



VIA ELECTRONIC MAIL

February 5, 2008

State Water Resources Control Board
c/o Jeanine Townsend
P.O. Box 100
Sacramento, CA 95812-0100

Re: Draft Strategic Plan Update: 2008-2012, January 25, 2008 Draft

Dear State Water Resources Control Board:

The State Water Resources Control Board ("SWRCB") has noticed a workshop for comments on its January 25, 2008 Draft Strategic Plan Update: 2008-2012 ("Update"). In response, we offer comment on behalf of the San Joaquin River Group Authority. Enforcement, discussed throughout the Update, is a critical component for every program. The Update even includes "Enforcement Effectiveness" among its six Program Priorities. (Update, p2.) However, the Update limits its goal of improving enforcement effectiveness to water quality enforcement. (Update, p16-18.) The Update entirely ignores the importance of water right enforcement.

Water right enforcement is important for all of the same reasons as water quality enforcement. Water right enforcement ensures the diversion and use of water does not harm downstream water users, senior water right holders, or fish and wildlife. More importantly, there is only a finite amount of water. If one person illegally diverts and uses water, all other persons downstream have less water. Enforcement deters and halts illegal diversion and use of water. The SWRCB implements many water quality objectives through terms and conditions attached to water right permits. In the Sacramento-San Joaquin Delta ("Delta") terms and conditions attached to permits held by the State Water Project ("SWP") and Central Valley Project ("CVP") are used to establish minimum flows for fish and wildlife habitat and to maintain water quality sufficient to protect beneficial uses such as agriculture. Other water right holders in the Delta have standard permit terms and conditions such as "Term 91" that prohibit diversion under certain conditions in order to maintain water quality for senior water right holders and maintain minimum instream flows. More recently, the Central Valley Regional Water Quality Control Board has recommended that the SWRCB use its water right authority to implement components of total maximum daily loads to control salinity in the Lower San Joaquin River and to improve dissolved oxygen conditions in the Stockton Deep Water Ship Channel.

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The Legislature recognized that water right enforcement is so important that it adopted Water Code §1825, declaring:

It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water.

As a policy mandated by statute, the SWRCB must include “vigorous” enforcement of water rights in its Update.

Nowhere is the need for vigorous water right enforcement more apparent than the Delta. In 1961 the SWRCB adopted Water Right Decision 990 and therein recognized the need to protect senior water right holders in the Delta from the CVP and SWP. However, since such rights had never been “comprehensively defined” the SWRCB could not determine what harm would occur or what terms and conditions would be required to prevent harming senior water right holders. Furthermore, since such rights had never been defined, the SWRCB could only assume that the rights asserted were valid. In the interest of avoiding a “lengthy and extremely costly adjudication” the SWRCB deemed it “imperative” that water right holders and the United States reach an agreement concerning such rights and the supplemental water required to provide the holders with a firm and adequate water supply. Whatever agreement the parties adopted would determine the measures necessary to protect existing Delta water rights. Nothing occurred.

In Water Right Decision 1485 and the 1978 *Water Quality Control Plan for the Sacramento-San Joaquin Delta* (“1978 Delta Plan”) the SWRCB again reiterated the need for an agreement between state and federal projects and Delta water right holders. The 1978 *Delta Plan* sought to protect Delta agriculture. Physical facilities providing adequate circulation and a substitute supply was the most practical long-term solution. If the physical facilities envisioned were constructed, the circulation flows needed would only be a “moderate” increase above those committed from New Melones, which at the time were 70,000 acre-feet 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.” Until an agreement was reached and physical facilities constructed, a salinity objective at Airport Way Bridge, near the town of Vernalis, would provide interim protection. (United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, 120.) Nothing occurred.

