



Early Fall Edition

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Governor Newsom's Water Resilience Portfolio: No Breakthroughs, Many Reruns

From the Desk of Bill Jennings

I hope each of you have had an opportunity to wet your line, while staying safe and healthy, during the present pandemic. CSPA's efforts to protect fisheries and water quality have continued unabated.



This edition of the newsletter is a sampling of recent events in our continuing efforts spanning years and decades.

These efforts involve extended administrative proceedings, often followed by litigation. For example, the current Don Pedro FERC relicensing must be read in the context that CSPA was heavily involved in hydropower relicensing on the Tuolumne River more than twenty-five years ago. Similarly, Governor Newsom's Water Resilience Portfolio is only the latest chapter in proceedings that began in the early 1990's and continued through CalFed, Delta Vision, the Bay-Delta Conservation Plan, and the WaterFix twin tunnels to the current proposed single tunnel Delta Conveyance Project.

We begin this newsletter with our landmark settlement with the State Water Board over a contentious pattern and practice lawsuit that began during the 2013-2015 drought. The settlement will fundamentally change the way the State Board addresses Sacramento River temperature control, temporary change petitions, Fish and Game Code Section 5937 and development of the Bay-Delta Water Quality Control Plan.

Second, we report on the National Marine Fisheries Service's historic capitulation in a 13-year process to develop a Habitat Conservation Plan (HCP) for the Calaveras River that essentially dewateres the lower 24 miles of the river. CSPA filed Public Trust Complaints in 2000 and 2005 that the State Water Board placed in abeyance pending development of the HCP that will now move forward. Other than CSPA, no other organizations have been minding the Calaveras store.

We then turn to lawsuits against the Federal Energy Regulatory Commission over waivers of Clean Water Act requirements, part of a disturbing national trend. We also relate current activities in the federal relicensing of the Don Pedro and La Grange Dams on the Tuolumne. We report on three recently filed lawsuits: one against the waterboards regarding massive pollutant discharges into the San Joaquin River without necessary permits, the second against the Bureau of Reclamation concerning water transfers, and the third against Interior and Westlands Water District over water service contracts. Finally, we discuss Governor Newsom's Water Resilience Portfolio that presages the next battle over attempts to divert Sacramento River water into a new reservoir and under the Delta for delivery to Southern California.

There is far too much else to cover in a brief newsletter: for example, scoping comments on the Notice of Preparation of an environmental document for the Delta Conveyance EIR; lawsuits against the Department of Water Resources over long-term contracts and over "validation" for bond funding for the tunnel; an array of Clean Water Act enforcement actions; etc.



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I believe it's accurate to say that, but for CSPA's involvement, California's fisheries and water quality would be in considerably worse condition than at present. And we've accomplished this on an extremely lean budget, because we don't accept funds from sources that would limit our efforts to protect fisheries. Since we don't accept "being reasonable" in lieu of protecting fish, we rely on your [donations and memberships](#). We are deeply appreciative of your continuing support.

In addition to our [main website](#), please be sure to frequently visit our [Fisheries Blog](#) on the current state of California fisheries. It's a great step-by-step tool to get a better grasp from a fish-eye perspective. Cheers!

Landmark Lawsuit Settlement Between CSPA and State Water Board to Protect Public Trust Fisheries

By Bill Jennings

"As a result of this lawsuit, the State Water Board can no longer completely ignore the Public Trust Doctrine in its Basin Planning and water rights orders."

- CSPA and CWIN Board Member and attorney Mike Jackson.

On 17 July 2020, shortly before trial, CSPA and its partners, California Water Impact Network and AquAlliance, settled a contentious 2015 lawsuit against the State Water Resources Control Board (State Board). The lawsuit alleged that the State Board had embraced a "pattern and practice" that failed: to comply with the Public Trust Doctrine; implement Sacramento River temperature management requirements; ensure that fish below dams be maintained in "good condition" and maintain minimum Clean Water Act standards in the Delta. The settlement agreement will greatly increase protection for seriously degraded fisheries by requiring the State Board to follow transparent procedures and to make specific findings in updated Bay-Delta water quality/flow standards and Sacramento River temperature criteria.



