



AQUALLIANCE
DEFENDING NORTHERN CALIFORNIA WATERS



August 12, 2011

Mr. Erick Soderlund, Staff Counsel
California Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

Dear Mr. Soderlund:

Thank you for your reply on behalf of the California Department of Water Resources which responds to our protests of the Department's petition for time extensions for its State Water Project permits. C-WIN, AquAlliance, and CSPA provide you a copy of our letter to the State Water Resources Control Board updating the Board on how our organizations see the status of our protests of the Department's requests for time extensions for its State Water Project water rights permits. If you have questions about this letter please contact any of us, or Tim Stroshane, with the California Water Impact Network (510/524-6313, Tim.Stroshane@c-win.org), or Chris Shutes, with California Sportfishing Protection Alliance (510/421-2105, blancapaloma@msn.com).

Sincerely,

A handwritten signature in black ink that reads "Carolee Krieger".

Carolee Krieger, President
California Water Impact Network
808 Romero Canyon Road
Santa Barbara, CA 93108
(805) 969-0824
caroleekrieger@cox.net

A handwritten signature in black ink that reads "Bill Jennings".

Bill Jennings, Chairman
California Sportfishing Protection Alliance
3536 Rainier Avenue
Stockton, CA 95204
(209) 464-5067
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A handwritten signature in black ink that reads "B. Vlamis".

Barbara Vlamis, Executive Director
AquAlliance
P.O. Box
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(530) 895-9420

Attachment



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DEFENDING NORTHERN CALIFORNIA WATERS



August 12, 2011

Kate Gaffney
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Subject: Department of Water Resources' Petitions for Time Extension for Water Right Permits 16477, 16478, 16479, 16480, 16481, and 16482 (Applications 5629, 5630, 14443, 14444, 1445A, and 17512) for the California State Water Project; SWRCB Reference: KMG:5629, 5630, 14443, 14444, 14445A, 17512

Dear Ms. Gaffney:

The California Water Impact Network (C-WIN), AquAlliance, and the California Sportfishing Protection Alliance (CSPA) have reviewed responses from the California Department of Water Resources (DWR) to our protests of the above-referenced petitions. With this letter, we respond jointly to separate letters from Mr. Erick Soderlund of DWR, both dated February 10, 2011, addressed to C-WIN and AquAlliance on the one hand and to CSPA on the other. We also address once again DWR's legally inadequate approach to California Environmental Quality Act (CEQA) compliance for its petitions, and request that the State Board direct DWR to commence CEQA compliance immediately. Finally, we provide the State Water Resources Control Board with an update on the still-unresolved status of our protests.

1. Granting DWR's petitions would be contrary to law.

The California Code of Regulations, Title 23, Section 844, states in pertinent part:

An extension of time within which to complete an application, to commence or complete construction or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of

time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.

DWR is unabashed about the fact that it does not foresee additional rates or quantities of diversion within the requested five year period. DWR's letter to C-WIN and AquAlliance explicitly acknowledges this: "Until the BDCP is completed projections of future SWP operations (including diversions and use) and potential impacts would be very speculative....Regarding project operations during the extension period, the projected operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions."¹ Equally, DWR's letter to CSPA affirms: "Until the BDCP is completed, projections of future SWP operations (including diversions and use) would be very speculative. As such, the limited 5-year extension period that DWR requested is to allow time for the BDCP to be completed [*sic*] and a Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) to be issued. During the extension period the project operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions."²

Since DWR clearly acknowledges that it will not make satisfactory progress in the five years for which it has applied, its petition is contrary on its face to the legal requirements for a petition for extension of time. The State Water Resources Control Board should deny the petitions and move to license DWR's State Water Project permits.

