



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

Chris Shutes

FERC Projects Director

Water Rights Advocate

1608 Francisco St., Berkeley, CA 94703

Tel: (510) 421-2405 E-mail: blancapaloma@msn.com

Web: www.calsport.org

June 14, 2010

Katherine Mrowka, Chief
Inland Streams Unit
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 94812-2000
(via e-mail and surface mail)

RE: Water Availability Analysis in support of Application 29657

Dear Ms. Mrowka:

In a March 18, 2010 letter addressed to many parties including the California Sportfishing Protection Alliance (CSPA), you requested comments on an enclosed Water Availability Analysis (Analysis) produced by GEI Consultants, dated October 8, 2009, in support of Application 29657 of San Joaquin County to appropriate water for the American River watershed in El Dorado County (to be diverted at Freeport on the Sacramento River). This letter contains the comments of CSPA on this Water Availability Analysis. The letter indicates that a supporting c.d. was sent to CSPA along with the letter and the written Analysis; however, CSPA did not received the c.d., and only noticed the enclosure statement in the letter in the last several days when we were reviewing the relevant material.

Overview

The Water Availability Analysis states that its purpose is to provide information required under the Water Code to support Application 29657, and to evaluate the application's potential impacts to public trust resources.

The Analysis uses runs of the CalSim II model to evaluate water availability from sources upstream of the proposed point of diversion at Freeport. Inputs into the model are relevant hydrology (based on gage data), simulated projected future demand by senior diverters that may affect water available (based on the Water Forum EIR and other

factors), and minimum instream flow requirements (notably from the Water Forum proposed flows for the Lower American River).

The Analysis also uses CalSim II to evaluate downstream Delta demands for water, as required by D-1641, CVPIA 3406(b)(2), and other applicable requirements that existed in 2007. A second series of model runs was developed that assumed a rule that reverse flows in the Delta would be reduced to a maximum of -750 cfs. However, how such limitation of reverse flows would be achieved is not specified. Notably, the scenario does not explicitly include the possibility that greatly increased Delta outflow, when compared to current requirements, might be required in order to achieve the -750 cfs limitation, or that a substantial portion of the source water in the South Fork American River might be called upon to achieve that increased outflow.

On the contrary, any flow above the minimum requirements as laid out in the assumptions for the various runs is assumed to be available for appropriation. Existing requirements, or those requirements as explicitly modified in the modeled scenarios, are assumed to be sufficient to meet instream public trust obligations, most notably in the Delta.

Term 91

Standard Permit Term 91 was established in Water Rights Order 81-15 as a interim means of assuring Delta water quality, awaiting a water availability analysis for the Central Valley as a whole.¹ Under Term 91, the Central Valley Project and State Water Project are responsible for “flows required by the Board for the maintenance of water quality and fish and wildlife.” During such time as the Projects are releasing “Supplemental Project Water” to meet these and other “in-basin entitlements,” diverters whose permits or licenses are subject to Term 91 are prohibited from diverting under those permits or licenses.²

San Joaquin County claims Area of Origin protection for its Application 29657, liberally interpreting the area of origin definition of “in-basin entitlements” from WRO 81-15 whose language includes “as rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta”³ The County apparently interprets “within the respective basins of origin” to mean that water can be exported from the American River in the Sacramento River watershed to the Mokelumne River in the San Joaquin River watershed⁴ and still be covered under the Area of Origin statutes. CSPA disputed this contention in its May 13, 2008 protest of Application 29657.

¹ “The provisions of Term 91 are interim in nature until replaced by the results of the Board’s Water Availability Study for the Sacramento-San Joaquin Delta watershed or other Board action. The Board’s adoption of this order is not intended to be a final determination on any of the issues that may be addressed in the Water Availability Study or other Board actions.” WRO 81-15, ¶20, p. 10.

² WRO 81-15, ¶4, pp. 3-4.

³ Ibid.

⁴ Also sometimes described in a “mid-Delta” category together with its tributary the Cosumnes and with the Calaveras.

The Analysis, in Section 6.0, contemplates the possibility that Term 91 might be applied to Application 29657. It analyzes the potential consequences of such application, and shows in Table 11 that only 2 percent of water otherwise available to San Joaquin County under Application 29657 would be affected by application of Term 91.

