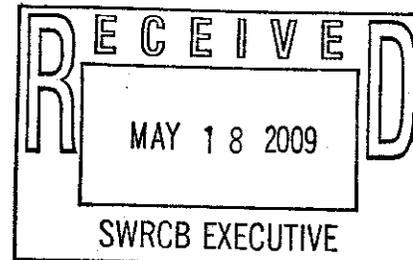


State of California

Before the State Water Resources Control Board

Draft Board Order 2009-00XX



Draft Order Approving a Change in the Place of Use of License and Permits of the California Department of Water Resources and the United States Bureau of Reclamation in Response to Drought Conditions

State Water Project – Oroville Facility of the State Water Project – State Pumps et al

Central Valley Project – Shasta Dam and Reservoir; Trinity Project; Friant Dam and Millerton Reservoir; American River Project and Facilities – Federal Pumps

Sacramento River Watershed – San Joaquin River Watershed – Trinity River Watershed - Bay Delta Estuary

Formal Comments by the California Salmon and Steelhead Association

We have reviewed the Draft Board Order WR 2009-00XX issued by the State Water Resources Control Board for comments. The California Salmon and Steelhead Association are a party to these proceedings. We are part owners of the public trust water resources of California; part owners of the resident and anadromous fisheries of California, and part owners of the Bay Delta Estuary that are affected by the operations of the State Water Board and the Central Valley Project.

These formal comments are based on the Public Trust Doctrine; Article X, Section 2 of the California Constitution; California Fish and Game 5937 of the California Fish and Game Code; and all other applicable state and federal statutes.

Decision Already Made by the Hearing Officer and his Staff

The Draft Order states as follows on the first page:

“It bears emphasis at the outset that contrary to protestants’ [ALL] assertions this approval will not result in an increase in Project exports from the Sacramento-San Joaquin Delta Estuary (Delta). For this reason, and for the reasons explained fully below, we conclude that approval of the petition will not injure any legal user of water or unreasonably affect fish, wildlife, or other Instream beneficial uses.” We reference Draft Order WR 2009-00XX; at 1.0 Introduction; page 1.

This statement by the Hearing Officer and his staff violates the Public Trust Doctrine; the Mono Lake Decision; the State of California Constitution; and California Fish and Game 5937 as stated and shown below:

Public Trust Doctrine – Mono Lake Decision

Before state courts and agencies approve water diversions they should consider effect of such diversions upon interests protected by public trust, and attempt, so far as feasible, to avoid or minimize any harm to these interests. We reference National Audubon Society v. Superior Court of Alpine Decision.

Draft Board Order WR 2009-00XX violates the Mono Lake Decision with reckless disregard to the millions of striped bass species; threatened steelhead trout species; and endangered Chinook salmon species that are harmed and lost at the State Pumps from the continued operations of the State Pumps by the California Department of Water Resources. Draft Board Order WR 2009-00XX provides no relief to the people who own the public trust fishery resources lost at the State Pumps not any relief for the millions of fish species lost at the State Pumps.

The public trust is more than affirmation of state's power to use public property for public purposes; it is an affirmation of the duty of the State to protect people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with purposes of trust. We reference National Audubon Society v. Superior Court of Alpine Decision.

The loss of millions of striped bass species; steelhead trout species; and Chinook salmon species continues to occur at the State Pumps for about 30 plus years without the State Water Board taking responsible actions in mitigating and reducing the fish losses at the State Pumps in all water rights decisions approved by the State Water Board that diverts water using the State Pumps. Clearly the State Water Board has neglected their duty and responsibilities in carrying out their public trust duty and protecting public trust uses.

The State Water Board, in undertaking planning and allocation of water resources is required by statute to take public trust interest into account. We reference California Water Codes 1243 and 1257.

Clearly the State Water Board has neglected their duty in carrying out their public trust duty under Sections 1243 and 1257 of the California Water Code and failed to protect public trust fishery resources of California that are damaged and harmed at the State Pumps. In fact the California Department of Fish and Game is absent from these proceeding in carrying out their duties and responsibilities to protect the people's fishery resources affected by the operations of the State Water Project and the Central Valley Project.

The State as sovereign retains continuous supervisory control over navigable waters and lands beneath those waters and that principle, fundamental to concept of public trust, applies to rights in flowing waters as well as rights in tidelands and lakeshore. It prevents any party from acquiring vested right to appropriate water in manner harmful to interests protected by the public trust. We reference National Audubon Society v. Superior Court of Alpine Decision.

