



**SENT VIA EMAIL & FIRST-CLASS MAIL**

February 22, 2010

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Re: Draft Technical Report Workshop  
*Need to Disclose Legal Theory Behind Intended Plan of Implementation*

Dear Board Members:

The San Joaquin River Group Authority (“SJRG”) invested a great deal of time and energy drafting and submitting comments to the *Draft Technical Report on the Scientific Basis for Alternative San Joaquin River Flow and Southern Delta Salinity Objectives* (“Draft Report”) and preparing for and participating in the SWRCB’s January 6-7, 2011 workshop. Additionally, in an effort to draft and submit additional informative comments on February 8, 2011, the SJRG reviewed the comments submitted by other parties, the PowerPoint presentation made by staff, and the DVD of the entire workshop. After participation in the workshop regarding the Draft Report, and upon review of the information presented therein, the SJRG found that the SWRCB failed to identify the legal theory or approach it will use at the implementation proceeding in order to obtain the necessary flows to meet the additional flow requirements identified in the Draft Report. Therefore, the SJRG urges the SWRCB to identify such legal theory or approach as part of its decision to adopt a San Joaquin River flow alternative because absent such theory, the SWRCB cannot conduct economic or other impacts analysis in the Substitute Environmental Document (“SED”).

Although the Draft Report profusely expresses that it does not specify from where in the San Joaquin River watershed the necessary additional flows will come, (*see, e.g.*, p. 85), the Draft Report blatantly **suggests** that additional flows will come from the Stanislaus, Tuolumne and Merced Rivers. (*See, e.g.*, p. 78, 81 and 85-89). This foreshadowing demonstrates that the SWRCB not only believes that, regardless of the Vernalis flow alternative eventually adopted, it will be able to obtain flow from all of the tributaries, but that it intends to do so. That approach, however, completely ignores the existence of the water right priority system. (*See, e.g.*, Pleasant Valley Canal Company v. Borror (1998) 61 Cal.App.4<sup>th</sup> 742, 770; City of Barstow v. Mojave Water Agency (2000) 23 Cal.4<sup>th</sup> 1224, 1243; *see also* El Dorado Irrigation District v. State Water Resources Control Board (2006) 142 Cal.App.4<sup>th</sup> 937, 961). As the SJRG has pointed out to the SWRCB on numerous occasions, any approach to allocating responsibility for new Vernalis flow requirements must incorporate the water rights priority system.

That said, the SJRGA recognizes that strict application of the water right priority system does not produce straightforward results such that the water required to meet the selected Vernalis flow alternative would come from a particular waterway or tributary, or that such water would roughly be divided equally or proportionally among such waterways and tributaries.

That the SWRCB chose not to apply the water right priority system and not to specify the source of the necessary additional flows is significant for several reasons.

First, without the inclusion of a specified method for obtaining additional flows, the “Water Supply Impact Analysis” chapter of the Draft Report is not only misleading, but also serves no purpose. When evaluating the impacts of scenarios assessing the percent of unimpaired flow, the Draft Report claims that the flow measured at Vernalis will constantly be deficient and such deficiency must be rectified. (See p. 85-89). As was explained by Mr. Steiner and other panelists at the workshop, however, the mere fact that a deficit exists is not an “impact.” A deficit is simply the result of the mathematical difference between the actual flow and the required flow. “Impacts,” on the other hand, are the effects resulting from the means by which the flow deficiency is eliminated. Such impacts cannot be identified and quantified without first determining the source of the water proposed to be used to remedy the deficit and then evaluating the specific ramifications experienced by that source—be it the water right holder, a district or an area—of having less water to use. Thus, not only has the SWRCB failed to make even a cursory examination of the potential impacts associated with any of the Vernalis flow alternatives that are being considered, but the SWRCB is incapable of making such analysis because the SWRCB has not identified the legal theory or approach it will employ in the implementation process.

