

California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

Chris Shutes, FERC Projects Director

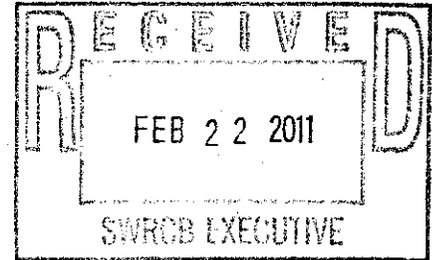
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February 22, 2011

Jeanine Townsend, Secretary
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
via e-mail



RE: Comment letter – 03/01/11 Board Meeting: WDCWA Draft Decision

Dear Ms. Townsend, Board Chair Hoppin, and members of the Board:

The California Sportfishing Protection Alliance submits the following comments on the February 15, 2011 Draft Decision on Water Rights Applications 30358A and 30358B of the cities of Woodland and Davis and the University of California at Davis.

We appreciate the opportunity to have presented testimony in the hearing on this matter that was held on January 18 and 19, 2011.

CSPA finds the Draft Decision to be unacceptable. Fundamentally, the State Board has not demonstrated that water is available to support the applications. In addition, we have several broad comments, though we shall not exhaustively discuss all of our issues. Finally, we have some technical corrections.

Technical corrections

In point 24 of the Draft Decision on the Davis - Woodland water rights application, it states:

On rebuttal, CSPA presented a table, Exhibit CSPA-CS#19, which, according to Mr. Shutes shows that the average annual diversion under WDCWA's permits would be only 2,356 acre-feet (af) of water if the Delta flow criteria were adopted. Neither party presented evidence to support what the maximum annual diversion would be under the Delta flow criteria.

In fact, the evidence referenced in the last sentence above can be found on the same table in Exhibit cspa-cs#19, the table that shows that Davis – Woodland’s average annual diversion under the Delta flow criteria would be 2,356 acre-feet (5.1% of the proposed face value of the permit). It is a simple arithmetic calculation to examine the projected monthly demand for each month that water would be available some of the time: **anything** more than zero. Since no water would be available to Davis – Woodland in the months of May through October, **ever**, the demand for those months must be excluded. Adding up demand in the remaining months, the maximum amount of water that could be diverted under the permits with the Delta Flow Criteria in effect would be 15,404 acre-feet in a water year.¹ Based on the probabilities for each month given in Exhibit WDCWA-104, the chances of achieving this level of diversion are infinitesimal. However, lack of likelihood does not seem to be of concern to the Board. It is apparently enough that “the evidence shows there would be **some amount of water available for diversion** if the Delta flow criteria were adopted.” (Ibid, emphasis added.)

CSPA also disputes the characterization that “water would still be available for diversion during December through March (a 4-month period) of **many** water years.” (Ibid, emphasis added). If this means that water would be available on at least one day in each of those months, the answer would be 13% of the time: less than one year in seven. There is no analysis in the record to support how often water would be available throughout the entire December through March period. However, based on the probabilities stated in Exhibit WDCWA-104, the likelihood for that also remains minute.

The Delta Flow Criteria Report should not be entirely dismissed as evidence because its recommendations may not be entirely adopted.

Neither the Draft Decision nor the applicant has contested CSPA’s testimony that “the [State Board’s own Delta Flow Criteria] Report concludes that Delta outflow is deficient by an average of about 5 million af to protect public trust resources.” (Ibid, point 23). This is not surprising: it is what the Board’s Report says. The modeling that supports this analysis (Exhibit cspa-cs#9) was performed for the State and Federal Water Contractors by the same modeler that, using CALSIM II, modeled water availability for Davis – Woodland (finding, for the Contractors, a disaster, but for Davis and Woodland, water available). The Draft Decision does not contest the effects of this deficiency on pollution and on fisheries as described in hearing by CSPA; these effects are described in the Report as well.

However, the State Board that commissioned and approved the Report now denigrates it: “... the report was only an informational report. In the Report, the Board clearly states that none of the determinations in the Report have regulatory or adjudicatory effect and

¹ The Draft Decision states: “it is clear that it is not possible for WDCWA to physically divert the full 45,000 af in a 4-month period of time because of the 80.1 cfs average diversion rate limitation.” (point 24). This is also incorrect. The limitation is the lesser of the maximum rate of diversion or the monthly demand; monthly demand for these months would, according to WDCWA’s own water availability analysis as presented in Exhibit cspa-cs#10, be less. Even the applicants’ witness appeared to be exasperated by Board staff’s repeated questions in hearing that showed failure to comprehend this simple point.

the Report is for informational purposes only. ... If the State Water Board develops new Delta flow criteria with regulatory effect, it must ensure the reasonable protection of beneficial uses, which may entail balancing of competing beneficial uses of water, including municipal and industrial uses, agricultural uses, and other environmental and instream uses.” (Draft Decision, point 25).

