

California Sportfishing Protection Alliance

Hearing on the Matter of Water Rights Application 30358A of the City of Davis and the University of California, Davis and Application 30358B of the City of Woodland

Before the State Water Resources Control Board

Testimony of Chris Shutes

January 18, 2011

Overview

The overarching issue presented by Application 30358A (City of Davis and the University of California, Davis) and Application 30358B (City of Woodland) is whether water is available for appropriation by the applicants. The particular issue is inseparable from the broader issue with which the State Water Resources Control Board has been reluctantly grappling for the last thirty years: How much water is available for diversion overall from the Sacramento – San Joaquin River system, if sufficient water is devoted to protecting, maintaining and restoring public trust resources, particularly in the Delta?

The applicants have presented water availability analyses that are based on the constraints existing as of the 2004 Biological Opinion (BiOp) for the Operations and Criteria Plan (OCAP) for the operation of the Central Valley Project and State Water Project. Those constraints are summarized in the Environmental Impact Report for the proposed project in Appendix B “Modeling Results and Water Demand.”¹ In addition to the constraints imposed by the 2004 OCAP BiOP, the applicants propose to make no diversions when Standard Permit Term 91 is in effect, except possibly for diversion of transferred water. The overt assumption in short is that if water beyond that required to meet existing constraints is present at the proposed point of diversion, and Term 91 is not in effect, then that water is available for appropriation by the applicants. The underlying assumption is that these constraints devote adequate flow to protect public trust resources in the Sacramento – San Joaquin River system.

In our 1994 protest of the applications by the cities of Davis and Woodland, CSPA wrote as the first statement of fact: “We believe that the San Francisco Bay – San Joaquin Sacramento – Delta system is fully appropriated and in fact over appropriated. Consequently, the application should be cancelled. We reference the data, information and findings contained in the State Water Resources Control Board’s Draft Water Right Decision 1630 for the San Francisco Bay/Sacramento – San Joaquin Delta estuary, dated

¹ DEIR Appendix B. For modeling assumptions, see chapter 2. For summary, see Chapter 7. Exhibit cspa-cs#8. As is often the case in lengthy EIR’s, the applicants incorporated the draft EIR into the final EIR, with modifications and additions contained in a separate document labeled the final EIR. Thus, when we reference the draft EIR, and extract from it, it is important to note that this is also the final EIR.

December 1992.”² This contention by CSPA is far from new. What is new, however, is the August 3, 2010 *Delta Flow Criteria Report*³ published by the State Water Resources Control Board. This report concludes that Delta outflow is deficient by an average of about 5 million acre-feet per year. This report completely undermines the assumptions of the applicants’ water availability analyses that existing constraints on appropriation of water are sufficient to protect public trust resources. The question before the Board today is how it will consider a proposed new diversion for the Sacramento River not only in light of its own findings in 1992, but in consideration of the overwhelming evidence presented to it by resource agency and academic scientists and the resulting compilation of best available science by Board staff in the *Delta Flow Criteria Report* in 2010.⁴

Applicants’ water availability analysis

The water availability analysis contained in Appendix B of the Davis – Woodland Water Supply Project EIR compares existing conditions without proposed Davis-Woodland diversions and existing conditions with proposed Davis-Woodland diversions. Part of the existing conditions assumes constraints of the 2004 BiOp. The EIR also conducts a similar with project and without project analysis for a 2020 level of development, but again, the instream conditions are assumed to be limited only to the constraints of the 2004 BiOp.⁵

On February 12, 2009, Ms. Anna Fock of Montgomery Watson Harza sent a memorandum, addressed to Katherine Mrowka of the Division of Water Rights.⁶ Ms. Fock is listed as one of the preparers of the Modeling Results and Water Demand appendix in the EIR. Her memorandum repeats part of the water availability analysis from Appendix B of the EIR, in order to respond to misconceptions on the part of DFG

² CSPA Protest, October 31, 1994. Exhibit cspa-cs #16.

³ State Water Resource Control Board, *Development of Flow Criteria for the Sacramento – San Joaquin Delta Ecosystem*, August 3, 2010. Hereinafter, *Delta Flow Criteria Report*. Exhibit cspa-es#1.

