

Witness Testimony¹**Bill Jennings, California Sportfishing Protection Alliance****Water Rights Hearing Regarding Proposed Revocation of Auburn Dam Project Permits****July 21 & 22, 2008****Before the State Water Resources Control Board**

The purpose of my testimony is to place in context some of the events that have transpired subsequent to the 1970 issuance of water rights permits 16209, 16210, 16211 and 16212 (permits) to the U. S. Bureau of Reclamation (Bureau) and some of the adverse impacts that are likely to occur in the Sacramento-San Joaquin Delta Estuary (Delta) should the State Water Resources Control Board (State Board) fail to revoke the permits. Further, the Bureau has failed to exercise due diligence or make reasonable efforts to comply with previous deadlines. The Auburn Dam project can no longer be considered to be in the public interest. Justification for the permits no longer exists and satisfactory progress cannot be made. While a remnant of Auburn Dam proponents may hope for divine resurrection, the Congress of the United States has already conducted last rites.

Over Appropriated Water

It is, perhaps, worth noting that the State Water Resources Control Board (State Board) has identified some 524,192,837 acre-feet of direct diversion and storage of water in California.² Additionally, there are some 7,352,603 acre-feet of pending applications before the State Board. By contrast, California's water balance³ is 64.8 MAF (dry year, 2001), 82.5 MAF (average year, 2,000) and 94.5 MAF (wet year, 1998).⁴ There is clearly a serious disparity between existing pre-1914 and appropriated water rights and real-world water that is actually available for consumptive use. The State Board has authorized the use of far more water than can ever be delivered. Indeed, the 4.5 MAF of diversion authorized by the subject permits is almost as much water as the total annual average water exported from the Delta by both the State Water Project (SWP) and the Central Valley Project (CVP) during the 1990s.⁵

¹ Jennings/CSPA Exhibit 3.

² Draft *California Water Board's Strategic Plan Update 2008-2012, Appendix 3 (Pie Chart)*. Jennings/CSPA Exhibit 3A.

³ The water balance is the balance between water sources (including groundwater, recycling and reuse, and imports from Colorado) and applied water (irrigated agriculture, urban, wild & scenic rivers, managed environment) in California. It does not include the approximately 120 MAF of water that evaporates, is used by native vegetation or rainfall on cropland and managed wetlands.

⁴ *Department of Water Resources Bulletin 160-05, December 2005, page 2*. Jennings/CSPA Exhibit 3B.

⁵ SWP average exports during the 1990s = 2.305 MAF; CVP = 2.219 MAF; Total = 4.675 MAF. Jennings/CSPA Exhibit 3C.

Monumental Changes Since 1970

Since the subject permits were originally approved thirty-seven years ago, enormous and unforeseen changes have occurred in the Delta and its tributary waterways. These include:

1. Significant increase in SWP and CVP exports.

For example, average annual SWP and CVP exports in the 1970s were 1.430 MAF and 2.141 MAF, respectively. Average exports in the 1980s were 2.425 MAF (SWP) and 2.519 MAF (CVP). During the 1990s, exports were 2.305 MAF (SWP) and 2.219 MAF (CVP). Exports dramatically increased between 2000 and 2007 to an annual average of 3.251 SWP and 2.590 MAF (CVP). Additionally, average annual exports to Contra Costa WD and the North Bay Aqueduct significantly increased from 90 TAF and 0 TAF, respectively, in the 1970s to 120 TAF and 48 TAF in the 2000s. In other words, total average annual exports from the South Delta increased from 3.662 MAF during the decade following approval of the subject water rights to an annual average of approximately 6.008 MAF between 2000 and 2007.

2. Subsequent to approval of the subject permits, numerous species dependant upon the Delta and the Sacramento/American River have been listed pursuant to state and federal endangered species Acts.⁶

These include: Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha* - federal and state listed as threatened); Central Valley steelhead (*Oncorhynchus mykiss* -federal listed as threatened); winter-run Chinook salmon (*Oncorhynchus tshawytscha* - federal and state listed as endangered); fall/late-fall-run Chinook salmon is both a federal and California species of concern; delta smelt (*Hypomesus transpacificus* - federal and state listed as threatened); Sacramento splittail (*Pogonichthys macrolepidotus* – proposed federal listed as threatened, California species of concern); green sturgeon (*Acipenser medirostris*) - federally listed as threatened and California species of concern; longfin smelt (*Spirinchus thaleichthys*), hardhead (*Mylopharodon conocephalus*) and Sacramento perch (*Archoplites interruptus*) are identified as California species of concern; river lamprey (*Lampetra ayresi*) and Kern brook lamprey (*Lampetra hubbsi*) are federal and state species of concern and the Pacific lamprey (*Lampetra tridentate*) is a federal species of concern.

