



O'Laughlin & Paris LLP

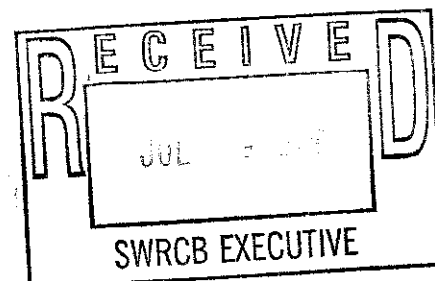
Public Comment
Bay-Delta Strategic Workplan
Deadline: 7/9/08 by 12 p.m.

Attorneys at Law

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

July 8, 2008

Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
Cal/EPA Headquarters
1001 I Street
Sacramento, CA 95814



Re: Bay-Delta Strategic Work Plan Comments

Dear State Water Resources Control Board Members:

The State Water Resources Control Board ("SWRCB") has requested comment on the *June 2008 Draft Strategic Workplan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*. In response, the San Joaquin River Group Authority ("SJRG") offers the following comments.

I. Introduction

The SWRCB's Draft Strategic Workplan purports to describe a suite of activities that the SWRCB will undertake in the next five years "to address the water supply and environmental crisis in the Delta." (p. 8). The suite of actions falls into nine broad categories or elements.

The remaining six elements deal with obtaining additional flow to protect fish, wildlife and the public trust. These elements, and the specific actions described thereunder, are all premised on the fact that (a) there are unmet needs within the Delta, and (b) that such unmet needs are superior to existing uses. The SJRG objects to both premises, and contends that there is no legal or factual finding requiring additional flow to protect fish, wildlife and the public trust.

From a more general perspective, the SJRG contends that the elements identified, and the specific actions associated with each, are improperly focused on the Delta as it exists today. The Draft Strategic Plan itself recognizes that a variety of efforts, including the Delta Blue Ribbon Task Force ("DV"), the Bay Delta Conservation Plan ("BDCP) Interagency Ecological Program ("IEP"), are at work and will almost certainly change the Delta in the long-term. For example, the SWRCB describes the BDCP process as one which will develop near and long term measures to "recover and restore at risk

Post Office Box 9259
Chico, California 95927-9259
www.olaughlinandparis.com

530.899.9755 tel
530.899.1367 fax

species...in the Delta while improving the reliability of SWP, CVP and other water supplies.” (p. 30). BDCP is considering four options to achieve its goals, three of which involve physical changes to the Delta conveyance system, including the outright removal of the conveyance systems from the Delta. (p. 30-31). Similarly, the DV Task Force found that “current patterns and of use of Delta resources are unsustainable and that *changes in the Delta and California’s use of its resources are inevitable.*” (p. 28) (emphasis added). Some of the changes being considered by the DV Task Force include new conveyance facilities located outside the Delta.

Given the strong likelihood, indeed almost certainty, that the way that water is delivered to and conveyed through the Delta will change, it does not make much sense to undertake a series of permanent, long-term initiatives like establishing minimum instream flows, South Delta salinity objectives, Vernalis flow objectives and adjudications of entire stream systems to determine if the uses and methods are reasonable that are clearly aimed at fixing the Delta as it is. As the Draft Strategic Workplan makes clear, the SWRCB has accepted that the CVP and SWP conveyance facilities located in the Delta are the primary cause of the fisheries and water quality in the Delta. (See, e.g., p. 24, 27, 62, 65-66, 77-79, 80-82, 84, and 91). As such, the SWRCB should not take actions requiring the commitment of scarce and irretrievable assets, but rather should focus on interim actions that can be taken in the near term that will improve the Delta until such time as the permanent physical changes can be implemented and constructed or foundational changes that no matter what way the Delta is recognized will yield long-term results. Thereafter, the SWRCB should engage in a period of study to determine what additional changes, if any, are necessary to protect the Delta in light of the fact that the conveyance facilities have been changed.

II. General.

A. Unmet Needs in the Delta, If They Exist, Are Not Superior to Existing Uses.

Much of the Draft Strategic Workplan comes down to a statement that there is an unmet need in the Delta, be it drinking water quality or decline of aquatic species, and that therefore some sort of action must be taken to alleviate the unmet need. While some of the proposed actions can be found in existing law (e.g., development and enforcement of TMDLs to attain water quality objectives), many more (e.g., obtaining more flow for DO in the Stockton DWSC and for “aquatic species decline) are not. Simply stating over and over again, as the SWRCB does, that there are unmet needs in the Delta, does not substitute for the identification of legal authority to act.