However, Section 6.0 does not contemplate a scenario in which Term 91 may be supplanted by another process or formula that requires greater contribution from the American River watershed to maintaining Delta outflow. Section 6.0 also does not consider that existing flow standards in the Delta may be changed to require substantially greater amounts of Delta outflow, thus increasing the frequency with which Term 91 conditions might exist in the future, should Term 91 continue to be carried forward.⁵

New sources for increased Delta outflow

Decision 1641, as modified by WRO 2000-02, assigned the responsibility for meeting public trust responsibilities in the Delta to the Central Valley Project and the State Water Project, also “on an interim basis.” However, the Board at the time announced its intention to re-evaluate that responsibility for Delta flow requirements in “Phase 8” hearings.⁶ Those hearings have never taken place.

In the Delta Flow proceeding that was held from January to March, 2010, numerous parties advocated greatly increasing Delta outflow from a variety of sources.⁷ The principal time period identified as requiring high outflow through the Delta was February through June, the same period of high flows most likely to produce flows adequate to support the proposed diversions at Freeport under Application 29657.⁸ Several parties also suggested, following the approach taken in Draft D-1630, modifying the provision of D-1641 which assigned responsibility for Delta flows to the CVP and SWP, and instead apportioning responsibility among the various major watersheds upstream of the Delta.⁹ A modeling exercise performed on behalf of the Sacramento Valley Water Users suggested that the projects could not meet Delta outflow needs alone and still meet existing water delivery commitments: in many years, State Water Project of Central Valley Project reservoirs could be significantly depleted, assuming lack of

⁵ The CalSim scenarios modeled as part of the WAA include scenarios that limit reverse flows in the South Delta, but the potential impacts of reduction in reverse flows does not apparently change the modeling assumptions about the future frequency of Term 91 conditions. Nor are assumptions specified which describe how new reverse flow requirements might be met, whether by reduced exports, greater Delta inflow requirements, or some combination of these or other factors.

⁶ D-1641 pp. 131-132.

⁷ For a summary overview of the proposals of the UC Davis experts, CDFG, USDO, the Bay Institute and CSPA/C-WIN, see CSPA closing testimony, Table 1:
http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/closing_comments/cspa_closing_tab1.pdf

⁸ Ibid.

⁹ Parties making such a recommendation included CSPA and the California Water Impact Network, California Department of Fish and Game (citing Exhibit WRINT-29, 1992, pp. 3-4), and the Bay Institute.

contribution from other watersheds or storage facilities and assuming existing levels of diversions and exports.¹⁰

Should the Board indeed decide to require each watershed to provide a portion of the water required for needed increases in required Delta flows, the division of responsibility within each watershed is unknown. Any unappropriated water that remains in any watershed, including the South Fork American, is likely to be preferred for allocation to Delta flows over water already appropriated or water reserved under County of Origin statutes.

The State Board's January – March, 2010 Delta Flow Informational Proceeding, in both written submittals and oral testimony, documented extensive adverse cumulative effects to fisheries and other public trust resources under existing conditions in the Delta.¹¹ The flow requirements that the “less restrictive” CalSim II model runs for the Analysis assumes for Delta operations were extensively documented, during the Delta Flow Informational Proceeding, as disastrous to public trust resources in the Delta. The “more restrictive” CalSim II model runs made for the Analysis assume a solution of greatly restricting reverse flows in the Delta. However, this restriction incorporates in isolation only one element of a suite of measures recommended by the fisheries agencies and virtually all the environmental and fishing organizations that participated in the Delta Flow Informational Proceeding. Reduction of reverse flows in the Delta requires either greatly increased Delta inflows, or greatly reduced exports, or both. Thus the stated availability of water for the San Joaquin County application assumes Delta operations that have placed Delta fisheries in crisis, or else assumes Delta operations which address the current collapse of the Delta ecosystem by conveniently redirecting impacts to parts of the system that do not affect the County or its ambition to import water from the American River watershed.

Use of CalSim II to support this Analysis

It is generically problematic to use model runs of a model as complex as CalSim II in order to support a water availability analysis of a particular part of the Central Valley watershed. The CalSim II monthly timestep is too coarse to provide an accurate assessment of water availability on a daily basis. More fundamentally, the huge quantity of assumptions embedded within the CalSim II model are not openly stated, since they are assumed to be extraneous to the immediate issue at hand.

