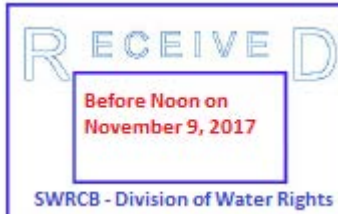




California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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CSPA Response to "Opportunity to Provide Input," Phase 2 of the Bay-Delta Water Quality Control Plan

The California Sportfishing Protection Alliance (CSPA) respectfully submits the following responses to the October 4, 2017 notice issued by State Water Resources Control Board staff entitled "Opportunity to Provide Input to Inform the Development of the Program of Implementation for the Phase II Update to the Bay-Delta Plan." This response reproduces each question in the notice and states CSPA's response immediately thereafter.

1. What specific provisions should be included in the program of implementation to ensure the expeditious implementation of the inflow and cold water habitat objectives?

In addition to the answers to (a) and (b) below, the Board should set a date for the initiation of Phase 3 of the update of the Water Quality Control Plan (modification of water rights), and stick to that date. In addition, consistent with the responsibility for meeting Delta inflow and outflow that D-1641 assigned to them, the Board should require the State Water Project and the Central Valley Project to implement their responsibilities under the new Program of Implementation immediately, during the pendency of Phase 3.

- a. How long should the State Water Board allow for voluntary tributary or regional plans to be developed and implemented to meet the inflow and cold water habitat objectives and what are the minimum provisions those plans should include to be acceptable?

CSPA has not supported the confidential voluntary agreement negotiations initiated by the California Department of Fish and Wildlife. The deadlines for these negotiations have been as ephemeral and unreliable as the deadlines for the Board's update of the Water Quality Control Plan. The Board should allow no longer than February 1, 2018 for parties to present the Board with defined elements of any proposed voluntary agreements. If and when any parties submit proposed agreements, the Board should hold hearings to evaluate the adequacy of these agreements, as part of the Board's ongoing regulatory process, and should conduct formal public trust balancing as required by law. The Board should not rely on answers to this questionnaire regarding minimum provisions to determine adequacy.

- b. What measures should the State Water Board take to implement the inflow and cold water habitat objectives if satisfactory voluntary tributary or regional plans are not developed?

The Board should complete the update of the Water Quality Control Plan, whether any parties reach voluntary agreements or not. The Board should consider any voluntary agreement in the overall context of the Plan update, not as a substitute for the Plan or for part of the Plan.

2. How should the State Water Board ensure that water released to meet objectives is protected through the system and not rediverted for other purposes?

The Board needs to require the modernization of the system of cataloguing water rights and real-time accounting for water diversions. The deficiencies in accounting became painfully obvious during the 2014-2015 drought years. Modernization will require the investment of tens of millions of dollars and the application of extensive technical expertise. In the interim, the Board should appoint a water accounting and auditing staff under the direction of the Delta Watermaster, to account for riparian and other diversions upstream of the Delta, and to monitor Delta inflow and diversions in the Delta, including the diversions of the state and federal water projects. Until the completion of Phase 3 of the Water Quality Control Plan, the State Water Project and the Central Valley Project should be responsible for releasing a buffer and/or cutting back on exports to assure compliance with Delta outflow requirements. In Phase 3 of the Plan update, the Board should consider adding additional responsibility for releasing such a buffer.

The Board should absolutely not rely on payments to assure adequate Delta outflow. Reliance on payments is inherently unreliable. It is also fundamentally inappropriate for the public to pay for water, or to rely on private payment for water, to protect the public trust.

3. What improvements should be made to measure compliance with the existing Delta outflow objectives (that are intended to be retained), and with the proposed new inflow- based Delta outflow objectives?

The Board should convene a technical committee to develop a replacement methodology for the Net Delta Outflow Index (NDOI) that D-1641 established. NDOI is notoriously inaccurate at lower outflows. While CSPA supports the concept behind “inflow-based outflow objectives” – that water released for instream resources should not be diverted for other purposes – CSPA does not support the application of these objectives as proposed in the Final Scientific Bases Report for Phase 2 of the Bay-Delta Plan. As written, the Report proposes outflow requirements that are unenforceable because the requirements are bound up with multiple adaptive management entities all engaging in various forms of flow sculpting, real-time adjustments, and other actions. In combination, it is not clear what the outflow requirements will be at any given time, how anyone will comply with them, and who will be responsible for such compliance. This unnecessary level of complication will not optimize the use of water. It will create an endless scrum among diverse entities all trying to meet their own vision of operations in individual watersheds, with some other unknown entity trying to make sense of what outflow standards are on a given day and trying to figure how to enforce them. The Board should define numeric outflow objectives and should define who is responsible for meeting them. Limited use of a

running average to true up outflow actual outflows and outflow requirements is a necessary tool for responsible operators to meet outflow requirements.

4. Understanding that the proposed outflow objective is derived from the inflow objective but will require some accounting methodology to accommodate Valley floor and Delta accretions and depletions and floodplain inundation, how should implementation and compliance with the new inflow and inflow-based Delta outflow objectives be coordinated?

Please see answers to questions 2 and 3. The Board should not ask stakeholders to answer a problem that the Board has unnecessarily created. The concept of “inflow-based Delta outflow objectives” prioritizes equity among water rights holders over equity between diversions and the public trust. This prioritization is wrong. In this regard, it fundamentally misapplies the CalTrout and Light decisions on the public trust. It is also deficient under the Clean Water Act because the conditions are not enforceable.