⁴ The 2004 OCAP BiOp was overturned in court, and was replaced in 2009 by two Biological Opinions (for salmonids and green sturgeon, and for listed pelagic species). The 2009 BiOps reduce the amount of water that is available for appropriation from the Sacramento – San Joaquin system, when compared to the 2004 BiOp. While the 2009 BiOps represented an improvement over the 2004 BiOp in many respects, and required greater restrictions on diversions from the system, the *Delta Flow Criteria Report* and the informational workshops and submittals that preceded it demonstrate that these BiOps as well were also insufficient to protect public trust resources, particularly in the Delta. Exhibit cspa-cs#14, Appendix D, pp. D-1 to D-3 of the 2008 OCAP Biological Assessment, presents the assumptions on which modeling for the 2009 OCAP BiOps was based. The constraints modeled for the 2009 BiOps include D-1641, D-1485, Section B2 of the Central Valley Project Improvement Act, Joint Points of Diversion (JPOD), transfers, and the Environmental Water Account. These constraints require far less Delta inflow and outflow than the SWRCB’s 2010 *Delta Flow Criteria Report*. Indeed, the modeling analysis of the State and Federal Water Contractors’ letter October 1, 2010 to Chair Hoppin (Exhibit cspa-cs#9) uses D-1641 and the 2009 BiOps as the baseline against which increased Delta outflow, per the Board’s *Delta Flow Criteria Report*, is measured.

⁵ Davis – Woodland Water Supply Project DEIR Appendix B, pp. 4-1 to 4-22. Exhibit cspa-es#8.

⁶ Memorandum of Anna Fock, Montgomery Watson Harza Katherine Mrowka, Division of Water Rights, February 12, 2009. Subject: December 12, 2008 Department of Fish and Game Memorandum Regarding Water Rights Application 30358 for the Davis-Woodland Water Supply Project. Exhibit cspa-cs#10.

staff. It concisely summarizes several key elements of the water availability analysis in the EIR.

The concluding paragraph of Ms. Fock's memorandum states as an example that, from January 1 through September 15, 2004, "there were 126 days when the Term 91 diversion prohibition was not in effect. ... On most of these days, the surplus flow rates almost always were substantially greater than the total projected DWWSP demand (Reclamation 2009). Ample unappropriated water therefore will be available for DWWSP diversions under Project Water Rights during times when the Term 91 diversion prohibition is not in effect, and no further water-availability analysis is necessary."⁷

In sum, the analysis is that when Term 91 is not in effect, water is assumed to be available, because under existing constraints it would have been.

Assistant Deputy Director for Water Rights response to CSPA on water availability for Applications 30358A and 30358B

On February 3, 2010, two weeks before the deadline for testimony and exhibits for the State Board's Delta Flow Proceeding, CSPA wrote to the Division of Water Rights regarding the Davis-Woodland applications. In that letter, we stated in part that any analysis of water availability to support the Davis-Woodland applications should be made only after the completion of proceedings that might significantly alter the amounts and timing of water required for Delta outflow, and/or alter the responsibilities for meeting increased Delta flow requirements. Among the proceedings we mentioned were the imminent Delta Flow informational proceeding, the upcoming San Joaquin flow and salinity evidentiary proceeding, and "further evidentiary hearings that may bear on Delta inflow and outflow in 2011 and 2012 have been contemplated in Board publications."⁸

In response, James Kassel, Assistant Deputy Director for Water Rights, responded on July 16, 2010. He stated: "The inclusion of standard water right permit 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."⁹ Mr. Kassel continues: "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."¹⁰ Finally, Mr. Kassel concluded: "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

⁷ Ibid, p. 3.

⁸ Letter from Chris Shutes to Steven Herrera re Applications 30358A and 30358B, February 3, 2010, pp 2-3. Exhibit cspa-cs#17

⁹ Letter from James Kassel, Deputy Director Water Rights to Chris Shutes re Applications 30358A and 30358B, July 16, 2010, page 1. Exhibit cspa-cs#15.

¹⁰ Ibid, p. 2.

(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.”¹¹

The Water Code requires that water be available for appropriation

Standard permit terms 80, 90 and 91 address permits for which water was sufficiently available to issue these permits, but where conditions or circumstances have changed sufficiently to require modifications of the season of diversion permanently (Term 80) or in any given year (Term 90), or when the Central Valley Project and/or State Water Project are releasing stored water to meet Delta water quality requirements (Term 91). This is fundamentally different than answering the question of whether water is available today in order to grant a new permit. As stated, the invocation of Terms 80, 90 and 91 appears to us, in the face of the *Delta Flow Criteria Report*, to be an unlawful circumvention of the Water Code Section 1375: “As prerequisite to the issuance of a permit to appropriate water the following facts must exist: ... (d) There must be unappropriated water available to supply the applicant.”

Simply asserting that we can fix it later if we were wrong doesn’t meet the requirement under the Water Code to show that water is available for appropriation. The Board just issued a report that says that under current regulatory requirements, flows needed to protect fisheries in the Sacramento – San Joaquin system suffer a shortfall that averages 5,000,000 acre-feet a year. CSPA would like to see the analysis up-front that shows that there will still be enough water available to supply the permit after that amount of water is provided for Delta outflow in order to restore the Delta ecosystem.

