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VIA ELECTRONIC MAIL: Commentletters@waterboards.ca.gov



Felicia Marcus, Chair  
Members of the Board  
State Water Resources Control Board  
c/o Jeanine Townsend, Clerk of the Board  
Post Office Box 100  
Sacramento, CA 95812-0100

### Re: Comment Letter: Delta September 2014 Workshop

Dear Chair Marcus and fellow members of the Board:

We submit these comments on behalf of our various South Delta landowner clients in response to your Notice of Public Workshop on Central and Southern Delta Water Availability and Use scheduled for September 24, 2014. Thank you for the opportunity to comment on this critical issue.

#### **Process, Type of Proceeding**

The notice requests comments on the type of proceeding the Board should use to address the issue of water availability in the Southern Delta. We feel very strongly that the only type of proceeding that can be used to address the *factual part* of this issue is a complete evidentiary hearing, for the following reasons:

1. The Board cannot adopt a regulation to address this issue until it understands the facts and realities of the Delta. These facts must be evaluated in an evidentiary hearing that includes cross-examination and expert testimony.
2. The Board and staff also cannot meaningfully conduct case-by-case investigations regarding alleged unlawful diversions of stored water in the Delta until the factual disputes regarding water availability in the Southern Delta are resolved.
3. Delta landowners and the State and Federal Projects rely on the common Delta Pool as part of their water rights. These rights comprise one of the largest sets of water rights and use in the entire state. The Board must have a solid factual basis to administer and/or regulate this rights.

4. The Delta is complex and works differently than a normal stream flowing out of the mountains. The effect of the tides and the use by the projects of Delta channels for conveyance adds to this complexity. The interested parties should be required to put forth evidence to support their view of how water availability in the Delta should be determined. Other interested parties must be allowed to cross-examine each witness to highlight the strengths and weaknesses of the testimony so that the Board members can obtain a complete and unbiased understanding of the facts.
5. This year the Board has curtailed all post-1914 appropriative rights, including early permits and licenses that divert from the Delta and pre-date the export projects. If there is water available in the Delta, these curtailments were improper and need to be lifted before additional damage to these lands is done. Also, this problem must be resolved before another dry year.

Once the evidentiary hearing is over, the Board can make factual findings regarding how it will determine water availability in the Delta. Aggrieved parties could appeal any findings/decision based on the administrative record.

The determination of *legal issues* is not best suited for the Board and should be referred to a Court. For example, the projects have claimed that riparian diverters in the Delta have no right to divert water that is composed of tidal flows. The Delta interests, including my clients disagree. The riparian rights doctrine was developed by the Courts at common law. Riparian rights are not defined by the Water Code or by this Board's precedent. This is the type of legal issue that should be decided by a Court of law in the first instance. We would support a request by the Board to Court of law to decide these fundamental legal issues.

### **Issue Identification/Questions to Address**

The Notice included three proposed questions and requested input. We respond to each:

*Notice Question 1: Is any of the previously stored water in Sacramento River watershed reservoirs that DWR and USBR release from storage (including releases for exports from the Delta or salinity control and public trust protection, or stored water that is transferred through the Delta from purchase points north of the Delta to points of delivery south of the Delta) available for appropriation by diverters in the central and southern Delta?*

This question confuses the main issue and should not be used. The main issue is not whether stored water is available for use by diverters in the Delta. Delta diverters are not seeking or intentionally diverting stored water. The main issue is how to determine water availability in the Delta. If Delta water availability is defined as the Delta interests believe it should be, this question would become essentially irrelevant.

*Notice Question 2: Does the connection of the Delta provide additional water to satisfy water right demand in the central and southern Delta? If so, is this water subject to, or available for appropriation or riparian right? Are there other sources of water available for appropriation or riparian right in the central and southern Delta, other than contributions from Sacramento-San Joaquin watersheds?*

This second question is closer to the main issue facing the Board. However, as phrased it mixes factual, legal and policy issues. We recommend rephrasing as follows:

**Issue: Is there water available for diversion in the South and Central Delta absent operation of the projects?**

- a. Factual Question: Are there other sources of water in the central and southern Delta, other than contributions from Sacramento-San Joaquin watersheds?**
- b. Legal Question: Are these other sources of water available for appropriation or use under a riparian right?**
- c. Policy Question: How should water availability in the South and Central Delta, absent the projects, be determined?**

It is appropriate for the Board to hold a hearing on the factual and policy questions. The legal question must be resolved by a Court.

Further, the factual question is complex and includes numerous sub-parts. We have attached as Exhibit A to this letter a partial list of subparts of this factual issue that would necessarily become part of an evidentiary hearing.

*Notice Question 3: Will the required diversion information proposed in the draft Order, in conjunction with the information submitted pursuant to the Delta TUCP Order, be sufficient to inform a State Water Board determination on the availability of water for diverters in the central and southern Delta?*

The third question involves the policy and logistics involved in getting the right information to Board staff so that they can actually administer water rights once water availability in the Delta is understood. However, there is a serious disconnect with this question, as phrased, and the main issue of water availability.

