



Summer Edition

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From the Desk of Bill Jennings



The Twin Tunnels scheme to move water around the Delta came and went, but tunnel supporters are creating a new one-tunnel project that will do most of the same damage. The Delta Reform Act's requirement to reduce reliance on the Delta for the state's water supply just doesn't seem to have sunk in. CSPA is preparing for the next round. In the meantime, see the roundup in ["Twin Tunnels Gone."](#)

The issue of whether the State Water Board must go through a formal public process to balance public trust resources and whether it can unilaterally weaken water quality standards is finally going to trial in November. Read about this extremely important lawsuit in ["Public Trust Fisheries Meet the State Water Board in Court."](#)

It's not surprising that the Trump administration is attacking the Clean Water Act. It's unfortunate that power generators across California have joined that attack. For part of the story, and the role CSPA is playing to stop it, see ["CSPA Defends Section 401 of the Clean Water Act."](#)

Water purveyors statewide are touting "voluntary agreements" to keep the State Water Board from setting real flow requirements into and through the Delta. In contrast, CSPA has sued the State Water Board because new standards for the San Joaquin River that water users want to weaken are already too weak. See ["CSPA Sues State Water Board over Bay-Delta Plan - Not Enough Flow & Worse Water Quality."](#)

And finally, CSPA is continuing a twenty-five year effort to make the lower Tuolumne River into the salmon and steelhead resource it can and should be. CSPA reluctantly signed a deal in 1995 that did not deliver. ["Tuolumne River - What's Up?"](#) describes CSPA's actions to correct that history and make the salmon run in the Tuolumne live up to its potential.

As always, CSPA is in the trenches fighting for fisheries and water quality on multiple fronts. And as always, it costs money to fight for fish. CSPA's activists don't squander limited resources on fluff - it all goes for technical analysis, regulatory processes and legal actions. [Please help us continue the fight with a membership renewal or a generous donation.](#)

We also invite you to frequently visit our [Fisheries Blog](#) on the



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current state of California fisheries. Tom Cannon generates story after story about the state's diverse and widespread fish: what's good, what's not good, and how it could be better. It's a great step-by-step tool to get a better grasp from a fish-eye perspective.

Twin Tunnels Gone: And Then There Was One (?)

By Chris Shutes

WaterFix Version 1 - the "Twin Tunnels" - officially died on May 16, 2019, not with the bang of millions of pile-driver strikes in the town of Hood, but with the whimper of a [one-page announcement](#) by the hearing officer of the State Water Board in Sacramento. The decision by newly elected Governor Newsom to abandon a twin-tunnel approach to Delta conveyance was foreshadowed in the Governor's February state of the State address, in which the Governor tentatively supported a one-tunnel option.



Delta Waterway at Hood - Photo Credit: Chris Austin

DWR withdrew its petition to the State Water Board for water rights to support the Twin Tunnels on [May 2](#). Shortly thereafter, DWR withdrew its pending Environmental Impact Statement and Environmental Impact Report, as well as its "validation" effort to advance bond funding for the twin tunnels. These withdrawals also brought pending lawsuits to an end. CSPA's war-weary staff, volunteers, and attorneys, and counterparts in allied organizations and governmental entities, are still recovering from over a hundred days of water rights hearings before the State Water Board, spread over more than two years, and from thousands of hours of work on the litigation. An outnumbered, outspent and outgunned alliance beat back a much stronger adversary - for the moment.

On April 29, 2019, Governor Newsom issued [Order-N-10-19](#), which charged Secretaries Crowfoot (Cal Resources), Blumenfeld (Cal EPA) and Ross (Cal Food and Agriculture) with "together preparing] a water resilience portfolio that meets the needs of California's communities, economy, and environment through the 21st century." Many environmental, fishing and environmental justice organizations view the Order as an opportunity to steer the State in a different direction from a single tunnel that would move water under the Delta to feed the exorbitant thirst of farms and others south of Tracy.

However, a no-tunnel alternative will be an uphill battle, with power and money once again stacked against it. Already, DWR has a roadmap to a second run at "Delta Conveyance." DWR's continues to fund the "[Delta Conveyance Design and Construction Authority](#)" (DCA). DCA has regrouped to make its primary purpose the design of a single tunnel option and the advocacy of it.