Second, upon proper evaluation of the “impacts,” such impacts will not be equitably or proportionately distributed among waterways or water right holders in the San Joaquin River basin if responsibility for new Vernalis flow requirements is determined solely based on the water rights priority system. Under the application of the water right priority system, junior water right holders will be required to reduce or completely cease their water use before senior appropriators will be required to reduce theirs. (United States v. SWRCB (1986)182 Cal.App.3d 82, 131, fn. 25).<sup>1</sup> That will result in a disproportional allocation of impacts by effectively “drying up” junior appropriators even if the result – as it would be in some instances such as the Chowchilla River – is only a modest and perhaps inconsequential contribution to Vernalis flows.

Third, the SWRCB has no jurisdiction to regulate pre-1914 appropriative water rights or riparian rights, regardless of any legal theory the SWRCB intends to use. If the SWRCB attempts to completely bypass the water right priority system and instead assign a percentage of flow to particular users or waterways to remedy the flow deficit at Vernalis, the SWRCB must consider the pre-1914 appropriative water rights and riparian rights held by those particular water users and on those particular waterways. Absent consideration of pre-1914 appropriative water rights and riparian rights, the desired flow results may not be achievable. For example, if the flow of a particular waterway is 100 cfs and the SWRCB attempts to assign a 60 percent bypass, yet the existing pre-1914 appropriative water rights and riparian rights

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<sup>1</sup> The reduction or elimination of junior rights is not based upon a finding of wrongdoing. The reduction in the rights of the junior water right holders is a function of their lack of rights, and not in the reasonableness or unreasonableness of their use. (See Moskowitz, “*Conflicts Between Water Rights and Water Quality*,” 174 California Env'tl. Law Reporter 216, 218 (1994).)

associated with that waterway are for 80 cfs, the SWRCB would not be able to obtain the full 60 percent flow desired. The California Environmental Quality Act not only requires the evaluation of project alternatives, it requires the evaluation of feasible project alternatives. If the SWRCB, due to lack of jurisdiction over pre-1914 appropriative water rights and riparian water rights, cannot implement a project alternative, then that project alternative is not a “feasible” project alternative.

Finally, by not identifying the legal theory or approach through which it will seek to obtain the flows necessary to eliminate the flow deficit at Vernalis, the SWRCB has also failed to address any methods it will employ to ensure that water made available by senior water right holders to remedy the flow deficit will not instead be diverted by junior water right holders located further downstream. This problem, which manifested itself throughout the performance of the VAMP experiment under the San Joaquin River Agreement, authorized by D-1641, must be addressed by the SWRCB in these proceedings to ensure that the water bypassed does in fact achieve its intended purpose and is not simply diverted by someone else.

As we were reminded in the SWRCB Cases (2006) 136 Cal.App.4<sup>th</sup> 674, any objectives the SWRCB adopts as part of its basin planning process must be achieved in a subsequent implementation proceeding. While the SJRGA contends that application of the water right priority system is the only method available to the SWRCB, it urges the SWRCB to immediately identify the legal mechanism it intends to use at implementation. The SJRGA and other parties have no interest in expending millions of dollars on the current process if the SWRCB’s implementation will ultimately be based upon an untenable legal theory, and thus will require the entire process to be redone starting from the beginning.

Although the SJRGA’s members were persuaded to submit a “settlement agreement” for implementing the 1995 WCQP in order to end the lawsuit filed by the San Joaquin Tributaries Association against the SWRCB alleging that the objectives adopted in the 1995 WQCP were not based upon sound science, the SJRGA’s members will not be similarly persuaded this time. The SWRCB must follow the law and must have substantial evidence to support whatever objectives it eventually adopts. The SJRGA’s members will not abide by the adoption of a poorly supported and facially deficient set of flow objectives in the hope that things will get better in the implementation proceedings.

Very truly yours,

**O’LAUGHLIN & PARIS LLP**



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TIM O’LAUGHLIN

TO/tb

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