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 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.) Then, in 2007, the Third District Court of Appeal affirmed SWRCB Water Right Order 2004-0004, wherein the SWRCB found that Delta water users lacked the riparian and pre-1914 appropriative rights they claimed. (Phelps v. State Water Resources Control Bd. (2007) 157 Cal.App.4th 89, 117-9.) If the Phelps respondents are typical of Delta appropriators, then Delta water rights are far less than the SWRCB has assumed. If the SWRCB had “vigorously” enforced its directive in Water Right Decision 990, it could have resolved a problem that has persisted for over 45 years. No agreement with the South Delta was ever reached and “physical facilities to provide adequate circulation and substitute supplies” were never constructed.

Today, the SWP and CVP export operations are highly regulated and restricted. Flows in and out of the Delta from the Sacramento and San Joaquin River are highly regulated. News of plummeting numbers of Delta smelt and Chinook salmon and of precarious water supplies appears in the state’s newspapers daily. Despite the Delta’s critical importance to California’s water supply, water rights in the Delta remain virtually unregulated and undefined. In Water Right Decision 1641 the SWRCB estimated there were over 1,800 diverters in the Delta and their combined pumping capacity exceeds that of the CVP’s Jones Pumping Facility. Many of these diversions are unscreened. The heart of water law in California is the constitution’s prohibition of waste and unreasonable use contained in Article X, section 2. Illegal diversion and use of water is never reasonable and in an area as sensitive as the Delta, neither are unscreened diversions.

If the SWRCB is going to reverse course in the Delta and continue implementing water quality control plans using its authority over water rights it must vigorously enforce water rights. To date, the SWRCB lacks even a water right enforcement policy matching the Water Quality Enforcement Policy. At the least, the SWRCB should acknowledge the importance of water right enforcement in its Update.

Very truly yours,
O’LAUGHLIN & PARIS LLP

By: 
KENNETH PETRUZZELLI



VIA ELECTRONIC MAIL

February 15, 2008

State Water Resources Control Board
c/o Jeanine Townsend
P.O. Box 100
Sacramento, CA 95812-0100

Re: Draft Strategic Plan Update: 2008-2012, January 25, 2008 Draft

Dear State Water Resources Control Board:

The State Water Resources Control Board ("SWRCB") conducted a workshop regarding its most recent draft of its Strategic Plan. Having participated in the workshop and having an opportunity to fully review the Strategic Plan, we offer comment on behalf of the San Joaquin River Group Authority regarding Action 1.1.4 for "Priority 1" for the issue "Protect and Restore Surface Waters."

Currently, under Action 1.1.4, where full TMDL implementation cannot achieve water quality objectives absent flow augmentation, then the SWRCB will consider using its water right authority to enhance flows. We agree that flow augmentation and water right actions should not occur until all efforts have been made to achieve water quality objectives by controlling discharges. Insufficient flows may, however, exist under natural conditions. Under the *Policy for Addressing Impaired Waters* (SWRCB Resolution 2005-0050; Cal. Code Regs., tit. 23, §2917), **if the failure to attain standards is due to the fact that the applicable standards are not appropriate to natural conditions, an appropriate regulatory response is to correct the standards. As a result, where full TMDL implementation cannot achieve water quality objectives** absent flow augmentation, the Water Boards should also consider the suitability of the objectives and, in some circumstances, the beneficial uses. The sentence should therefore read:

If full TMDL implementation will not achieve water quality standards without flow augmentation in a water body, consistent with the *Policy for Addressing Impaired Waters* (SWRCB Resolution 2005-0050; Cal. Code Regs., tit. 23, §2917), consider whether the water quality standard and beneficial use is appropriate. If the water quality standard and beneficial use designation is appropriate consider water quantity factors in TMDLs and refer to State Water Board for consideration as a water rights issue by 2012.

Flow augmentation raises issues of storage impacts, supply impacts to other beneficial uses, reasonable use, and much more. A simple statement in the Strategic Plan cannot begin to scratch the surface of the depth and complexity of augmenting flow to achieve water quality objectives.

Very truly yours,
O'LAUGHLIN & PARIS LLP

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