoir storage capacity in the Sacramento Valley, plus Trinity Reservoir. The SWP's Oroville Reservoir has about 31% of the total joint project storage capacity, and the CVP's Shasta, Folsom, and Trinity have about 69%. The 1986 Coordinated Operating Agreement's obligations for storage withdrawals for inbasin needs thus roughly followed the projects share of joint storage capacity.

But the amendment of Article 6(c) in the 2018 Addendum to the Coordinated Operation Agreement³ significantly increased the obligation of the State Water Project in dry and critically dry years. Amendment #1 provided that "[e]ach party's responsibility for making available storage withdrawals to meet Sacramento Valley inbasin use of storage withdrawals shall be determined by multiplying the total Sacramento Valley inbasin use of storage withdrawals by the following percentages:

	United States	State
Wet Years	80%	20%
Above Normal Years	80%	20%
Below Normal Years	75%	25%
Dry Years	65%	35%
Critical Years	60%	40%

The Amendment to Article 6(c) in the 2018 COA Addendum further states that the obligation of the SWP for meeting the Bay-Delta Water Quality Control Plan standards under multiple dry and critically dry years is undefined: "In a Dry or Critical Year following two Dry or Critical Years, the United States and State will meet to discuss additional changes to the percentage sharing of responsibility to meet inbasin use."

The net result of these changes to the COA is that less storage capacity is dedicated to assuring that stored water is available to meet Decision 1641 standards.

Additional factors make it unreasonable for the Board to assume that SWP and CVP reservoirs will be operated to meet the flow criteria in the Bay-Delta Water Quality Control Plan in dry and critically dry years. These factors include failure of the SWP and the CVP to limit deliveries to senior contractors and changing runoff patterns under a changing climate.

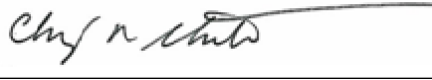
³ US Bureau of Reclamation and California Department of Water Resources, *Addendum to the Agreement Between the United States of America and the Department of Water Resources of the State of California for Coordinated Operation of the Central Valley Project and the State Water Project*, December 12, 2018. Available at: <http://calsport.org/news/wp-content/uploads/Signed-COA-Addendum-121218.pdf>.

V. The Board must revise the Water Unavailability Methodology to assure protection of public trust resources.

The Water Unavailability Methodology must take into account the extent to which the Board uses the April 4, 2022 Order or similar orders on temporary urgency change petitions to waive the SWP and CVP's joint obligations for storage releases to meet water quality control plan standards. The Board must either develop a curtailment methodology specific to SWP and CVP contractors, or require additional curtailments of other water rights holders to backfill both the allowed (out of priority) SWP and CVP health and safety diversions and other SWP and CVP diversions, or both.

In addition, the Board needs to define a methodology for enforcing curtailments of water deliveries to SWP and CVP contractors, including settlement and exchange contractors. To the degree that these entities divert under their underlying rights, they should be curtailed in order of priority. The Board must develop and enforce accounting methods that monitor, report, and, as appropriate, curtail diversions, consistent with priority. To the degree that these entities are diverting stored water pursuant to contracts with the SWP and CVP, the Board must enforce limitations on contract deliveries consistent with the obligations of the SWP and CVP to meet all Delta public trust needs and public trust requirements in tailwaters controlled by the SWP and CVP.

Respectfully submitted,



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