Equally mystifying is the naiveté of the SWRCB in terms of developing actions to “fix” the Delta. For example, the SWRCB claims that water conservation is critical “as a means of addressing the statewide needs of an adequate and reliable water supply to serve a growing population.” (p. 85). This statement seems completely contradicted by another statement, on the prior page, that “conservation will reduce the demand for water throughout the State, thus assisting in the protection of beneficial uses...” (p. 84). The

fact of the matter is, the benefits of conservation will not accrue to the Delta and its unmet needs, but will simply become additional water to meet other legal needs.

The SWRCB expressly states that conservation will reduce diversions from the Delta and its tributaries. (p. 84). This is simply false and betrays a gross ignorance of how the entire system works. Most of the tributaries to the Delta have storage facilities on them that divert and store water. Assuming conservation takes place, all that will happen is that the water made available will be stored in the reservoirs until (a) that water is spilled as a result of inflow during a wet season, or (b) is used for the same purposes for which it was originally stored during a dry period. Absent some sort of affirmative action by the SWRCB to physically take control of the water "saved" as a result of conservation, conservation will not result in a reduction on the demand of the Delta and its tributaries.

The SWRCB displays a similar ignorance when it talks about performing an adjudication to demonstrate that some existing uses are unreasonable under Article X, Section 2 of the California Constitution. (p. 86). Even assuming that the SWRCB is successful in conducting such an adjudication, and finds that an existing use is unreasonable, and thereon decreases the quantity of water available for diversion by that party, the "excess" water is not committed to meeting unmet needs within the Delta. To the contrary, that water would become available for use by downstream riparians, and would be subject to appropriation by other parties. Absent an actual dedication of appropriated water for in-stream uses, any appropriated water taken from existing water right holders or any of them would only be flow into the Bay-Delta estuary until such time as a valid permit for the appropriation of such water is granted by the State Board. (Wat. Code § 1253; Wat. Code § 1225; Crane v. Stevinson (1936) 5 Cal. 2d 387, 398; People v. Shirokow (1980) 26 Cal.3d 301, 308-309; Fullerton v. State Water Resources Control Bd. (1979) 90 Cal.App.3d 590, 603; See also Wat. Code § 1707). While the SWRCB could refuse to grant an appropriative right for such water, or condition any such appropriative right to increase or insure the protection of the environmental resources of the Bay-Delta, such water would not become dedicated to the sole purpose of instream use.

The SWRCB also states that it intends to work with DFG to ensure adequate streamflows are available for the protection of fish and wildlife, both for future water right applications and for existing rights, and uses the heading "Minimum In-Stream Flow Standards." (p. 91-92). The SJRGA notes that the SWRCB has the authority to take into account the needs of fish and wildlife when considering an application to appropriate water under Water Code Section 1243.5, and shall consider recommendations from DFG. The SJRGA also notes that the SWRCB has continuing authority over post-1914 appropriative water rights for the purpose of reconsidering such prior decisions in light of the current condition of public trust resources. That said, there is no authority which permits the establishment of "minimum" instream flows, which would create any sort of express or implied presumption that such flows were necessary to meet the needs of the public trust.

In 1980, the Attorney General was asked to review a series of regulations, proposed by the SWRCB, which would have required the SWRCB to determine the instream needs of all bodies of water generally, without regard to any specific appropriative application, and which would establish a presumption that the determined instream needs were reasonably required to meet the needs of the public interest. The Attorney General indicated that such regulations were not authorized under the Water Code since

“the [SWRCB] would have effectively ordained in the absence of legislative authorization, that the beneficial instream uses shall prevail against the other beneficial uses...” (63 Ops.Atty.Gen. 95, 104 (1980)).

The Attorney General went on to say that

“while beneficial instream uses are to be considered by the [SWRCB], *such uses are not determinative*, and the presumption which would impose upon applicants for appropriation of water for beneficial offstream uses the burden of proof as to the nonexistence of presumed facts is not countenanced by the statutes in question.” (*Id.* at 105) (emphasis added).

In this case, by using the term “minimum” instream flows, the SWRCB appears to again be engaging in an illegal act which presumptively establishes that a certain level of instream flow takes precedence over other beneficial uses. As in 1980, there is no legislative authority for such a presumption.