DWR continues to refuse to account for its use of water under each permit. In its petition to the State Water Resources Control Board, DWR claims: "the SWP is a complex system and, as such, it is difficult to separate water diverted under the provisions of specific individual permits. The permits operate together consistent with the provisions governing overall SWP operations. The water is commingled to meet overall project purposes."³ DWR restates this point in its letter to CSPA: "The project is thus operated as a single project and its operation is not segmented by permit."⁴

DWR is required to perform such accounting as a condition of its permits. On September 14, 2009, the State Board issued an unnumbered order that covers DWR water right applications 5630, 14443, 14445A, and 17512. Condition 11 of this order states:

¹ California Department of Water Resources Memorandum to Tim Stroshane, California Water Impact Network, February 10, 2011, p. 5.

² California Department of Water Resources Memorandum to Chris Shutes, California Sportfishing Protection Alliance, February 10, 2011, p. 2.

³ See Supplement to Petition for Extension of Time for Application 5629 et al, point 5, pdf page 4.

⁴ See DWR Memorandum to Chris Shutes, p. 4.

11. Upon the request of the Board, Permittee [DWR] shall make such measurements and maintain and furnish to the Board such records and information as may be necessary to determine compliance with the terms and conditions of this permit including the recognition of vested rights and for the further purpose of determining the quantities of water placed to beneficial use under this permit, both by direct diversion and storage.⁵

DWR's evasion of accounting in its petitions is neither credible nor logical. It also suggests DWR may willfully decline to comply with its water rights permit condition 11, which is also contrary to law and not in the public interest. In addition to the requirements of Condition 11, DWR must account for every release from Oroville, and every acre-foot pumped from Banks Pumping Plant, to and from its portion of San Luis Reservoir, to and from all other State Water Project reservoirs, aqueduct extensions, and turnouts along the California Aqueduct system. DWR meters water throughout this system precisely so that it can ensure at a minimum State Water Project contract compliance, compliance with the terms of water transfers it facilitates (e.g., its wheeling of water for non-contractors), and accuracy of its participation in "joint points of diversion" activity authorized under Water Rights Decision 1641 (D-1641). Considerable amounts of data are collected and presented by DWR annually in Bulletin 132, *Management and Operation of the State Water Project*.⁶

While compliance with existing permits per se is not subject to evaluation in a water rights petition, petitioners are required to adequately describe baseline conditions, if for no other reason than to comply with CEQA. Protestants continue to maintain that absent adequate accounting of use to date, DWR's petitions remain legally incomplete. C-WIN, CSPA, and AquAlliance urge the State Water Resources Control Board to reject DWR's failure to account for water use under each of its permits, and to require a complete petition that describes water put to use under each permit as a prelude to licensing State Water Project permits.

2. Granting DWR's petitions would not serve the public interest.

There is no disagreement from our organizations that there is a public interest in the continued operation and public purposes of the State Water Project. Instead, there is no public interest in allowing DWR an extension of five years on its permits when DWR itself has acknowledged that it has no expectation of making any additional progress toward full beneficial use of water. In effect, DWR asks for a procedural "time-out" from regulations that implement appropriative water rights doctrine.

⁵ State Water Resources Control Board, Order Approving Change in Place of Use and Issuing Amended Permits in the Matter of Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 1445A and 17512) of the California Department of Water Resources, September 14, 2009, p. 7.

⁶ However, DWR has still not completed Bulletin 132s for water years 2007 through 2010, and 2011 concludes on September 30, 2011.

There are several reasons why granting DWR's petitions is not in the public interest. First, DWR gives no reasonable expectation of progress toward any additional beneficial use. DWR plainly and simply acknowledges that it will not make any progress toward increasing its diversions and contributions to storage to the amounts and volumes found in its permits. This directly contravenes California Code of Regulations, Title 23, Section 844, which requires that reasonable progress be made.

Second, Board approval of DWR's petitions would violate the co-equal goals of "providing a more reliable water supply protecting, restoring and enhancing the Delta ecosystem," as required in SB7X1 (2009). In Water Rights Decision 1650 (2011), the State Water Resources Control Board recently granted a permit to the cities of Davis and Woodland to divert up to 45,000 acre-feet per year from the Sacramento River. In arriving at this decision, the Board rejected CSPA's argument at hearing that the Board should defer decision on this permit until a known and ongoing process required by SB7X1 to determine and institute Delta flows was completed. In essence, the Board denied as invalid a suspension of decision pending completion of a process designed to provide ecosystem protection, restoration and enhancement. However, through DWR's petitions for time extensions, the Board is asked to suspend its decision whether to license a water supply project until a regulatory process also required by SB7X1 is allowed to reach a conclusion.

