



SOMACH SIMMONS & DUNN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814

OFFICE: 916-446-7979 FAX: 916-446-8199

SOMACHLAW.COM

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Via Email and Hand Delivery

Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor Mail Room
Sacramento, California
Bay-Delta@waterboards.ca.gov
pcrader@waterboards.ca.gov

Attn: Phillip Crader

Re: Delta Flow Criteria Informational Proceeding: Sacramento Valley Water
Users' Comments for January 7, 2010 Pre-Proceeding Conference

Dear Mr. Crader:

These comments are submitted on behalf of the parties listed on Exhibit 1 attached hereto. These comments address the State Water Resources Control Board's (SWRCB) December 16, 2009 Notice of Public Informational Proceeding and Pre-Proceeding Conference to Develop Flow Criteria for the Delta Ecosystem Necessary to Protect Public Trust Resources (Notice). We particularly focus on the scope of the Informational Proceeding currently scheduled to commence on March 22, 2010, and offer an approach that will satisfy the Legislature's direction in these matters, and will comport with the courts' explanations of the public trust doctrine.

At the outset, we appreciate the enormity of attempting to achieve the Legislature's stated coequal goals of (1) providing a more reliable water supply for California, and (2) protecting, restoring and enhancing the Delta ecosystem, and we recognize that the SWRCB's informational proceeding is simply one step towards achieving these coequal goals. Indeed, the Legislature directed the SWRCB to develop these "flow criteria" as part of the "early actions" contained in Senate Bill No. 1 of the 2009-2010 Seventh Extraordinary Session (SB 1). To that end, SB 1 added Water Code section 85086(c)(1), which provides in pertinent part:

For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to

protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions. *The flow criteria shall be developed in a public process by the board within nine months of the enactment of this division. The public process shall be in the form of an informational proceeding* conducted pursuant to Article 3 (commencing with Section 649) of Chapter 1.5 of Division 3 of Title 23 of the California Code of Regulations, and shall provide an opportunity for all interested persons to participate. *The flow criteria shall not be considered predecisional with regard to any subsequent board consideration of a permit,* including any permit in connection with a final BDCP. (Emphasis added.)

In undertaking this legislative directive to develop the undefined “flow criteria” within the short time frame allowed (i.e., by August 2010), it is critical that the SWRCB accurately and precisely identify the scope and expected outcomes of this proceeding. Most importantly, this is an informational proceeding—not a proceeding where the SWRCB will exercise its legislative and/or adjudicatory authorities. In this context, the SWRCB should follow an approach wherein it develops a comprehensive list of relevant factors, which the SWRCB then can consider in future legislative or adjudicatory proceedings, and in a manner consistent with its public trust obligations.

Consistent with this approach, the SWRCB must also recognize and respect the other ongoing Delta-related processes, including at least one additional process mandated by SB 1; namely, the Legislature’s directive to the California Department of Fish and Game (DFG) to develop, and recommend to the SWRCB, Delta flow criteria and biological objectives for certain species dependent on the Delta within 12 months of the enactment of SB 1 (i.e., by November 2010). (Wat. Code, § 85084.5.) The SWRCB’s process as provided in the Notice should be framed in the context of this other process being undertaken by DFG.

A. Flow Criteria

1. The SWRCB is Not Setting Binding Delta Outflow Standards in This Informational Proceeding

While Water Code section 85086(c)(1) directs the SWRCB to develop “flow criteria,” the statute does not define “flow criteria” in the context of section 85086(c)(1), nor does the SWRCB’s Notice. The Notice does make clear, however, that the “flow criteria” developed pursuant to SB 1 are neither water quality criteria, developed pursuant to the Clean Water Act, nor flow objectives, developed pursuant to the Porter-Cologne Water Quality Control Act (Porter-Cologne). Moreover, according to the Notice, flow criteria developed through this informational proceeding will have *no regulatory or adjudicatory effect*.

The SWRCB's Notice is confusing, however, in that it identifies, as *the key issue* for the informational proceeding, "what volume, quality, and timing of Delta *outflows* are necessary for the Delta ecosystem under different hydrologic conditions to protect the public trust resources pursuant to the [SWRCB's] public trust obligations and the requirements of SB 1." (Notice at p. 6, emphasis added.) The Notice briefly explains that Delta outflow will be the focus of the upcoming hearings, and assumes that Delta outflow is the primary driver of the health of the Delta ecosystem.

The informational proceeding contemplated by the SWRCB's Notice cannot result in binding Delta flow standards, because it does not comply with the laws that govern the adoption of such flow standards. In order for the SWRCB to adopt binding standards, it generally must comply with the Administrative Procedure Act's (APA) provisions that govern rulemakings. (Gov. Code, §§ 11340-11365.) The APA contains an exception from those provisions for the development of water quality control plans and guidelines under Porter-Cologne (Gov. Code, § 11353(a)), but the SWRCB is not holding this proceeding pursuant to Porter-Cologne.