Term 91 has not protected the Delta

Term 91 is simply one of the suite of already existing inadequate requirements that has failed to protect the Delta. Enormous amounts of testimony to the critically degraded condition of the Delta ecosystem were submitted during the Delta Flow Criteria proceeding. We will not repeat that testimony here. Conclusions regarding the inadequacy of current Delta flow requirements, which include Term 91, can be seen in the Board’s *Delta Flow Criteria Report*.

Term 91 was a temporary measure that was coupled in D-1641 with the responsibility of the CVP and SWP to provide water to meet Delta water quality requirements. Mr. Kassel says in his July 16 letter to CSPA: “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 the purpose of that proceeding.”¹² This response ignores the magnitude of the flow shortfall.

¹¹ Ibid, p. 3.

¹² Ibid, footnote to p. 2.

If the projects are required to provide a “fair share” contribution to a protective Delta outflow, they will likely not have sufficient stored water, on their own, to meet both Delta Water Quality requirements and to meet instream cold water needs downstream of project reservoirs in the second half of the year. If the projects are not required to meet a fair share, and continue as at present at Oroville to store water (releasing little except for flood control) until July 1, when the bulk of the needed Delta flow requirements ease, then there will likely not be enough water in the system to support downstream diversions in the spring while also meeting Delta outflow needs from sources other than those upstream of project reservoirs. Term 91 would then be in effect for far more months per year than under present outflow requirements, Sacramento Valley users upstream of the Delta subject to Term 91 would be much more frequently prohibited from diverting, and the projects would be required to contribute their “fair share” through the back door of needing to meet Delta water quality.

In summary, Term 91 is not protective and cannot endure in its present form. It is premised on the fact that too little water in the Sacramento – San Joaquin system is devoted to Delta inflow and outflow. It balances between competing consumptive uses that are grossly over-hydrated due to lack of Delta outflow.¹³

Term 90 addresses incidental rather than systemic lack of water availability

Standard permit term 90 states:

This permit is subject to prior rights. Permittee is put on notice that, during some years, water will not be available for diversion during portions of all of the season authorized herein. The annual variation in demands and hydrologic conditions in the Sacramento River Basin of the Sacramento – San Joaquin Delta are such that, in any year of water scarcity, the season of diversion authorized herein may be reduced or completely eliminated by order of the SWRCB, made after notice to interested parties and opportunities for hearing.

So. In probably any year but a very wet year, the Board needs to make up 5,000,000 acre-feet in order to meet public trust needs in the Delta. The Board restricts the season of diversion in that year for enough permits to make up the shortfall, “after notice to interested parties and opportunities for hearing.” CSPA respectfully requests the Board to estimate the number of permits that might be affected, the number of hearings it would anticipate holding, and the amount of Board and staff time it would take in any given year to hold hearings to reduce diversions under existing permits sufficient to increase Delta outflow by 5,000,000 acre-feet in that year.

The Board is, moreover, extremely reluctant to take away water from any actual diverter. CSPA respectfully requests that the Board recount the history of diversions that have been restricted under Term 90 in each year to date when such restrictions have taken place, both in terms of face value any permits so restricted and in terms of the actual

¹³ These uses include the in-Delta riparian users who tried to pose the broader question, but were pushed aside over twenty years ago in WRO 89-08. Water rights order 89-08, pp. 13-17. Exhibit cspa-es#6.

amount of water that was diverted under such permits in the year immediately preceding the restriction.

Finally, if as a policy matter the Board rarely or never restricts diversions under existing permits, even given the acknowledged fisheries crisis in the Delta and the Sacramento – San Joaquin system, is it not prudent at the very minimum to not issue any new permits in the system until public trust fisheries have substantially recovered?

Jurisdiction under Term 80 is so reserved that it is never exercised

Term 80 prospectively reserves the Board’s jurisdiction to permanently reduce the season of diversion of a subject permit.

Standard Permit Term 80 states:

The State Water Resources Control Board reserves jurisdiction over this permit to change the season of diversion to conform to later findings of the SWRCB concerning availability of water and the protection of beneficial uses of water in the Sacramento – San Joaquin Delta. Any action to change the authorized season of diversion will be taken only after notice to interested parties and opportunity for hearing.

