



VIA ELECTRONIC MAIL AND U.S. MAIL

January 11, 2008

Ms. Isabel Baer
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P.O. Box 2000
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RE: January 22, 2008 Pelagic Organism Decline Public Workshop
Written Comments of the San Joaquin River Group Authority

Dear Ms. Baer:

The San Joaquin River Group Authority (“SJRG”) notes that the State Water Resources Control Board (“SWRCB”) will conduct a public workshop on January 22, 2008 to, in part, “collect information that may be used in a proceeding to update the current Water Quality Control Plan for the Bay-Delta (Bay-Delta Plan) or to support other actions that the [SWRCB] may consider to improve fishery resources of the Bay-Delta.” (Notice of Public Workshop, p. 1). Further, at the January 22, 2008 public workshop, the SWRCB will discuss and seek specific recommendations for actions to improve the fishery resources in the Delta, including specifically “Short-term and long-term actions the [SWRCB] should consider under its various authorities to improve habitat conditions for fishery resources.” (Notice of Public Workshop, p. 2). At this time, the SJRG recommends that the SWRCB undertake a complete and thorough review of the existence and exercise of water rights within the legal Delta, and especially the South Delta, and enforce those rights as necessary. The SJRG is confident that, at the conclusion of such review, water that is presently diverted from the Delta will be required to remain in the Delta and thereby improve the habitat conditions for the fishery resources within the Delta.

Problems Associated with Delta Water Rights Are Not New

The SWRCB has long been aware of the relationship between Delta exports and in-Delta water rights and the need to identify and quantify such rights. However, such identification and quantification has never been done.

In D-990, the SWRCB stated “the Bureau’s representatives have consistently affirmed their policy to recognize and protect all water rights on the Sacramento River and in the Delta existing under State law at the time these applications were filed,

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including riparian, appropriative and others. **Unfortunately, these rights have never been comprehensively defined.** It is imperative, therefore, that the holders of existing rights and the United States reach agreement concerning these rights and the supplemental water required to provide the holders with a firm and adequate water supply, if a lengthy and extremely costly adjudication of the waters of the Sacramento River and its tributaries is to be avoided...the type of contract entered into between the holders of existing rights and the United States will have a direct bearing on the requirements necessary to protect existing rights.” (D-990, p. 35 (1961)).

After D-990, the SDWA and CDWA were created by statute with the primary purpose of negotiating and entering into agreements with the United States and/or the State of California to (a) protect the lands within their boundaries against salt water intrusion from the ocean and (b) assure the lands within their boundaries a dependable supply of water. (SDWA, Water Code Appendix § 116-4.1; CDWA, Water Code § 117-4.1; *see also* Central Delta Water Agency v. SWRCB (1993) 17 Cal.App.4th 621, 630).

In D-1485 and the 1978 Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh, the SWRCB again reiterated the need to reach an agreement between the CVP and SWP to avoid an adjudication of water rights. It stated that agriculture in the Delta was a beneficial use to be protected and the most practical solution for long-term protection of southern Delta agriculture was construction of physical facilities to provide adequate circulation and substitute supplies. If necessary physical facilities were constructed, the circulation flows needed would only be a “moderate” increase above those committed from New Melones, which at the time were 70 TAF annually. The projects needed to mitigate for their impacts to Delta agriculture, but the SWRCB cautioned “If an agreement is not executed by January 1, 1980, the Board will examine in detail southern Delta water rights, determine the causes and sources of any encroachment, and take appropriate action to the extent of the Board’s authority.” (D-1485, p. 6 (1978)).

As of 1985, the nature and extent of Delta water rights was still unknown. In *South Delta Water Agency v. the U.S. Department of the Interior*, the court found no basis to support an injunction against the Central Valley Project (“CVP”) to protect and preserve water rights in the Delta. The Court stated “there has been no judicial determination whether South Delta has rights to the water it asserts the CVP is affecting. Logically, a court cannot adjudicate the administration of water rights until it determines what those rights are.” (*Id.* 767 F.2d 531, 541).

For more than 40 years, the SWRCB has known, as a general matter, that the water rights held and exercised by diverters within the Delta have not been properly identified or quantified. For the most part, however, such knowledge has been general in nature, with no specific information as to how the lack of identification and quantification is actually causing harm within the Delta. However, the specific nature of the problem has been repeatedly acknowledged in recent years by Delta diverters and can no longer be ignored by the SWRCB.

Delta Diverters Acknowledge They Don't Know What Rights, if Any, They Have

The primary problem associated with the lack of any information regarding the identification or quantification of is that the Delta diverters regularly take whatever quantity of water that they need, without regard to whether or not they have a right to the water or, if so, if such right is limited by place of use, purpose of use, or timing of use restrictions.

