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January 31, 2011

Mr. Charles R. Hoppin, Chair  
State Water Resources Control Board  
1001 I Street  
PO Box 2815  
Sacramento, CA 95812-2815

Re: Proper Scope of Draft Technical Report Workshop

Dear Mr. Hoppin:

On December 6, 2010, the San Joaquin River Group Authority ("SJRG") submitted comments on the *Draft Technical Report on the Scientific Basis for Alternative San Joaquin River Flow and Southern Delta Salinity Objectives* ("DTR") ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/bay\\_delta\\_plan/water\\_quality\\_control\\_planning/comments120610/tim\\_olaughlin.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/comments120610/tim_olaughlin.pdf)), which was the subject of the SWRCB's workshop on January 6-7, 2011. In its comments, the SJRG explained that there was a disconnect between the legal scope of the SWRCB's inquiry and the factual and technical information being submitted. (See December 6, 2010 comments, p. 9-11).

The SJRG had hoped that, having received the SJRG's comments, the SWRCB would have taken steps at the workshop to ensure that the panel discussions were properly limited to information relevant to the Delta. Unfortunately, however, the SWRCB failed to take such steps, and much of the panel discussions, which were focused on matters well upstream of Vernalis, were completely irrelevant. Before continuing with the formal proceedings to consider changes to the SJR flow objectives, the SWRCB must either (1) specifically refuse to consider any information submitted to date regarding conditions upstream of Vernalis, except as such information may be relevant for purposes of evaluating the impacts of any new flow objectives, or (2) issue a new notice that properly identifies both the legal and factual scope of the SWRCB's inquiry to include the areas upstream of Vernalis and permit the parties an opportunity to submit relevant information regarding those areas.

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*The Proper Scope*

Beginning with the SWRCB's February 13, 2009 letter, announcing the release of a notice of preparation and of a scoping meeting, and continuing through the SWRCB's November 22, 2010 notice of opportunity for public comment, the SWRCB has been clear that it is considering amending the SJR flow objectives presently contained in the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("2006 WQCP"). This is significant since the SWRCB is required to establish, within a specified area, beneficial uses which serve as the basis for establishing water quality objectives. (Water Code § 13050(j)). By continuing to frame the inquiry as limited to amending the SJR flow objectives that are set forth in the 2006 WQCP, the SWRCB has accepted the geographic area specified in and by the 2006 WQCP.

The SWRCB identified the geographic scope, the "waters within a specified area" as required by Water Code section 13050(j), in the 2006 WQCP to be "the waters of the San Francisco Bay system and the legal Sacramento-San Joaquin Delta..." (2006 WQCP, p. 10; *see* 2006 WQCP, p. 2, Fig. 1 [attached hereto as Exhibit A]; *see also* 1995 WQCP, p. 14 [giving same geographic scope]). The "legal Sacramento-San Joaquin Delta" is defined in Water Code section 12220 and does not include any area upstream of Vernalis. Having accepted the San Francisco Bay and legal Delta as the geographic scope, the SWRCB is thus required to identify beneficial uses to be protected within that specified area (Water Code § 13050(j)), which are the basis for any water quality objectives established to protect the beneficial uses found within the specified geographic area. (*Id.*, *see* Water Code § 13050(h)). That is, the beneficial uses to be protected by the current SJR flow objectives, as well as any amended SJR flow objectives, must be found and limited to the waters of the San Francisco Bay and legal Delta.

In the DTR, SWRCB staff recognizes that it is limited to considering those flow objectives that will protect the reasonable and beneficial uses found in the San Francisco Bay and legal Delta:

"While SJR flows upstream of the Bay-Delta, including SJR tributary flows, are important to the protection of fish and wildlife beneficial uses, the focus of this water quality control planning effort is on the Bay-Delta. The legal boundary of the Delta on the SJR is at Vernalis, where the lower SJR flows directly into the southern Delta. Accordingly, the focus of this review is on SJR flows at Vernalis for the protection of fish and wildlife beneficial uses. Other SJR flows, including tributary flows, will be the focus of future State Board activities..." (DTR, p. 34)

This statement by SWRCB staff is correct, and accurately defines and limits the SWRCB's inquiry to possible SJR flow objectives that will protect the beneficial uses found within the San Francisco Bay and legal Delta.