Clearly the loss of millions of striped bass, steelhead trout, and Chinook salmon species at the State Pumps and the change petition including the ongoing operations of the State Pumps is harmful to the fishery resources protected by the public trust, but lost and harmed at the State Pumps.

State has affirmative duty to take public trust into account in planning and allocation of water resources, and to protect public trust uses whenever feasible. We reference National Audubon Society v. Superior Court of Alpine Decision.

Draft Board Order WR 2009-00XX did not take into account the protection of the people's anadromous fisheries lost at the State Pumps.

In exercising its sovereign power to allocate water resources in public interest, the state is not confined by past allocation decision which may be incorrect in light of current knowledge or inconsistent with current needs. We reference National Audubon Society v. Superior Court of Alpine Decision.

The State Water Board turns it's regulatory enforcement back on the losses to the public trust fisheries lost at the State Pumps and approves new conditions based on former allocations that provide no protection measures for millions of fish species lost and harmed at the State Pumps.

Person claiming that use of water is harmful to interests protected by the public trust may seek Water Board determinations of allocations of water in stream system, a determination which may include reconsideration of previously granted in that system. We reference National Audubon Society v. Superior Court of Alpine Decision.

Our comments are consistent with the Mono Lake Decision as shown above because Board Order WR 2009-00XX and the existing water right permits held by the California Department of Water Resources are harmful to the public trust.

Conclusion

Clearly the Draft Board Order, the continued operations of the State Pumps, and also other decisions approved by the State Water Board such as water transfers have harmed the people's trust assets and violated the determinations made by the Court in the Mono Lake Decision.

Article X, Section 2 of the California State Constitution

Article X, Section 2 of the California State Constitution states in pertain part:

“Section 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which that are capable, and that the waste or unreasonable use or unreasonable method of diversion be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” We reference California Constitution; Article X, section 2.

Clearly the diversions of the people’s water at the State Pumps under the existing water right permits are the unreasonable method of diversion that violates the California Constitution.

Further, the water allocated to the Central Valley Project and the State Water Project by the State Water Board is the cumulative unreasonable use and cumulative unreasonable method of use of the people’s water because said allocations harm the public trust because of the lack of water to protect California public trust fisheries resources of the Sacramento River Watershed; Trinity River Watershed; American River Watershed; and the Bay Delta Estuary.

California Fish and Game Code 5937

California Fish and Game Code requires sufficient water at all times is released from dams to keep fish below the dams and downstream in good condition. We reference Natural Resources Defense Council v. Houston. (Friant Dam Decision – California Fish and Game Code 5937).

The point of storage and diversion for the State Water Project is Oroville Dam. The point of rediversion and use is the State Pumps. Because the rediversion of water at the State Pumps from Oroville Reservoir is having adverse effects to millions of fish species, the CDWR has violated California Fish and Game Code 5939 by failing to provide sufficient amounts of water into the Bay Delta Estuary and also preventing fish species from being harmed and lost at the State Pumps at the point of rediversion.

The same is true of the operations of the Central Valley Project by the US Bureau of Reclamation where water is stored at Shasta Dam; Trinity Dam; and the American River and rediverted at the Federal Pumps in the Bay Delta Estuary. Consequently the USBR is in violation of California Fish and Game Code 5937.

It is a well-known fact that the Bay Delta Estuary has been adversely harmed by water diversions collectively by the State Water Project and the Central Valley Project.

Governor's Emergency Drought Conditions

The major problem with the Governor's Emergency Drought conditions is that the State Water Board has over appropriated the state's water. Why? Because the DWR and USBR water right permits have NOT been based on water year type conditions by the State Water Board and its staff when the original permits were issued. i.e. High water year conditions; normal water year condition; low water year conditions; critical water year conditions, and drought water year conditions. Without conditioning the uses of the state's water under water right permits and a license held by the USBR and DWR, the State Water Board cannot and has not controlled the storage and diversions of the state water being used by the State Water Project and the Central Valley Project during water year conditions. It is impossible for the Board and its staff to make a decision in water right matters pertaining to drought conditions because they failed to control the water uses during all water year type conditions.

