



California Sportfishing
Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

May 18, 2009

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P.O. Box 100
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Subject: Comment Letter – 05/19/09 Board Meeting: Reclamation/DWR CPOU Draft Order

Dear Members of the State Water Resources Control Board:

Thank you for the opportunity to participate in the recent evidentiary hearings concerning the Petition of the California Department of Water Resources (DWR) and the US Bureau of Reclamation (USBR) to consolidate the place of use of license and permits of the State Water Project (SWP) and the Central Valley Project (CVP) in response to alleged drought conditions in the Central Valley, including the 2009 Drought Water Bank project.

The California Water Impact Network (C-WIN) and the California Sportfishing Protection Alliance (CSPA) urge denial of the above Petition and are deeply disappointed that the State Water Resources Control Board (SWRCB) proposes to approve the above Petition with conditions. The Draft Order by the SWRCB fails to confront more fundamental issues raised in our respective testimonies provided to the hearing record on April 27, 2009. These include:

- The Governor's drought emergency declaration does not withstand empirical confirmation or legal scrutiny.
- The proposed Petition has not benefited from adequate environmental review under either CEQA or NEPA. We note here that the SWRCB's Draft Order, if adopted, would be based on the same inadequate environmental reviews.
- The Petition's proposal to consolidate places of use for the SWP and CVP is a policy issue requiring state and federal legislative authority. We believe that the SWRCB does not have the legal authority to approve this Petition. This is important because, as Board Chair Charles Hoppin pointed out on the record for April 28, 2009, "I think we would be very naïve if we didn't assume that by granting this Petition, or a portion of it, certainly that we wouldn't be developing a template for a more permanent change of some sort, whether in drought conditions [or] under permanent conditions..." (Hearing Transcript, April 28, 2009, page 73.)

In the Central Valley, dry or critical runoff conditions occur about 33 percent of the last 103 years of California hydrological history in either the Sacramento Valley or San Joaquin Valley. They occur in both valleys simultaneously 28 percent of the time over this historical record. When confronted with merely "dry" conditions in 2009, why is it necessary for the state and

federal government to suspend critical environmental protection statutes to deal with an entirely predictable event (in a policy sense)? Dry or critical conditions are regular occurrences and occur with even greater frequency since 1960. Yet this is the first time in seeking a Drought Water Bank that the State of California has sought to avoid compliance with the California Environmental Quality Act. For none of the Drought Water Banks of the early 1990s did the state and federal governments seek to operate the projects with both joint points of diversion and consolidated places of use. Yet these drought relief efforts went forward without apparent difficulty. The matter of what has changed since that time is not addressed by either the SWRCB, DWR, USBR, or the main beneficiaries of the Petition, the San Luis Delta Mendota Water Authority and the Westlands Water District. These issues are hardly peripheral as State Board members have characterized them, but are central to public understanding about the significance of the Petition. We believe that the Board's unwillingness to recognize them as such reflects the degree to which the Board's authority and quasi-judicial independence has been politically compromised.

We are profoundly concerned that the "more permanent change" Chair Hoppin alludes to is the permanent establishment of a unified water market, for which the Consolidated Place of Use Petition before the Board at this time would establish the quasi-judicial precedent, and the precedent of using specious exemptions from CEQA to facilitate its creation. We are concerned that such an action will cede ever more control over both the SWP and the CVP to state and federal water project contractors (particularly the Westlands Water District and other districts that hope to take advantage as either buyers or sellers of water in a water market), without meaningful public debate or legislative authorization. Approval of the Petition is necessary neither to operate the Drought Water Bank in 2009 nor to accomplish transfers as have been publicly disclosed to date; existing laws and programs are sufficient. We are concerned that a great many more transfers wait in the wings for approval of the Petition before being unleashed on the public as accomplished facts, beyond public control or recourse beyond litigation.

If the Board still insists on approving the Petition to grant the precedent of a unified water market facility that gets around established water right priorities then we recommend you do so in the most gradual, incremental, and protective fashion—knowing that such action is still vulnerable to legal challenge. In this light, we appreciate that within the conditions of the Draft Order you limit the scope of the Petition in certain ways:

1. Clarifying that Petition transfers occurring after January 1, 2010, shall only be allowed when completing exchanges of water transferred prior to that date, and that all exchanges must be completed by October 31, 2010. We appreciate that you require a summary report on Petition activities through December 31, 2009, due on January 31, 2010, including a report of all transfers and exchanges completed under this order (Condition 2).
2. Requiring DWR and USBR to submit detailed monthly reports as well (Condition 3).
3. Limiting transfers to the Drought Water Bank that cross the Delta for export to San Joaquin Valley recipients to no more than 16,000 acre-feet (Condition 4).
4. Requiring DWR and USBR to operate their projects in accord with the 2008 Delta smelt biological opinion required by the US Fish and Wildlife Service (Condition 5).

