



State Water Resources Control Board



Linda S. Adams
*Secretary for
Environmental Protection*

Division of Water Rights

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Arnold Schwarzenegger
Governor

JUL 16 2010

In Reply Refer To:
KDM:30358A, 30358B

Mr. Chris Shutes
California Sportfishing Protection Alliance
1608 Francisco Street
Berkeley, CA 94703

Dear Mr. Shutes:

APPLICATIONS 30358A AND 30358B OF CITIES OF DAVIS AND WOODLAND AND U.C.
DAVIS, SACRAMENTO RIVER IN TEHAMA AND YOLO COUNTIES

The Division of Water Rights (Division) is in the process of determining whether the protest filed by the California Sportfishing Protection Alliance (CSPA) on Applications 30358A and 30358B has been satisfactorily addressed. The Division is providing a copy of the draft permits to allow you to see the full slate of environmental mitigation measures currently proposed for these water rights. Additionally, it appears based on your letter of February 3, 2010, that some background information concerning the effect of certain standard permit terms and of area of origin protection laws would be helpful in evaluating which, if any, issues raised in your protest remain unresolved.

Water Availability

The inclusion of standard water right terms 80, 90 & 91, as well as area of origin water right protections address CSPA's concerns regarding water availability for other water right holders and for the environment. Term 80 reserves jurisdiction to change the season of diversion to conform to later findings of the Board concerning water availability and protection of beneficial uses in the Sacramento-San Joaquin Delta and San Francisco Bay. Term 90 subjects permits to prior rights, including reduction or elimination of the season of diversion during any year of water scarcity. Term 91 allows the State Water Resources Control Board (State Water Board) to curtail diversions under appropriative water rights when satisfaction of in-basin entitlements, including flows for fish and wildlife protection, requires release of supplemental stored water by the State Water Project (SWP) or the Central Valley Project (CVP). Essentially, Term 91 provides a method of determining when water is available on a real time basis, taking into consideration both flow and water quality needs.

State Water Board Order WR 89-8 addressed the issue of 46 protests filed by the Delta Water Users Association and the South Delta Water Agency against petitions and applications to appropriate water from the Sacramento and San Joaquin Rivers and their tributaries. Water availability protests against applications on the Sacramento River and its tributaries upstream of the Delta were dismissed on the basis that the State Water Board would subject new appropriations to the requirements of State Water Board Water Right Decision 1594, namely standard permit terms 80, 90, & 91. The State Water Board found that new appropriations diverting water in accordance with Decision 1594 would not affect the natural flow of water in

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the Sacramento River during periods when there is inadequate flow to satisfy all demands. (Order WR 89-8, pp. 13-17.) The effect of these permit terms on water availability in State Water Board Order WR 89-8 is the same as that presented by Applications 30358A and 30358B.

The responsibility for ensuring Delta flow and water quality objectives was assigned primarily to the Department of Water Resources and the U.S. Bureau of Reclamation in Decision 1641 (as modified by Order WR 2000-02).¹ To the extent that the DWR and USBR release previously stored water from their reservoirs to comply with Delta flow and water quality objectives as required by their permit conditions, that water is not available to other water users. Term 91 requires inbasin users to curtail diversions when this occurs. When the SWP and CVP are releasing stored water to maintain Delta water quality and outflow, the Applicants will not be authorized to divert water and must rely on an alternative supply to meet their needs.

Applications 30358A and 30358B seek water rights for inbasin use. Under the area of origin provisions of the Water Code, diversions for inbasin uses have priority over SWP and CVP water exports, regardless of the relative dates upon which the various appropriations commenced. (See Wat. Code §§ 11128, 11460 et seq.) Essentially, the later inbasin appropriations have a higher priority right as against the earlier appropriation of water by the export user. This means that inbasin diverters, such as the Applicant, may acquire water rights for inbasin uses, even if granting those inbasin permits reduces the water supply available to SWP and CVP users in the export areas. If there is insufficient water to satisfy all demands, the DWR and USBR must either reduce its exports or increase releases of previously stored SWP and CVP water over and above the amount required to maintain instream flows in order to support its exports.

