

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. BOX 2000, Sacramento, Ca. 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterrihts.ca.gov>

**PROTEST – (Petitions)**

**BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS**  
Protests based on Injury to Vested Rights should be completed on other side of this form

APPLICATION: 13370 PERMIT: 11315  
APPLICATION: 13371 PERMIT: 11316  
APPLICATION: 13372 PERMIT: 11317  
APPLICATION: 14662 PERMIT: 11318  
APPLICATION: 5627 PERMIT: 11317  
APPLICATION: 5628 PERMIT: 11318  
APPLICATION: 15374 PERMIT: 11968  
APPLICATION: 15376 PERMIT: 11970  
APPLICATION: 16767 PERMIT: 11971  
APPLICATION: 16768 PERMIT: 11972  
APPLICATION: 17374 PERMIT: 11973  
APPLICATION: 17376 PERMIT: 12364  
APPLICATION: 17375 PERMIT: 12365  
APPLICATION: 5625 PERMIT: 12720  
APPLICATION: 5626 PERMIT: 12721  
APPLICATION: 9363 PERMIT: 12722  
APPLICATION: 9364 PERMIT: 12723  
APPLICATION: 9365 PERMIT: 12724  
APPLICATION: 9366 PERMIT: 12725  
APPLICATION: 9367 PERMIT: 12726  
APPLICATION: 9368 PERMIT: 12727  
APPLICATION: 15764 PERMIT: 12860  
APPLICATION: 18115 PERMIT: 13776  
APPLICATION: 21542 PERMIT: 15149  
APPLICATION: 22316 PERMIT: 15735  
APPLICATION: 14858A PERMIT: 16597  
APPLICATION: 14859 PERMIT: 16598  
APPLICATION: 19303 PERMIT: 16599  
APPLICATION: 19304 PERMIT: 16600  
APPLICATION: 14858B PERMIT: 20245  
APPLICATION: 27319 PERMIT: 20246  
APPLICATION: 15375 PERMIT: 11969

We, the California Sportfishing Protection Alliance; Chris Shutes, 1608 Francisco St., Berkeley, CA 94703; Bill Jennings, 3536 Rainier Ave, Stockton, CA 95204; and Michael Jackson, P.O. Box 207, 429 West Main St., Quincy, CA 95971, have read carefully the September 3, 2009 notice relative to the petitions for extension of time of the **Central Valley Project of the Bureau of Reclamation** for above-listed permits under the above-listed applications. The summaries of the permits, including counties,

places of use, points of diversion, amounts, and seasons are given in the Notice for these petitions, which is available on the Board's website at [www.waterboards.ca.gov/waterrights/water\\_issues/programs/applications/petitions/2009/12721etal\\_cvpnotice.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/petitions/2009/12721etal_cvpnotice.pdf)).

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

- (1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
- (2) not best serve the public interest** **x**
- (3) be contrary to law** **x**
- (4) have an adverse environmental impact** **x**

**State Facts, which support the foregoing allegations:**

These petitions are both formally and substantively flawed.

In Water Rights Order WR 2008-045, the State Water Resources Control Board described the law regarding petitions for extension of time:

The Board's regulations provide that the Board will grant a petition for an extension of time only upon such conditions as the Board determines to be in the public interest, and only upon a showing that (1) due diligence has been exercised, (2) failure to comply with previous time requirements was caused by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension is granted. (Cal. Code Regs., tit. 23, § 844.)

The Bureau of Reclamation, on page 2 of its Supplement to [the present] Petitions, states, on the contrary, that it cannot account for how much water has been put to beneficial use under each permit, and flatly affirms that it does not know how much water it will put to use in the future should these petitions be granted:

The reason that Reclamation can not provide any more specific data is that Reclamation operates the CVP in an integrated fashion where water is diverted under a variety of CVP permits and is commingled to meet project purposes. Reclamation's CVP operations are extremely complex and involve a dynamic operating environment in which compliance with Bay-Delta water quality control standards is integrated.

Reclamation has further determined that it is not possible at this time to accurately predict future operations and diversion levels at specific times during the extension period. Major uncertainties that include possible future State Water Board actions involving additional conditions to CVP permits, outcome of the Bay Delta Conservation Program (BDCP) process, as well as any other future actions necessary for compliance with the Federal Endangered Species Act, frustrate any attempt to make such predictions at this time. As a result, Reclamation is unable to determine what the ultimate diversions under its CVP

permits will be. Reclamation will continue to put water diverted under its CVP permits to beneficial use, including consumptive uses, as well as for environmental and fisheries purposes. Reclamation will also continue to divert to storage in CVP reservoirs in accordance with its permits. However, Reclamation is unable at this time to provide any recommendations on permits that are ready for licensing, but may do so in the future.