The concept of determining water availability in the Delta relates to determining what water is available for valid water right diverters. The draft order embraces a totally different concept of determining who is a valid water right diverter regardless of what water is available to divert. As we explain in detail below, the draft order (1) is grossly overbroad because it covers all diverters in the Delta, (2) unfairly targets one region of the State, and (3) would result in an enormous waste of private and public time and resources with no identifiable benefit.

### **Comment on the Draft Order for Additional Information**

The draft order proposes to require ALL diverters in the Delta to provide information to the board within 5 days. The information requested is (1) the type of water right claimed for each point of

diversion and place of use, and (2) diversion amounts from October 2013 to December 2014.

1. **The requested information cannot be realistically provided within 5 days:** Most diverters are currently harvesting crops. It would take several hours to compile the requested information for each point of diversion and each field. Additionally, diverters will likely want to consult with their water rights counsel.
2. **The Board already has the requested information on the type of water right being claimed.** This information is already part of the Statements on file for each diverter and each diversion point. If the Statements are unclear on this point, then it would make sense for the Board to ask for clarification from only those who filed unclear statements.
3. **The Board will receive the same water use information from most diverters in June 2015 when reporting is due.** The same information must be reported by diverters on their triennial reports, which generally take several months to compile for larger farmers. It is unclear what the Board could do with this information between now and June that would be useful. If the Board believes this information is necessary earlier, at a minimum, it should give farmers at least 60 days to compile it so that they can get through harvest and do a good job with the compilation.
4. **The order is overbroad and without rationale basis.** The board only has authority under its regulations to make information requests when there is a complaint alleging interference with a water right or upon receipt of information indicating unlawful diversion of stored water. Obviously, the board should not act on unfounded complaints that lack specificity or a showing of actual injury as this would be an abuse of discretion.

Here, the Board has not received a credible complaint or information indicating that stored water is being unlawfully diverted. The credibility of the projects' allegations must be evaluated in an evidentiary hearing. *There has been no allegation that the projects are unable to pump from the export pumps the amounts this Board has allowed them to pump pursuant to their rights* ó there has been no actual or alleged interference with a water right.

Further, a generalized complaint of unlawful diversion against each and every diverter in the south and central delta that they are stealing stored water or do not have a valid water right is not reasonable or credible. Board staff have spent countless hours over the past five years investigating complaints against purported unlawful diversions in the Delta only to determine the complaints are unfounded.

This Board should not even consider using such an order to request information until the projects put forth at least some evidence to suggest that specific diverters are diverting without a valid right. Absent this kind of specific complaint, any such order would be an abusive fishing expedition against a single region of the state.

Thank you again for the opportunity to comment and for your thoughtful consideration of these important issues.

Very truly yours,

A handwritten signature in blue ink that reads "Jennifer L. Spalletta". The signature is written in a cursive style with a prominent initial "J" and a long, sweeping underline.

JENNIFER L. SPALETTA  
Attorney at Law

cc: SWRCB Board Members  
Tom Howard, Executive Director

## **Exhibit A**

### **Subparts to the Factual Issue of How to Determine Water Availability in the Delta**

- What water makes up the Delta Pool (or alternatively, “the watercourses from which South and Central Delta diverters divert”)?
- How does the volume of water in the Delta Pool change under different hydrologic conditions?
- What does the “natural flow” in the central and southern Delta consist of? Inflow from Sacramento River, San Joaquin River, Mokelumne River, Calaveras River, Cosumnes River? Water already in Delta channels? Suisun Bay? San Francisco Bay? Rivers tributary to Bay waters like the Napa River? Artesian flow? Accretions from groundwater?
- Does the effect of the tide maintain a constant pool of water in the central and southern Delta or does that pool dissipate in the absence of inflow from eastside tributaries?
- What effect does the diversion of water from the central and southern Delta have on the total amount of water available from those channels?
- Under natural conditions did the waters of the various tributaries remain distinct after entering the Delta or did tidal action, sea level and varying rates of inflow mix those waters? Did that mixed water travel upstream on tides or did only the water originating from each tributary move back upstream on each tide toward the respective tributaries?
- Does Sacramento River water reach the central and southern Delta channels under natural conditions? Are the central and southern Delta part of the Sacramento River watershed? The Suisun Bay watershed? The San Francisco Bay watershed?
- Do transfers affect accretions to and losses from watercourses upstream of the Delta?
- Is it possible to characterize (e.g., designate as natural flow) any water in the Delta in light of the numerous inputs, accretions, losses, reuse and discharges which occur upstream?
- How does the storage of water by the projects in earlier months impact the water available in the Delta in later months once the time lag for natural flow that resides in the Delta is accounted for?