



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Executive Office
1001 "I" Street, 24th Floor
Sacramento, CA 95812-0100
commentletters@waterboards.ca.gov



VIA: Electronic Submission
Hardcopy if Requested

RE: **Draft Order Granting in Part and Denying in Part the Petitions For Reconsideration of the Executive Director's February 3, 2015 Order That Approved Temporary Urgency Changes in License and Permit Terms and Conditions for the State Water Project and Central Valley Project and Subsequent Modifications to That Order**

Dear Ms. Townsend and Members of the State Board:

The California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance (hereinafter "CSPA") have reviewed the State Water Resource Control Board's (State Board) draft order on the subject petitions for reconsideration and subsequent modifications to that order (Order) and submits the following comments.

CSPA timely submitted numerous objections, protests, petitions for reconsideration and public hearings, complaints and workshop presentations regarding the various joint petitions for temporary urgency changes (TUCPs) submitted by the California Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) and resulting State Board orders. These submittals detailed the environmental damage that would result from the orders, cited numerous violations of law and proposed reasonable alternatives that would balance competing demands for water during drought conditions.

Now, more than ten months after CSPA initial objection, protest and petition for reconsideration and only after the disastrous consequences of the State Board's ill-considered actions have become apparent, the State Board has responded with self-serving excuses and attempted justifications wrapped in a blanket of half-truth and fabrication. Contrary to claims that the State Board orders were "appropriate based on the information available at the time, including the concurrence of the fisheries agencies and biological reviews," CSPA and other parties outlined in considerable detail the consequences to endangered and threatened species from further weakening promulgated critical-year water quality standards in the Delta and tributary rivers. For example, it was well known that Reclamation's temperature models were seriously flawed. As Reclamation's hindcast of 2014 Sacramento River temperature control performance

demonstrated, not all variability and uncertainty can be predicted by a model and real-time operational adjustments are always needed and the National Marine Fisheries Service pointed out in April 2015 that Reclamation's Sacramento River temperature model underestimated actual temperatures.

It is, frankly, outrageous that the State Board delayed until the close of business on the 7th of December to respond to the sequential objections, protests, complaints and petitions for reconsideration submitted by CSPA and other parties regarding the TUCP orders. It is outrageous that the State Board refused repeated requests to conduct formal hearings on the weakening of crucial water quality standards despite the fact that real-time fishery surveys and water quality monitoring results were documenting the disastrous consequences of the orders. And it is outrageous that the State Board has effectively provided petitioners only four working days to respond to seventy-nine pages of excuses and justifications and given itself only a single day to review responses prior to the hearing on the matter. Obviously, the State Board has prejudged the issues and is not prepared to seriously evaluate and consider comments on the proposed Order. Consequently, CSPA's response is brief, as it is pointless to squander valuable time preparing an item-by-item rebuttal.

We do agree with the State Board that the proposed Order acknowledges the Board's miscalculations, the enormous damage to our fisheries resulting from the relentless weakening of water quality standards over the last three years and the fact that the temporary change orders are now moot. The damage to the environment has been done and is extensive and possibly irreparable. California may have lost species that evolved and thrived over millennia, including the mega-droughts of the past. The State Board, an agency originally established as an independent regulator, has been revealed under its present iteration to be a captured agency of special interests. The captive nature of the State Board is evidenced by the fact that, although it acceded to virtually every weakening of water quality standards requested by DWR and Reclamation, the Board is unable to issue sanctions for the numerous violations of the weakened standards.

CSPA has now filed a lawsuit against the State Board. The last two years of temporary change petition issues are now before the courts, and the courts will determine whether the State Board's TUCP orders were consistent with water quality law and if the Governor and State Board have the imperial authority to employ a commonly-occurring sequence of dry years as justification to ignore a suite of state and federal laws and serially waive compliance with federal water quality standards over consecutive years. CSPA no longer regards the State Board as an independent regulatory agency committed to balancing competing needs in accordance with law while protecting the public trust but, rather, as simply an administrative obstacle that must be cleared before reaching the level playing field of the courtroom.