Despite the continued recitation to the “fact” of aquatic species decline in the Delta, the SWRCB continues to ignore that there is no general priority for environmental resources, including those which are subject to protection under the public trust doctrine. The SJRGA has made this point repeatedly to the SWRCB, the regional boards, the DV Task Force and just about every other board, body or agency that claims an interest in the Delta. Simply stating that the Delta is “broken” or “in crisis” is not enough to justify the taking of action which will deprive an existing water right holder of all or some of its entitlement. To the extent that the actions of a water right holder are causing harm that is prohibited by law, the SWRCB has the authority to take action, as in the case of the development and enforcement of TMDLs. To the extent that a party is taking action that violates a term or condition of its water right, such as in the case of a violation of Term 91, violating existing water quality objectives, or simply diverting without right, again the SWRCB has the authority to take action. And, in the case that there is simply not enough water available to meet all of the reasonable and beneficial needs, again the SWRCB can take action by enforcing the water right priority system. But simply stating, *ad nauseum*, that the Delta needs to be fixed is not a justification for the type of actions being contemplated by the SWRCB.

Indeed, the SJRGA cannot help but wonder why the SWRCB simply does not exercise the authorities it already has, instead of seeking to develop new authorities or utilize old authorities in new ways. The SJRGA is starting to believe that the SWRCB has predetermined that, under the proper use of existing authorities, some parties that should be "penalized" won't be, while others that shouldn't be will be. The SJRGA contends that the SWRCB should not be selecting winners and losers, but should instead hew closely to its established authorities and let the chips fall where they may.

B. The SJRGA Supports the Construction of an Isolated Facility

The SJRGA does not contend nor agree that the existence, use or operation of the Delta conveyance facilities by the CVP and SWP are illegal or unreasonable. Indeed, the SJRGA contends that the problems being experienced by the Delta are not "legal" in nature but are largely one of plumbing. Simply by moving the SWP and CVP conveyance and pumping facilities out of the Delta, most of the issues highlighted by the SWRCB as needing "fixing," from entrainment to reverse flows, will be "fixed." While such "fix" will result in significant financial and engineering difficulties, those can be overcome and will not result in the continuation of the so-called "water wars" that have been the hallmark of the SWRCB's efforts in the Delta since at least D-1485.

C. Since the Construction of An Isolated Facility, or a Dual Use Facility, Will Almost Certainly Occur, There Is No Justification for Many of the Actions Contemplated By the SWRCB.

It has now been well established that the continued reliance on pumping and conveyance facilities located within the Delta is no longer a long-term option. Such facilities are at severe risk of interruption due to potential levee failure, rising sea water, seismic events, and the need to protect sensitive species, to name but a few. Thus, regardless of the alleged impacts that the SWP and CVP pumping and conveyance facilities within the Delta are having on water quality and aquatic species, those facilities must be moved. Because of this, the SJRGA is unclear why the SWRCB insists on taking actions now which will have long-term impacts to existing water users based upon the condition of the Delta as it is today. The SJRGA recommends that the SWRCB announce its support for the construction of an isolated facility, and take interim steps to preserve and protect species and water quality in the Delta until such time as the isolated facility can be constructed.

If implemented as described, Elements 3, 5, 6, 8 and 9 will all result in the irretrievable commitment of resources. Moreover, once implemented, there is little likelihood that, once an isolated or dual facility is constructed, that the SWRCB will be quick to reverse or change the actions designed to implement these Elements. Indeed, the SWRCB expressly contemplates changes to existing water rights in Element 3 (p. 62), Element 5 (p. 6, 76), Element 6 (p. 79), Element 8 (p. 85, 89) and Element 9 (p. 92). Given that the impetus for making these changes to existing water rights is the concern that such rights are harming the Delta as it is today, and the Delta will dramatically

change once the isolated or dual facility is constructed, this type and level of effort is simply unwarranted.

There are plenty of actions the SWRCB can engage in that will have an immediate benefit to the Delta as it exists today but that will not result in long-term or permanent changes to existing water users that will soon become unnecessary and obsolete. Cracking down on illegal diverters, encouraging water conservation and recycling, and implementing and enforcing TMDLs are some of the actions that the SWRCB calls for in its draft strategic plan that are appropriate regardless of the physical situation in the Delta. Actions that are more permanent in nature, however, are uncalled for at this time.

III. Specific Comments.

A. Contaminants.

The SJRGA is perplexed. The SWRCB proposes to implement more TMDL's. Yet, in its second response to the Delta Vision it states that it has no money and no staff to implement the TMDLs. Why implement more? Currently two out of the three TMDLs adopted for the SJR/Sacramento/Bay Delta, Dissolved Oxygen and Salt & Boron, are in litigation. The basis for these TMDLs is also under review in the § 303(d) process. The adoption of the Salt & Boron objective at Vernalis will also be subject to litigation this year upon its adoption.

