

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. BOX 2000, Sacramento, Ca. 95812-2000**  
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**PROTEST – (Petitions)**

**BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS**

**Temporary Urgency Change Petition for Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation for the Central Valley Project.**

**We, Chris Shutes, Water Rights Advocate, California Sportfishing Protection Alliance (CSPA), 1608 Francisco St., Berkeley, CA 94703, [blancapaloma@msn.com](mailto:blancapaloma@msn.com), (510) 421-2405; Bill Jennings, Executive Director, CSPA, 3536 Rainier Ave, Stockton CA 95204, [deltakeep@me.com](mailto:deltakeep@me.com), (209) 464-5067; Barbara Vlamis, Executive Director, AquAlliance, P.O. Box 4024, Chico, CA 95927, [barbarav@aqualliance.net](mailto:barbarav@aqualliance.net), (530) 895-9420; Carolee Krieger, Executive Director, California Water Impact Network, 808 Romero Canyon Rd., Santa Barbara, CA 93108, [caroleekrieger7@gmail.com](mailto:caroleekrieger7@gmail.com), (805) 969-0824; and Michael Jackson, counsel to CSPA, CWIN and AquAlliance, P.O. Box 207, 429 W. Main St., Quincy, CA 95971, [mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net)**

have read carefully a notice relative to a petition for Temporary Urgency Change of of the Department of Water Resources and the Bureau of Reclamation. The Executive Director issued an Order granting this petition on January 31, 2014 entitled *Order Approving a Temporary Urgency Change in License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions*. The Executive Director issued a Revised Order on February 7, 2014 allowing exports of transferred water and allowing export of natural and abandoned flows under certain conditions. Subsequently, the Executive Director issued a second Revised Order on February 28, 2014, extending the terms of the Order through March, 2014.

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

- (1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
- (2) not best serve the public interest

x

- (3) be contrary to law** **x**
- (4) have an adverse environmental impact** **x**

**State Facts, which support the foregoing allegations:**

**Background.**

Huge carryover storage from the (very) wet water year 2011 allowed the major CVP and SWP (Projects) reservoirs north of Delta to fill in 2012, despite the fact that water year 2012 was a below normal year. Between May 2012 and February 2014, combined storage in Folsom, Shasta and Oroville dropped from 8,941,671 AF to 2,916,297 AF. (CDEC). Total exports for water year 2013 were just over 4,000,000 AF. (Bureau of Reclamation data). The Projects exported almost 1,700,000 AF between June 2013 and September 2013. (Bureau of Reclamation data) The Projects continued to export throughout the fall: though there was almost no precipitation, and had been none since December, 2012. Indeed, some 589 TAF of water was exported from October through December,<sup>1</sup> at levels ranging above 10,000 AF per day in November and above 5,000 AF per day through December (CDEC).

Given low reservoir storage levels and facing another dry year, the U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) jointly filed a temporary urgency change petition with the State Water Resources Control Board (Board) on January 29, 2014. The Bureau and DWR asked the Board to reduce Delta flow requirements, relax salinity standards, allow the Delta Cross Channel Gates to remain open during the salmon outmigration period, and maintain exports at levels needed for “health and safety.” The Board granted the requests asked for in the temporary urgency change petition in an Order dated January 31, 2014, effective immediately, and scheduled a workshop for February 17 and 18.

On February 4, 2014, storage in Folsom was about 162 TAF, storage in Shasta was about 1,650 TAF, and storage in Oroville was about 1,270 TAF.

On February 7, following a subsequent rain event, the Bureau and DWR again jointly petitioned the Board to modify the January 31 Order-to allow export of water during runoff events over and above levels required for health and safety, provided that D-1641 standards were being met. This request was granted and the Order was modified to reflect this change. During and after rain events in February 2014, combined exports reached as high as 10,000 AF per day (February 12-18, 2014; Bureau preliminary figures).

On February 17 and 18, the Board held its workshop. At the workshop, CSPA presented many of the facts that support the present protest.

On February 27, the Bureau and DWR petitioned the Board to extend through March the conditions granted by the Board on January 31 and modified on February 7. On February 28, the Board’s Executive Director modified the Order to extend the applicability of the modified flow

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<sup>1</sup> The figure 681 TAF stated in Slide 10 of CSPA’s February 17, 2014 presentation as covering October through December, 2013, also includes 91 TAF exported in January, 2014. The correct figure for October through December, 2013 is 589 TAF.

requirements. On February 28, 2014, storage in Folsom was about 302 TAF, storage in Shasta was about 1,770 TAF, and storage in Oroville was about 1,405 TAF.