Lower Sacramento River, Anderson CA

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Central Valley pelagic and salmonid fisheries have experienced precipitous decline.

The Public Trust Doctrine establishes powerful public property rights in natural resources. The settlement requires the State Board to conduct a full transparent evaluation of the specific Public Trust factors the State Board will consider and to make specific findings that new Bay-Delta Plan requirements will protect fish and wildlife.

Excessive temperatures have decimated Sacramento River salmonid fisheries.

The settlement agreement requires the State Board to conduct a transparent Sacramento River Temperature Management process that addresses all controllable factors, including deliveries, and ensures adequate staffing, modeling and public review.

Fisheries below rim dams have long suffered from inadequate flow.

Fish and Game Code Section 5937, which requires dam operators to release sufficient flow to keep "fish in good condition," has long been ignored. The settlement agreement requires the State Board to specifically evaluate whether Bay-Delta updates are consistent with Section 5937.

Fish and Wildlife have disproportionately suffered during droughts as the State Board has

temporarily relaxed water quality standards.

The settlement agreement requires transparent Public Trust analysis for Temporary Urgency Change Petitions.

[Settlement Agreement](#) [Press Release](#) [Lawsuit](#)

NMFS Gives Stockton East All the Water in the Calaveras River

by Chris Shutes

On September 14, 2020, the National Marine Fisheries Service (NMFS) and Stockton East Water District (Stockton East) issued a Final [Habitat Conservation Plan](#) (HCP) for the Calaveras River. The HCP will require a minimum flow of 20 cfs upstream of Stockton East's major water supply diversion at Bellota Weir (River Mile 24). It will also require fish ladders and screens at several major diversions. However, the Plan allocates **zero** water to fish in the lower 24 river miles of the river. At Bellota Weir, Stockton East will recapture all of the required flow release from New Hogan Dam (River Mile 42).



Stranded Dead Salmon - Calaveras River

Water supply operation currently blocks salmon and steelhead migration into the Calaveras River from its confluence with the San Joaquin River in Stockton to Bellota Weir. Migration opportunities in the 24 miles between those two points are currently limited to periods of flood control releases from New Hogan Dam during the non-irrigation season. Dozens of flashboard irrigation dams downstream of Bellota Weir block fish migration from March or April through October 15 every year. CSPA objects to the fact the HCP omits flows for salmon and steelhead migration to the upper sections of the Calaveras River which will have some minimum flows.

In 2006, the State Water Resources Control Board put in abeyance [CSPA's public trust complaint](#) regarding the operation of the Calaveras River, pending the outcome of the HCP. Since NMFS couldn't find the courage to require any flow at all to get fish into and out of the Calaveras watershed, it may be time to ask the State Water Board to reopen CSPA's complaint.

[Read full article on the CSPA News and Archive.](#) [2005 Public Trust Complaint](#)
[2019 Comments on HCP](#) [2019 Comments on HCP Environmental Review](#)

CSPA Files Second Lawsuit against FERC over Waiver of Clean Water Act

By Chris Shutes

CSPA and three other non-profit groups have filed a second lawsuit against the Federal Energy Regulatory Commission (FERC) in the Federal Appeals Court 9th Circuit in defense of the State of California's authority to place conditions on new licenses for hydropower projects. The new lawsuit is the latest chapter in CSPA's concerted opposition to FERC's serial "waivers" of the application of Clean Water Act Section 401 to the issuance of FERC licenses for California hydropower projects. (For description and discussion, see previous posts [here](#) and [here](#)). Hydropower licenses have a term of 30 to 50 years.



Yuba River

The second lawsuit filed on September 18, 2020 is over waiver of the State's authority to issue a "water quality certification" for the Yuba River Development Project, operated by Yuba Water Agency in the Yuba River watershed. The [previous lawsuit](#) addressed waiver of certification for Nevada Irrigation District's Yuba-Bear Project in the Yuba and Bear river watersheds.