Because the DWR and the USBR are required by their permits to operate their projects to meet instream flow requirements, the Division of Water Rights is satisfied that senior water right holders will have their demands met and environmental flow and water quality objectives will be met. If the State Water Board determines in the future that different flow or water quality objectives are necessary to protect beneficial uses in the Delta, it will amend its Water Quality Control Plan and will assign responsibility for meeting the new objectives through diversion management following a water right hearing. Because Term 91 is triggered when the state and federal water projects release water to meet flow and water quality objectives, regardless of the numeric objective in place, Term 91 ensures that beneficial uses are being protected from inbasin diversions that are approved subject to the term. To the extent that the Delta is in excess conditions and available flow exceeds minimum flow objectives and flow-dependent water quality objectives, that flow is available to inbasin users, even at the expense of SWP and CVP export contractors.

Therefore, approval of Applications 30358A & 30358B would not affect the availability of water for senior users or to meet Delta water quality objectives.

¹ Your letter notes that this obligation is interim until a different system for allocating responsibility for flows is achieved. Should the State Water Board open Phase 8 of the Delta proceedings or invoke another process to distribute responsibility for meeting flow standards among other diverters, the proposed diversions, if permitted, would be treated as other diversions are for purposes of that proceeding.

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Mr. Chris Shutes
Calif. Sportfishing Protection Alliance

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EIR and Cumulative Delta Impacts

The Applicants prepared an EIR to address the project specific impacts. In the February 3 letter, CSPA expresses several concerns regarding assumptions in the EIR. The Draft EIR was circulated in April 2007. The EIR has been certified, and no litigation is pending.

CSPA's February 3, 2010, letter also indicates concern regarding the project's potential impacts to fresh water flowing into and through the Bay Delta Estuary, citing potential cumulative and direct impacts from the EIR. CSPA also indicates that the current Delta water quality objectives may be inadequate and that it is unknown how much water will be needed later to recover Delta fisheries.

Staff believes that your concern regarding cumulative Delta impacts is appropriately addressed for purposes of individual water right applications through reserved jurisdiction (Term 90) and the requirement that in-basin entitlements, including flows required by the State Water Board for maintenance of water quality and fish and wildlife, must be satisfied (Term 91). These terms allow for changes in flow and water quality objectives to be applied to the applications, as they would be to all other diverters in the area whose water rights contain the standard provisions.

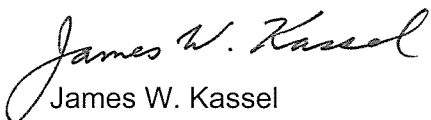
Wastewater Treatment Planning

The CSPA letter of February 3, 2010 asserts that the substantial investments that the Applicant will make in wastewater infrastructure in the next 10 years is dependent on assumptions that the Applicants make on the reliability of the surface water supply available from the proposed diversions. The Applicants are aware of the lack of certainty regarding diversions under these filings, as addressed in their EIR and their protest dismissal memorandum with Department of Fish and Game. The determination regarding whether it is economically feasible to proceed with these filings, including the costs associated with purchasing water from others or using groundwater during times when diversions would not be allowed under Applications 30358A and 30358B, must be made by the Applicants, not the State Water Board.

Division staff requests that CSPA identify any unresolved protest issues within the next 30 days. Unless we are advised to the contrary, we will assume that the CSPA protest issues have been resolved. If CSPA's concerns have not been satisfied, this application will be scheduled for a hearing before the State Water Board for resolution of any remaining issues at the soonest time possible.

If you require further assistance, please contact me at (916) 341-5446.

Sincerely,



James W. Kassel
Assistant Deputy Director for Water Rights

Enclosure

Mr. Chris Shutes
Calif. Sportfishing Protection Alliance

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cc: (w/enclosure)

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Bartkiewicz, Kronick & Shanahan
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