What the use of the CalSim II model does show is that everything in the Central Valley and Bay/Delta watershed is connected. When there is a huge portion of the system that requires remediation on a massive basis, the assumption that any given part of the system can be viewed in isolation is flawed. The Water Availability Analysis offered in support of Application 29657 selectively chooses some aspects of the system to improve, and improves them at the expense of someone far away from the party that commissions the

¹⁰ See http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/svwu.shtml. See especially testimony of Walter Bourez, SVWU-1.

¹¹ See http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/

modeling exercise. It does not even rise to the level of showing that senior diverters are kept whole, or that non-Area of Origin users are appropriately burdened by Area of Origin diversions, because the assumptions are not transparent.

Granting new applications for water in the Bay-Delta watershed in conditions of systemic overallocation should be postponed or simply not allowed

The State Board has acknowledged the overallocation of Central Valley water. In a letter to Delta Vision dated September 26, 2008, the Board stated that water rights have been granted for far more water than exists in the Central Valley watersheds. In a section titled Water Use vs. Water Rights, the Board stated in part:

The mean annual unimpaired or full natural flow in the Delta Watershed between 1921 and 2003 was 29 million acre-feet per annum (AFA), with a maximum of 73 million AFA in 1983. Unimpaired flow is flow that would be expected in the Delta watershed in the absence of storage and other human developments. In contrast, the total face value of the approximately 6,300 active water right permits and licenses within the Delta managed by the State Water Board, including the already assigned portion of state filings, is approximately 245 million AFA. There are 100 rights with a face value of 500,000 AFA, or more that account for 84% of the total face value of the water rights within the Delta watershed. The Central Valley Project and State Water Project hold 75 permits and licenses within the Delta watershed that account for 53% of the total face value of the water rights within the watershed. The total face value of the unassigned portion of state filings for consumptive use (excluding state filings for the beneficial use of power) within the Delta watershed is approximately 60 million AFA. This does not mean that this 60 million AFA is hydrologically available for appropriation. Prior to assignment of a state filing, the State Water Board will require that an applicant provide evidence that water is available to support the assignment. Clearly, actual use must be only a small fraction of the face value of these water rights, particularly since face value does not include pre-1914 and riparian water rights.¹²

Proceedings at the State Board to deal with this chronic overallocation, forced by the Pelagic Organism Decline and the Salmon Collapse, will take place over the next several years. Evidentiary hearings at the Board on San Joaquin flow and salinity standards are scheduled for November of 2010, and further evidentiary hearings in 2011 and 2012 that may bear on Delta inflow and outflow have been contemplated in Board publications. The development by the Delta Stewardship Council of a Delta Plan, the Bay Delta Conservation Plan, and, possibly, water rights hearings to move the point of diversion for the Projects to a peripheral canal or tunnel intake, will all directly or indirectly address the use of water to maintain and restore the Delta, and the availability of whatever water may be left in the system. Environmental review that will be necessary to support these

¹² See State Board to Delta Vision, September 26, 2008, pp. 2-3.
http://deltavision.ca.gov/BlueRibbonTaskForce/Oct2008/Response_from_SWRCB.pdf

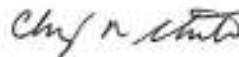
actions and processes will necessarily need to understand both the availability of water for appropriation and the impacts of further diversions.

Actions to address the cumulative effects of diversions in the Bay-Delta watershed, and the environmental review in support of such actions, are required in order to truly define and understand the amount of water (if any) within the watershed that remains available for diversion and appropriation. A snapshot of the status quo, or of unexplained modifications to the status quo as contained in an opaque modeling platform, does not allow an informed evaluation of water availability.

CSPA recommends that the State Board adopt a policy of not allowing new diversions from the Bay-Delta watershed until such time as flow standards are established that protect fisheries and other public trust resources. CSPA further recommends that the Board allow no new diversions from the Bay-Delta system under the County of Origin or Area of Origin statutes until such time as it is able to condition such diversions on an equivalent numeric reduction in diversions by junior diverters in the amount equivalent to any new priority diversions.

Thank you for the opportunity to comment on the October 8, 2009 Water Availability Analysis by GEI Consultants in support of Application 29657.

Respectfully submitted,



Chris Shutes
Water Rights Advocate
California Sportfishing Protection Alliance

cc:

County of San Joaquin
c/o James Hanson
Wagner & Bonsignore CCE
2151 River Plaza Dr., Suite 100
Sacramento, CA 95833-4133