As in the previous lawsuit, CSPA is joined in [second legal challenge](#) by the South Yuba River Citizens League, Friends of the River, and the Sierra Club and its Mother Lode Chapter.

Final EIS for Don Pedro/LaGrange Dam Relicensing - The Low-Flow Drumbeat Continues

By Cindy Charles

On July 7, 2020, the Federal Energy Regulatory Commission (FERC) released a final Environmental Impact Statement (EIS) for the relicensing of Turlock and Modesto Irrigation Districts' (Districts) Don Pedro and La Grange hydroelectric projects.

CSPA has been a leading participant in this relicensing process since the Districts initiated the licensing process in 2011.

In its 1,043 page document, FERC staff recommends the staff alternative, which largely contains the Districts' proposed measures, including flows contained in the proposed Tuolumne River Voluntary Agreement (VA). The Districts, together with the City and County of San Francisco, propose that the VA flows replace the flow requirements approved in December 2018 in the State Water Board's Bay-Delta Plan. The State Water Board's adopted flows would require that the Districts release 30-50% of the February-June unimpaired flow into the lower Tuolumne River.

Following the trend over the past five years, FERC staff made changes to the final EIS from the draft EIS that preponderantly follow the recommendations of the license applicants. Unlike the draft EIS, the final EIS agreed with the Districts' plan to remove bass from the river ("predator control"), but recommended that that the plan not be a condition of the new project license because fishery agencies should be responsible for it.

One such fisheries agency, the National Marine Fisheries Service, just released a [scientific peer review](#) of the Districts' fish population models that formed much of the support for the Tuolumne Voluntary Agreement. The review by the Seattle firm Anchor QEA found:

[T]he Chinook salmon production model cannot identify the number of predators that would need to be removed or how much of a reduction in consumption would be required to achieve a significant increase in smolt-to smolt survival. **The response from predator control is assumed, not predicted.** (page 5, emphasis added).

In response, CSPA and thirteen other conservation and fishing groups wrote a [letter](#) on September 9, 2020 to the San Francisco Public Utilities Commission asking that the Commission withdraw its support of the Tuolumne River Voluntary Agreement.

The next major step in the overall FERC licensing process is for the State Water Board to issue a water quality certification for these projects. The conditions in a certification are mandatory. FERC also needs to complete Endangered Species Act consultation with the National Marine Fisheries Service



Don Pedro Reservoir at low water



Don Pedro Dam

CSPA, Coalition Sues Waterboards Over Grasslands Bypass Pollutant discharges to San Joaquin River

by Bill Jennings

On 5 May 2020, CSPA and a coalition of fishing and tribal groups (CSPA et al.) sued the State and Regional Water Boards, Bureau of Reclamation and San Luis & Delta-Mendota Water Authority over illegal discharges of pollutants from the Grasslands Bypass Project into the San Joaquin River. The [Lawsuit](#) alleges violations of the federal Clean Water Act, Porter-Cologne Water Quality Act, Delta Reform Act, California Environmental Quality Act and Public Trust Doctrine.

The Bypass Project drains substantial quantities of selenium, salts, sulfates, mercury, arsenic and other pollutants collected from 97,400 acres of farmland in the Central Valley and discharges those contaminants into the San Joaquin River. These discharges frequent exceed aquatic life criteria.

Late last year, CSPA et al. prevailed at the [Ninth Circuit Court of Appeals](#) on a 2011 lawsuit alleging that discharges from Grasslands Project required a federal NPDES discharge permit. However, the Regional Water Board issued significantly less stringent state Waste Discharge Requirements (WDRs) for the Bypass discharges. In January 2019, the WDRs were [appealed](#) to the State Water Board. The subject lawsuit was filed after the State Board declined to hear the appeal. Of note, CSPA also has a current CEQA, CWA and Public Trust [lawsuit](#) against the Bureau of Reclamation and San Luis & Delta-Mendota Water Authority regarding the 2019 certification of the Addendum to the Final 2009 EIS/EIR for the Grassland Bypass Project.