A. Riparian Rights Unexamined and Unproven

Alex Hildebrand, a landowner within the South Delta Water Agency ("SDWA"), as well as a director of SDWA, consultant to SDWA, and expert witness for SDWA (*See* June 17, 2003 deposition transcript, p. 9, 13-15, attached hereto as Exhibit A), has stated on several occasions that virtually all of the lands within the Delta are riparian due to their elevation relative to tidal elevation. (*See, e.g.*, May 27, 1999 deposition transcript, p. 14-15, attached hereto as Ex. B; *see also* June 25, 1998 deposition transcript, p. 29-30, attached hereto as Ex. C). However, despite this assertion, the SDWA has not conducted any investigation as to whether or not any specific parcel of land within the Delta is, as a matter of law, riparian. (*See* Ex. C, p. 22-24).

Similarly, few individuals in the Delta that claim riparian rights have ever done any investigation to substantiate such claim. For example, Mr. William Salmon, who leases a 300+ acre ranch owned by Henry and Bill Long ("the Long Brothers Ranch"), assumes that the ranch is riparian to the San Joaquin River, but has never investigated whether or not his assumption is correct. (*See* May 25, 1999 deposition transcript, p. 13, 17, attached hereto as Exhibit D). Mr. Salmon also manages two ranches owned by Augusta Bixler Farms comprised of more than 3300 acres, and assumes that they have riparian rights. Again, however, Mr. Salmon has never investigated or verified his assumption. (*See* Ex. D, p. 11, 28 and 37).

Mr. Richard Pellegrini, manager of Reclamation District 258 and farmer within the Delta, also could not substantiate his claim to riparian (or any other) water rights. (March 24, 2003 deposition transcript, p. 9-10, attached hereto as Exhibit E).

Mr. Hildebrand is no different, as he testified that his land is riparian based on the fact that it is contiguous to the San Joaquin River. (Ex. B., p. 14).¹

In 2004, the SWRCB issued complaints for administrative civil liabilities ("ACL") against four landowners within the Delta, alleging that they took water despite being ordered to cease diversions pursuant to Term 91. All four alleged that they had riparian rights which enabled them to divert despite the Term 91 prohibition. After a

¹ Even assuming Mr. Hildebrand's property is riparian, he is woefully ignorant of the limitations on riparian rights and likely diverts water to which riparian rights do not attach. Although the law is clear that riparian rights only attach to natural flow (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 116), Mr. Hildebrand has testified that he believes that "if upstream parties retain water that causes it to come down at a later time, I think riparian rights still applies to it." (Ex. A, p. 71).

complete evidentiary hearing before the SWRCB in 2004, and appeals to the Superior Court of Sacramento County and the Third District Court of Appeals, it was determined that three of the four did not have riparian water rights. (*See* SWRCB Order WRO 2004-0004; *see also Phelps v. SWRCB* (2007) 68 Cal.Rptr.3d 350). As a result, stiff financial penalties were issued (and upheld) for diverting water for which they had no right.

B. Appropriative Rights Are Exercised Without Regard to Their Limitations on Quantity, Timing or Place of Use

Much like their treatment of riparian rights discussed above, Delta diverters with appropriative rights make little or no effort to know, let alone comply, with the limitations on such rights. For example, Mr. Pellegrini was unable to identify what individual rights, if any, his property had to water (Ex. E., p. 10), nor what RD 258's rights under its SWRCB-issued licenses are. (*Id.*, p. 16-17).

Mr. Jerry Robinson testified that 75 acres of the Lafayette Ranch had water rights pursuant to license 1063. However, Mr. Robinson did not know how much water he was taking, nor the reason for the license itself. (*See* March 27, 2003 deposition transcript, p. 5-6, attached hereto as Exhibit F). When pressed on how he would know if he was exceeding his licensed right without a meter on his pump, Mr. Robinson testified that he just continued to use the pump that existed when he bought the place and assumed that it was properly sized. (*Id.*, p. 6).

Mr. Robert Ferguson, also a director for SDWA, farms approximately 1500 acres in the Delta. (*See* May 27, 1999 deposition transcript, p. 5, attached hereto as Exhibit G). His property is benefited by two licenses, one for irrigation from Grant Line Canal between April 1 and December 31 on 463.1 acres, and another for irrigation from Grant Line Canal between April 1 and December 31 for 1017.3 acres. (*Id.*, p. 13). Nonetheless, Mr. Ferguson was unable to explain how the acreage numbers for his licenses were derived, nor to which specific acreages of his 1500 that they applied. (*Id.*, p. 13). Further, Mr. Ferguson did not measure the amount of water he was diverting at any one time, nor did he measure the amount of water applied to any specific acreage (*Id.*, p. 14). In short, Mr. Ferguson neither knows nor demonstrates concern for whether or not he is complying with the terms and conditions of his licenses.

