



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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James Kassel
Assistant Deputy Director for Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
via hand delivery and e-mail

RE: KDM: 30358A and 30358B, Applications of Cities of Davis and Woodland and U.C. Davis

Dear Mr. Kassel:

This letter is in response to your letter of July 16, 2010, regarding the above referenced water rights applications. You asked whether CSPA's protest issues have been addressed. They have not, and we request a hearing before the Board on these applications, as discussed below.

Delta Flow Criteria Report

In culmination of an informational proceeding held in the first half of 2010, the State Water Resources Control Board approved, on August 3, 2010, a document entitled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (hereinafter, *Delta Flow Criteria Report*). The purpose of the document is described in a footnote on page 5: "the flow criteria developed in this proceeding are intended to halt population decline and increase populations of certain species."¹

In Section 1.2, Summary Determinations, the *Delta Flow Criteria Report* states:

¹ The draft document was circulated on July 21. The document was slightly modified and approved by the Board at its August 3, 2010 meeting. According to Board staff on August 13, the final version of the document has not been posted on the Board's Delta Flow web page, and will not be circulated until later in August; this is due to administrative issues at the Board. For purposes of the present letter, we reference the July 21 draft document; to our knowledge, the referenced sections were not modified at the Board's August 3 meeting.

2. Recent Delta flows are insufficient to support native Delta fishes for today's habitats.

3. Flow modification is one of the immediate actions available although the links between flows and fish response are often indirect and are not fully resolved. Flow and physical habitat interact in many ways, but they are not interchangeable.

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
- 60% of unimpaired San Joaquin River inflow from February through June.

It is not the State Water Board's intent that these criteria be interpreted as precise flow requirements for fish under current conditions, but rather they reflect the general timing and magnitude of flows under the narrow circumstances analyzed in this report. In comparison, historic flows over the last 18 to 22 years have been:

- approximately 30% in drier years to almost 100% of unimpaired flows in wetter years for Delta outflows;
- about 50% on average from April through June for Sacramento River inflows; and
- approximately 20% in drier years to almost 50% in wetter years for San Joaquin River inflows.²

75% of the unimpaired November through June inflow on the Sacramento needs to be passed through the Delta as outflow to "preserve the attributes of a natural variable system." At present, the number is as low as 30%, and the April through June period averages 50% of the unimpaired Sacramento River flow.

According to the *Delta Flow Criteria Report*, we need to reduce the total annual diversions on the Sacramento River by, roughly speaking, 5,000,000 acre-feet per year in average years to "halt population decline and increase populations of certain species." Under current conditions, the Board is allowing depletion of the system beyond the amount that would allow fish and wildlife residing in or passing through the Delta to recover. Even if, conservatively, we were to say that the amount of required Delta outflow originating in the Sacramento River system were 3,000,000 acre-feet per year, there is a huge amount that will need to be made up from *already existing diversions*. Under such circumstances, the Board needs to explain exactly where it will find 44,000 acre-feet per year of water available to service Davis, Woodland, and U.C. Davis's Applications 30358A and 30358B, or, for that matter, *any* available water to service these diversions.

² *Delta Flow Criteria Report*, pp. 5-6.

The State Board made clear that the *Delta Flow Criteria Report* does not represent an adjudication of existing water rights. CSPA is not asking that the Board to make it an adjudication. CSPA asks, rather, that the *Delta Flow Criteria Report* be used as *evidence* in the Board's exercise of its adjudicatory role in considering the Applications 30358A and 30358B. Indeed, the *Delta Flow Criteria Report* is compelling evidence that the Board is currently violating the water quality and fish and wildlife attributes of the public trust.

Standard water right terms 80, 90 and 91

Your letter of July 16 states on page 1: "The inclusion of standard water right terms 80, 90 and 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." We respectfully but strongly disagree.

These standard permit terms address permits for which water was once sufficiently available to issue these permits, but where conditions or circumstances have changed sufficiently to require modifications permanently (Term 80), 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."

Further, these standard permit terms have been available as tools to the Board for over twenty years. The *Delta Flow Criteria Report* is compelling evidence that these terms have not been successful in protecting fish and wildlife in the Delta and connected waterways. There is no evidence that Term 91, or Terms 80 or 90, will deal with the information that is disclosed in the *Delta Flow Criteria Report*. Science says that, in spite of these standard permit terms, too much water is still being diverted in the Bay-Delta system.

CSPA agrees with your letter of July 16 that the proposed new diversions by Davis, Woodland and U.C. Davis would be area-of-origin diversions. However, there is no evidence that this provides protection to fish and wildlife resources any more than would the standard permit terms. You state on page 2 of your letter: "If there is insufficient water to satisfy all demands, the DWR and USBR must either reduce its [sic] 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." As the last ten years have clearly shown, the projects have not reduced exports to offset increases in in-basin diversions. The projects, rather, have simply increased releases of stored water and continued to export at unprecedented levels, jeopardizing cold water pools in their reservoirs to meet oversubscribed contract obligations. Moreover, the projects have

successfully sought relaxation of water quality standards: Delta salinity standards, for example, were violated for a substantial portion of 2009, and Delta outflow standards were violated in early 2009. The concept of reducing exports in order to offset increased in-basin diversions is an illusion, for the simple reason that there is no fixed numeric limit on the amount of exports. The amount of water exported can be increased as quickly as it would hypothetically be reduced. The Board has never shown how increases in in-basin diversions could be enforceably offset by decreases in exports.

CEQA, Water Availability and the *Delta Flow Criteria Report*

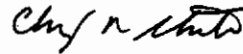
In our comments of February 3, 2010, CSPA referred to the 2007 EIR in support of applications 30358A and 30358B, not only for its deficiencies under CEQA, but also because it appeared to be the water availability analysis that the Board was relying on to determine that water was available for the project. The Board needs to distinguish between the CEQA purposes of the EIR and the use of the EIR to show that water is available for appropriation under these applications. Given that the modeling assumptions made in developing a water availability analysis for the EIR did not take into consideration the conclusions of the *Delta Flow Criteria Report*, the assumptions of that analysis, which found that the requirements of D-1641 and the 2004 Biological Opinions for OCAP were sufficient to protect fish and wildlife resources, cannot be accepted. Indeed, the continuing collapse of pelagic and salmonid fisheries is graphic evidence that D-1641 and the 2004 Biological Opinions dismally failed to protect that aquatic ecosystem of the estuary and its tributaries. A water availability analysis needs to be conducted that analyzes flow requirements for the Delta as we understand them today.

Additionally, the *Delta Flow Criteria Report* presents voluminous significant information that was not disclosed in the 2007 EIR. The fact that the State Board will present the *Delta Flow Criteria Report* to the Delta Stewardship Council in August, 2010, as required by the State Legislature, could not have been disclosed in that document. The State Board as a responsible agency is required to take into account this significant new information. The Board must also assure that this information and its impacts are disclosed to the public. Prior to ruling on the availability of water to support applications 30358A and 30358B, the Board should require that a supplemental CEQA document be issued that discloses how the flow requirements of the Delta as presented in the *Delta Flow Criteria Report*, could or will limit such availability of water.

CSPA requests a hearing

CSPA requests a hearing in order to submit evidence that there is damage to fish and wildlife under existing conditions due to insufficient Delta outflow, that more, not less flow through the Delta is required, and that there is no water available for appropriation to supply Applications 30358A and 30358B, as indicated by the *Delta Flow Criteria Report*.

Respectfully submitted,



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cc:

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