3. The Delta has experienced a catastrophic collapse of pelagic fish species.⁷

⁶ CSPA/CWIN Public Trust, Waste and Unreasonable Use and Method of Diversion Complaint presently pending before the State Water Resources Control Board, May 2008.

⁷ *Ibid*

The Delta's pelagic fisheries are experiencing catastrophic collapse. The California Department of Fish and Game's Delta Summer Tournet Survey and Fall Midwater Trawl Survey show indices (measures of relative abundance) for delta smelt, longfin smelt, Sacramento splittail, threadfin shad (*Dorosoma petenense*) and young-of-the-year striped bass (*Morone saxatilis*) to be at historic or near historic lows. Native phytoplankton production in the estuary has decreased about one order of magnitude while zooplankton production is down one to two orders of magnitude.

The special team of federal and state scientists investigating the pelagic organism decline in the Delta has identified entrainment at the state and federal project pumps and toxic pollutants as two of the three major suspected causes of the collapse of these pelagic fisheries. The third suspected cause is identified as food web changes, partially caused by invasive species. Relative abundance of these introduced species is likely related to changes in the balance of fresh and saline waters.

4. The Central Valley's long-term decline in salmonid escapement has accelerated.

The listing of winter run and spring run Chinook salmon as either threatened or endangered and the listing of steelhead as threatened along with the identification of fall/late-fall-run Chinook salmon as a federal and California species of concern evidences that salmonid species in the Central Valley are at serious risk. CVPIA doubling goals for salmonids seem out of reach. The recent dramatic drop in salmon escapements (from 800,000 in 2002 to 88,000 in 2007 to an estimated 58,000 in 2008), that led the Pacific Fishery Management Council and California fish and Game Commission to close the 2008 ocean commercial and sport fishing season and virtually close the Central Valley sport fishing season, indicates a potential acceleration in the decline of the salmonid fisheries. The fact that only 2,000 jacks returned, compared to a long-term average of about 40,000 and previous record low of 10,000 indicates the decline will extend into the future. It should be noted that, while multiple factors are likely in play, the recent tailspin coincided with record export levels in 2003 (6.32 MAF), 2004 (6.15 MAF), 2005 (6.47 MAF) and 2006 (6.32 MAF).

5. The Delta has been identified as impaired and incapable of supporting identified beneficial uses pursuant to the federal Clean Water Act.

Delta waterways have been included, pursuant to the federal Clean Water Act, on the California 2002 and 2006 CWA Section 303(d) List of Water Quality Limited Segments as incapable of supporting identified beneficial uses because of diazinon, chlorpyrifos, Group A pesticides, DDT, mercury, electrical conductivity, unknown toxicity and dissolved oxygen

deficiencies. With the exception of electrical conductivity (salt), these impairments were unknown when the subject water rights were approved. None of these identified impairments have been successfully eliminated.

6. The Delta has been identified as a Toxic Hot Spot for mercury, pesticides and low dissolved oxygen pursuant to California's Bay Protection and Toxic Cleanup Program.

In 1989, the California Legislature established the Bay Protection and Toxic Cleanup Program to identify and cleanup toxic hot spots. The State Board identified the Delta as a toxic hot spot for mercury, low dissolved oxygen in the Stockton Ship Channel and pesticides from agricultural return flows and dormant spray runoff and urban runoff in the Stockton and Sacramento area in 1999. The Central Valley Regional Board was granted variances for the pesticide cleanup plans. Following a successful lawsuit by Deltakeeper and Bill Jennings, revised pesticide cleanup plans were adopted in 2003. It should be noted that neither the State Board nor the Central Valley Board have yet complied with the explicit requirements of Water Code § 13395 to revise waste discharge requirements to ensure elimination of toxic hot spots.

7. Continued population increases in the Central Valley have led to significant increases in the mass loading of pollutants into the Delta.