*Much of the Information Submitted Was Beyond the Proper Scope*

Despite recognizing that the scope of the SWRCB's inquiry is limited to the San Francisco Bay and legal Delta, in the DTR the SWRCB staff nonetheless discusses the alleged benefits of increased flow upstream of Vernalis, including triggering fry migration from the tributaries, and

improving conditions and temperatures for egg incubation and adult spawning in the tributaries (DTR, p. 48). Worse, the SWRCB presentation at the January 6-7, 2011 workshop also contained a host of information that was focused upstream of Vernalis, including detailed flow analysis of the Stanislaus, Tuolumne, Merced and Upper San Joaquin Rivers. (See SWRCB staff presentation, slides 13, 15-16, 20-21 and 24). In fact, despite identifying the San Francisco Bay and legal Delta as the scope of its inquiry in the 1995 and 2006 WQCPs, and including a map depicting such area, the SWRCB staff presentation map of "The Project Area" depicts the Stanislaus, Tuolumne, Merced, Chowchilla, Fresno and Upper San Joaquin Rivers, and fails to include the San Francisco Bay, the Central Delta, the North Delta or the Suisun Marsh. (See SWRCB staff presentation, slide 9 [attached hereto as Exhibit B]). A comparison of Figure 1 from the 2006 WQCP and "The Project Area" from the SWRCB staff presentation is both revealing and troubling.

Not unexpectedly, many of the commenters to the DTR and participants in the January 6-7, 2011 workshop provided information regarding conditions, factors and alleged benefits upstream of Vernalis. For example, the Department of Interior ("DOI") supports the proposed use of the natural hydrograph as a basis for new SJR flow objectives based, in part, upon the perceived benefits such use will have upstream of Vernalis on temperature (see DOI's December 6, 2010 comments, p. 5-6) and restoring natural geomorphic process to benefit spawning habitat. (*Id.*, p. 5). In fact, DOI makes no secret of its contention that lower SJR and tributary flows are intertwined and must be considered together (*Id.*, p. 8-9), and nearly all of its comments are directed towards support for increasing flow in both the lower SJR and the upstream tributaries. (*Id.*, p. 1-2).

The National Marine Fisheries Service ("NMFS") provided similar comments, suggesting that there should be both Delta and tributary flow standards (and that the tributary flows should be a proportionate allocation of the Delta flow) (NMFS' December 6, 2010 comments, p. 8) and arguing that the proposed flows at Vernalis will protect fish not in the Delta but "in the San Joaquin River basin." (*Id.* at p. 1). The California Department of Fish and Game ("CDFG") submitted lengthy comments focused on the anadromous fish populations in the tributaries and how it supports increased flows to increase production of anadromous fish in the tributaries. (See DFG's December 6 comments, p. 3-14). Similar comments were provided by The Bay Institute (see December 6, 2010 comments, p. 2-6).

In all of the comment letters discussed above, there is little or no discussion of whether or not the proposed flow objectives need to be changed to protect salmon and steelhead while in the Delta. Instead, almost all of the discussion is limited to (1) informing the SWRCB that it must include year round and tributary flow requirements, or (2) supporting amended SJR flow objectives for their assumed benefits in the various tributaries.

This same pattern can be found in the various panel discussions, which focused almost exclusively on the areas upstream of Vernalis. Whether the discussion was about mobilization of sediment, reconnection of the floodplain, or improving water temperature, it was always focused on the tributaries. Whenever the SJRGA's witnesses tried to bring the discussion back to the Delta, and whether or not the proposed flow amendments would lower temperatures, increase habitat or reconnect the floodplain, the other panelists reacted with obvious frustration. At one point, Mr. Roger Guinee, appearing on behalf of the DOI, responded to Mr. Doug Demko by stating that "water is habitat" and therefore any increase in SJR flows into the Delta would

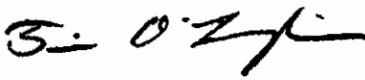
increase the available habitat in the Delta. Similarly awkward moments occurred when Mr. Dale Stanton of DFG, Peter Vorster of TBI and Mr. Roger Guinee all discussed the opportunities for the creation of additional floodplain habitat in the tributaries and how valuable that was irrespective of whether or not or how much floodplain habitat was created in the Delta via the proposed flow objectives. When Ms. Spivey-Weber asked questions of the fish panel regarding the likelihood of increasing habitat and reconnecting with the flood plain *in the Delta*, Mr. Demko responded to her question directly, but Dr. Tina Swanson of TBI dodged the question and talked about needing to take a "holistic" view, and Mr. Dean Marston of DFG stated that the relationship between flow and habitat was a "conundrum" but that more flow was still needed.

The SJRGA understands that the SWRCB will have to look at the tributaries and other areas upstream of Vernalis as part of its Substitute Environmental Document ("SED"). However, an evaluation of impacts after the flow objectives have been established is radically different from looking at the alleged benefits that the new flow objectives may have upstream of Vernalis, or worse, using such alleged benefits as justification for the new flow objectives in the first place. The SWRCB should not seek, receive or consider any information concerning the areas upstream of Vernalis until it has identified the various SJR flow alternatives it will consider for protection of beneficial uses found within the Delta.