5. What approach should the State Water Board use to transition from the current Delta outflow objective in Table 4 of the 2006 Bay-Delta Plan to a new inflow-based Delta outflow objective to ensure that Delta outflows are not reduced while the tributary inflow requirements are being implemented?

As noted above, until the completion of Phase 3 of the Water Quality Control Plan, State Water Project and the Central Valley Project should be responsible for releasing a buffer and/or cutting back on exports to assure compliance with Delta outflow requirements. This will have the added benefit of creating an incentive for the Projects and their contractors to expedite, rather than delay, completion of Phase 3.

6. How should the State Water Board account for flows provided for floodplain inundation to benefit native species?

At first blush, the intent of this question is not clear, because it is overly broad. For example, floodplain inundation can occur along tributary corridors, where accounting is relatively straightforward: it is accounted for as flow released from the respective tributary control points or flow that passes downstream control points if the Water Quality Control Plan defines such downstream points. One way to account for both may be to have requirements for both release points and points downstream at the bottom of tributaries to the San Joaquin and Sacramento rivers.

We will assume the thrust of the question goes to how to account for water that passes down the Yolo Bypass in terms of Delta inflow and outflow. The answer to this problem depends in part on how the Water Quality Control Plan defines Delta inflow and outflow requirements, and the question is thus in some measure premature. In addition, Delta inflow through the lower Sacramento River between Freeport and Rio Vista is important in its own right because of known fish migration routes and patterns. Thus, there need to be separate requirements for inflow through the Sacramento River (at the Freeport gage, for example) and floodplain inundation flows for the Yolo Bypass. Inflow to the Yolo Bypass is currently gaged or at least

accounted for by mass balance; the Board can check with USGS on this issue. In terms of contribution to Delta outflow, water leaving the Yolo Bypass at the Cache Slough complex can be accounted for at the Rio Vista gage; differentiating it from in-river inflow likely involves a mass balance calculation that accounts for in-Delta diversions, flow through the Delta Cross Channel and Georgiana Slough, and the like.

Again, this question seems to be in part a construct of defining outflow by somehow tying it to inflow, and seeks to answer a problem that the Board has unnecessarily created. Flow that enters the Yolo Bypass can be accounted for, at least to some degree. Flow that leaves the Yolo Bypass passes Rio Vista. It is difficult to account for the transit time of water in the Yolo Bypass; it is not clear why accounting for this transit time is necessary.

7. How should the State Water Board structure adaptive management for the new objectives?

The new objectives should not rely on adaptive management. They should be clear in their own right on a stand-alone basis.

Adaptive management in any situation must define specific measures to improve outcomes based on performance in achieving specific, pre-established biological goals. The decision space for such measures must be clearly delineated, limited, and pre-defined. Regulatory staff (for instance, from the Water Board) must not participate in adaptive management of any decisions over which the regulatory agency has regulatory authority. Participation of staff from water agencies or water users must be balanced by participation of qualified staff representing public interest groups. The regulatory agency must formally review adaptive management decisions in a formal public process that allows opportunity for hearing.

Adaptive management should manage how responsible entities comply with water quality objectives, not whether they must comply with water quality objectives or whether such objectives should be reduced.

8. How should the State Water Board ensure that non-flow measures included in voluntary tributary or regional plans are implemented in a timely and effective manner?

The Board should ensure compliance with non-flow measures by incorporating them into water rights in Phase 3 or Phase 4 of the Water Quality Control Plan, and/or by incorporating them into water quality certifications for new FERC licenses where applicable. The Board should specify alternative flow objectives that require greater flow if non-flow measures are not implemented by a date certain.

9. What specific drought measures should be included in the Bay-Delta Plan?

The flow requirements of the Bay-Delta Plan should explicitly set flows and water delivery limits for dry years and dry year sequences. The Board should not deviate from these flow requirements. The Bay-Delta Plan should also set carryover storage requirements for major Central Valley reservoirs. The Plan should enforce carryover storage requirements by reducing allowable diversions when operators do not meet these carryover storage requirements.

10. What should be the threshold for triggering drought measures?

The flow requirements of the Bay-Delta Plan should explicitly set flows and water delivery limits for dry years and dry year sequences. The Board should not deviate from these flow requirements.

11. How could the State Water Board incentivize creative voluntary drought measures?

The greatest incentive to voluntary drought measures is the threat of curtailments. The Board should create the necessary accounting system in order to accurately and effectively catalogue water rights and account for diversions on a real-time basis, as suggested in the answer to Question 2, above.

It is important to note that the oversubscription of many watersheds cannot be solved by voluntary drought measures. Many watersheds are so oversubscribed that the Board must use its public trust, public interest and reasonable use authorities to reduce diversions in those watersheds, and not only in drought years. Modification of water rights and/or setting limitations in water quality certifications for FERC projects are the most reliable methods for reducing oversubscription. In regard to water rights, water right priority is important, and the Board should respect it where possible. However, public trust, public interest and reasonable use considerations may at times override strict adherence to the priority system, particularly in cases where senior water rights control very large percentages of a watershed's annual runoff. The most egregious cases occur where holders of such senior rights routinely sell large amounts of water to junior diverters on the transfer market.

Conclusion

Thank you for the opportunity to respond to the notice entitled "Opportunity to Provide Input to Inform the Development of the Program of Implementation for the Phase II Update to the Bay-Delta Plan."

Respectfully submitted,



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