The SJRGA has consistently told the CVRWQCB and the SWRCB that a Use Attainability Analysis must be done before adopting a TMDL for Salt & Boron upstream of Vernalis. To date, no such analysis has been done.

Finally, characterizing discharges from Delta Islands must occur immediately. It goes to the issue of Interior Delta salinity standards. No matter how the Delta may change, this foundational work needs to be accomplished.

B. Southern Delta Salinity and San Joaquin Flow Objectives.

The SJRGA supports the review of the Southern Delta Salinity Standards. The SJRGA understand that the Salinity work group would be meeting to review the scope of work for Doctor Hoffman and identify data gaps. It was also discussed to have joint studies and joint modeling runs done to try to ascertain the difference between upstream loading and Delta loading. To date, the SWRCB has not reconvened this working group.

The SJRGA disagrees with the characterization of San Joaquin River Flows and the activities, products and timelines to implement flow changes. As previously stated, it appears the SWRCB has predetermined that flow objectives on the San Joaquin River are inadequate. Why else would the SWRCB lay out a two year process to change the flow objectives and implement a water right order when no such action is proposed anywhere else?

It would be more appropriate to state that the SWRCB will receive information, not evidence, at its workshop in September and then upon a review of the information decide what it wants to do.

The SJRGA will fully participate in the workshop. The SJRGA asks the SWRCB to allow parties to ask questions of witnesses, so the strength and efficacy of the information offered can be tested. The SJRGA also reiterates its request that the CDF&G model be peer reviewed prior to the workshop. It also ask that the model, its input, assumptions and be made available at least 90 days prior to the workshop so it can test the model. The SJRGA expects its presentation will take at least three hours.

C. Water Right Compliance, Enforcement and other Activities to ensure adequate water flow to meet water quality objectives.

The SJRGA supports this element of the Workplan. The SJRGA also supports that this effort focus on the Delta, beginning with the South Delta. It may be that illegal diversions are having an impact on reverse flows on Old and Middle River, contributing significantly to interior Delta salinity degradation, contributing to DO sags at the DWSC, and dewatering channel and riparian habitat.

The SJRGA has examined potential riparian and pre-1914 appropriative water rights in the South Delta and believes that the SWRCB inquiry as set forth on page 82 misses the point. Its initial review of water rights on Union and Roberts Island indicates that only 10% of the acreage may have riparian rights, pre-1914 appropriative rights, or both. While reviewing the applicable rights for each parcel is the beginning of the inquiry, it is not the end. Almost all the licenses issued in the 1920s included the following term:

“As there is a possibility that there will not be sufficient water in the San Joaquin River during the latter part of the irrigation season to satisfy all requirements, this permit is issued subject to the express condition that the use hereunder may be regulated by the Division of Water Rights during such periods of water scarcity to the end that such use will not interfere with rights under prior applications.”

The SWRCB again recognized the problem in the 1970's. In D-1485 and the 1978 *Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh* (“1978 Delta Plan”) the SWRCB reiterated the need to reach an agreement between the CVP and SWP to avoid an adjudication of water rights, stating that:

“The most practical solution for long-term protection of southern Delta agriculture is construction of physical facilities to provide adequate circulation and substitute supplies. If necessary physical facilities are constructed, the circulation flows needed may be only

a moderate increase above those committed from New Melones Reservoir. Negotiations concerning such facilities are currently underway between the project operators and the South Delta Water Agency.”

(1978 Delta Plan, Ch. VI, p23.) The SWRCB cautioned, however:

“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. 11.)

Finally, the whole intent of forming SDWA was so the landowners in its jurisdiction could obtain contracts from the USBR and SWP when there was insufficient water available.

The key inquiry as to water rights in the South Delta is not simply what they have but what water is available and when for those rights to divert. This is a critical inquiry. As stated in the report:

“Many water right holders in the Central Valley (we would say South and Central Delta) continue to divert water under their appropriative rights when water is not available, taking into consideration the amount of water needed to meet water quality and flow objectives and senior in-basin demands” (emphasis added)

In the South Delta, once the riparian lands are identified, then the availability of natural flow must be determined. If there is insufficient natural flow then the correlative share of the riparian rights must be determined. If there is no natural flow, as is the case in this summer of 2008, then riparian owners should cease diversion. An interesting legal question in this area for the SWRCB will be is, “Have the Upstream Pre-1914 appropriators on the SJR and its tributaries acquired prescriptive rights against Delta riparians?” Meridian v City and County of San Francisco (1939) 13Cal.2d 424,437.