**The condition addressed by the Temporary Urgency Change Petition and Order is not temporary, and the urgency results in substantial part from gross mismanagement by the Central Valley Project and State Water Project (Projects).**

California experienced little rainfall throughout calendar year 2013 and these extremely dry meteorological conditions continued through January 2014. Project managers made operational decisions that greatly exacerbated the impacts of these meteorological and hydrological conditions. The Projects gambled that rainfall would resume in the first four months of water year 2014 and, when it didn't, were faced with a crisis largely of their own making by the beginning of February.

As CSPA demonstrated in its February 17, 2014 presentation at Board's workshop on this petition and on the drought more generally, California has experienced ten multi-year droughts of large-scale extent in the last one hundred years, spanning forty years. The hydrographs for Folsom, Shasta and Oroville reservoirs between 2012-2014 demonstrate the same pattern of major north-of-Delta reservoir drawdown as occurred in the 2007-2009 time period. (Slides 6,7). The 2012-2014 pattern of CVP and SWP reservoir operation is not anomalous; it is standard for dry year sequences, since the 1976-1977 drought.

The waiving or failure to enforce Bay-Delta standards that were established to protect Delta agriculture, municipal and industrial and fish and wildlife beneficial uses has become standard operating procedure. These standards, enumerated in D-1641, were established in evidentiary proceedings and include critical drought conditions. The Board informed the Projects that it would not enforce D-1641 standards in 2013. They were violated during the 2007-2009 period. There were hundreds of documented violations during the 1987-1992 drought. In fact, D-1641 standards have even been routinely violated in non-drought years and the Board has failed to take enforcement action for these violations.

The Board has largely left the Projects to effectively police themselves, and has inexplicably failed to establish constraints on Project operations sufficient to protect the health and safety of California citizens and the state's public trust resources. Likewise, the fisheries agencies have grievously failed to require the Projects to modify operations in order to protect the ecological health of the Delta and tributary waterways despite severe documented declines in the health and abundance of multiple species.

All of these entities ignored the over-export of water throughout calendar year 2013, depleted reservoir storage conditions and the lack of rainfall in the first four months of water year 2014 until late January, when the Projects submitted their urgency petition. This delay left the timeline for triage severely compressed, and these entities now collectively propose to manage the result together, without public input or due process. They avoided protective regulation in the long term, exercised complete lack of discipline in the last five months, and now on the fly propose a shotgun adjudication of water rights for the next 180 days or more with no rules of evidence and no public accountability. The Order granting the Temporary Urgency Change

supplants water rights law for at least half a year. It delegates determination of the public interest to managers working for diverters and junior water rights holders who have mismanaged water to the benefit of their contractors, and to the resource agencies who failed to stand up to them while they did it.

A further example of the Bureau and DWR's misuse of process and exclusion of meaningful public participation is the fact that, barring the very unlikely chance that nature will bail them out of the present situation, they know that they will have to again petition the Board to waive the salinity objectives for agricultural and fish and wildlife beneficial uses beginning the first of April. They should have already made those requests, and the Board should have already circulated them for public comment.

### **The Temporary Urgency Change Petition and Order illegally waives CEQA, Water Code Section 13247 and federal water quality standards**

Foreseeable circumstances that occur on a frequent basis and that are exacerbated by historical mismanagement cannot reasonably be characterized as an emergency. The fact that the Governor has mischaracterized the present crisis as an Emergency is no defense. CSPA, CWIN and the Butte Environmental Council successfully challenged the previous Governor's declaration of "emergency" during the last drought. The Court found in *Butte Environmental Council v DWR* (2010), regarding then-Governor Schwarzenegger's proclamation of a Drought Emergency in 2009, that the proclamation's words "describe a condition that is ongoing, not one that is sudden or unexpected." (*BEC v DWR*, 2010, p. 17) *BEC v DWR* thus found that the 2009 Drought Water Bank was not exempt from the law on grounds of emergency. Ordering paragraph 9 of the Governor's January 17, 2014 Drought Proclamation explicitly exempts drought-related actions from CEQA and Water Code Section 13247, which requires compliance with applicable Basin Plan standards. We believe that *BEC v DWR* is directly on point: "In short, none of the recitals in the Proclamation, even if evidence, provide substantial evidence of a 'sudden, unexpected occurrence, involving a clear and imminent danger, involving immediate action to prevent or mitigate loss of, or damage to, life, health, property or essential public services.'" (*id.*, p. 18). Predictable consequences of management decisions must not be allowed to circumvent applicable law.