According to a June 13, 2019 DWR [Blog Post](#) entitled "Delta Conveyance Next Steps," DWR will "launch a new environmental review and planning process toward the end of this year" that will "take about two and a half to three years to complete. DWR will lead the renewed environmental planning process and will provide ongoing oversight of the DCA." The Delta Conveyance Authority "will provide engineering, field studies and design work to inform the environmental planning process, and assist in evaluating and minimizing community impacts, under DWR's oversight." The DCA has a substantial budget.

In DWR's map of the new Delta reality, "Some of the things that stakeholder engagement can help inform include:

- Specific footprint considerations when siting facilities.
- Design concepts that help create community benefits.
- Measures to further minimize construction effects..."

In short, the default position of DWR is that one tunnel is in, full speed ahead, and the public is invited to nibble around the edges. One of the big questions is how much of the voluminous earlier documentation DWR will try to dust off and recycle for the current effort.

In case there is any question of what the default is, Secretary of Resources Wade Crowfoot was quite candid in presenting his view of the administration's stance at a July 8, 2019 meeting of Metropolitan Water District of Southern California. While affirming that there are no assurances of a single tunnel, Mr. Crowfoot clearly pointed to a single tunnel as the most likely decision by the administration. (Listen to the transcript at [here](#).)

In many ways, California water policy (and Delta policy in particular) has returned to the days of "Delta Vision," the 2007-2008 process of the Schwarzenegger administration to create stakeholder buy-in for a Delta conveyance outcome that was largely though not absolutely a foregone conclusion. Out of Delta Vision grew the Bay-Delta Conservation Plan (BDCP), which framed the tunnels as the center of an effort to restore the Delta. BDCP was unsuccessful in mobilizing stakeholder buy-in as well. Out of its ashes, WaterFix arose in 2015, with DWR taking a more top-down approach to stakeholders: you're gonna love it, trust us.

Though without great expectations, CSPA and its allies will make every effort to give the Newsom administration the tools and the opportunity to make better choices this time around. Already, CSPA helped draft broad-based [written recommendations](#) for Governor's water portfolio effort. CSPA has also joined others groups in calling for [transparency](#) in DWR's conduct of developing a one-tunnel alternative. CSPA will directly engage with the administration and other groups in promoting solutions that reduce reliance on the Delta for California's water supply. CSPA will use its [website to counter](#) the one-sided messaging of DWR and its rebranding of WaterFix.

And CSPA fully expects that it will be back at the State Water Board fighting a Tunnel Lite within a few years.

Public Trust Fisheries Meet the State Water Board in Court

Bill Jennings

The public trust is essentially the people's property right in our rivers, fisheries and aquatic ecosystems. Its origins lie in Roman law, conveyed forward in English common law and Spanish civil law and encoded in America through state and federal Supreme Court decisions. For example, in the 1983 Mono Lake Decision, the California Supreme Court declared that public trust values must be balanced with consumptive uses when considering the rights of Los Angeles to divert water from the lake. The subsequent formal balancing at Mono Lake led the State Water Resources Control Board (SWRCB) to significantly reduce the amount of water the City diverts from the lake. Unfortunately, the SWRCB has refused to balance the public trust in Central Valley waterways.

Over the last three decades, the SWRCB has frequently failed to enforce water quality standards in the Bay-Delta and tributary rivers. In 2013-2015, the Board made a series of arbitrary decisions that actually weakened the legally adopted water quality and flow standards themselves. Subsequently, CSPA filed a 2015 [public trust/pattern and practice lawsuit](#) against the SWRCB. The suit alleges violations of the public trust, federal Clean Water Act and California Fish and Game Code. A number of powerful water agencies intervened. Over the last four plus years, our exceptional legal team has prevailed over a blizzard of motions and multiple appeals and is now scheduled for trial in Alameda Superior Court in early November 2019.

The case is one of the most important environmental lawsuits in California in the last three decades. It will decide whether or not the SWRCB can unilaterally waive formally adopted water quality standards and whether it must engage in a public process of balancing the public trust that includes identifying the methodology, facts and analytical reasoning behind its decision. The outcome may make the difference in determining whether the native Central Valley estuarine and riverine ecosystem survives or whether it finally collapses.



Lower Merced River

CSPA Defends Section 401 of the Clean Water Act

By Chris Shutes

A key section of the federal Clean Water Act is under attack. CSPA and others are working hard to defend Section 401 of the Clean Water Act as it applies to licensing hydropower projects.