California's population has almost doubled since the subject permits were adopted: increasing from 19,953,134 in 1970 to almost 38 million today. The Central Valley is one of the fastest growing areas of the state. Waters from north of Redding to south of Fresno gather in the Delta. Renewals of municipal wastewater NPDES permits routinely allow significant increases in pollutant mass loading; often exceeding the identified assimilative capacity of receiving waters. As an example, the Regional Board will shortly circulate a tentative NPDES permit for the Sacramento Regional Wastewater Treatment facility. That permit renewal will inevitably include substantial increases in pollutant mass loading into the Sacramento River.

The Delta has experienced significant increase in the ambient concentration of an array of pollutants; some exceeding water quality objectives, some below the threshold. However, the potential harmful consequences of synergistic and additive interactions, bioaccumulative toxins, sublethal or chronic impacts and the cumulative effects of multiple stressors remain largely unidentified and unaddressed. Further, it is an inescapable fact that water quality standards have never been promulgated for a large number of known and potentially harmful constituents.

Flip Sides of the Same Coin

It must be remembered that water quality and water quantity are irrevocably connected and can be characterized as flip sides of the same coin. Alterations of instream flow, through upstream diversion or changes in the natural hydrograph, inevitably alter the assimilative capacity of downstream waters. Reductions in assimilative capacity will adversely impact habitat and water quality. In other words, diversion of relatively good quality American River water at Auburn Dam water increases the concentration of pollutants in downstream waters. While the potential impacts may be difficult to quantify, they are inescapable; toxic pollutants will become more toxic, impacts to an already degraded estuary will increase.

The Permits Would Not Likely be Authorized Today

Given the over-appropriation of water in California, massive increases in SWP and CVP export levels, grievous degradation of the Delta and its tributary waters, precipitous declines in pelagic and salmonid species and pervasive impairment of water quality; it is virtually impossible that the permits could be issued today in their present form. Awareness of this reality is a likely contributing factor to the Bureau's failure to comply with repeated requests by State Board staff to provide the updated CEQA/NEPA documents required for consideration of a time extension.

It is highly improbable that the Bureau would reserve a significant percentage of project yields for fisheries and water quality protection. The vast majority of water collected pursuant to the Auburn water rights would be diverted upstream for consumptive use or committed to support SWP and CVP export programs. However, the East Side Canal is but a footnote in memory. EBMUD, Placer County, El Dorado County, Sacramento County and even San Joaquin County have either made or have the potential to make alternate arrangements.⁸ Sensitive life stages of listed species are present in the Delta every month of the year. Present export levels are constrained by recent court decisions and those constraints may increase in the future. It is highly problematic that the Bureau could ever put the majority of the subject water rights to consumptive beneficial uses within a reasonable timeframe. Conversely, it is clear that, if the Bureau were ever able to exercise their Auburn water rights, existing problems in the downstream American/Sacramento Rivers and Delta would be exacerbated.

The Permits Should be Revoked

I do not need to repeat the factual information contained in the Notice of Proposed Revocation, Stipulation to Facts and the excellent testimony prepared by Ron Stork of Friends of the River and Chris Shutes on behalf of CSPA. I incorporate those facts and testimony in these comments.

⁸ Testimony of Chris Shutes, pages 4-6.

The bottom line is that Bureau has failed to justify an extension of time. It has not exercised due diligence. It did not comply with permit mandates to timely construct Auburn Dam and put its water rights to beneficial use. It refused to provide requested and required information to the State Board. The will of Congress cannot be construed as an obstacle that can be reasonably avoided. The public interest cannot be served by the exercise of water rights that are likely to significantly exacerbate existing environmental problems. Satisfactory progress cannot be demonstrated or projected for a project that no longer exists.

The ultimately reality is that the foundational project that provided the rationale for the 1970 issuance of the subject water rights has expired. Since construction was stopped, more than 32 years ago, Congress has rejected the project 13 separate times.⁹ Auburn Dam is dead, the autopsy is over and the site has been restored. There is no continuing justification for these water rights.

The State Board should revoke permits 16209, 16210, 16211 and 16212.

I note that the proposed revocation is without prejudice. Should an offspring of Auburn Dam rise magically from the ashes, the State Board will have the opportunity to evaluate any new proposal in light of present-day realities. But if the State Board cannot rescind permits that have never been put to beneficial use for a project that ceased construction in 1975, it is improbable that the Board will ever be able to meaningfully deal with the more difficult and intractable problems that lie in the future.

Thank you for considering these remarks.

23 June 2008

Respectfully,



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⁹ Testimony of Ron Stork.