

# Memorandum

Date: February 10, 2011

To: Mr. Chris Shutes  
Water Rights Activist  
California Sportfishing Protection Alliance  
1608 Francisco Street  
Berkeley, CA 94703

From: Department of Water Resources

Subject: Response to California Sportfishing Protection Alliance's Formal Protest of the Department of Water Resources' Petition for Extension of Time Regarding the State Water Project Permitted Water Right Applications 5629, 5630, 14443, 14445A, and 17512

Dear Mr. Shutes,

This letter is the Department of Water Resources' (DWR) response to the allegations contained in the formal protest filed by the California Sportfishing Protection Alliance (CSPA) on October 13, 2010.

In the protest, CSPA contends that the petition materials are not clear regarding what progress DWR will make if an extension is granted. Without evidence that satisfactory progress will be made, CSPA argues, the petition for extension of time should be denied. CSPA also identifies several permits that allegedly have already reached the maximum rate of direct diversion and maximum amount of storage. Accordingly, there is no need to extend the time for these permits and they should go to license. In support of their claim, CSPA points to the fact that the maximum annual diversion to storage from the Feather River at Lake Oroville occurred during the 1977/78 water year and therefore there is no hydrologic or operational explanation that would support a reasonable expectation of increasing the maximum annual diversion. As such, CSAP contends, the relevant permit should be licensed. Lastly, CSPA asserts that speculated future actions or changes related to the State Water Project (SWP) have no place in the petitions for extension of time and should be ignored by the State Water Resources Control Board (State Water Board) when considering the petitions.

The responses below are organized into two parts. Part 1 provides a brief explanation of the progress DWR expects to make during the requested extension period. In this explanation, DWR demonstrates good cause exists for an extension of time so that DWR can complete a planning process that will provide a realistic projection of future SWP operations. Part 2 explains why DWR does not believe it is appropriate at this time to proceed to license for the listed permits.

## **1. Satisfactory Progress Will Be Made During The Requested Extension Period Through 2015**

CSPA states that if no new facilities will be constructed during the next five years,

there is no reasonable expectation that DWR will increase the amounts of maximum use. As such, no satisfactory progress will be made if an extension is granted.

As will be discussed below, DWR's plan for projected, long-term State Water Project (SWP) Delta operations is being developed in the Bay-Delta Conservation Plan (BDCP) process. 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 and a Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) to be issued. During the extension period the projected operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions.

DWR has at times diverted at the maximum instantaneous rate allowed under the Feather River/Delta Permits, but due to various factors DWR has not directly diverted, rediverted, or diverted to storage the maximum annual amounts allowed under the Feather River/Delta Permits. If DWR proceeded to license, SWP diversions would be limited to the maximum rates and quantities diverted to date. However, DWR is unsure that the maximum historic rates and annual maximum diversions will be sufficient to meet future water needs, including DWR's contractual obligations, the State's future projected water demands, or possible needs to address vulnerabilities in the State's water supply associated with emergencies, drought and the effects of climate change. As such, it is in the public interest to continue evaluation of DWR's ability to make full use of the Feather River/Delta Permits so DWR can maintain operational flexibility in order to meet the SWP's water supply needs in the future.

Due to current uncertainties related to future operations in the Delta, it is not possible at this time to accurately predict what the ultimate diversions under the Feather River/Delta Permits will be, or a date at which the full permitted quantity will be put to beneficial use. Factors such as the outcome of the current BDCP process, recent legislation, current litigation, and potential impacts of climate change create tremendous uncertainty in predicting future operations and diversions. It is clear, however, that demand exists for the additional SWP water supply and demand is expected to grow as the service area of the SWP continues to develop.

DWR believes that the primary activity that will address the current uncertainty and, ultimately, provide a realistic projection of future SWP operations is the BDCP process. The BDCP will provide the basis for SWP and Central Valley Project (CVP) compliance with the state and federal endangered species acts and the Natural Community Conservation Planning Act. The BDCP will result in systemic changes in SWP and CVP conveyance infrastructure as well as restoration and enhancement of ecological resources. The outcome of the BDCP is expected to result in more long-term regulatory stability for the SWP. It will support the issuance of take permits from the US Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS) and the state Department of Fish and Game (DFG). The BDCP is expected to have a significant impact on project operations. Program documents will include an EIR/EIS analyzing the potential impacts of project operations and the restoration and

enhancement efforts. The current BDCP schedule projects a final BDCP and EIR/EIS by the end of 2012. As noted earlier, DWR will be able to more accurately predict future allowable diversions from the Feather River and Delta following completion of the BDCP process. DWR thus limited the scope of the current petition to a short term extension of only five years to allow for the BDCP to be completed.