Mr. Salmon, whose duties as manager of the 3300 acres owned by Augusta Bixler Farm includes "everything," thinks that the property is benefited by two or three licenses but is not sure, does not know what the season of use, or what the quantity approved for diversion is. (Ex. D, p. 13, 27-28). None of the pumps have meters on them to measure the amount of water diverted. (*Id.*, p. 32, 37).

Mr. Hildebrand is likewise not concerned with the specifics of his two licenses. Mr. Hildebrand essentially claims that the licenses are duplicative of his claimed riparian right, and he only got them as he was concerned that riparian rights would be done away with. (*See* Ex. B, p. 9; *see also* Ex. C, p. 26; *see also* Ex. A, p. 72; *see also* D-1641 Reporter's Transcript, p. 16041, attached hereto as Exhibit H). As such, he cares little for

the season of use restrictions on his licenses, diverting when he wants to and claiming that any out of season diversions are legal under his riparian right. (Ex. B, p. 11-12; Ex. H, p. 16043). Similarly, he pays no attention to the diversion rate or amount, again claiming that any exceedances of his licenses are under his riparian right. (Ex. B, p. 12-13; Ex. H, p. 16060). Moreover, according to Mr. Hildebrand, “appropriative rights are diversion rights which don’t really tell you much about how much water you can actually use...” (Ex. B., p. 28). This may explain why Mr. Hildebrand does not have a meter on his pump to determine whether or not he is complying with his licenses conditions. (*Id.*, p. 13).

Mr. Hildebrand’s laissez-faire attitude regarding the terms and conditions of his licenses also applies to the application of the priority system. It is well established that California’s appropriative water right system is based upon priority, such that in times of insufficient water to meet the needs of all appropriators, the most senior appropriators get to divert their full entitlement before the junior appropriators get to divert at all. (*United States v. SWRCB*, *supra*, 182 Cal.App.3d at 101-102). Despite this, and despite the fact that his licenses date from the 1960s, Mr. Hildebrand has never made a determination of whether or not he should cease diverting water based upon his lower priority. (Ex. A, p. 70-71).

Admissions By Delta Diverters Demonstrate the Problems In Action

The ignorance and attitudes regarding the existence, nature and extent of Delta water rights outlined above are troubling in the abstract, but have manifested themselves in concrete action by diverters in the Delta. In short, such ignorance and attitudes have resulted in the diversion of water at all times, under all conditions, without regard to and in contravention of riparian and appropriative rights.

As a personal matter, Mr. Hildebrand has expressly admitted diverting water from the Delta for which he had no legal right. During the D-1641 proceedings before the SWRCB, the following exchange took place:

“Mr. O’Laughlin: Mr. Hildebrand, do you remember in your deposition saying that in certain dry years that you took water – you went over to Walthall Slough and put a pump in and began diverting water? Under what right did you do that?”

Mr. Hildebrand: Riparian right.

Mr. O’Laughlin: Okay. Where is Walthall Slough in relation to your property?

Mr. Hildebrand: I guess it’s not strictly correct to say that I have a riparian right on Walthall Slough...”

Mr. O’Laughlin: ...That slough never touches your property, does it?

Mr. Hildebrand: No. I corrected myself when I said I had a riparian right to it, that isn’t quite correct.

Mr. O’Laughlin: Okay. So under what right did you go into Walthall Slough and begin diverting water to your property?

Mr. Hildebrand: I guess it was the right of desperation...” (Ex. H, p. 16055-16057).

This is not an isolated incident, or limited to the actions of Mr. Hildebrand. According to Mr. Hildebrand, diversions without right are common throughout the Delta. In the D-1641 proceedings, he testified that in the 1992 drought, many parties ignored notices from the SWRCB to cease or limit diversions. (Ex. H, p. 16048-16050). In fact, Mr. Hildebrand testified that such notices were “unenforceable and people just continued to divert what was available to them,” and that “as far as I know, nobody on the river system stopped pumping with the kind of water right situation that we have. Except, of course, when the water wasn’t available.” (Ex. H, p. 16048-16050).

Mr. Hildebrand reaffirmed the notion that those in the Delta divert based upon need, as opposed to right, in 2003.

“[Mr. O’Laughlin]: Do you know if farmers within the South Delta Water Agency basically irrigate whenever they want?