The Delta Flow Proceeding and subsequent *Delta Flow Criteria Report* states on page 5:

3. In order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows. These criteria include:
- 75% of unimpaired Delta outflow from January through June;
 - 75% of unimpaired Sacramento River inflow from November through June; and
 - 60% of unimpaired San Joaquin River inflow from February through June.¹⁴

About 92% of the unimpaired Sacramento River inflow to the Delta takes place in the November through June period.¹⁵ CSPA respectfully requests that the Board demonstrate how reducing the season of diversion, when 92% of the unimpaired water is already being limited to diversion rates of 25%, is going to leave any water available to applicants Davis and Woodland in the first instance, and how changing the season of diversion is going to leave any water available thereafter.

CSPA respectfully requests that the Board recount the history of diversions that have been restricted under Term 80 to date, both in terms of the face value any permits so restricted and by comparing the actual annual diversion amounts under those permits before and after such restrictions have been required.

¹⁴ *Delta Flow Criteria Report*, p. 5. Exhibit cspa-es#1.

¹⁵ *Ibid*, p. 29. 67% of the annual unimpaired flow through the Delta from 1921-2003, and 65% of the actual (regulated) outflow from 1986-2005 took place in the February through June time period.

CSPA also respectfully requests that the Board estimate the total face value and average annual diversions of permits that are subject to Term 80, and how many diverters senior to applicants Davis and Woodland would be required to reduce their diversions in order to meet reduce overall diversions from the Sacramento River by an annual average of 5,000,000 acre-feet per year.

Since there is a massive annual shortfall of water from the Sacramento River available for Delta outflow, CSPA does not understand why the State Board has not massively invoked Term 80, almost as a default action, if this is indeed the way the Board proposes to assure water availability for the Delta ecosystem.

Our conclusion regarding Term 90 applies even more strongly to Term 80. If as a policy matter the Board rarely or never restricts diversions under existing permits, even given the acknowledged fisheries crisis in the Delta and the Sacramento – San Joaquin system, is it not prudent at the very minimum to not issue any new permits in the system until public trust fisheries have substantially recovered?

Area of Origin Priority

In his letter to CSPA of July 16, 2010, Assistant Deputy Director Kassel suggests, finally, that area of origin protections will protect the Delta by compelling reductions of exports to offset increases in area of origin diversions, except under Term 91 conditions: “If there is insufficient water to satisfy all demands, the DWR and USBR must either reduce its exports or else 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.”¹⁶

The Board has never shown how increases in in-basin diversions could be enforceably offset by reductions in exports. There is no fixed numeric limit on exports, no hard number that establishes a baseline from which exports can be reduced. The reality has been when exports have been reduced, it has been because of regulatory limitations or occasional seasonal lack of demand. Less and less “surplus” water (water beyond what is needed to meet “balanced conditions” in the Delta) has been left for Delta outflow.¹⁷

If the Board proposes to reduce exports in order to meet increased in-basin demand, we would like to know exactly how it proposes to achieve that condition. What specific mechanism will ensure that a new diversion of 45,000 afy (less Term 91 limitations) will cause an equivalent reduction in exports? What will the rules be, and how will accounting take place? We don’t think that such a mechanism exists or can be effectively created under the existing patchwork of constraints that currently regulate Delta inflow and outflow. We also don’t think that anything near an adequate accounting system is currently available to the Board. An appropriate approach would be to consider such a mechanism as part of a re-working of the Delta inflow and outflow requirements in order to meet the ecosystem restoration needs outlined in the *Delta Flow Criteria Report*, and

¹⁶ James Kassel letter to CSPA July 16, 2010, p. 2. Exhibit cspa-cs#15.

¹⁷ *Delta Flow Criteria Report*, p. 29. Exhibit cspa-es#1.

in the Sacramento – San Joaquin Delta Reform Act of 2009 that required the Board to develop the criteria contained in that report.

The Board may ask why as a policy or procedural matter an individual water rights application should be held in abeyance contingent on a forthcoming proceeding. The reply to that is straightforward. For decades, the Board has held in abeyance addressing overappropriation of Sacramento – San Joaquin water resources. The result of that deferral, in part enabled by permit terms 80 and 90 and invocation in the abstract of area of origin priority, has been the collapse of an ecosystem. The collapse is extensively documented in the *Delta Flow Criteria Report*. Deferral in the first instance needs to be addressed by the Board catching up to the reality it has documented in its own report.

Waiting for the Board to make such long overdue adjustments does not place an unfair or undue burden on the applicants. Further proceedings are either underway or are clearly contemplated for the next several years that will address the broader Delta flow issues. The San Joaquin flow and salinity evidentiary hearing has been noticed, with a preceding workshop that will have taken place by the time the hearing on the Davis – Woodland applications are held. The Sacramento – San Joaquin Delta Reform Act of 2009 requires completion of a Delta Plan by January 1, 2012; proceedings relating to the Bay Delta Plan, and to the Bay Delta Conservation Plan and possible changes in points of diversion for the export projects will follow.