Like last year and the year before, subsequent events have established that our predictions on the consequences of weakening water quality standards were accurate and the State Board's claims and projections were grievously wrong. Pelagic and anadromous fisheries have plummeted to historic lows and several species may be past the point of no return, while Central Valley agricultural production has ascended to record highs in each of the recent drought years.

The claim that the TUCP orders were justified because the fishery agencies concurred with the orders is a meaningless excuse, given the track record of the fishery agencies, the relentless decline of fisheries over the last several decades and their failure to enforce even the inadequate requirements of their biological opinions. Indeed, as Tom Howard pointed out in the 3 February 2015 TUCP order, the fishery agencies didn't even bother to determine whether the potential impacts of the proposed weakening of water quality standards would "unreasonably affect fish and wildlife," an essential condition of State Board orders.

The State Board's claim is also undermined by NMFS' July 2015 concurrence with the State Board Executive Officer's 7 July 2015 approval of the Sacramento River Temperature Management Plan that acknowledged the situation "could have been largely prevented through upgrades in monitoring and modeling and reduced Keswick releases in April and May." It is undermined by NMFS's admonition in their 15 April 2015 temperature evaluation that an increase in temperature above 56°F would result in significant mortality and sub-lethal impacts to incubating salmon eggs, alevins and emerging fry. And, as we substantiated in our 2 August 2015 complaint against the State Board, the larger scientific literature establishes that 56°F is not protective of spawning, incubating and emerging life stages of salmon.

The excuse is further undermined by the continuing concurrences of the U.S. Fish & Wildlife Service on weakening Delta water quality standards despite California Department of Fish & Wildlife's (DFW) real-time surveys revealing historic lows, or in a number of trawls, that no Delta or longfin smelt were present in their critical habitat areas. And, as the Order reveals and as we predicted, the massacre of endangered winter-run Chinook salmon in the Sacramento River this year apparently exceeds the 95% loss of last year and DFW's current Fall Midwater Trawls are finding no longfin smelt and few Delta smelt. To reiterate, we were unfortunately right and the State Board and fishery agencies were wrong!

The propose Order observes that the existing water quality objectives and D-1641 merit review and update and that the State Board is currently in the process of updating water quality objectives and will undertake a proceeding to implement any revised objectives. Federal law requires that water quality objectives be reviewed and revised on a triennial basis. In the almost four decades since issuance of the 1978 Water Quality Control Plan, the State Board only updated Delta Bay-Delta water quality standards in 1995 and subsequently rubber-stamped them in 2006. The current process to update standards has experienced considerable delay and, at best, will not be completed for several more years.

Unfortunately, the State Board is undermining the current effort to update standards by scheduling hearings on the DWR/Reclamation petitions for change in points of diversion to facilitate California WaterFix's efforts to divert Sacramento River water under the Delta for delivery to southern California. The State Board will have to include interim water quality standards in any approval of a change in point of diversion, which would enable construction of the project. The Board is not likely to subsequently establish more rigorous standards that would render a fifty-plus billion-dollar project worthless. Addressing the WaterFix petition before updating the Bay-Delta Plan is prejudicial and sabotages the water quality control planning process. The Bay-Delta Plan update must precede any consideration of a change in point of diversion.

With regard to third party water transfers, the order states that they were not subject to the approval of the TUCP orders and comments related to those transfers should be made in the separate transfer consideration processes. For years, the State Board has routinely approved sequential one-year water transfers through the Delta that are designed to be exempt from CEQA review. These water transfers exacerbate adverse impacts to fisheries, especially during precarious periods when already inadequate critical-year water quality standards are further weakened. The cumulative impacts from these serial water transfers compounds the impacts from weakened standards and should have been evaluated during the TUCP approval process.