Some Background: The Federal Energy Regulatory Commission (FERC) issues licenses to operate hydropower projects in the United States for a period of thirty to fifty years. For each new or renewed license, FERC requires a license holder ("licensee") to begin a multi-year

process to license or relicense its project. Before FERC can issue a new license, the Clean Water Act requires the state where the project is located to certify that the new license will conform to state water quality laws and standards.

Section 401 of the federal (nationwide) Clean Water Act gives the states one year to exercise their authority to certify or deny that a new FERC license will comply with state water quality law and standards. However, FERC has not strictly enforced this one-year timeframe in the past. Recognizing that complex hydropower projects and processes often take longer than a year, FERC has allowed the licensees applying for water quality certifications to withdraw and resubmit their applications before the expiration of the one year deadline. This prevented a situation where the states would have to deny certification for lack of information or supporting documentation, or else waive the state's right to issue a certification.

The Problem: *The Hoopa Valley Tribe v Federal Energy Regulatory Commission (Hoopa Valley Tribe v FERC)* court case decided in the District of Columbia Federal Circuit Court of Appeals in January 2019 threatens to undermine the issuance of water quality certifications in about a dozen hydropower relicensings in California. *Hoopa Valley Tribe v FERC*, as later interpreted by FERC in another case, requires strict adherence to the one-year timeline. In California alone, there are over a dozen pending certifications that FERC may declare waived based on precedent from *Hoopa Valley Tribe v FERC*.

The Response: Already, CSPA has contributed substantial time researching and drafting three interventions in opposition, where licensees have petitioned FERC for orders seeking waiver of certifications ([Middle Fork American Project](#), [Kilarc-Cow Project](#), [six Big Creek projects](#)). CSPA has also contributed substantial effort in opposing two letters from licensees seeking "clarification" of the status of certifications ([Yuba-Bear Project](#) and the [Merced River Project](#)

[and Merced Falls Project](#)); these letters also suggested that FERC should find that California had waived certification.

CSPA's efforts in opposition to waiving the Clean Water Act are important to develop standing in each process. These efforts also identify important factual differences in each proceeding that may have legal consequences. It is time-consuming, tedious work, but it is also exacting since it may become part of the record in future court cases.

CSPA does not always agree with the way the State of California, through the State Water Resources Control Board, applies Section 401 of the Clean Water Act in hydropower licensing. However, the state is an important check on the operators of hydroelectric projects. The state is also an important check on FERC, which is placing even fewer requirements in licensing hydropower projects under the Trump administration than it did in the past.



Lower Tuolumne River at Dos Rios- Near San Joaquin River Confluence

CSPA Sues State Water Board over Bay-Delta Plan - Not Enough Flow & Worse Water Quality

By Cindy Charles

In April 2019 the California Sportfishing Protection Alliance joined in a lawsuit with the California Water Impact Network and AquAlliance challenging the California State Water Resources Control Board's adoption of the Final Substitute Environmental Document (SED) on Bay-Delta Plan Amendments and approval of flow and salinity objectives for the lower San Joaquin River and the southern Delta. The [complaint](#) states that these actions by the State Water

Board violate the California Environmental Quality Act (CEQA), the Clean Water Act, the Porter-Cologne Act and the Public Trust Doctrine.

In 2009, the State Water Board initiated the review and update to the water quality objectives, including flow objectives, for the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. After years of circulating draft SED's, conducting hearings, collecting public comments and delaying a decision, the State Board voted to certify the SED and approve the portion of the plan that covers lower San Joaquin flow objectives and southern Delta salinity (with modifications) on December 12, 2018.

During the multi-year hearing/public comment process, CSPA provided detailed comments addressing deficiencies in the proposed actions. In particular, CSPA noted the Plan's flows are significantly lower than flows identified in the 2010 Delta Flow Criteria Report. That report established a flow criterion of 60% of unimpaired San Joaquin River flows from February to June as necessary to protect fish and wildlife.

The SED approved by the Board in December adopted much lower minimum flows of between 30%-50% of unimpaired flow, with a starting point of 40%. These flows are too low to protect, let alone restore, numerous public trust resources, including fish, wildlife, and recreation.

Another major flaw of the Plan is the fact that it weakens current salinity objectives, allowing increased salinity in the southern Delta. This will worsen water quality, in violation of the Clean Water Act's anti-degradation policy.

Several lawsuits were filed against the State Water Board's SED and its approval of the Bay-Delta Plan update. These lawsuits will likely be consolidated into one case.