Moreover, applicants have been on notice since 1994 that CSPA held that position that the Sacramento – San Joaquin system is over-appropriated. Applicants have had sixteen years to attempt to find resolution with CSPA on this issue, by, for instance, exploring systemic options for reducing exports to offset area of origin diversions, or by exploring opportunities within the Yolo Bypass to both meet the applicants' water supply needs and habitat improvements for fisheries. Instead, applicants chose the superficially easy path of settling with water purveyors, both in-basin and exporters, according to the lipstick pretense that permit terms 80, 90 and 91 were acceptable solutions to a systemic problem. In a sense, applicants were caught out by the *Delta Flow Criteria Report*. No longer is it CSPA and a few other persistent entities pointing to gross over-allocation; it is now the State Board itself.

Cumulative impacts on Sacramento – San Joaquin fisheries

The Environmental Impact Report for the proposed Davis – Woodland Water Supply Project documents extensively that on a percentage basis, increased diversions because of the proposed project would have small, largely de minimis impact on various hydrologic and biological parameters in the Delta, assuming Delta outflow standards that are in existence today.¹⁸ For the record, CSPA maintains that this analysis does not meet the requirements of CEQA. It is an incremental effects analysis, not a cumulative effects analysis. A cumulative effects analysis has to analyze the cumulative, overall condition of an affected watershed, in addition to the incremental effect of a proposed action.

¹⁸ Davis – Woodland Water Supply Project DEIR Appendix B, pp. 4-1 to 4-22. Exhibit cspa-es#8.

Regardless of the adequacy of such an analysis under CEQA, it is certain that for the purposes of a public trust analysis, the overall condition of the affected watershed must be analyzed and considered by the Board. Much of that analysis has already been completed: the cumulative condition of the Sacramento – San Joaquin watershed is extensively documented in the *Delta Flow Criteria Report*. Asking only the question of whether this particular permit will result in still further degradation presumes that the underlying, cumulative degraded condition will continue and not be addressed by the Board. That assumes that the Board will not carry out its public trust responsibilities. This type of analysis is the classic mechanism by which every diverter claims that his diversion is sustainable (if not inconsequential), and that he is not responsible for a cumulative condition.

Such an approach also fails to give appropriate consideration to the water rights priority system. As we discuss below, there is substantial evidence that even in-basin diversions may need to be reduced in order to meet Delta flow requirements sufficient to comply with the need (and legislative mandate) to restore the Delta ecosystem. If true, granting new diversions would then cause injury to existing, senior in-basin diversions, which in any case may need to be reduced without a new permit granted to Davis and Woodland. Before granting permits 30358A and 30358B, the Board needs to show that the senior diversions are sustainable and that this proposed new diversion will not injure senior diversions that are likely to be limited by requirements for Delta inflow and outflow.

Both the face value of legal diversions and the actual quantities of water diverted from the Bay-Delta watershed are unknown

In an September 26, 2008 letter to Delta Vision,¹⁹ a member of the State Water Board's staff made some general observations about the face value of existing and prospective water rights. In a section titled Water Use vs. Water Rights, Board staff stated in part:

The mean annual unimpaired or full natural flow in the Delta Watershed between 1921 and 2003 was 29 million acre-feet per annum (AFA), with a maximum of 73 million AFA in 1983. Unimpaired flow is flow that would be expected in the Delta watershed in the absence of storage and other human developments. In contrast, the total face value of the approximately 6,300 active water right permits and licenses within the Delta managed by the State Water Board, including the already assigned portion of state filings, is approximately 245 million AFA. There are 100 rights with a face value of 500,000 AFA, or more that account for 84% of the total face value of the water rights within the Delta watershed. The Central Valley Project and State Water Project hold 75 permits and licenses within the Delta watershed that account for 53% of the total face value of the water rights within the watershed. The total face value of the unassigned portion of state filings for consumptive use (excluding state filings for the beneficial use of power) within the Delta watershed is approximately 60 million AFA. This does not mean that this 60 million AFA is hydrologically available for appropriation. Prior to assignment of a state filing, the State Water Board will require that an

¹⁹ Board letter to Delta Vision, September 26, 2008. Exhibit cspa-bj#12

applicant provide evidence that water is available to support the assignment. Clearly, actual use must be only a small fraction of the face value of these water rights, particularly since face value does not include pre-1914 and riparian water rights.²⁰

Staff also states that, in addition to the fact far more water is permitted than is actually available, the amount of actual use is not known by the Board:

