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VIA ELECTRONIC MAIL

Ms. Barbara L. Evoy
Deputy Director
Division of Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: July 23, 2014 Letter from DWR and USBR and related correspondence

Dear Ms. Evoy:

This office represents several landowners in the South Delta. I write in response to the letters sent to you on July 23, 2014 by the State Water Project and Central Valley Project operators, on August 5, 2014 by the State Water Contractors and on August 7, 2014 by Westlands Water District. Those letters (1) accuse South Delta landowner of illegally diverting water and (2) encourage you to order these landowners to report additional information on their water rights and diversion amounts.

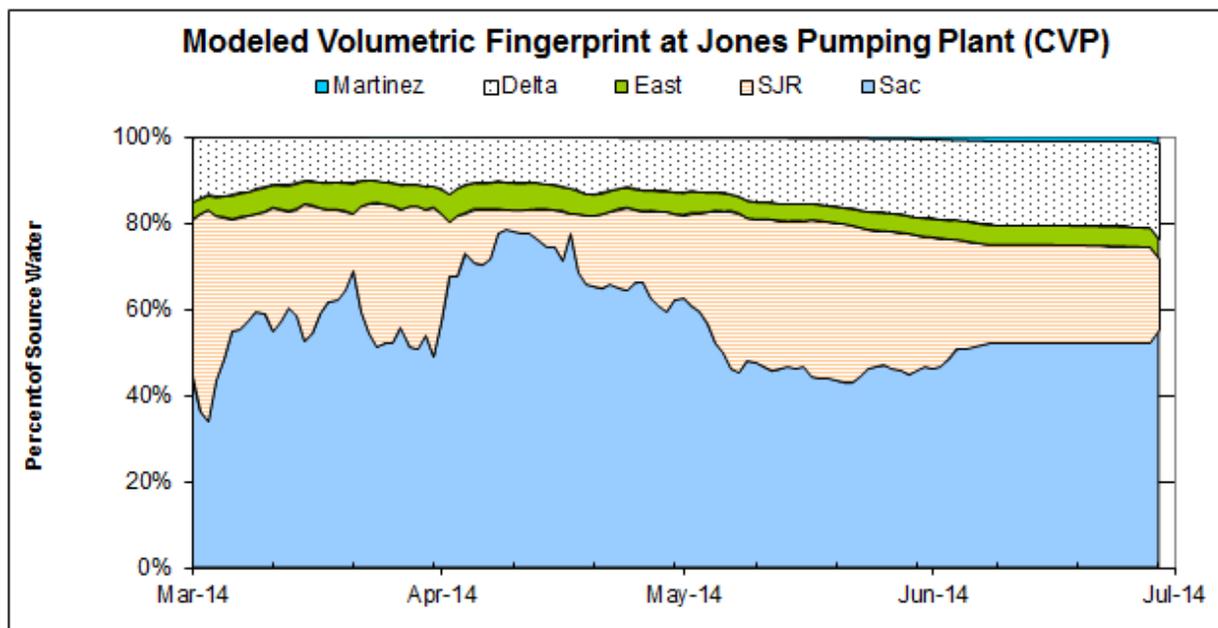
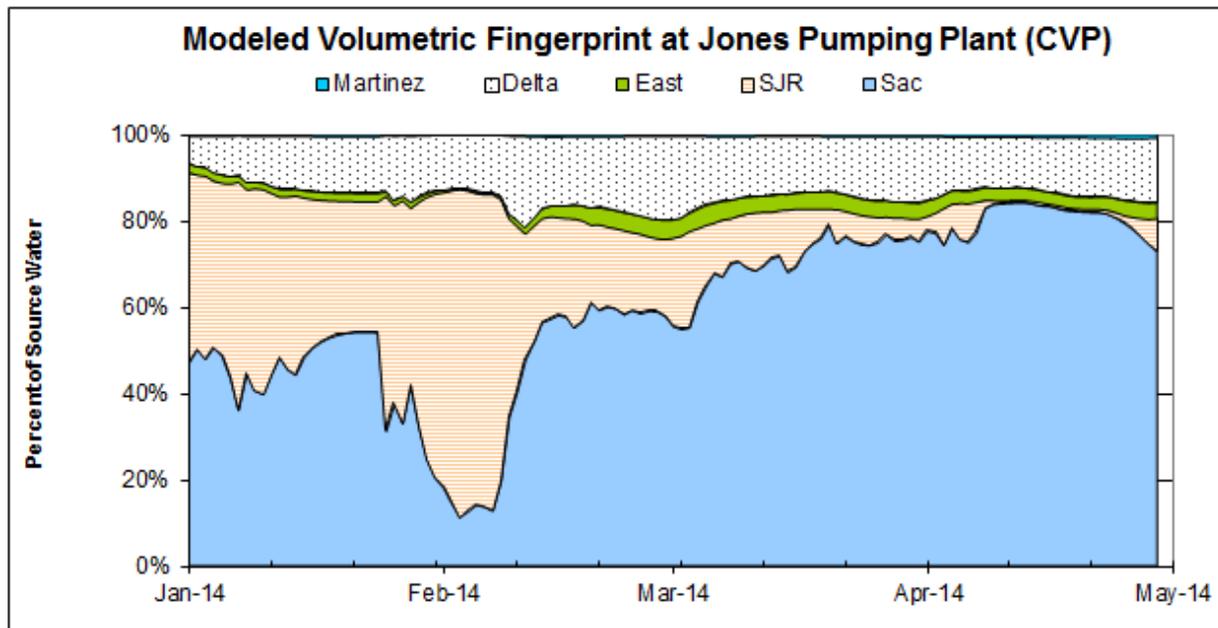
Requesting information will not solve water supply problems.

