

## M e m o r a n d u m

Date: January 14, 2010

To: Division of Water Rights  
State Water Resources Control Board  
Attention: Philip Crader  
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Via electronic mail to: [Bay-Delta@waterboards.ca.gov](mailto:Bay-Delta@waterboards.ca.gov)

From: **Department of Water Resources**

Subject: Delta Flow Criteria Information Proceeding – Organization of Groups and Panels

The Department of Water Resources (DWR) submits the following comments in response to the State Water Resources Control Board's (State Water Board) request for information on establishing expert panels for presentations of scientific issues for the upcoming Delta Flow Criteria Information Proceeding (Proceeding). The State Water Board has requested that participants submit 1) a final proposal to organize into groups with the purpose of briefly summarizing exhibits, and 2) suggestions as to what topics should serve as the basis for formation of expert panels. These proposals and suggestions will be used to inform the State Water Board as it develops the hearing procedures. DWR appreciates the opportunity to provide its views on this aspect of the Proceeding.

As stated in the State Water Board Notice for the Proceeding, the Board is to develop Delta flow criteria as required by the recently enacted Delta Reform Act of 2009 establishing the Delta Stewardship Council and provisions for a Delta Plan.<sup>1</sup> The Act requires the State Water Board to "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources" to inform the Delta Stewardship Council in its planning decisions for the Delta Plan and the Bay Delta Conservation Plan (BDCP).

DWR believes that if this mandate is to be achieved, the Board must develop the Delta flow criteria through a process that balances the benefits and costs to other beneficial uses of water and public trust resources. In order to develop what is "necessary to protect" public trust resources, the State Water Board must essentially determine what level of protection is required by California law for the protection of the public trust uses. In general, the State Water Board determination is governed by the California Constitutional standard and Water Code provisions of reasonable use and public interest. Under Audubon, the public trust doctrine requires the State Water Board to consider the effect of the diversion or use of water on streams, lakes, or other bodies of water, and "preserve, so far as consistent with the public interest, the uses protected by the trust." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 at p. 447.) The Board recognizes its public trust obligations but indicates that because the flow criteria are for information purposes and not part of a regulatory or

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<sup>1</sup> (Senate Bill No. 1 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 (7th Ex. Sess) ch 5, § 39) (SB 1)

adjudicatory proceeding, it will not use public trust balancing in developing the criteria. In addition, the Board noted that it has limited time to develop the flow criteria. However, DWR does not believe it is possible to develop what is a "necessary" level of protection without knowing whether it is a reasonable level of protection. Since the Delta Plan will be developed to address multiple objectives, the impacts of protecting a particular use must be known for the Council to develop an acceptable Plan. Thus, in order for the criteria to be useful for the Delta Council and Resources Agency, DWR believes that the Board must provide balanced information.

The following comments focus on the two questions presented in the January 7, 2010, email from Mr. Philip Crader.

1. DWR Proposes to Have a Separate Presentation.

If parties are provided the opportunity to summarize their exhibits, DWR proposes to make its own presentation, and not with other parties.

2. The Topics Used to Form Expert Panels Should Reflect and Support a Balanced Approach to Developing the Flow Criteria.

DWR supports that the panels should be grouped by issue and not by interest. A topical approach will allow the State Water Board to more efficiently identify areas of consensus, disagreement, and key information that will help it develop the flow criteria. As stated at various times during the Pre-Proceeding Conference, how the expert panels are formed will depend largely on what information is submitted by February 16, 2010. DWR recommends that the Board determine the topics for each expert panel based on that information, which may identify particular issues, their complexity and importance. This information should determine whether a particular issue deserves its own expert panel or is included within a larger topic panel.

DWR believes that the topic panels should reflect a balanced approach and ultimately support the Board's understanding of the full range of factors that influence or affect the Delta ecosystem. DWR recommends that the State Water Board consider a variety of potential levels of protection, i.e., a range of flow criteria, that would be developed in consideration of balancing public trust uses. Also, DWR notes that the Department of Fish and Game (DFG) recommendation on flow criteria required under the new legislation could be useful to the Board's process and decision. DWR suggests, if possible, that the DFG flow criteria recommendations be provided sometime prior to the Board's decision.

In conclusion, DWR believes that the Board should provide a process that allows opportunity for a full understanding of the interrelationship of Delta hydraulics, diversions, and instream beneficial uses so it can use this to provide balanced flow criteria. The balanced flow criteria may, in turn, inform the Council of how the Delta ecosystem and public trust resources may be improved in the short term and in the long term.

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DWR appreciates the opportunity to comment and looks forward to working with the State Water Board during the upcoming Proceeding. If you or your staff have questions on these comments or would like additional information please contact me at (916) 653-8826 or [esoderlu@water.ca.gov](mailto:esoderlu@water.ca.gov).

A handwritten signature in black ink, appearing to read "Erick Soderlund", written in a cursive style.

Erick Soderlund  
Staff Counsel