There are two basic categories of surface water rights: post-1914 appropriative; and pre-1914 appropriative and riparian. The State Water Board has very limited information on water use for either of these classes of water rights, and the little information it does have has not been synthesized and is not maintained electronically. The State Water Board has no information on groundwater use in the Delta watershed.²¹

Actual use under existing water rights is clearly a better metric to compare with unimpaired flows than is face value but the State Water Board has limited information on actual use. Comprehensive review and synthesis of the State Water Board's paper files would however provide only a crude estimate of actual historic and current use because of gaps in reporting and unreliability of the data already collected.²²

The water rights system has remained functional in the Sacramento Valley in part because the system has not been operated tightly in order to allow for adequate Delta outflow. If the Board were to require Delta outflow at the magnitude it found needed in the *Delta Flow Criteria Report*, accounting issues would become far more critical, because issues of priority and injury would arise almost daily.

A multitude of competing interests are already engaged in a bitter fight for the water in the system that they know is limited and overallocated

The competition for water in California today is a great game of musical chairs in which there are far more players than seats, and in which many of the limited seats that appear turn out to be imaginary. The etiquette of the game is that every player must pretend that the seats he assigns to himself are both solid and exclusively his. The competition, and the tenuousness of the seats of others, is to be acknowledged only under duress. To acknowledge risk to others is to acknowledge risk to oneself.

The State and Federal Water Contractors, in Appendix B of their October 1, 2010 letter to State Board Chair Hoppin and Delta Stewardship Council Chair Isenberg²³ regarding the

²⁰ Ibid, pp. 2-3.

²¹ Ibid, p. 1

²² Ibid, p. 4

²³ Letter of the State and Federal Water Contractors to Charlie Hoppin, SWRCB, and Phil Isenberg, Delta Stewardship Council, October 1, 2010, Appendix B, modeling analysis. Exhibit cspa-cs#9. See also letter to Hoppin, Exhibit cspa-cs#8.

Delta Flow Criteria Report, start to get at the significance of the shortfall of needed outflow, as presented in the *Delta Flow Criteria Report*.

On behalf of the Contractors, MBK Engineers performed a modeling analysis, using CALSIM II, of the *Delta Flow Criteria Report's* flow criteria, as compared to conditions required under current legal requirements, including the 2009 OCAP Biological Opinions. As a caveat, we have not seen all the assumptions that were made by MBK Engineers in performing this analysis, and we may not agree with some of them. We also disagree with the conclusions in the body of the State and Federal Contractors' letter. Our takeaway from this document is not the details, but in the big picture acknowledgment of the magnitude of water supply impacts that the State Board found was needed for Delta outflow.

First, MBK gives the annual average reduction in water available for consumptive use that would result from institution of the flow schedule suggested in the *Delta Flow Criteria Report* at 5,500,000 acre-feet per year. This is based on a modeled average increase in Delta outflow in an equivalent amount. MBK says: "This is very significant."²⁴ In the body of their letter, the State Water Contractors say: "Gross Supply Impacts are Catastrophic."²⁵ Only 2,500,000 acre-feet would, on average, be available for consumptive use in the Sacramento Valley.

In modeling the flow criteria from the *Delta Flow Criteria Report*, deliveries to north of Delta CVP Settlement Contractors were reduced by 88%, and north of Delta SWP Settlement Contractors were reduced by 42-43%. MBK notes: "Such cuts would not be allowed under existing contracts and water rights."²⁶ MBK explains the reason that such cuts were modeled: "Cuts to CVP Settlement Contractor deliveries, though unreasonably large, were unable to restore Shasta carryover to baseline levels. According to SWRCB staff, the intended purpose of the delivery cuts to Settlement Contractors was to alleviate impacts to Shasta storage and cold water pool. The cuts were unsuccessful."²⁷ While other modeling choices might have been made by Board staff in trying to maintain cold water pools in reservoirs to support salmonids in river reaches downstream of those reservoirs, it is telling that Board staff found it necessary to consider reducing in-basin demand.

Despite the priority of the area of origin, hydrologic reality may still require reductions in existing in-basin diversions in order to meet flows required to restore the Sacramento – San Joaquin ecosystem. The Board needs to demonstrate that it is possible to provide needed Delta outflow without injuring in-basin diverters and still have water available to supply permits 30358A and 30358B.

²⁴ Appendix B, modeling analysis, p. 2. Exhibit cspa-cs#9.

²⁵ State and Federal Water Contractors Letter to Hoppin and Isenberg, p. 3. Exhibit cspa-cs#8.

²⁶ Appendix B, modeling analysis, p. 2. Exhibit cspa-cs#9.