[Mr. Hildebrand]: They do it whenever they need to if they can, yes.

[Mr. O’Laughlin]: So, given the parameters that they need water to irrigate, and if water is available, they’re going to irrigate. Correct?

[Mr. Hildebrand]: Yes.” (Ex. A, p. 69-70).

While it is clear that many Delta diverters take based upon need, and not based upon right, it is hard to quantify how much water is being illegally diverted.² On the macro-level, in D-1641 the SWRCB compared the South Delta Diversion requirements to natural flow and determined that for those lands that are riparian or hold Pre-1914 rights, their diversions will be limited solely to “natural flow,” which generally does not exist between July and October of most Below Normal, Dry and Critically Dry water year types. Assuming South Delta diverters continue diverting regardless of their water rights,

² This is especially true as many diverters have no meters on their pumps, as is discussed above.

but rather based upon their needs, in some years more than 100 TAF could be illegally diverted.

Year Type	Jul		Aug		Sept		Oct		Year Total (AF)
	Flow	AF	Flow	AF	Flow	AF	Flow	AF	
W	12,685	0	2,274	0	634	0	601	0	0
AN	4,567	0	94	0	-476	-28,274	26	0	-28,274
BN	2,915	0	-410	-25,166	-672	-39,917	-373	-22,895	-87,977
D	488	0	-741	-45,483	-406	-24,116	-118	-7,243	-76,842
C	176	0	-804	-49,350	-725	-43,065	-402	-24,675	-117,089 ³

The amount of water taken by riparian and pre-1914 water rights is further exacerbated by post-1914 diversions. In BN, Dry, and CD years the appropriators in the Delta are, at various times of the year, junior to the upstream diverters. Thus, junior appropriators should be cut off before any senior water right holders. There are approximately 225,000 acres in the South Delta. Of these, 180,000 acres are farmed. With an average ET of three feet per acre one can see how much demand there is within SDWA for water, approximately 540,000 acre feet.

More specific amounts of illegally diverted water were calculated by the SWRCB as part of its decision WRO 2004-0004. In that case, the SWRCB found that three farmers had diverted water without right in 2000 and 2001. In those two years, the SWRCB calculated that the total amount of water illegally diverted by the three farmers was 1093.4 AF. (See excerpt from exhibits of John O'Hagan, p. 5, attached hereto as Exhibit I).⁴ According to the Sacramento County Superior Court, the "harmful effects" of the illegal diversion of over 1000AF by these three farmers "is patent: the unauthorized diversions took water out of the Delta system at a time when it was needed to meet Delta water quality standards and the requirements of water right holders senior to" the three farmers. (See February 14, 2006 Ruling, p. 11, attached hereto as Exhibit J).

The SWRCB Must Take Action to Identify and Quantify Existing Water Rights in the Delta, and to Enforce the Existing Law Against Those that Illegally Divert

In its December 11, 2007 Notice of Public Workshop, the SWRCB indicates that it wants to examine actions that it can take to improve habitat conditions in the Delta for fishery resources. The SJRGA is confident that many of the suggestions made to the SWRCB, and many of the alternatives considered by the SWRCB, will relate to actions or activities located *outside* of the Delta, such as increasing flows into the Delta, water conservation by the SWP and CVP customers, and regulating the quality of water that enters the Delta. Without commenting on the appropriateness of such actions, the SJRGA submits that the SWRCB can and must first enforce the law against illegal diversions *within* the Delta.

³ This chart was derived from SWRCB Decision D-1641 at page 32, Figure 1. The annual acre-footage was derived by multiplying the number of days by 1.98.

⁴ This amount is calculated by adding the amount for Ratto (102.4 AF), Phelps (784.4 AF) and 48.5% of the total diverted by Conn and Silva (633.9 AF X 633.9 AF = 307). The SWRCB found Silva had a riparian right, and found that Conn owned 48.5% of the total land irrigated. (SWRCB WRO 2004-0004, p. 33).

Illegal diversions within the Delta are akin to a hole in the bottom of a bucket. Unless and until the hole is repaired, the bucket will never remain full no matter how much water is poured into it. In the Delta, unless and until the problem of illegal diversions is addressed, no other action or combination of actions that the SWRCB might take to improve habitat conditions for fishery resources will be as effective as anticipated and needed.

The SWRCB knows, and has known for over 40 years, that illegal diversions within the Delta are a problem. As the above indicates, unless made to stop, Delta diverters will continue to divert water based upon perceived need, and not upon right, to the detriment of all other reasonable and beneficial uses in the Delta.

If you have any questions, please let me know.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By:



TIM O'LAUGHLIN

Enclosures: (Exhibits A-J)