If the Board issues an order on DWR's petitions to suspend applicable water rights law, the Board would procedurally treat ecosystem protection and of water supply reliability unequally. This is not only contrary to legislative intent as expressed in SB7X1, but also to goal 6 of the Board's 2008 Strategic Plan: "Enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures."⁷

Third, it is not in the public interest to accord DWR special treatment and allow it to play by different rules than other permit holders. The State Water Resources Control Board should treat all permit holders equally as it implements California Code of Regulations, Title 23, Section 844.

In sum, the State Water Resources Control Board should apply its due diligence regulation consistently, reject DWR's time extension requests, and license DWR's State Water Project permits.

Additionally, granting DWR's petitions for extension of time is not in the public interest because such action would have adverse environmental impacts, as described below.

⁷ Final Draft, Strategic Plan Update 2008-2012, adopted September 2, 2008, p. ii.

3. Extension of time of the State Water Project permits would have adverse environmental impacts.

DWR is required to operate the State Water Project in conformance with applicable biological opinions. DWR also is an active participant in the Bay Delta Conservation Plan planning process. The reasons for these requirements and actions are simple and direct: SWP operations (deriving from DWR's State Water Project permits) generate extensive and cumulating environmental impacts on listed aquatic species that use the Delta as habitat. There are also severe impacts on non-listed species: just this summer, it was well documented that operation of the Banks and Jones pumping plants killed literally millions of Sacramento splittail and thousands of individual fish from numerous other species, including fall-run salmon, the backbone of California's sport and commercial salmon fisheries.

DWR's own actions contribute to its inability to put water to full beneficial use under its permits. The regulatory limits imposed under biological opinions became necessary because DWR filed water right applications and the Board issued permits that allowed Delta pumping and project reservoir storage at levels that became highly detrimental to the ecosystems of the Delta estuary and its Central Valley watershed's rivers. This resulted in the listing of several species under the Endangered Species Act, some as early as the early 1990s. These detrimental effects could have been avoided by reducing Delta export pumping levels and by increasing project reservoir releases at appropriate times. The regulations imposed are intended to redress the unreasonable uses and methods of diversion DWR has employed under its State Water Project permits.

In August, 2010, the State Water Resources Control Board concluded that there is sufficient scientific information to support the need for greatly increased flows to protect Delta public trust resources. In making this conclusion, the Board asserted that "scientific certainty is not the standard for agency decision making."⁸ In the Delta Stewardship Council's fifth staff draft of the Delta Plan (August 2, 2011) is a proposed requirement of the State Water Resources Control Board:

The State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan objectives and establish flows as follows:

- a) By June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals.⁹

⁸ State Water Resources Control Board, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem: Prepared pursuant to the Sacramento-San Delta Reform Act of 2009*, adopted August 3, 2010, p. 4.

⁹ Fifth Staff Draft, Bay-Delta Plan, August 2, 2011, p. 86.

DWR offers no explanation in its petitions of how increased diversions under its State Water Project permits might be achieved, let alone without exacerbating the adverse environmental impacts of the State Water Project that have already occurred and continue to occur under historic and present levels of diversion. On the contrary, flows that would help recover species as analyzed by the State Water Resources Control Board in its *Delta Flow Criteria Report*, and that will be required under the Bay-Delta Plan, will almost certainly need to come in substantial part from *reductions* in State Water Project direct diversions, both in the Delta and in diversions to storage at Oroville.

Unwilling to explain how it expects to put more water to full beneficial use under its permits while protecting the public trust and complying with biological opinions, DWR only offers as justification that demand exists¹⁰, and (using its own term) “speculates” that the outcome of various stakeholder and regulatory processes may create more advantageous regulatory conditions to the State Water Project than at present.