²⁷ Ibid, p. 4.

In-basin and other water purveyors are already acting to avoid losing water because of the Bay-Delta Plan

On November 4, 2010, a coalition of 43 water purveyors signed a joint letter addressed to Karen Scarborough, Undersecretary of the California Natural Resources Agency. The letter reads in part:

Water Rights and Delta Flows – The Delta Reform Act of 2009 states that water rights shall not be impaired or diminished as a result of its provisions, which include the BDCP. As explained in the September 3, 2010 letter from Somach Simmons & Dunn (copy attached), the current “ranges of operations” being considered by the BDCP include contributions of flow from upstream water users who are not party to the BDCP. We strongly agree with the Somach Simmons & Dunn finding that such a proposal is neither lawful nor appropriate for inclusion in the BDCP. It is critical that the BDCP expressly acknowledge that the parties to the BDCP – not third parties – have full responsibility to satisfy any flow obligations described as part of the BDCP alternatives.²⁸

The September 3, 2010 letter from Somach Simmons & Dunn referenced in the Coalition letter affirms the priority system, citing to *El Dorado Irrigation District v. State Water Resources Control Board*. Mr. Somach continues:

The California Supreme Court reached a similar conclusion in *City of Barstow v. Mojave Water Agency* (2000) 23 Ca.4th 1224 (*Barstow*). There, the Court rejected a "physical solution" as a method of settling a water right dispute where the physical solution that relied on an "equitable apportionment" and did not consider prior rights. ... Like *Barstow* and *EID v. SWRCB*, any analysis of flow contributions needed to make BDCP a success cannot be conducted under the assumption that water right priorities are somehow irrelevant.²⁹

In considering applications 30358A and 30358B, the Board must consider the degree to which it will support Mr. Somach’s vision of the priority system. If affirming this vision, the Board must make serious provision to protect area of origin rights by providing a clear and workable mechanism to prioritize, in wet water, those area of origin rights over exports, while assuring that area of origin rights are not simply exercised at the expense of public trust resources. If contemplating a different vision of solving requirements for Delta flow, the Board must quantify any reductions that may be borne by in-basin diverters, and consider those reductions in the context of water availability for the present applications.

²⁸ Northern California Coalition letter to Karen Scarborough, November 4, 2010, p. 3. Exhibit cspa-cs#12.

²⁹ Letter of Stuart Somach, on behalf of Glenn-Colusa Irrigation District, to Karen Scarborough, September 3, 2010, p.5. Exhibit cspa-cs#11.

CVP and SWP have extensive water rights that may have priority over applicants' permits

On September 3, 2009, the State Board noticed a series of petitions for extension of time for a series of Central Valley Project permits (1272 et al) with a face value for consumptive diversions of Sacramento River water alone of over 18 million acre-feet per year.³⁰ The CVP has filed petitions for extension of time on these permits through 2030, and has stated that it may seek change places of use for the permits. Any use of this water for in-basin purposes, including Delta outflow, would be senior to the rights of applicants. The Bureau of Reclamation has stated that it does not know where it might ultimately seek to use these rights, but suggests that it will put the full amount to beneficial use by 2030.³¹ The Bureau has also stated that it cannot assign specific usage amounts to any given permit, but rather must have its permits considered en bloc when evaluation for permit extension and ultimately licensing takes place.³²

In addition, there are millions of acre-feet of permitted rights in the Trinity, American and Stanislaus river systems that are jointly operated in coordinated fashion with the CVP's Sacramento Division. When any water from these other divisions of the CVP is being released from storage to meet Delta water quality needs, Davis and Woodland would be precluded from diverting under Term 91. As more and more of the American and Stanislaus water is diverted before it reaches the Delta, particularly under County of Origin state filings which are senior in priority both to the applicants' right and to those of the CVP, the time period when Term 91 applies can only increase.

On August 19, 2010, the State Board noticed petitions for extension of time filed by Department of Water Resources for direct diversion rights and storage rights in the Feather River.³³ The notice and petitions when cross referenced show that 1.3 million acre-feet per year in storage rights for consumptive purposes have not been put to beneficial use by DWR at Oroville.³⁴ The State Water Project (SWP) provides large quantities of water to exchange contractors in the Sacramento Valley. DWR rights for water used in-basin are also senior in priority to those of Davis and Woodland. State Water Project water is also to meet Delta water quality requirements. Under coordinated operations of the SWP and CVP, water released from storage from the SWP's major storage facility, Oroville Reservoir, is sometimes used to meet Delta water quality standards. When this takes place, Term 91 conditions apply, and Davis and Woodland are precluded from diverting from the Sacramento River. In addition, storage rights that are part of DWR's petitions are strong candidates for reinvestment under a petition for change of place of use for use at a future Sites Reservoir. Any water stored at Sites and subsequently used for in-basin purposes would equally be senior to the proposed permits of Davis and Woodland.