In addition, limiting the current time extension request to five years also allows DWR to reasonably predict and evaluate future operations for the period of the extension. DWR published its most recent delivery reliability report in August 2010, *The State Water Project Delivery Reliability Report 2009* (2009 Report). The 2009 report evaluates the ability of the SWP to deliver water to its contractors under existing conditions (Water Rights Decision 1641 (D1641) and current Biological Opinions). The report projects that under current hydrology and regulatory restrictions, maximum SWP deliveries will be less than 3.4 million acre-feet which is less than the maximum historic SWP deliveries. Because of the limited term of the extension, it is reasonable to expect that the water rights terms and conditions and regulatory restrictions will not change substantially before the end of 2014. Consequently, the current conditions analysis in the 2009 Report is a reasonable estimate of the level of deliveries during the period of the requested extension. If DWR were to instead proceed to license, DWR would expect to continue to operate under the same terms and conditions and regulatory restrictions. Continued operation up to maximum historic rates and annual maximum diversions (license case) is thus the baseline against which the current project will be assessed.

DWR recognizes that full beneficial use under the listed permits will not be reached in the next five years and that additional time will be required to reach full beneficial use. However, since the BDCP will offer the best opportunity to provide a realistic projection of future, long-term SWP operations, good cause exists to extend DWR permits until the BDCP is completed. 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 filed at that time.

Importantly, during the period of the five year extension, DWR will continue to divert and redivert water to direct use and storage in accordance with the terms and conditions of its permits, as well as any additional regulatory restrictions imposed on the SWP, such as D 1641, and any biological opinions or permits for threatened and endangered species from federal and state agencies.

## **2. DWR Is Not Prepared To Proceed To License With Any Of Its Water Rights Permits At This Time**

CSPA highlighted several permits that, in its opinion, should proceed to license. The rationale for this position is that DWR maximum rate of diversion and annual diversions to storage and use have exceeded the quantities allowed for in certain permits and, as such, there is no need to extend the time for these particular permits. For Permit 16479 (Application 14443), specifically, CSPA contends that there is no reasonable expectation that DWR will divert to storage more than its historical

maximum and thus this particular permit should also proceed to license.

For the reasons discussed below, DWR does not believe the time is ripe to proceed to license with any of the permits at issue in this current extension process.

A. The SWP is Operated and Regulated as a Single Project and its Operation is Not Segmented By Permit

The permits at issues here authorize the diversion and use of water at Lake Oroville and the Thermalito Complex, downstream in the Feather River and within the Sacramento-San Joaquin Delta and rediversion at the North Bay Aqueduct, Delta pumping facilities and the SWP reservoirs south of the Delta. The permits authorize water use for numerous purposes from multiple water courses and contain numerous points of diversion and rediversion for both direct use and diversion to storage. The project is thus operated as a single project and its operation is not segmented by permit.

Given the nature of how the SWP is operated, DWR believes the Feather River/Delta permits should proceed to license jointly at the appropriate time in the future. Approaching licensing in this manner will provide a more comprehensive picture of total diversions from the particular locations and ultimate use of water by the SWP. It will also allow the State Water Board to address public trust issues and apply terms and conditions uniformly. D-1641 provides a good example of regulating the SWP as a single project, where DWR's various permits are not separated out but are amended in an uniform manner.

B. In the Long-Term DWR Has A Reasonable Expectation of Increasing the Maximum Annual Diversion Storage From the Feather River at Lake Oroville

CSPA asserts that there is no hydrologic or operational explanation that would support a reasonable expectation of increasing the annual amount diverted to storage at Lake Oroville over that which occurred in the 1977/78 water year. DWR disagrees with this assertion.

While it is difficult to predict the future, there are certainly hydrological and operational circumstances in which DWR could exceed the historic maximum direct diversion and annual amount diverted to storage. While 1977/78 was the driest year on record, demands for SWP water were substantially below existing demands. Level of demand affects project operations and places additional demands on the SWP. It is reasonable to expect that SWP operations at Oroville could result in storage levels below that experienced in 1977/78. For example, storage in Lake Oroville at the end of December 2009 was the lowest since the reservoir was completed in 1964; including 1977, the driest year on record. Had hydrologic conditions in 2010 been sufficiently wet, total diversion to storage could have exceeded the historic maximum. DWR acknowledges that opportunities to increase its maximum direct diversion and diversion to storage from the Delta have decreased given the more stringent water

quality and regulatory requirements. However, the fact that these opportunities are decreasing (in the face of increased level of development within the state) is all the more reason to maximize storage if and when the opportunity arises. As such, DWR not only believes that it can reasonably plan for greater diversion to storage, but it is in the public interest to allow for that possibility. Thus, permit 16479 should not proceed to license.

Lastly, DWR is currently conducting an environmental review process in compliance with CEQA. As stated above, continued operation up to maximum historic rates and annual maximum diversions with the existing regulatory restrictions (the license case) is the baseline against which the current project will be assessed.

DWR appreciates CSPA's interests in the extension of time process and hopes that the above information addresses the concerns raised in the protest letter. If you have any questions regarding DWR's responses, please contact me at (916)653-8826 or [esoderlu@water.ca.gov](mailto:esoderlu@water.ca.gov).

Sincerely,



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