In addition to addressing diversion under riparian right, diversion in the South Delta relative to appropriative right must also be addressed. Here the question is what water is available that is not natural flow (previously stored water, imported water), or is natural flow in excess of riparian needs. If there is insufficient water available for all appropriative right holders then the junior water rights must cease diverting until the available flow matches the remaining ability to divert of the senior rights.

The SJRGA firmly believes that the Water Right Priority System must be adhered to and followed in this inquiry.

Another area that was raised in the D-1641 proceedings, addressed by the SWRCB in a Water Code § 1707 Water Right Change permit, and finally by the Court of Appeals in the *SWRCB Cases* (SWRCB Cases (2006) 136 Cal.App.4th 674, 743) is the issue of whether stored water is available for diversion by Delta appropriators and riparian owners when it is released to meet a Bay-Delta water quality objective. The 1995 WQCP has two flow objectives for the SJR, one from February through June for Delta outflow, and the second, a 30-day pulse flow from April through May, to move fall-run Chinook salmon smolts through the South Delta.

It makes no sense physically, legally or biologically to have upstream senior water right holders release stored water from their reservoirs on the premise that it will benefit fish, only to have riparian owners illegally divert it (because it's stored water) or junior appropriators divert it. If an objective is tagged with a designated beneficial instream flow amount then the water made available to meet that SJR flow objective should not be subject to diversion. In this regard we fully support FN #6.

One final comment on the last paragraph of this section, "If adequate natural flows and abandoned flows continue to be unavailable to meet water quality and flow objectives..." needs a modifier. The modifier should be "After application of the Water Rights Priority System adequate and natural flows..." For it is only after the water right priority is applied that the shortfall from a given objective can be quantified. It should be very clear to all that while the SJRGA entered into the VAMP settlement agreement and did not assert their senior rights versus junior appropriators if there is a need for SJR flow then junior appropriators will need to forgo their rights first to ensure the flow objectives can be met.

We look forward to working with the SWRCB and others in finally determining the legal rights to divert water in the Delta and the water available for such diversion.

The SJRGA attaches a report on this issue as it pertains to Union and Roberts Island. Mr. Wee's report is attached as to our water rights analysis of South Delta.¹ As the Board and staff will recall Mr. Wee provided the definitive testimony in the Term 91 hearings (Water Right Order No. 2004-0004) that those lands were not riparian. Contrary to the assertions by Mr. Herrick and Mr. Hildebrand, most of the lands on Roberts and Union Islands are not riparian. Out of 65,000 acres approximately 20,000 may have riparian rights, but upon further refinement of the analysis the amount may be no more than 6,500. Mr. Wee's entire report is attached as an appendix.

The SJRGA is finalizing the place of use mapping of the licenses held by Landowners on Union and Roberts Islands. Mr. Wee's historical maps have been put into a GIS format. The parcel maps are in a GIS format. The CDF&G diversion points map is also in GIS format. An updated cropping map, also in GIS format, should soon be provided from DWR. The fundamental database is well on its way to being compiled.

¹ Due to the length of the SJRGA's South Delta water rights analysis and associated appendices, we have only provided an electronic copy on compact disc.

The SJRGA hopes this initial data gathering and analysis is helpful to the SWRCB and staff and stands ready to provide assistance as necessary in this inquiry.

IV. Conclusion.

As a general matter, the SWRCB is too concerned with taking long-term actions designed to address a situation which will not last much longer. The SWRCB must recognize the impending physical changes to the Delta and re-focus its efforts accordingly. It must focus its effort on addressing issues that will not be lost or abandoned when the plumbing in the Delta changes. We must not commit time and resources to issues where we will lose irretrievable resources.

More specifically, the SWRCB continues to attempt to elevate fish, wildlife and other uses protected by the public trust doctrine above existing uses despite the lack of legal authority enabling them to do so. The SWRCB needs to stop seeking to acquire new authorities and attempting to utilize old authorities in new ways, and simply stick to applying its existing authorities as contemplated by the legislature. Such authorities grant the SWRCB more than enough power to address the problems and concerns affecting the Delta.

The SJRGA recommends that the SWRCB abandon the grandiose comprehensive plans that it seems so fond of, and engage in the less flashy but ultimately more effective exercise of its existing authorities. The SWRCB needs to put in the work to effectively put in the foundation for the Delta, no matter how the Delta will change. We believe the priority should be on illegal diversions from the Delta and Salinity Standards to protect beneficial uses in the Delta.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By:


TIM O'LAUGHLIN