5. Requiring DWR and USBR to monitor streamflow and salinity during the period of time the Order is in effect (Condition 10).
6. Providing for continuing jurisdiction of the SWRCB under its public trust obligations, and the constitutional prohibition on waste and unreasonable use, method of use, and method of diversion of water over the license and permits included in the Petition (Condition 11).
7. Authorizing no actions under the Petition that would result in takings of threatened, endangered or candidate species under either the California Endangered Species Act or the federal Endangered Species Act (Condition 12).

Our comments in this part of the letter are intended to address our larger concerns within the framework of a Draft Order we do not otherwise support, in order to make what we see as a dangerously unprecedented situation less dangerous to endangered species affected by potential stream flow changes and altered irrigation practices, and communities dependent on groundwater supplies in the Sacramento Valley.

Through-Delta Transfers Under the Petition

The SWRCB's Draft Order characterizes our concerns as tied necessarily to whether Drought Water Bank and Petition quantities of water transferred would exceed historical averages. Historic averages are not the appropriate baseline to apply to the analysis of the Petition. Moreover, the Petition's proponents included inadequate information about the scale and timing of transfers called for in the Petition until finally providing some information at the evidentiary hearings. The Draft Order, unfortunately, parrots the Petition's dismissal of potential concerns that transfers passing through the Delta or within areas south of the Delta would not exceed "historic averages" of exports. If by "historic averages" is meant the average annual deliveries to SWP and CVP contractors of 6.4 million acre feet from 2000 to 2008, then the transfers contemplated in the Petition of course amount to but a puddle. But the SWRCB, DWR, and USBR provide this as a straw man. "Historic averages" remains an extremely vague and inappropriate environmental baseline on which to base the SWRCB's Draft Order, since it is these very deliveries, including some 5.9 million acre-feet of Delta exports on average during this same period, that correlates so closely with the pelagic organism decline and the closure of commercial salmon fisheries in 2008 and 2009. These are the highest decadal averages of exports and deliveries since the combined operation of SWP and CVP Delta pumping facilities began in the 1970s. Instead, the SWRCB should be considering the increment of impact as the "no project" baseline: what is the impact of these transfers as compared with the situation of not approving the Petition *at this time*?

The SWRCB's Draft Order states (page 7) that all of the protestants' environmental concerns "are predicated on the assumption that approval of the Petition will cause an increase in transfers through the Delta. To the contrary, undisputed evidence in the record establishes that approval of the Petition will not cause an increase in through-Delta transfers, as explained below." This is beside the point, and mischaracterizes the concerns of both C-WIN and CSPA. Mssrs. Jennings, Stokely, and Stroshane consistently stated the illegality of the CEQA exemption, the inadequacies of the environmental documentation provided, and the lack of transparent

information in the Petition about actual quantities of transfers proposed in both the Drought Water Bank and the other eight transfers described in the Petition; these assertions were documented with exhibits (see especially Exhibit C-WIN-1H, “Comments on Environmental Reviews for the 2009 Drought Water Bank.”). We stated to the Board that the SWRCB does not reasonably have sufficient project and environmental information to make sound decisions leading to this Draft Order. Nor does the Board rely on a legal application of CEQA to the proposed project before it. We informed the SWRCB that there was no way to know just how much water would be transferred through the Petition. No assumption of *increased* transfers through the Delta is required to sustain these concerns; we believe the SWRCB misreads our testimony. To approve the Petition under these circumstances is just like writing a blank check—the actual amount would be filled in later by DWR, USBR, and various unspecified parties to water transfers, but the State Water Resources Control Board would provide its authorizing signature in advance.

Our testimony was prepared in advance of the hearings and could therefore rely only on the content of the publicly available Petition. Therefore, in the absence of advance knowledge of SWRCB conditions of approval and information, we necessarily had to advocate against a blank check for water transfers and exchanges, especially since the inadequate environmental reviews provided by DWR and USBR provide up to 600,000 acre-feet of transfer potential through the Drought Water Bank alone. (The US Fish and Wildlife’s biological opinion focusing on the Giant Garter Snake comes in with a figure under 400,000 acre-feet, but we note that its opinion is predicated for only one year’s worth of drought water bank activity, and not the entire course of the Petition transfers and exchanges ending in October 2010.) Had precipitation, runoff, and reservoir storage conditions worsened instead of improving this spring as they have, this much environmental authorization could have been disastrous, especially since the Drought Water Bank is on a fast track for approval.