Disclosure of Hydrology – State Pumps – Federal Pumps

Draft Board Order WR 2009-00XX did not disclose and provides daily hydrology records showing the amount of water diverted at the State Pumps. Draft Board Order WR 2009-00XX failed to disclose and provides daily hydrology records showing the amount of water diverted at the Federal Pumps. Without these records the Hearing Officer and his staff cannot assert that there will be no increases in exports of water at the State Pumps and Federal Pumps.

in addition, because of recent rainfall that provided more water (inflow) into the State Water Project and Central Valley Project reservoirs, the amount of water in storage at Project reservoirs was not disclosed and evaluated in the Draft Board Order WR 2009-00XX. The Governor's Emergency Drought Conditions were developed long before the recent rainfalls. Consequently there was no disclose and evaluation by the Hearing Officer and his staff regarding the amount of new water stored at Project reservoir. Without the disclosure of the information, the draft Board Order WR 2009-00XX is deficient.

California Environmental Quality Act and its Guidelines

The Board, US Bureau, and the DWR failed to disclose that a notice of exemption from the requirements of the California Environmental Quality Act and its Guidelines was filed by the USBR and the DWR for the operations of the State Water Project and the Central Valley Project.

The failure to provide formal notice to Protestants' and the public purposely avoids the opportunity for formal comments by Protestants and the public, and violates the intent of the California Environmental Quality Act and its Guidelines.

Further, the notice of exemption from the requirements of the California Environmental Quality Act and its Guidelines by the USBR and the DWR prevents the disclosure and mitigation of the harm to the public trust fishery resources lost at the State Pumps and consequently violates the Public Trust Doctrine and the determinations made by the Court in the Mono Lake Decision.

Relief Requested by the California Salmon and Steelhead Association

Pursuant to the Public Trust Doctrine; Article X, Section 2 of the State Constitution and California Fish and Game Code 5937, the State Water Board must amend Draft Board Order WR 2009-00XX and require the following:

- 1. Re-visit and re-condition the water right permits held by the California Department of Water Resources based on water year types conditions;**
- 2. Re-visit and re-condition the water right permits held by the California Department of Water Resources based on water year types conditions with improved conditions for California resident and anadromous fisheries and their habitat;**
- 3. Require the California of Water Resources to develop an immediate mitigation plan to significantly reduce fish losses at the State Pumps;**
- 4. Require the California of Water Resources to report all fish losses at the State Pumps from the time the State Pumps was implemented to divert water to the California Aqueduct to the present time and including future years;**
- 5. Require the California of Water Resources to report to the people and the Board the daily amounts of water diverted at the State Pumps;**
- 6. Re-visit and re-condition the water right permits held by the US Bureau of Reclamation based on water year types conditions;**
- 7. Re-visit and re-condition the water right permits held by the IS Bureau of Reclamation based on water year types conditions with improved conditions for California resident and anadromous fisheries and their habitat;**
- 8. Require the US Bureau of Reclamation to develop an immediate mitigation plan to significantly reduce fish losses at the Federal Pumps;**
- 9. Require the US Bureau of Reclamation to report all fish losses at the Federal Pumps from the time the federal Pumps was implemented to divert water to the water users in the Central Valley Project to the present time and including future years;**
- 10. Require the US Bureau of Reclamation to report to the people and the Board the daily amounts of water diverted at the Federal Pumps;**
- 11. Amend Draft Order WR 2009-00XX to comply fully with the Public Trust Doctrine and the Mono Lake Decision;**
- 12. Amend Draft Order WR 2009-00XX to comply fully with Article X, Section 2 of the California Constitution and prevent the unreasonable method of diversion at the State Pumps;**
- 13. Amend Draft Order WR 2009-00XX to comply fully with California Fish and Game 5937 from all Project dams to and from the State Pumps and the Federal Pumps;**

14. Deny any and all exemptions to the California Environmental Quality Act and its Guidelines by the USBR and the DWR unless expressly approved by the California Legislature.

Place these formal comments into the records for draft Board Order WR 2009-00XX. Advise the California Salmon and Steelhead Association of any and amendments to draft Board Order WR 2009-00XX.

Respectfully Submitted

Signed by Bob Baiocchi

**Bob Baiocchi
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Water Rights and Fisheries Consultant
California Salmon and Steelhead Association
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Dated: May 17, 2009

Certificate of Service

**All Parties of Record;
Other Interested Parties (cc and bcc).**