The Law Offices of Stephan C. Volker is representing CSPA et al. in both actions.



Lower San Joaquin River

CSPA, Coalition Sues Bureau Over Long-Term Water Transfers

By Bill Jennings

On 11 May 2020, CSPA, AquAlliance, California Water Impact Network and the South and Central Delta Water Agencies filed a [federal lawsuit](#) against the U.S. Bureau of Reclamation (USBR) and the San Luis & Delta-Mendota Water Authority over the EIS/EIR for the proposed Long-Term Water Transfer Project (Project). The Project proposes to transfer as much as 600,000 acre-feet of water from sellers upstream of the Sacramento/San Joaquin Delta to buyers south of the Delta. The lawsuit alleges violations of the National Environmental Policy Act, Administrative Procedures Act, California Environmental Quality Act and Public Trust Doctrine.

The Project would have devastating impacts to degraded Sacramento-San Joaquin Delta fisheries and water quality by exacerbating the suite of existing problems. Because it relies on "groundwater substitution" for transferred water, it would have detrimental effects on groundwater and connected surface water and habitats in the counties of origin.

In 2015, the Bureau had proposed a similar ten-year water transfer program. CSPA and allies litigated the EIR/EIS and prevailed in 2018, when the judge vacated the project. Subsequently, the Bureau simply cobbled together pieces of the invalidated 2015 EIS/EIR interwoven with fragmented updates in a new environmental document. The new 2019 EIS/EIR fails to correct the inadequacies in the earlier document plus inadequately addressing the changed scope of the project and changed environmental conditions.

The Aqua Terra Abris Law Group and Law Offices of Michael Jackson are representing CSPA, AquAlliance and CWIN and the Soluri Meserve Law Corporation is representing South and Central Delta Water Agencies.

CSPA, Coalition Sues Interior and Westlands Over Long-Term Water Contracts

By Bill Jennings

On 8 July 2020, CSPA and a coalition of fishing organizations sued the U.S. Department of the Interior, U.S. Bureau of Reclamation and Westlands, San Luis and Panoche Water Districts in federal court over a series of interim water service contracts and a series of permanent repayment (or conversion) contracts. The lawsuit alleges that the decisions by the Bureau allow environmentally harmful diversions by the Bureau's Central Valley Project of massive quantities of freshwater from the Delta for consumptive use without the comprehensive environmental reviews and requirements required by the National Environmental Policy Act (NEPA) and the Central Valley Project Improvement Act (CVPIA). The Second Amended and Supplemental Complaint for Declaratory and Injunctive Relief incorporates an earlier 2016 complaint for approval of interim water service contracts and the 2020 reauthorization of the same water service contracts.

The Law Offices of Stephan C. Volker is representing CSPA et al. in this matter.

Governor Newsom's Water Resilience Portfolio: No Breakthroughs, Many Reruns

By Cindy Charles

On July 28, 2020, Governor Newsom released a final version of the Water Resilience Portfolio, 144 pages listing actions attempting to meet California's water needs through the 21st century.

The final Portfolio includes the expensive (\$16 billion+) and undefined Delta tunnel. It tacks on "accelerating" the Sites reservoir project, yet another prospective net loss to Sacramento River flow and Delta outflow. Another element reaffirms Voluntary Agreements with water agencies to achieve flow increases in the Bay-Delta watershed, even as the discussions stalled out after years of arguments over how skimpy amounts of water were too much.

The central theme of CSPA's comments of the draft Portfolio was that California uses more water than its rivers and aquifers can sustain:

Adding a series of good projects to a portfolio founded on water debt does not balance or offset the fundamental structural problem of California's overallocated and overappropriated water system. The Portfolio proposes many actions that in and of themselves would be good things to do. But even as the state may do some of those good things, implementation of the Portfolio will increase the systemic pressure to divert more water.

California needs to get beyond the same old, same old loop of giant unfunded and questionably beneficial water projects. The time is overdue to figure out how to live with a balanced water budget that the state can afford.



Hetch Hetchy Reservoir - Yosemite National Park



Lyell Fork - Tuolumne River