Pursuant to the federal Clean Water Act, the U.S. Environmental Protection Agency has promulgated specific water quality standards for California at 40 CFR 131.37. Those standards are current as of February 27, 2014. They include estuarine habitat salinity criteria of 2640 micromhos/centimeter specific conductance at the confluence of the Sacramento and San Joaquin Rivers, as a 14-day running average, from February 1 through June 30. They also include specific estuarine habitat salinity standards at Chipps Island and Roe Island between February and June and specific fish spawning salinity criteria at various points along the San Joaquin River from April through May. The Board has no authority to waive compliance with federally promulgated water quality criteria.

It should also be noted that the Temporary Urgency Order omits any mention of the D-1641 salinity objectives for fish and wildlife beneficial uses at Collinsville and Montezuma Slough in

Eastern Suisun Marsh and at Chadbourne and Suisun Sloughs in Western Suisun Marsh (January through May). The Board must address potential violations of these criteria.

**The Temporary Urgency Change will have an unreasonable effect on fish and wildlife.**

Populations of multiple Bay-Delta fish species have declined dramatically since 1967. (We provide examples in our February 17, 2014 presentation, slide 3). As CSPA and others have shown in voluminous presentations to the Board over the past five years and before, D-1641 has not protected pelagic and anadromous species that spend much of their life history in the Delta and its tributaries. For example, lethal temperatures hammered Delta smelt when the low salinity zone was drawn into the Delta during a heat wave as outflows were substantially reduced and exports dramatically increased in early July 2013. Up to half of the 2013-2014 Sacramento River cohort of upstream migrating winter-run Chinook salmon was lost in canals in the spring of 2013, attracted in part by high canal flows combined with low spring flows in the Sacramento River. A significant percentage of winter-run spawning habitat on the Sacramento was lost when the temperature compliance point was pushed upstream to Anderson in 2013. Large numbers of spring-run and fall-run Chinook redds were dewatered in the Sacramento River in the fall of 2013 when the Bureau reduced flows. Significant numbers of fall-run Chinook redds were dewatered in the lower American River in early 2014 when the Bureau reduced flows. As NOAA fisheries pointed out during the recent workshop, the entire year class of Sacramento winter-run Chinook salmon may be lost this year, the entire cohorts of spring-run on Mill and Deer Creeks may also be lost and water temperatures are likely to be critical on Butte Creek and the Feather and Yuba Rivers. Recognizing that there is likely to be insufficient flows for the successful outmigration of salmon in the spring of 2014, fishery agencies are discussing the possibility of transporting juveniles from hatcheries and, perhaps, some wild salmon to salt water locations downstream of the Delta.

The January 31 Order allows exceptions to the prescribed South Delta export restrictions of 1,500 cfs in cases of transfers of non-Project water rights or between state and federal Project contractors. There is no restriction on volume, and no requirement that the Delta Cross Channel gates be closed during these transfers. Forty years of testimony by fisheries experts shows that the combination of opening the Delta Cross Channel gates and exports creates a conduit of mortality from the Sacramento River to the south Delta export pumps for outmigrating Chinook and for other anadromous and pelagic species. This mortality is exacerbated in the absence of positive Q-West flows. These fish are not deterred from following down-river hydrodynamics simply because the water is for transfer and not for contracted Project exports per se. Any limited protective function of reducing combined Project contracted exports to health and safety needs of 1,500 cfs will simply be incrementally reduced in proportion to the volume of any water transfers that take place. The closer Delta outflow is to the temporary minimum of 3,000 cfs, the more severe the impact of exporting transferred water will become.

Water in north-of-Delta storage that is transferred south of Delta will not be available in storage in order to protect in-river resources and cold water pools north of Delta, later in 2014 or in the future. Large amounts of water were transferred to storage south of Delta in water years 2012 and 2013; Castaic Lake has 278,000 AF (85% of capacity) in storage today; Pyramid Lake has 168 TAF (98% of capacity) in storage today, and Diamond Valley Reservoir had 583 TAF in

storage (72% of capacity) at the end of January. Additionally, many municipalities have local and alternate sources of water. For example, the City of Tracy has access to water stored in New Melones Reservoir and newspaper accounts report that the Santa Clara Water District has sufficient water to get through this season. Water that is exported cannot be restored to northern California to benefit fish and wildlife or other northern California beneficial uses, including Delta area municipal and industrial and agricultural uses. Under present conditions, any further export of water south of Delta beyond water essential for health and safety is a waste and unreasonable use of water.