The Order states that the TUCP orders did find that impacts of straying and entrainment may occur to salmonids from opening the DCC gates and that the State Board agrees that keeping the DCC gates closed would likely be more protective than opening them. However, it justifies DCC gate opening by claiming difficult decisions had to be made. Had the Board not approved water transfers and water exports greater than health & safety needs, it is unlikely that the DCC gates would need to have been opened. Fisheries already teetering on the brink of extinction should receive benefit of doubt. Fallow fields can be replanted but extinction is forever.

The Order claims that the State Board did not violate antidegradation policy because changes in water quality standards are relative, depending on site-specific conditions, and subject to site-specific balancing under Porter-Cologne. To the contrary, the federal Clean Water Act provides the State Board with no latitude to weaken water quality standards below levels necessary to “fully protect” fishable and swimmable beneficial uses. As numerous fishery surveys have established, the State Board’s serial weakening of water quality standards has reduced water quality below levels necessary to support renewable fisheries and identified beneficial uses. The claim that elevated temperatures on the Sacramento River were simply the result of a Temperature Management Plan that proved to be inadequate is irreconcilable with the fact that it was the State Board that allowed the cold water pool in Shasta Reservoir to be depleted because of deliveries to Sacramento Settlement Contractors and it was the State Board that increased the temperature standard to a level that destroyed two consecutive year-classes of endangered winter-run Chinook salmon and devastated the 2015 Sacramento main-stem spring-run and fall-run Chinook salmon.

Claims that the TUCP orders did not violated state or federal endangered species acts because the fishery agencies signed off on the orders are refuted by the history of the continued decline of species ostensibly protected under the acts. Listed species have continued their downward spiral despite the biological opinions and reasonable and prudent measures. The failure of the fishery agencies to adopt and enforce the endangered species acts does not necessarily relieve the State Board of complying with the acts.

The claim that the TUCP orders did not violate public trust doctrine because the State Board is granted considerable latitude in balancing competing demands for water is indefensible. Whatever latitude in balancing State Board is provided, it does not extend to the extinction of fish species in order to provide water for junior water rights holders to grow alfalfa.

These preceding comments on the TUCP Order are brief and are not intended to represent all of our concerns but are provided as an illustration. A more comprehensive suite of our differences with the State Board's Order will be addressed in the pending litigation against the Board.

With respect to the latest modification to the renewed drought Order, we provide the following brief observations:

First, the proposed modifications to the 3 July 2015 order are similar to assurances the State Board provided at the close of last year prior to receiving the January 2015 temporary urgency petition from the DWR and Reclamation. There is nothing to indicate that the State Board would not again accede to a request to waive water quality standards, Shasta carryover storage or other requirements should another dry year occur.

Second, the proposed carryover storage requirement in Shasta Reservoir is a minimum and cannot be construed as having a "margin of safety." A Shasta Reservoir minimum pool is meaningless without a similar requirement in Trinity Reservoir. Excessively warm water transferred from Trinity Reservoir through Whiskeytown Reservoir to Keswick Reservoir on the Sacramento River undermined efforts to control temperatures in the Sacramento River last year. Given the interrelated nature of SWP/CVP operations, minimum pool levels should be required for Oroville, Folsom and New Melones Reservoirs.

Third, the Order contains a suite of studies, reports and plans it claims will protect fisheries and water quality. A similar suite of requirements was required last year and the result was that fisheries declined to historic lows bordering on extinction. There is nothing in the Order that indicates that the State Board is prepared to oppose the Governor and water agencies by rejecting new demands to weaken standards in the event of another dry year. El Nino may save California fisheries but the State Board has provided little indication that it is prepared to do so.

In conclusion, the State Board proposed order is little more than an excuse for its actions, a perfunctory dismissal of objections and petitions for reconsideration and an effort to create an illusion that it is doing something to protect fisheries and water quality.

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,



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Michael Jackson
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/s/ Michael Jackson