In this context, we reiterate our appreciation that in proposing to approve the Petition, the SWRCB “will impose a 16,000 acre-foot limit on the amount of water that Petitioners may transfer through the Delta under their water rights and deliver to the consolidated place of use pursuant to this approval.” (Draft Order, page 8.) However, we recommend that the SWRCB revise Condition 4 of the Draft Order as follows:

4. This approval is limited to the transfers and identified and described in the subject Petition for the Drought Water Bank that meet the criteria set forth in conditions 2, 5, 6, 7, 8, and 9 of **this order to a maximum of 16,000 acre-feet**. In addition, this approval does not extend to any transfers to the 2009 Drought Water Bank under DWR’s or Reclamation’s water rights in excess of a total of 16,000 acre-feet **transferred through the Delta and exported by the SWP and CVP facilities**. [No further edits to this Condition.]

We believe this change reconciles language on page 8 of the Draft Order with the language of Condition 4 on page 13, which we regard as insufficiently clear about the Board’s stated intent on page 8. We request the SWRCB include these edits when they adopt the Order on May 19th.

Transfers and Exchanges South of the Delta

The SWRCB states in the Draft Order that “the record contains no evidence that approval of this Petition will in fact cause water to be delivered to drainage-impaired lands, or cause an increase in agricultural discharges.” We note that the record contains no evidence that approval of this Petition will in fact cause water NOT to be delivered to drainage-problem lands or drainage-impaired lands, since the very water districts with low allocations from the CVP and the SWP are those on the western side of the San Joaquin Valley where there are naturally high concentrations of salt and trace metals that have historically impaired west-side San Joaquin River tributaries as well as the River’s mainstem.

“In addition,” the Draft Order continues, “water will not be delivered to lands that have not been irrigated in the past, and any increase in agricultural drainage that might occur will not exceed the historic averages.” (Draft Order, page 8.) Our comments above on “historic averages” apply here as well. The point is not whether the transfers and exchanges of the Petition might exceed “historic averages” but whether they continue irrigation practices on agricultural lands that have been cited in the by the SWRCB as a public nuisance in the absence of resolving the western San Joaquin Valley’s drainage issues, and which represent a likely violation of the state’s constitutional ban on waste and unreasonable use of water. Moreover, some lands may not be “drainage impaired” from high groundwater, but still contribute to contamination of deeper aquifers, and/or saturation of lower-lying lands, and are thus “drainage-problem” lands. Evidence submitted in C-WIN Exhibit 3P demonstrates that irrigation of soils in the western San Joaquin Valley creates contaminated drainage water, regardless of the disposition of the drainage water created. The issue is not “historic averages” of drainage water, but what the additional drainage created would be in the absence of Petition approval. We believe the additional drainage created would be far less this year than might otherwise occur should the Petition be denied, especially given historic average deliveries to water districts in areas with these drainage problem lands.

Potential Future Transfers

The Draft Order acknowledges that many hearing participants “expressed concern”— more like profound frustration—regarding the unknown impacts of potential future transfers that are not specifically identified in the Petition...”

In our view, approval of the Petition’s “Future Projects” provision (Petition Supplement, page 9) would mean that DWR and USBR’s “parameters” would become operative. They state, in pertinent parts:

- A. For any project involving a transfer of SWP or CVP water through the Delta, DWR and Reclamation will continue to operate the Projects in accordance with the 2008 delta smelt biological opinion, which analyzed the effects of a maximum of 600,000 acre-feet of transfers exported only from July through September.

...

- C. The total quantity of water delivered to SWP or CVP contractors as a result of the

change will not exceed historic average deliveries.

Parameter A especially gave our organizations pause about the Petition. Here the Petition is stating that the 2008 Delta smelt biological opinion (BO) by the US Fish and Wildlife Service provides the overall projects in the Petition with up to 600,000 acre-feet of potential environmental authorization.

No “future projects” are specified in the Petition, and between now and the period of July through September when the BO provides authorization, *many transfers could come forward that would not operate through the Drought Water Bank that were never subject to adequate environmental review.* If these transfers come forward, approval of the Draft Order would enable them to receive only the barest of SWRCB review by the Executive Director. Our organizations believe the SWRCB would be vulnerable to legal challenge on this point, and for many reasons.