CSPA recognized in its August 16, 2010 request for hearing (Exhibit cspa-cs#18) that the Delta Flow Criteria Report was not adjudicatory. Rather, CSPA stated:

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. (Exhibit cspa-cs#18, p. 3).

In simply choosing, on an all-or-nothing basis, between an existing standard that the Board itself has extensively shown to be grossly inadequate, and a recommended standard that the Board not yet evaluated in a public trust balancing, the Board has ignored its own best evidence.

The Board should independently analyze water availability and systemic changes required to protect public trust resources.

It is the Board’s responsibility to show that water is available for appropriation. Yet it has done absolutely no independent analysis of water availability.

The Draft Decision does no more than punt on the issue of how the face value of water rights interacts with water availability. The Draft Decision makes no effort to identify how much water will actually be available to service the permit under the present application. The Draft decision also makes no effort to get a handle on how the face value of other water rights may limit water availability for the present application. It simply defers the whole issue, in point 41 of the Draft Decision, to licensing.

CSPA has serious concerns with the use of the CALSIM II model. However, if the Board proposes to rely on CALSIM II to analyze water availability, then the Board has an affirmative duty to engage the tool and independently evaluate water availability under various modeling scenarios, rather than simply rely on the alternatives that are selectively presented to the Board by water purveyors. CSPA, in responding to questions from the Board Chair on January 20, 2011, raised this point: if the 5 million acre-feet of deficiency identified by the Delta Flow Criteria Report is not likely to ultimately be on the table, the Board should model alternatives for an average increase in Delta outflow of 2 million and 3 million acre-feet per year. But the Board has done nothing of the sort. It apparently does not even have a modeler that can run CALSIM II.

In the absence of analysis, the Board has substituted process: the invocation of Permit Term 91. (See Draft Decision, esp. points 27 and 41). Yet without analysis, that

invocation is also defective. It assumes that, if more water is required for Delta outflow, the overall operation of the CVP and the SWP, including reservoir management and patterns of storage and diversion, will remain essentially the same, but with less water available. That assumption is not supported by substantial evidence. Indeed, in modeling the Delta Flow Criteria Report, MBK Engineers found that fundamental changes were likely to take place in the operation of the Projects, such as changes in reservoir storage and operation, and non-sustainability of various aspects of the priority system in the Sacramento River basin. (See Exhibit cspa-cs#9). Touting Term 91 as a "real-time mechanism for limiting diversion" does not address such systemic changes, or identify a qualitative tipping point of increased Delta outflow beyond which such systemic changes fundamentally alter operation of the Projects and diversion patterns in the Sacramento Valley.

Return flow and speculated future increases in groundwater inflow do not mitigate for diversion of water from the Sacramento River.

CSPA finds particularly objectionable the idea that water returned from wastewater discharge thirty miles downstream from the proposed point of diversion somehow makes up for the river water that is lost in the process. (See point 36). CSPA also questions the alleged benefits of potential increases in Yolo Groundwater subbasin contributions that may result from reductions in groundwater pumping by the cities of Woodland and Davis. (See point 37). First, increased quantity of inflow from either source assumes lack of alternative use of treated water, or of groundwater following reduction in groundwater pumping by the cities. Second, there is no evidence that water quality of such speculated increased inflow from either source will not degrade existing conditions. Regarding groundwater in particular, CSPA reminds the Board that it is in large measure the poor water quality of Yolo groundwater that has motivated the effort to secure the present permit.

The Board should clarify how watershed of origin statutes will assure an alternative water supply for the applicants when they cannot divert because of Term 91.

Point 39 suggests that the Board has identified a mechanism to assure that Davis and Woodland can obtain alternative sources of water when they are precluded from diverting by Term 91. The Board should clarify its understanding of the mechanics of such an assurance as well as the underlying principle. Should the Board ultimately approve the requested permit, the Board should also more explicitly require the implementation of such a mechanism.

The Board should require approval by the Board itself of alternative sources of water supply as stated in Draft Decision point 28.

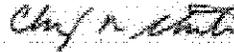
Point 28 of the Draft Decision delegates to the Deputy Director for Water Rights the authority to approve "an alternative source of water supply for use when Term 91 is in effect." Should the Board ultimately approve the requested permit, then, given the broad

legal and policy implications of such a finding, any approval of such an alternative should be made by the Board, and not be delegated to the Deputy Director.

The Board should deny the requested permit.

Water is not available to service the permit requested by Woodland and Davis. Approval of the permit based on water availability under existing flow requirements will only valorize and reinforce existing conditions. These conditions kill fish and degrade water quality in a highly impaired estuary and ecosystem.

Respectfully submitted,



Chris Shutes
Water Rights Advocate
California Sportfishing Protection Alliance