³⁰ See CVP petitions Notice, cspa-cs#6. The total face value for consumptive water alone under these permits is greater than 40,000,000 acre-feet per year.

³¹ See Supplement to CVP Petitions, pp. 2-3 Additional demand for irrigation from the Corning Canal is explicitly anticipated on page 3. Exhibit cspa-cs#7.

³² Ibid, p. 2.

³³ See SWP petition Notice, Exhibit cspa-cs#3.

³⁴ SWP petition Notice, p. 3. See also , SWP petition, Exhibit cspa-cs#4, p. 5.

State filings for county of origin water rights are both senior on paper to Applications 30358A and 30358B and are being used to appropriate wet water

The September 26, 2008 letter from the State Board to Delta Vision states: “The total face value of the unassigned portion of state filings for consumptive use (excluding state filings for the beneficial use of power) within the Delta watershed is approximately 60 million AFA.”³⁵ While many of these unassigned state filings were filed on behalf of the Central Valley Project and the State Water Project, many were also filed on behalf of counties of origin under Water Code Sections 10500-10505.

The recent applications and petitions of El Dorado County Water Agency for partial assignment of state filings 5645 and 5644 to El Dorado County water purveyors represent a significant shift of approach to county of origin state filings.³⁶ El Dorado seeks to use the 1927 priority date of these filings not simply to avail itself of unappropriated water, but to gain priority to water that may already be appropriated by a junior in-basin user or by the Central Valley Project. In *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, the Appeals Court upheld a ruling that an earlier partial assignment of state filed Application 5645 to El Dorado would not be subject to Term 91 unless junior diverters were first so subjected. State filings to the benefit of counties of origin may therefore represent a significant and senior competitor to area of origin applications such as 30358A and 30358B, both during periods when Term 91 is not in effect and under Term 91 conditions.

Since the face value magnitude of state filings is greater than the average annual runoff in the Sacramento – San Joaquin watershed, the Board should both on a policy level and in legal terms describe how it plans to address state filings in the future and how it is accounting for those state filings in determining water availability for the present applications.

Not only is water in the Sacramento – San Joaquin watershed already overallocated, but there will likely be less in the future

PG&E senior hydrologist Gary Freeman has documented that in the North Fork Feather River basin, average annual runoff has decreased in the 1960-2009 time period by between 264,000 and 279,000 acre-feet per year.³⁷ Freeman attributes this decline to the affects of climate change on a relatively low elevation sub-watershed. The Feather River’s elevation range that is characteristic of the much of the Sacramento River watershed overall. The Board should make clear how its water availability analysis accounts for likely reductions in runoff due to climate change.

³⁵ Board letter to Delta Vision, September 26, 2008. Exhibit cspa-bj#12, p. 3.

³⁶ See Notice of Applications for Partial Assignment and Petitions for Applications 5645 and 5644, Exhibit cspa-cs#5.

³⁷ Gary Freeman, *Tracking the Impact of Climate Change on Central and Northern California’s Spring Snowmelt Subbasin Runoff*, 2010. pp. 8-10 (pdf pagination). Exhibit cspa-cs#13.

Applications 30358A and 30358B should not be approved

The current condition of the Sacramento – San Joaquin river system, including the Bay-Delta estuary, is unsupportable. The Board cannot consider applications 30358A and 30358B separate from the need for the Board to give practical expression to the *Delta Flow Criteria Report*, however it may ultimately do so. As a policy matter, and in order to defend the public interest, as well as to defend the priority system, there should be no new consumptive diversions in the Sacramento – San Joaquin system permitted until public trust requirements are established and met.

Permit terms 80 and 90 have resulted in deferral of protecting fish and wildlife to the point of crisis. Permit term 91 is no longer even a band-aid: it has simply become part of a grossly deficient scheme for facilitating exports at the expense of instream flow.

Area of origin priority needs to find practical expression, rather than being a convenient abstraction whose net result is increased overall diversions at the expense of the public trust.

A mechanism to enforce area of origin priority is only a subset of the larger need to create and maintain an accurate and functional accounting system for water used in the state. The Board cannot know how much water is available if it does not know how much water is already being diverted.

Governor-elect Jerry Brown campaigned on the slogan: “California needs major changes. We have to live within our means.” It is no less true of water than it is of money.

December 17, 2010

Respectfully submitted,



Chris Shutes
Water Rights Advocate
California Sportfishing Protection Alliance