We need to address the elephant in the room - **defining water availability in the Delta**. This is a serious policy issue involving factual and scientific dispute, with enormous economic consequences. It must be resolved by the Board and deserves an evidentiary hearing.

Water Availability in the Delta

There is a glaring disconnect between the way the SWRCB and export projects described Delta water availability historically versus today. Jeanne Zolezzi's letters of July 21, 2014 and August 6, 2014, on behalf several Districts, provided a useful history of this issue. I also suggest review of the following:

- DWR's "Fingerprint" Data for various Delta locations found at: http://www.water.ca.gov/waterquality/drinkingwater/Delta_Fingerprints.htm. I have attached two charts below, compiled by DWR, showing the source of water at the Jones Pumping Plant in January through May of this year, and then again in March through July. Note that (1) one of the sources of supply is the "Delta", which is not a tributary, and (2) the CVP is pumping water from this "Delta" source.



- DWR’s “Long Term Trends of Delta Residence Time,” attached and available at http://baydeltaoffice.water.ca.gov/modeling/deltamodeling/presentations/DeltaResidenceTimeResults_mmierzwa.pdf. This diagram explains how the Delta works as a mixture of water from the bay and the tributaries.

These sources explain and confirm that the Delta acts like a mixing pool between the tributaries and the Bay. The pool receives water from the tributaries and from the bay through the tide. The two supplies mix and stay in the Delta channels (which are below sea level) until they are extracted or displaced by additional water from the tributaries or the Bay. The residence time for the water in the Delta is highly dependent on the volume of water pushing through from the tributaries, extractions and other factors. In a flood event, the time is short because the water is pushing out to sea. In a drought, the time is long because very little new water is flowing in from the tributaries to

cause displacement.

The bottom line - because the Delta channels are below sea level and influenced by the tide, the mix of water in the channels may change from time to time, but the channels never go dry. As the Department of Water Resources acknowledged in its 1981 Contract with the North Delta Water Agency (Recital e):

Water problems in the Delta are unique within the State of California. As a result of the geographic location of the lands of the Delta and tidal influences, there is no physical shortage of water. Intrusion of saline ocean water and municipal, industrial and agricultural discharges and return flows, tend, however, to deteriorate the quality.

Despite this geographic reality, and more than a century of water diversion out of the South and Central Delta during all year types, the exporters now allege it is only the flow, measured at Vernalis (a location on the San Joaquin River tributary), that determines water available for South Delta diverters. The exporters ignore the “Delta” component of the Delta water supply – a component that forms an important part of their own water rights. (See e.g. DWR Permit 16478).

If water availability for Delta diverters (under natural conditions and without any influence of exports or transfers) is properly defined, it will illustrate that there is always water available in the Delta channels for Delta diverters.

The Exporters Cannot Use the Delta Channels for Conveyance in a Manner that Infringes Diversion Rights from those Channels

The projects are using the Delta channels for conveyance of purchased water or releases from storage and mixing their water with native Delta channel supplies. This comingling cannot diminish the diversion rights of those with rights along the channel. See Water Code section 7075; *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal.143, 152-53. It is the mixer (DWR and the USBR), not the diverters on the natural channel (Delta landowners), who bears the burden of proof to show the mixing is following this rule. *Id.*

To meet this burden, the exporters would need to show water availability in Delta channels absent operation of the projects, and water availability with operation of the projects. Because of the nature of the Delta, this comparison would be academic – the water availability is similar under either scenario. The difference is the mix. If the Sacramento River water released from storage and transfers were not in the Delta this summer, the Delta would contain more water from other sources, including the bay. The use of the Delta for conveyance of stored water displaces native Delta channel water. This displacement by a foreign “mixer” cannot serve as the basis for an illegal diversion claim.

California Water Rights Can Attach to Any Body of Water

The exporters, without authority, argue that Delta diverters cannot have a right to divert Delta water if it is composed of water from the Bay. This is flat wrong. Water rights may attach to any stream or watercourse as well as to the water of a lake, pond, slough, or any natural body of water by whatever name it may be called. Cal. Const., art. XIV, sec. 3; *Turner v. James Canal Co.*, 155 Calif. 82, 87 (1909).

No One Disputes that Diverters Must Have a Proper Water Right

Finally, you have been asked to order production of water right information from Delta diverters. No one disputes that Delta diverters, like all diverters, need a valid right. You can request this information and it could be provided – in literally dozens of boxes of historic documents.

Its usefulness to the current dispute is questionable. If the Roberts and Union Islands water rights investigations of the last few years are any indication – your staff will spend significant resources learning why these Delta diverters claim their water rights, and water lawyers will have more work. But you will not find significant illegal diversions and you will not solve the current dispute.

There are valid water rights in the Delta. If the exporters are to be believed, there is not water available even for these valid rights. We need to get to the heart of the issue and address water availability in the Delta.

Thank you and your staff for your extraordinary efforts this year and for your attention to this important issue.

Very truly yours,



JENNIFER L. SPALETTA
Attorney at Law

cc: SWRCB Board Members
Tom Howard, Executive Director