On February 7, the Executive Director of the Board modified the January 31 Order to allow export from the Projects' south Delta export facilities when D-1641 requirements are being met. These export limitations do not apply to transfers involving non-project water rights or between state and federal project contractors. Non-transfer exports are limited to "natural or abandoned flow." (Order at ¶2). Even if D-1641 flow standards were protective under non-urgency conditions as requirements for *minimum baseflows*, the decision to effectively cap natural flow *pulses* to these (in fact inadequate) minimums ignores the importance of flow pulses for outmigrating salmon, particularly in a prolonged condition when these baseflows are waived.

Salmon move through and out of the Delta on flow pulses. This phenomenon is documented by del Rosario (*Migration Patterns of Juvenile Winter-Run-Sized Chinook Salmon through the Delta*, 2013) and others. Since required Delta outflow pursuant to the Order has dropped to less than half of the D-1641 Critically Dry February through April requirement of 7100 cfs, the effect of exports even during and after rain events can be severe. From February 12-18, 2014, combined exports were greater than 10,000 AF per day. Perhaps the greatest impact of pumping came on February 17 and 18, when exports remained above 10,000 AF per day while natural flow was receding, leaving exports at 40% and 39% of outflow, respectively. (Bureau preliminary data). OMR reverse flows exceeded 4000 cfs. (DWR daily reports). Any Sacramento River salmon that entered the central Delta through the Cross Channel Gates while the Gates were open February 1-9 were likely pulled towards the pumps as soon as exports ramped up, since the net central Delta flow suddenly moved towards the Project pumps. Throughout the February 12-18 time period, San Joaquin River flows at Vernalis were less than 900 cfs, and the lower Mokelumne had almost no flow spike (CDEC). Once the Gates closed, there was almost no outflow from the south and central Delta. Further, any salmon fry migrating out of the San Joaquin system or the Mokelumne River would have been overwhelmingly pulled through Old River, Middle River and other south Delta waterways to the export pumps. As the season progresses and levels of outmigration (particularly of fall-run) increase, the effect of exports on salmonids during runoff events is likely to increase.

Similar impacts likely occurred to larval longfin smelt, a listed species that was present in the central Delta and Old River in early February, as reverse flows increased. (DFW Smelt Larva Survey, February 2-5 and 18-20, 2014). It should be noted that south Delta project facilities cannot screen or salvage larval stages of pelagic fish. The impacts to pelagic species are likely to become increasingly severe as the season progresses. Open Cross Channel Gates will help keep the Delta less saline. However, the volume of water entering the Delta will not be sufficient to keep Delta smelt and other species that prefer the Low Salinity Zone out of the Delta altogether. In the absence of positive Q-West flows, pelagic fish that enter the central Delta seeking fresher

water will be vulnerable to entrainment at the south Delta pumps whenever exports are ramped up. Impacts will be magnified during periods of hot weather, as elevated water temperatures approach or exceed lethal levels. Even if, during a storm event, the Cross Channel Gates are closed, Delta smelt and other pelagic species that are already in the Central Delta will be exposed to reverse flows. Water going down the Sacramento River will not reduce the likelihood of their entrainment; water in the San Joaquin and Mokelumne systems in this very dry year is likely to be captured in upstream reservoirs (absent curtailment). The prevailing (non-storm) condition will attract them into the Central Delta, and reverse flows during any ramped up exports during storms will pull them towards death at the pumps.

### **The Order will injure existing senior water rights holders.**

The Order states: “Under the current circumstances, the most prudent course of action is to conserve storage in upstream reservoirs until significant improvement of that storage is realized.” (Order, p. 9). This construct assumes that the Projects have the legal right to store inflow to Project reservoirs over and above water released from storage. If the Projects are to store water, this must be done during times when senior downstream demands (riparian, pre-1914 or post-1914 appropriative) demands do not exceed inflow to Project reservoirs. Otherwise, the Board must make an explicit finding based on substantial evidence that there is an overriding public interest for the Projects to store water and that the Board has taken every reasonable measure to comply with the priority system. *City of Barstow v. Mojave Water Agency (2000) 23 Ca.4th 1224*; *El Dorado Irrigation District v. State Water Resources Control Board, 142 Cal.App.4th 937*. The Board has made no such finding.