The adverse environmental impacts of State Water Project operations are known, ongoing, and destructive. The State Water Resources Control Board should instead license the Project’s permits and reject DWR’s petitions for a five-year “time-out” during which more environmental damage would occur.

4. California Environmental Quality Act (CEQA) Compliance

DWR has neither defined nor described a project to analyze under the California Environmental Quality Act (CEQA). Without a project description, C-WIN, CSPA, and AquAlliance request that both the State Water Resources Control Board and DWR clarify how DWR will achieve compliance of its petitions with CEQA. DWR’s February responses to our protests repeatedly invoke the Bay Delta Conservation Plan (BDCP) process as justification for its petitions. The Bureau of Reclamation has suggested that it may rely on BDCP environmental documents for its own time extension request petitions for that agency’s Central Valley Project permits. Our organizations previously stated that such reliance on BDCP would be inappropriate.¹¹ Reliance by DWR on the BDCP environmental review process for these State Water Project petitions would be similarly inappropriate.

¹⁰ Just as the map is not the same as the terrain, neither contractual obligations nor projected water demands constitute *real* water demands. As economic analysis demonstrates, demand for a commodity (including water) is a function of price, and prices may be either elastic or inelastic. The very drought conditions DWR uses to justify its State Water Project time extension requests regularly trigger water use reduction responses (such as rate hikes and voluntary reduction targets) from state water contractors, their customer agencies, and the customers at their taps. Demand and need are malleable and speculative, not fixed. The State Water Resources Control Board should ignore this rationale from DWR.

¹¹ See October 31, 2009 protest of CSPA and combined October 1, 2009 protests of C-WIN to Bureau of Reclamation Petitions for Extension of Time, Application 5625 et al.

On page 8 of its response to C-WIN and AquAlliance, DWR states that it is “currently conducting an environmental review process in compliance with CEQA.” We have not been notified of the preparation of this environmental review either by DWR or by the State Board. We request that the Board require clarification of the nature and progress of this review, including the project to be analyzed, the date of the Notice of Preparation, and contact information, so that protestants may further inquire and be placed on the mailing list for this review process.

We are further confused by DWR’s statement that it would comply with CEQA after this “extension period.”¹² But because DWR mentions as many as *three* distinct potential environmental review processes associated with its time extension petitions for the State Water Project water rights, it is unclear to us as engaged participants how CEQA is being complied with at this time. We request that the State Water Resources Control Board provide clear direction to DWR that clarifies how CEQA compliance for DWR’s petitions will be handled. Clarity on CEQA matters here will benefit all concerned.

5. The protests of C-WIN, AquAlliance and CSPA remain unresolved

In sum, DWR simply reasserts positions it stated in its earlier petitions to the State Water Resources Control Board to justify time extensions for State Water Project permits. Except for its February 2011 responses to our organizations, DWR has made no effort to contact us or to initiate discussions to resolve our protests. While our organizations would make representatives available for any such discussions, we believe it is unlikely that agreement on protest dismissal terms could be reached.

Any new increments of diversion and storage resulting from the current public processes outlined by DWR in its February letters to protestants are not only speculative, they also almost surely assume major modifications to existing permits that will require still further petitions, and not only for extension of time. They might well require new facilities, including both storage and diversion works. They may have new places of use. Large portions of them would likely bear little resemblance to existing permits. Future major changes in the State Water Project should be the subject of new water right applications, and present State Water Project permits should be licensed.

If you have questions about this letter please do not hesitate to contact any of us, or Tim Stroshane, with the California Water Impact Network (510/524-6313, Tim.Stroshane@c-win.org), or Chris Shutes, with California Sportfishing Protection Alliance (510/421-2105, blancapaloma@msn.com).

¹² See DWR Memorandum to Chris Shutes, p. 3: “At the end of the extension period, DWR anticipates filing for a longer term time extension and will comply with the California Environmental Quality Act (CEQA) for any petition at that time.”

Sincerely,



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cc: Erick Soderlund, Staff Counsel, California Department of Water Resources
Katherine Mrowka, Division of Water Rights, State Water Resources Control Board