Tuolumne River - What's Up? Dam Relicensings, State Water Board's New Flow Regime, and "Voluntary Agreements"

By Cindy Charles

Three major processes are converging that will either protect or write off on the Tuolumne River. CSPA is in the middle of all of them. Here's a look at each one.

Hydropower Relicensing

It's been over eight years since the Turlock Irrigation District and Modesto Irrigation District (Districts) filed their initial documents in the relicensing of the Don Pedro Hydroelectric Project. The license expired in April 2016, and the project is operating on a year-to-year renewal basis until a new 30-50 year license is granted by the Federal Energy Regulatory Commission (FERC).



Salmon Spawning Habitat - Lower Tuolumne River at La Grange

In a significant victory for CSPA and its conservation group allies, FERC ordered in 2012 that the La Grange Hydroelectric Project also required a FERC license for the first time since the powerhouse was added in 1924. La Grange is a smaller, older agricultural diversion dam two miles downstream of Don Pedro Dam. La Grange is the lowest dam on the Tuolumne that blocks fish passage for salmon and steelhead to their historical spawning grounds in the upper watershed. Licensing La Grange put fish passage squarely on the table.

From the beginning of this arduous regulatory process, CSPA has been a leading advocate for substantial flow improvement as well as for serious consideration of fish passage on the Tuolumne River. Populations of fall-run Chinook salmon, Central Valley steelhead and resident rainbow trout on the Tuolumne have been struggling for decades. The Districts and the City and County of San Francisco annually divert more than half the average annual flow.

Earlier this year, FERC released the draft Environmental Impact Statement (nearly 800 pages). CSPA was the primary author on the [Conservation Groups' comments](#) on the inadequate Draft EIS (75 pages). Among the many deficiencies of the DEIS are:

- The FERC staff alternative in the DEIS recommended that the new licenses adopt the flow regimes supported by the Districts. These flows, also supported by the City and County of San Francisco, are only slightly better than existing flows. They will fail to help with recovery of salmon and steelhead. Additionally, the Districts' flow proposal is based on their fish population modeling which depends on predator reduction measures that FERC rejected. With invalidation of the predator reduction assumption, the fish population model is deeply flawed.
- The FERC staff alternative proposed even less extensive non-flow measures than the measures proposed by the Districts. These types of measures include much needed floodplain habitat restoration, spawning gravel additions and large woody debris improvements.
- The FERC staff alternative proposed no monitoring plan for salmonids. This monitoring is needed to assess the condition of the fish over the next 40 to 50 years.
- The FERC staff alternative writes off fish passage based on the NIMBY arguments of the Districts and San Francisco.

Currently, CSPA and its colleagues are waiting for FERC to issue a Final Environmental Impact Statement for the projects.

Update of the Bay-Delta Plan

Another landmark development on flows for the Tuolumne River occurred in December 2018 when the State Water Resources Control Board finally approved the long-overdue update to the Bay-Delta Water Quality Control Plan (Bay-Delta Plan). This plan amends the water quality

objectives for the protection of fish and wildlife beneficial uses in the Lower San Joaquin River and its three tributaries, including the Tuolumne River. The Plan sets flow objectives for the Tuolumne of 30-50% of unimpaired flow between February and June, starting at 40%. The Districts, San Francisco and FERC proposed just over 20% of unimpaired flow during the February-June time period.

"Voluntary Agreements"

Former Governor Brown's administration began the pursuit of Voluntary Agreements (VAs) for many major California rivers as a proposed alternative to the Board's regulatory update of the Bay-Delta Plan. The VAs purport to be a package of flows, habitat and other measures that will protect the Bay-Delta estuary without the need for new regulations. CSPA, along with other fishing and river groups, released an [analysis](#) critical of the outline of the VAs in March 2019.

The VA proposal for the Tuolumne is largely based on what the Districts proposed for their FERC license renewal.

Governor Newsom continues to support the pursuit of voluntary agreements. However, timelines for a fully detailed agreement continue to slip for the Tuolumne. CSPA and allied conservation groups continue to press the State Water Board to complete its update of the Bay-Delta Plan without waiting for voluntary agreements.

Moving Forward

There is still much complexity and uncertainty in the outcomes of these various regulatory and voluntary proceedings. One certainty is that CSPA will persevere as a lead advocate to fight for meaningfully better flows and habitat restoration for the Tuolumne River.



Turlock Irrigation District's Don Pedro Reservoir