The Draft Order limits 2009 Drought Water Bank through-Delta transfers to a maximum of 16,000 acre-feet. It appears *this limit would not apply to through-Delta transfers that were not routed through the Drought Water Bank, but which could nonetheless be wheeled through SWP and CVP Delta pumps and delivered in either project’s service area during the critical July through September period this summer.* As we understand the Petition, this could occur through “multi-party exchanges,” as well as the “Future Projects” component of the Petition where either SWP or CVP contractors could be involved as sellers of water, including contractors north of the Delta. Unless our recommended cap on the Petition of 16,000 acre-feet (see above) is included in your adopted Order, an additional 584,000 acre-feet could potentially be transferred under the auspices of the Delta smelt biological opinion and the (we believe) spurious reliance on the 2007 Environmental Water Account Supplemental Environmental Impact Statement/Report, and which could be delivered to water service contractors in either state or federal service areas. We are very concerned, as described in our testimony and exhibits, that if transfers at this scale come forward, the effects on groundwater pumping in the Sacramento Valley could be significantly adverse, that effects on the giant garter snake could be significantly adverse, and the potential effects on Sacramento River tributary streams and salmonid habitat could also be significantly adverse. There are no assurances in either the Draft Order or the Petition that such effects would be adequately mitigated or avoided altogether. That this amount of water is lower than historical averages shown in Exhibits 1 and 2 to the Petition is in our view once again beside the point: SWRCB approval of the Petition would authorize an unprecedented engineering of a unified California water market, however briefly allowed, without state or federal legislative authorization, and if events unfold differently than disclosed by DWR and USBR staff in the evidentiary hearings, then mitigation measures will not be available or effectively deployed to protect these resources. In other words, the consequences of DWR, USBR, and SWRCB being wrong on trends in the California water market this summer could be severe for groundwater resources (and communities and farmers reliant on it) and listed species we discussed in our testimony, our exhibits, and in our comments on environmental review documents.

Monitoring and Reporting

Conditions 2 and 3 require DWR and Reclamation to submit a reporting plan for approval of

SWRCB's Deputy Director for Water Rights prior to operations and to provide monthly reports and a consolidated final report on the activities that would be subject to the Order once adopted. We note with appreciation that SWRCB specifically requests monthly reporting by the Petitioners, which exceeds our requested quarterly reports. As drafted, these conditions call for reports to include only the parties involved, the amount of water, the dates the transfer or exchange began and ended, the original point of diversion of the water, and the original and changed places of use. Places of use should be specifically defined in Conditions 2 and 3 to include the names, addresses and property locations of end users of Petition water—the actual beneficial users of water provided through these transfers and exchanges, particularly when irrigation users are involved. If the SWRCB intends to make and condone special exceptions to state laws for the sake of the San Luis Delta Mendota Water Authority and Westlands Water District, the California public is entitled to know *exactly who* is benefiting from the State's actions. We therefore recommend the Board add prompt notification and disclosure of the reports to the Petition's protestant list, and prompt uploading of the reports online for public access to Conditions 2 and 3 of the Order prior to adoption.

We also recommend including reporting requirements in these conditions on all transfers and exchanges under the Order indicating whether joint point of diversion was employed in the activity, the quantities of water involved in the transfer or exchange, the price of water negotiated as part of the exchange (whether or not the transfer was processed through the Drought Water Bank), the date and time when reservoir release transfers are initiated, whether the beneficial end user was employing water conservation and use efficiency measures to use the water, and whether these measures were among the best management practices associated with established agricultural water conservation techniques. The reports should also correlate these actions with water temperatures in the Sacramento River where relevant. Otherwise, neither DWR, USBR, nor SWRCB will have meaningful data for evaluating the practices and merits of this Order.

Other Recommendations

Parameters A through F from the Petition (pages 9 and 10) are directly incorporated as Conditions of the Draft Order. We recommend the following amendments (in **bold and underscore** and ~~strike-out~~) to conditions 5 through 8:

- Condition 5 should be amended to read: DWR and Reclamation shall operate the SWP and CVP ~~in accordance to comply~~ with the 2008 Delta smelt biological opinion **and the upcoming salmonid biological opinion to be delivered by the National Marine Fisheries in June 2009.**
- Condition 6 should be amended to read: Carriage loss shall be deducted from any water transferred through the Delta and delivered under this order, **and carriage amounts shall be reported monthly as part of DWR and Reclamation compliance with Conditions 2 and 3 of this Order.**
- Condition 7 should be amended to read: The total quantity of water delivered **under this order** to any SWP or CVP contractor ~~under this order~~ shall not exceed ~~historic average deliveries to the contractor as stated in the attachments provided with the Petition for~~ change **16,000 acre-feet.**

- Condition 8 should be amended to read: Transfers or exchanges under this order shall not result in the net decrease of **flows in tributaries of the San Joaquin River or Sacramento River, or in the mainstems of the San Joaquin River and Sacramento Rivers** flow over the period of the transfer.