The Bureau cannot claim to have made a showing of previous diligence in the absence of accounting of past use. Not knowing what was done in the past, it is impossible to evaluate whether failure to comply with previous time requirements could have been reasonably avoided. And absent predicted future use, it cannot possibly make a showing that satisfactory progress will be made should an extension be granted.

In its closing brief following the July, 21, 2008 Board hearings regarding the revocation of the water rights for Auburn Dam, the Bureau affirmed on page 2:

“Contrary to assertions made at the hearing by the California Sportfishing Protection Alliance (CSPA) and Friends of the River (FOR), Reclamation is not requesting that the Board apply a different set of rules and regulations to the Federal Government.”

It is frankly hard to imagine any other entity that would come before the Board petitioning for extensions of time on a group of permits with a combined face value of tens of millions of acre-feet per year. Still less can one imagine another entity that would tell the Board and the public to effectively go look through the files at the Division of Water Rights and figure out for themselves how diligent that entity has been.

The complexity of the Bureau’s CVP operations is acknowledged, but this does not excuse the lack of specific data about the permits for which an extension of time has been sought. The Bureau has had just short of twenty years to develop a way to explain this complexity to the Board and to the public. While the operation of the CVP has changed since 1990, resulting in disastrous environmental consequences, a mechanism or template for accounting could surely have been developed by the Bureau to demonstrate how it assigns its diversions to its various water rights. As CSPA stated in its 2008 testimony for the Auburn Dam hearing, part of diligence consists in meeting the requirements set forth by the Board in order to comply with the terms and conditions associated with a water right.

These petitions are stated by the Bureau as superseding petitions for extension of time filed in 1985, and amended in part in 1996. One form or another of these petitions have thus been on file for 24 years, and the Bureau still can’t tell us how much water has been used each year under what permit. The principle of diligence was in effect in 1985 as surely as it is today. The failure to meet the requirement to show diligence for the purposes of those earlier, now “superseded” petitions (over and above the requirements under the permits themselves) represents a fundamental failure to comply with Board process and applicable sections of the California Code of Regulations. The failure is thus not simply present; it is historic.

The face value of these permits is far greater than the average annual runoff in the Central Valley. Having paper water on file that vastly exceeds the water available is not in the public interest. It effectively leaves no water available for any other water user. It creates permanent, systemic pressure to reduce use of water for environmental purposes. Cloaked behind the plea of complexity is a basic operating principle: the CVP will take as much water as it can whenever and wherever it can, and put it to use wherever it pleases. Lacking specificity, these water rights permits effectively operate as a permanent line of credit, good anywhere in the Central Valley and in the Trinity River watershed upstream of Lewiston Dam, limited only by operational constraints, by whatever regulatory restrictions the Bureau cannot avoid, by diversion and storage facilities, and by what is taken by others. It is, in short, not a right to a certain amount of water. It is a right to all of it that's left.

If extended, these permits drastically limit the possibility that a defined amount of water can ever be specifically devoted to improving Delta conditions. Any "additional" water returned by to the system as an improvement or mitigation can always be diverted at the Delta by the CVP, or stored by the CVP for later use.

In D-1641, the place of use for most of the water rights permits covered by the present petitions was consolidated and extended. These permits contain storage rights far greater than the average annual runoff in the Central Valley. Given the past history of re-assigning these permits to new places of use and new diversion facilities, leaving open these permits will effectively eliminate the need for the Bureau to seek specific and new water rights for new or expanded facilities it may choose to build, including storage facilities and diversions. It will eliminate the need for a water availability analysis for new projects. It will perpetuate the over-appropriation of Central Valley watersheds. It will maintain the cloak of secrecy surrounding how the Bureau conducts its Central Valley operations.

These permits have effectively become a shell whose details can be filled in, changed, or adapted by the Bureau at will at any time.

Continuing the status quo of these water rights permits is not in the public interest. It runs directly counter to several of the basic goals of the California Water Boards' Draft Strategic Plan Update 2008-2012 (May 2008), including:

Goal 5. Improve transparency and accountability by ensuring that Water Board goals and actions are clear and accessible, by demonstrating and explaining results achieved with respect to the goals and resources available, by enhancing and improving accessibility of data and information and by encouraging the creation of organizations or cooperative agreements that advance this goal, such as establishment of a statewide Water Data Institute.

Goal 6. Enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of the laws, regulations, policies, and procedures.

