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Landmark Lawsuit Settlement Between Environmentalists and State Water Boards Strengthens Delta Protections

Enforceable transparency and analysis to replace years of failure to comply with existing water quality and flow standards.

SACRAMENTO, California — Three California environmental nonprofits secured a landmark settlement agreement with the California State Water Resources Control Board to uphold the common law Public Trust Doctrine and other legal protections for imperiled fish species in the Sacramento River and San Francisco Bay/Sacramento – San Joaquin Delta Estuary.

The lawsuit, filed in 2015 by the [California Sportfishing Protection Alliance](#) (“CSPA”), the [California Water Impact Network](#) (“CWIN”), and [AquAlliance](#), brought sweeping claims against the State Water Board. It alleged that the agency’s management of the Sacramento River and San Francisco Bay-Delta displayed an overarching pattern and practice of:

- failure to comply with the Public Trust Doctrine;
- failure to implement Sacramento River temperature management requirements;
- failure to ensure that fish below dams be maintained in “good condition”; and
- acceptance of water quality below minimum Clean Water Act standards.

“The Water Board’s long-standing pattern and practice of inadequately implementing foundational environmental laws has brought the Central Valley aquatic ecosystem to the brink of collapse. This settlement agreement is a major step forward, compelling the State Water Board to fulfill crucial legal requirements it had previously ignored,” said Bill Jennings, CSPA Executive Director.

Among other things, the settlement terms protecting the Sacramento and Bay-Delta include:

- transparent evaluation of the specific Public Trust Doctrine factors the Water Board will consider in determining if new Bay-Delta Plan requirements will protect fish and wildlife;
- a Sacramento River Temperature Management process that addresses controllable factors, including deliveries, and ensures adequate staffing, modeling and public review.
- consideration of California Fish and Game Code section 5937, protecting fish below dams, in Bay-Delta Plan updates; and
- transparent Public Trust analysis for Temporary Urgency Change Petitions.

The ancient common law Public Trust Doctrine establishes powerful public property rights in natural resources. In 2009, the Legislature, recognizing that Bay-Delta fisheries were collapsing and that standards had not been modified since 1995, commanded the State Water Board to update its “flow criteria for the Delta ecosystem necessary to protect public trust resources.” A decade later, in 2018, the State Water Board finally approved updated standards for the San Joaquin River and its tributaries, known as “Phase I,” which is the subject of a separate lawsuit by CSPA, CWIN, AquAlliance, and many others. Now, in a departure from past practices, the settlement agreement requires the Board’s “Phase II” updates, addressing Sacramento River Flows and Cold Water, Delta Outflows, and Interior Delta Flows, to include a “Transparent Public Trust Evaluation,” covering enumerated factors.

“The Water Board has agreed to include ‘an express evaluation’ of the factors it considers and balances in determining whether the new standards will protect the Public Trust interests in fish and wildlife,” said Jennings.

“Before now, the Water Board’s consideration of public trust resources had been perfunctory at best,” said Carolee Krieger, CWIN Executive Director. “We hope this lawsuit will result in a culture change at the Water Board, with long-lasting impact. This agreement has teeth and can be enforced,” Krieger said.

The courts have called California Fish and Game Code section 5937 “a legislative expression of the public trust protecting fish as trust resources when found below dams.” Yet the Water Board’s past pattern and practice has been to ignore this statute altogether in its Bay-Delta planning. This agreement will now ensure that 5937 is explicitly considered in the Water Board’s Phase II analysis.

The lawsuit was originally filed in 2015, after the Water Board’s approval of a series of “Temporary Urgency Change Petitions” (TUCPs) that relaxed permit restrictions for the U.S Bureau of Reclamation and California Department of Water Resources. The resulting changes during the 2014-2016 drought had catastrophic results for fish. Most of the fourteen TUCP orders failed to mention the Public Trust Doctrine at all, with only a few passing references. Under the settlement, the Water Board now agrees that its consideration of TUCPs must contain an express public trust analysis.

“A transparent process is the only way to ensure the Water Board complies with the law,” said Barbara Vlamis, AquAlliance Executive Director. “Back room deals will be a lot harder when

the Water Board has to explain, in writing, how it is advancing the public's interests in the Public Trust.”

“As a result of this lawsuit, the State Water Board can no longer completely ignore the Public Trust Doctrine in its Basin Planning and water rights orders,” said CSPA and CWIN Board Member and Mike Jackson.

Because of the lawsuit, Sacramento River temperature management will also improve.

To protect salmon spawning habitat, the Central Valley Basin Plan requires that the Bureau of Reclamation manage “controllable factors” to keep Sacramento River water temperature less than 56°F from Keswick Dam to Hamilton City. The Basin Plan also requires Reclamation to manage controllable factors to keep water temperature no greater than 68°F between Hamilton City and the I Street Bridge in Sacramento, whenever higher temperatures would be detrimental to migrating fish. In 1990, the Water Board adopted Water Rights Order 90-5, requiring the Bureau to submit an annual Temperature Management Plan for how to meet these temperatures. However, as late as 2019—nearly 4 years into the lawsuit—the Water Board had never required the Bureau to actually demonstrate whether it could provide colder water farther downstream using factors within its control. As a result of this lawsuit and settlement agreement, the Water Board is now asking Reclamation to analyze alternatives for the timing and quantities of water that Reclamation delivers to water users downstream, to meet temperature standards. The Board will also seek Reclamation’s analysis earlier in the year and will provide an annual opportunity for public comment and hearing.

The agreement includes an array of additional improvements. The Water Board has agreed to maintain staff with sufficient modeling and other expertise to actually evaluate the Bureau’s Sacramento River temperature impacts. The Water Board’s Phase II analysis commits to evaluate “a carryover margin of safety” of stored water from one water year to the next, to require water supply management that buffers against the potential for future dry years. Phase II will also evaluate water transfers and effects on groundwater.

“It is our expectation that, as a result of this agreement, the Water Board’s future consideration of TUCPs and Bay-Delta Plan updates will now account for and better protect public trust fisheries,” said Jennings.

CSPA, CWIN, and AquAlliance were represented by Jason Flanders at ATA Law Group (<http://www.atalawgroup.com/>), and the Law Office of Adam Keats (<https://keatslaw.com/>).

Lawsuit Settlement Agreement: <https://calsport.org/news/wp-content/uploads/2020.07.17-CSPA-v.-SWRCB-Settlement-Fully-Executed.pdf>

Lawsuit: <https://calsport.org/news/wp-content/uploads/Second-Amended-Complaint-Final.pdf>