We recommend a new condition be placed into the Draft Order that requires DWR and Reclamation to monitor flows in the streams covered by Condition 8 and report monthly to SWRCB and the public on streamflow conditions in tributary streams to the San Joaquin and Sacramento Rivers and on salmonid conditions. *This condition should be inserted especially if SWRCB declines to amend its Order's conditions limiting overall transfers under the order to no more than 16,000 acre-feet.* This new condition could also be accomplished by amending Condition 10 to specify which streams should be the subject of flow and salinity monitoring during the time the order is in effect.

We also recommend that a new condition be inserted into the Order prior to adoption stating that prior to operation of activities under this Order, the California Department of Water Resources shall furnish proof of compliance with the California Endangered Species Act for operating its Banks Pumping Plant and the California Aqueduct.

Conclusion

We remind the SWRCB that, regardless of your deference to the Governor's drought emergency declaration of February 28, 2009, evidence accrues that this "drought" is merely a year of dry conditions and the contention that low water allocations to low priority water service contractors merits a statewide emergency declaration is specious. Dry conditions recur, and occur now simultaneously with the worst economic recession in nearly four generations. Drought water banks were organized in prior droughts, but only under circumstances more dire and more widespread than exist today. State and federal water agencies and affected water contractors have failed to justify the need for suspension of environmental laws and the need for the projects contained in the Petition.

Meanwhile, the May 14, 2009, data on Daily Full Natural Flows from DWR's online data exchange center shows that Shasta Lake inflows are 166 percent of normal for May 2009, the San Joaquin River at Millerton Lake flows at 115 percent of normal for May 2009, and southern Kern and Tulare rivers (81 and 77 percent of normal) flow at below normal—but not dry—levels for May 2009. Shasta Lake reservoir elevation is now at 80 percent of normal, and Oroville is at 75 percent of normal. Both reservoirs' storage exceed what they stored last year at this time by 400,000 to 500,000 acre-feet each. Their storage levels have consistently increased since the Governor's drought declaration in late February. Other reservoirs exceed normal levels of storage for this time of year, including Folsom (117 percent of average), Millerton (131 percent of average), and the SWP's Pyramid Lake in southern California (103 percent of average). DWR's Daily Reservoir Storage Summary (ending midnight May 17, 2009) reports that statewide reservoir storage average is 81.3 percent of total average storage. This dramatically exceeds the drought conditions typical of the 1987-1992 and 1976-1977 droughts. Drought claims this year are exaggerated.

As CSPA highlighted in its testimony, the appearance of an emergency has been caused and exacerbated by policies and actions of DWR and the USBR (Exhibit CSPA-2). Delta exports in the dry/critical year of 2007 were 99.1 percent of exports in the 2000-06 wet cycle average, even though statewide runoff was 53 percent of normal, as DWR reported to the Governor in March 2009. And when statewide runoff was just 58 percent of normal in 2008, Delta exports by both projects still reached 71 percent of the 2000-06 average of exports.

DWR and USBR's propensity to continue high deliveries despite low runoff conditions is borne out in data from Tables 1 and 2 to the Petition. In addition to 2007 and 2008 being dry or critical runoff years as illustrated in DWR's WSIHIST online data, 2001 and 2002 were also considered dry years in both the Sacramento and San Joaquin valley basins. "Historic average" deliveries for this nine-year period was 6.4 million acre-feet, as noted above. The dry year average deliveries were 5.6 million acre-feet for the four dry years during this period, 88 percent of the average for the nine-year period. The range for these years was 4.8 to 6.2 million acre-feet. Within these figures, Westlands Water District received 90 percent of its nine-year historic average in these four dry years on average. We believe this reflects mismanagement of these water systems—a propensity to meet contractual allocations despite the possibility of additional dry years yet to come, and which has come to light as a result of dry conditions in 2009, California's third consecutive dry year.

Finally, we urge SWRCB to deny the Petition from DWR and USBR. It is borne of unnecessary and unjustified suspension of environmental requirements and lacks legislative authorization to establish unprecedented consolidation of the places of use of SWP and CVP permits. It is a blank check, which we urge the Board not to sign.

Sincerely,



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