### **The Order is not in the public interest.**

While it is in the public interest to manage water remaining in storage today and in the next few months to best protect fish and wildlife while to the degree possible maintaining other beneficial uses, it was absolutely not in the public interest for the Projects to deplete Project storage and then compel a Temporary Urgency Change under duress. The Projects delayed submitting a Temporary Urgency Petition until late January despite being acutely aware that they were facing severe water shortages and serious operational constraints months earlier. This approach forced the Board to make a rapid response that eliminated the ability of interested and affected parties to provide input or participate in the process. Short term operation of the Projects and decision-making about Project management and resource protection in the Bay-Delta system under crisis conditions, with little public input and while making instantaneous decisions about which aspects of the water rights priority system to set aside, are not in the public interest.

Nor is it in the public interest to ignore and violate federally promulgated water quality standards for the Delta. It is further not in the public interest to improperly characterize a foreseeable situation that routinely occurs and was exacerbated by gross mismanagement by the Projects as an emergency in order to illegally waive CEQA and Water Code Section 13247.

This Temporary Urgency Change has put a real face on what CSPA and others mean when we argue that the Bay-Delta system is over-allocated and that the Projects cannot be relied on to self-regulate. Systemic over-demand, enabled by Project contracts for more water than the

Projects can deliver, requires specific regulatory measures to protect instream and other beneficial uses. The State Board must step in and establish clearly defined short-term and long-term changes to the management of carryover storage in Project reservoirs and other aspects of Project management that are defensible, protective of beneficial uses and legally enforceable.

**Under what conditions may this protest be disregarded and dismissed?**

1. The Order must be modified to define conditions under which it will be cancelled.
2. The Order must be modified to forbid export of transferred water until D-1641 requirements have been met for sixty consecutive days or until the Order is cancelled or expires.
3. The Order must be modified to forbid Project exports of water through south Delta Project facilities of any sort, including water secured through groundwater substitution, except for those quantities of water required for health and safety, until D-1641 requirements have been met for sixty consecutive days or until the Order is cancelled or expires.
4. The Board must determine how health and safety is defined for the purposes of the Order and require quantification and location of deliveries for health and safety.
5. The Board must require quantification of water held in Project storage pursuant to the terms of the Order.
6. The Board must require that water held in Project storage pursuant to the terms of the Order be prioritized for cold water and carryover storage management, and for fisheries management in the fall of 2014.
7. The Board must immediately hold a hearing to determine how much inflow to Project reservoirs greater than reservoir releases can be stored to meet the public interest, and how much must be released to senior water rights holders downstream. The hearing must also address other issues related to existing and potential conflicts between the Order and the water rights priority system.
8. The Board must hold a hearing to determine how Project storage will be managed on an interim basis to protect fish and wildlife until the update of the Water Quality Control Plan is completed. This hearing must result in carryover storage requirements for Project storage reservoirs. This hearing must also define how the Board will require operation of the Projects to actually meet Delta water quality standards.
9. The Real-Time Drought Operations Management Team must be expanded to include two qualified members from environmental NGO's.
10. The Board must post a comprehensive update of the actions of the Real-Time Drought Operations Management Team to the public on the State Board's drought web page, no less frequently than once a week, as long as the Order is in effect.
11. The State Board must include an operations update from the Real-Time Drought Operations Management Team at the beginning of each Board meeting as long as the Order is in effect.

A true copy of this protest has been served upon the petitioners by e-mail (see below)

Date March 3, 2014

Chris Shutes, Water Rights Advocate  
California Sportfishing Protection Alliance



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Bill Jennings, Executive Director  
California Sportfishing Protection Alliance



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Barbara Vlamis, Executive Director  
AquAlliance



Carolee Krieger, Executive Director  
California Water Impact Network



Michael Jackson  
Counsel to California Sportfishing Protection Alliance,  
AquAlliance, and  
California Water Impact Network

/s/ Michael Jackson

Pursuant to page 2 of the January 31, 2014 Notice of Temporary Urgency Change Petition, we have used the State Board's protest form for petitions, and have filed these objections via e-mail to: [Michael.Buckman@waterboards.ca.gov](mailto:Michael.Buckman@waterboards.ca.gov)

Also pursuant to page 2 of the January 31, 2014 Notice of Temporary Urgency Change Petition, we have served these objections via e-mail to the following:

Department of Water Resources, c/o James Mizell: [James.Mizell@water.ca.gov](mailto:James.Mizell@water.ca.gov)

Regional Solicitor's Office, c/o Amy Aufdemberge: [Amy.Aufdemberge@sol.doi.gov](mailto:Amy.Aufdemberge@sol.doi.gov)

U.S. Bureau of Reclamation, Paul Fujitani: [pfujitani@usbr.gov](mailto:pfujitani@usbr.gov)

Attachment: CSPA presentation to the February 17, 2014 Board workshop