The 1995 WQCP established SJR flow objectives at Vernalis to improve attraction and transport flows and to improve in-Delta habitat. These objectives were unchanged in the 2006 WQCP. Now, the SWRCB is evaluating whether or not it needs to amend the SJR flow objectives, but in so doing, it is not focusing its inquiry on the beneficial uses located within the Delta and the water quality objectives necessary to protect those uses. Salmon and steelhead migrate through the Delta, so a focus on conditions in the Delta during the times that those species may be found in the Delta is appropriate. To date, however, the framing of the inquiry by the SWRCB staff and the evidence submitted by many of the interested parties, as well as the SWRCB staff, is focused on conditions far upstream from the Delta. If such focus is in accordance with the SWRCB's wishes, the SWRCB needs to issue a new notice and officially inform all of the interested parties that information regarding the areas upstream of Vernalis is relevant to its inquiry and that information regarding such areas and the alleged benefits of increased flow on such areas is welcomed. If, on the other hand, such focus is not in accordance with the SWRCB's intentions, then the SWRCB must publicly re-direct both its staff and the interested parties to limit the information, presentations and arguments to the Delta.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**

By:   
TIM O'LAUGHLIN

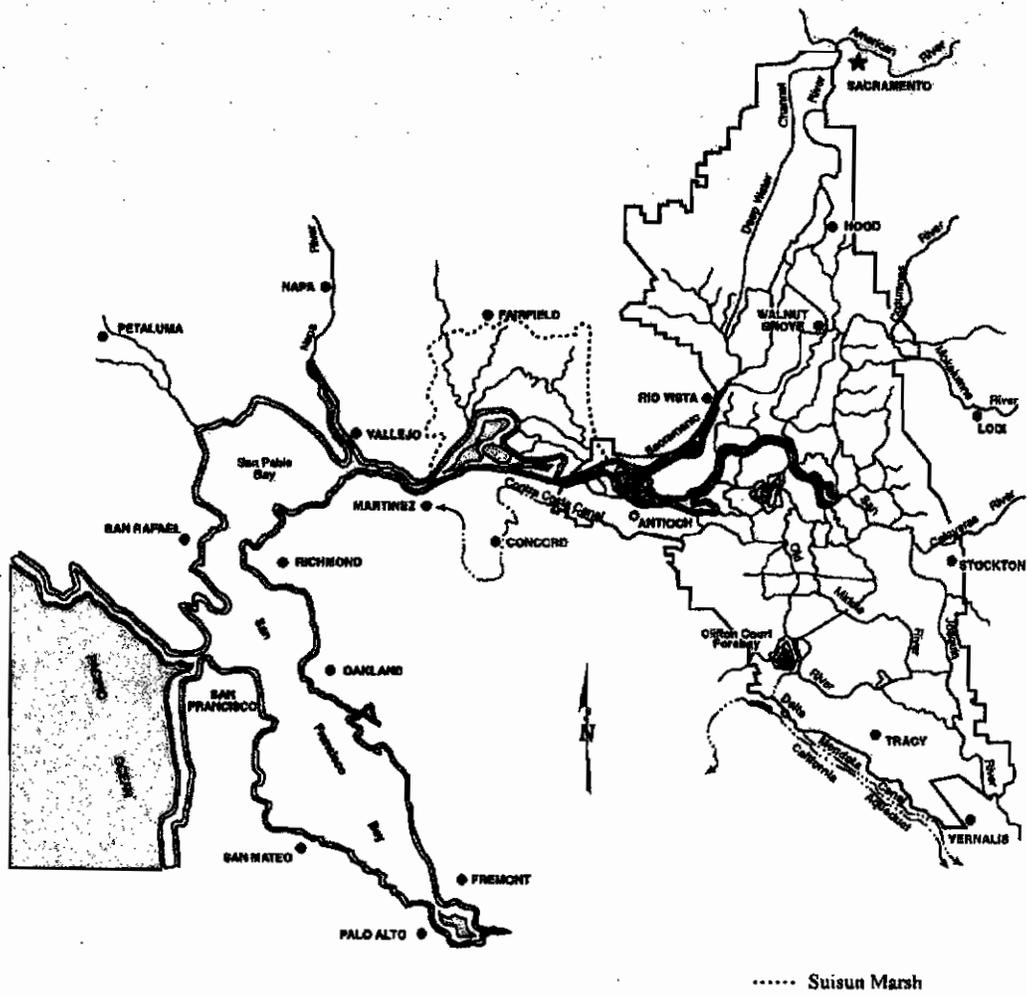
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Enclosures (2)

Charlie Hoppin  
January 31, 2011  
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# EXHIBIT "A"

**FIGURE 1  
BAY-DELTA ESTUARY**



# EXHIBIT "B"

# Project Area