D-1641 also included compliance requirements, and requirements for reporting this compliance. Petitioner has not shown that it has complied with the requirements place upon it by the Board in D-1641. The Bureau has also not shown that is has complied with Biological Opinions for the Operations and Criteria Plan for the Central Valley Project and State Water Project under the Federal Endangered Species Act, in particular the BiOps for Delta smelt, and for Central Valley winter-run and spring-run Chinook salmon, Central Valley steelhead, and Central Valley green sturgeon. The Board should require the Bureau to demonstrate such compliance. Failing to comply with the rules and regulations of the Board and with permit conditions is contrary to law (see Water Code Section 1397).

On pages 9-10 of its supplement, the Bureau suggests that the Board consider use of an EIS/EIR from another process, such as the Bay Delta Conservation Plan, as an environmental document for these petitions. An imported EIS/EIR for a water rights matter of this magnitude would be inherently incomplete and confusing. The no action/no project alternative as stated for BDCP would likely contradict no action/no project alternative for extension of time for these permits. The use of an EIS/EIR for BDCP would assume processes and events that are hypothetical, subject to countless changes, and which may never occur.

Use of water under the combined exercise of these permits has had disastrous environmental consequences. Pelagic organisms in the Delta have crashed. Delta water quality has become increasingly and unlawfully degraded. Countless fish have been illegally entrained by project facilities. Still more fish have been eaten because the CVP as operated in coordination with the State Water Project has defined the hydrodynamics of the Delta, creating numerous gauntlets of predation. These permits have allowed the CVP to radically alter the hydrograph of the Delta; this has doomed millions of outmigrating anadromous smolts, and greatly reduced returns of adult anadromous fish to their natal streams. These permits have been used to irrigate seliniferous and otherwise toxic soils on the West Side of the San Joaquin Valley. These permits have repeatedly been operated in violation of Delta salinity standards. These permits have been used to deplete cold water pools in project reservoirs, further contributing to drastic declines of anadromous fish, particularly salmonids.

**Under what conditions may this protest be disregarded and dismissed?**

1. The Bureau must make a complete accounting in a transparent manner for water used under each permit, and water use that is proposed in the future. Should the Bureau make an accounting, CSPA reserves the right to revise or add to its dismissal terms based on analysis of that accounting.

2. The Bureau must submit clear and transparent records of compliance with all terms of these permits before the petitions are evaluated. CSPA reserves the right to revise or add to its dismissal terms based on analysis of this compliance.

3. The petitions for extension of time should be denied, and the permits should be licensed for operation that is consistent with applicable law, including the Public Trust Doctrine, The Clean Water Act, Section 5937 of the Fish and Game Code, the California Water Code (and particularly its provision in Section 275 against unreasonable method of diversion), salinity standards under D-1641, and the Porter-Cologne Water Quality Control Act. The licenses should be required to comply with all applicable Biological Opinions.

4. The California Endangered Species Act requires full mitigation for take and damage to critical habitat. Regardless of the ultimate disposition of these petitions for extension of time, the Board should order, as part of this proceeding, compliance by the Bureau with this requirement. In consideration of this requirement, the Board should address, to start: mitigation for loss of access to habitat caused by lack of passage past Project dams; destruction of habitat downstream of Project dams; lack of passage caused by flow alterations downstream of Project dams; lack of adequate cold water downstream of Project dams; inadequate magnitude, timing and duration of flows to support all lifestages of listed species and other native fishes, particularly non-listed salmonids; inadequate cold water pool management in Project reservoirs; entrainment into Project facilities, most egregiously at the Jones Pumping Plant;

5. Public Resources Code 10000-10005 requires the California Department of Fish and Game to recommend and the Board to adopt instream flows for major rivers in California. The Board should comply with its requirements under these statutes to institute these flows and condition the Bureau's water rights accordingly.

6. The 2000 Trinity Record of Decision mandates that 47% of the unimpaired flow into Trinity Reservoir be released into the Trinity River below Lewiston Dam. The permits for the Trinity River should be modified to conform to the Record of Decision.

7. Complete project-specific environmental documentation for the extension of time or other disposition for these permits must be completed. A full range of alternatives, including reduced use of the permits, must be analyzed in a manner that is compliant with CEQA. CSPA reserves the right to revise or add to its dismissal terms based on review of environmental documents.

A true copy of this protest has been served upon the petitioner by mail.

(Personally or by mail)

Date: October 31, 2009.

Chris Shutes, FERC Projects Director,  
Bill Jennings, Executive Director  
Michael Jackson  
California Sportfishing Protection Alliance



Chris Shutes  
(signed on his own behalf and for  
Bill Jennings and Michael  
Jackson)

Protestant(s) Authorized Representative sign here

cc:

Bob Colella  
U.S. Bureau of Reclamation  
2800 Cottage Way  
Sacramento, CA 95825

Appendix:

SWRCB Notice for above-listed petitions