

ANNE J. SCHNEIDER
1947-2010

CHRISTOPHER T. ELLISON
JEFFERY D. HARRIS
DOUGLAS K. KERNER
ROBERT E. DONLAN
ANDREW B. BROWN
PETER J. KIEL
LYNN M. HAUG
CHRISTOPHER M. SANDERS
GREGGORY L. WHEATLAND
ELIZABETH P. EWENS
RONALD LIEBERT

ATTORNEYS AT LAW

2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CALIFORNIA 95816
TELEPHONE: (916) 447-2166
FACSIMILE: (916) 447-3512
<http://www.eslawfirm.com>

BRIAN S. BIERING
CRAIG A. CARNES, JR.
JEDEDIAH J. GIBSON
CHASE B. KAPPEL
SHANE E. C. McCOIN
SAMANTHA G. POTTENGER

September 15, 2014

Via U.S. Mail and Email to commentletters@waterboards.ca.gov



Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, CA 95812-2000

Re: Comment Letter: Delta September 2014 Workshop

To Chair Marcus and Members of the Board:

This letter is submitted on behalf of Delta Wetlands Properties (“Delta Wetlands”) regarding the workshop to be held on September 24, 2014 by the State Water Resources Control Board (“Board”) relating to allegations of unlawful diversions of stored CVP and SWP water by riparian and pre-1914 water right holders within the central and southern Delta. Delta Wetlands owns Bouldin Island, Bacon Island, Webb Tract and the majority of Holland Tract in the central Delta and irrigates the islands using riparian and appropriative water rights.

Board Should Convene an Objective, Information Gathering Process and Not an Enforcement Proceeding

A stated purpose of the workshop is to receive input on the “type of proceeding or process the Board should use (such as public hearing, case-by-case investigation, or regulation) to most effectively resolve the issue of what water is available for diversion and use by water right holders in the central and southern Delta.” Delta Wetlands does not believe that any formal enforcement process is warranted at this stage, but recommends that the Board convene a series of informational workshops to investigate the different sources of water in the Delta, the residence time of the water, the legal characterization of the water, and rightholders that are entitled to divert the water. Framing the process as an objective information gathering exercise rather than an enforcement proceeding will yield useful information that will inform an assessment of water right priorities, potential unauthorized diversions, and improve the Board’s curtailment process.

The Draft Order Would Not Provide Useful Information

The draft order requesting pre-1914 appropriators and riparians to provide the actual amounts of water diverted since October 2013 and amounts anticipated to be diverted through December 2014 would not reveal meaningful information about the water available for appropriation and/or alleged unauthorized diversions of water. It will only provide information regarding what diversions were or will be—information which can be estimated from prior years' permittee/licensee reports and statements of water diversion and use. Diversion data would not describe the actual hydrologic conditions in the Delta; a complete picture is shown only when the Board considers the effect of the tides and residence time of water, return flows from Delta irrigation, evapotranspiration from shallow groundwater, and other related information.

Water managers have understood that Delta diversion data is of limited value, which is why DWR and USBR have used the imperfect Delta Island Consumptive Use Model (“DICU”) to estimate the effect of Delta diversions on CVP and SWP operations. In recent years great strides have been made using remote sensing technologies to obtain better estimates of in-Delta consumptive use. (See Medellín-Azuara, J. and R. Howitt, “Comparing Consumptive Agricultural Water Use in the Sacramento-San Joaquin Delta: A Proof of Concept Using Remote Sensing,” Center for Watershed Sciences University of California, Davis (2013), *available at*: https://watershed.ucdavis.edu/files/biblio/DPC_ComparativeStudy_ET_Final_Report_UCD.pdf.) This new information should be featured in any future Board investigations of Delta water use and impact on Delta hydrology.

Curtailement of Delta Water Rights Will Not Save Water

The Board must understand that curtailing water rights within the Delta lowlands will *not* result in making additional water available for other water users. This is relevant because one of objectives of the Board's proposed order is to inform future curtailment analyses. The hydrologic conditions unique to the subsided islands in the Delta make it such that not farming Delta islands (i.e., the result if the Board curtails pre-1914 and riparian water rights) would cause seepage and weed growth that could consume the same amount of water used for farming.¹ The oxidation and wind erosion of the peat soils have caused Delta islands to subside many feet below mean sea level. The hydraulic pressure created by the pressure gradient from the water surface of the adjacent channels to the interiors of the islands creates significant seepage to the interior of the islands. This seepage creates shallow groundwater conditions that are typically controlled as part of farming operations (i.e., shallow groundwater pumping). If the seepage is

¹ Further, the unique nature of the Delta also makes it such that water is present (and would be present) in the Delta for diversion regardless of releases of stored water by the CVP or SWP. (See, August 6, 2014 letter of Jeanne Zolezzi (on behalf of Banta-Carbona Irrigation District, the West Side Irrigation District, Patterson Irrigation District and West Stanislaus Irrigation District) and the August 8, 2014 letter of Dante Nomellini, Sr. (on behalf of Central Delta Water Agency).)

not controlled as part of farming operations, the significant soil moisture caused by the seepage feeds aggressive weeds widespread across the Delta. These weeds can consume as much water as the crops typically planted on Delta islands. Further, heavy weed growth will continue to consume water after the normal irrigation season for agricultural crops, which will lead to increased consumptive use at the end of summer (as compared to under normal conditions where Delta farmers control seepage and weed growth) when flow is most critical to the Delta water supply. Therefore, curtailing the water rights used for farming on Delta islands will not provide additional water for other users and will likely reduce the available supply when it is needed most.

Draft Order Deadlines Are Not Reasonable or Feasible

The proposed time period for complying with the request for information (i.e., 5 days) is not practical for many Delta diverters and is not practical for Delta Wetlands. In Delta Wetlands' case, there are ninety siphons on its four islands, and each siphon has its own statement of diversion and water use. Further, Delta Wetlands leases its islands and the associated water rights. Similar arrangements are common in the Delta. Thus, if the SWRCB issues the proposed order, Delta Wetlands will have only five days to (1) receive notice of the order, (2) notify its tenants of the order's reporting requirements, and (3) obtain the requested information from its tenants for ninety points of diversion. These actions cannot be completed in five days. Therefore, if the Board decides to require the proposed reporting, it must extend the timeframe to provide the requested information or provide responding parties with a mechanism to obtain an extension of time to respond.

Thank you for your time and consideration of these comments.

Sincerely,

A handwritten signature in blue ink that reads "Craig A. Carnes, Jr." The signature is written in a cursive style.

Craig A. Carnes, Jr.