Because the SWRCB is not conducting this informational proceeding as a rulemaking or under Porter-Cologne, any resulting criteria can be neither directly binding nor presumptively binding on the SWRCB in any future proceeding. (See *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 341 [agency cannot rely on "regulation" adopted without APA compliance in further consideration of matter].)¹ Moreover, this informational proceeding will not include compliance with essential procedures that apply to the development of water quality control plans and guidelines under Porter-Cologne. For example, the Notice does not indicate that the SWRCB intends to prepare an environmental document for any proposed flow criteria, as the SWRCB's regulations would require for plans or guidelines under Porter-Cologne. (See Cal. Code Regs., tit. 23, §§ 3775-3782.) Such an environmental document would have to analyze, among other things, "reasonable alternatives" to proposed flow criteria. (Cal. Code Regs., tit. 23, § 3777(a)(2).) The Notice also did not indicate that the SWRCB intends to consider all of the factors that Porter-Cologne, the Clean Water Act and the EPA's regulations require the SWRCB to consider in developing binding water quality standards. (See, e.g., 33 U.S.C. § 1313(c); Wat. Code, § 13241; 40 C.F.R. §§ 131.10-131.11.)

In light of these laws, if the SWRCB were to adopt in this proceeding *new* numeric, but non-binding, Delta outflow standards, the result would be at best confusion, which would be counterproductive, given the stressed state of Delta fish species. The fact that *new* numeric standards would result in highly problematic confusion is only emphasized by the fact that, in the near future, significantly more scientific information concerning Delta species will

¹ The fact that the Legislature directed the SWRCB to conduct this informational proceeding does not allow the SWRCB to adopt binding criteria without complying with the APA because the Legislature did not expressly exempt this proceeding from the APA. (See Gov. Code, § 11346(a) [APA "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly"].)

become available. As noted above, under SB 1, DFG, in consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, must “develop and recommend to the [SWRCB] Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern dependent on the Delta” and deliver that information to the SWRCB by November 2010. In addition, the National Academy of Sciences is reviewing the 2008 and 2009 biological opinions that apply to the operations of the Central Valley Project (CVP) and the State Water Project (SWP). It would make little sense for the SWRCB to risk preempting these other scientific processes by announcing new, numeric but non-binding Delta flow standards as a result of this informational proceeding before it receives the results of those processes. There inevitably would be disputes about what numeric criteria or standards should govern, and this would do nothing to promote the health of the Delta ecosystem or provide more reliable water supplies for California.

2. This Informational Proceeding Should be Limited to the Development of Criteria that Would Aid Further Decisionmaking if the SWRCB Subsequently Sets Flow Standards in a Future Proceeding

Given that the results of this informational proceeding will be non-binding, the best approach for the SWRCB to take is to focus on identifying the key biological, operational and other factors that it will consider when, after it receives the results of the pending scientific processes, it decides whether to set new objectives under Porter-Cologne. In SB 1, the Legislature took pains to distinguish “flow criteria” from water quality standards adopted under the federal Clean Water Act, or water quality objectives adopted under Porter-Cologne. The key term “flow criteria” therefore should be afforded a meaning distinct from those existing numeric standards and objectives.

Webster’s Dictionary defines the word criterion (the singular of criteria) as the “standard on which a judgment or decision may be based.” Any new “flow criteria” beyond the 2006 Water Quality Control Plan objectives, therefore, should be comprised of the key factors that the SWRCB identifies for its consideration when it ultimately updates the Water Quality Control Plan, and when the SWRCB potentially sets new flow objectives under that plan. These factors do not lend themselves to quantification in this initial proceeding. Instead, these factors should be viewed as a description of the facts and interrelationships that the SWRCB must consider when it begins the process of updating the Water Quality Control Plan, and undertakes its public trust obligations.

At this time, we suggest that these factors can best be developed in a matrix format. One axis of the matrix would list the many different types of public trust uses of water in the Delta and its watersheds (i.e., navigation, commerce, commercial fishing, wildlife habitat, aquatic habitat, etc.). The other axis lists the locations at which such public trust uses occur (i.e., in the Delta, Suisun Marsh, upstream areas, flood control bypass areas, etc.). In order to adopt a water quality control plan or other regulatory document for the Bay-Delta Estuary, the SWRCB should have sufficient information to answer at least the following questions for

each box in the matrix:

1. What flows are needed to support this public trust use in this portion of the watershed? How do those flows vary by season or by water-year type?
2. Are there water quality considerations (e.g., temperature, pH, salinity) that are needed to support this public trust use in this portion of the watershed? Do those factors vary by season or by water-year type?
3. How do the flows needed to support this public trust use in this portion of the watershed relate to the needs of other public trust uses, both in this portion of the watershed and in other areas of the watershed? Are the flows compatible or are they inconsistent?
4. How do the flows needed to support this public trust use in this portion of the watershed relate to the water supply needs of other legal users of water?
5. To what extent do the answers to questions 1-4 reflect the influence of factors other than flows (e.g., the effects of ocean fishing or introduced species)?
6. To what extent are the answers to questions 1-5 known with a high degree of certainty? If not, what should be done to reduce that uncertainty?²

Accordingly, this informational proceeding should focus on developing a comprehensive matrix of factors to be considered when the SWRCB convenes a further proceeding to actually set binding water quality objectives. This will ensure that the right questions are asked in each regulatory context, and that appropriate balancing can occur pursuant to the SWRCB's public trust obligations. The SWRCB can implement this approach—which allows for the completion of DFG's scientific process under Water Code section 85084.5 and of the National Academy of Sciences' review of the biological opinions—under Water Code section 85086(c)(1), given that the 2006 Water Quality Control Plan's existing numeric Delta outflow objectives do, in fact, address “volume, quality, and timing of water necessary for the Delta ecosystem under different conditions.”

B. Public Trust

As noted above, SB 1 directs the SWRCB to undertake this informational proceeding “pursuant to its public trust obligations.” (Wat. Code, § 85086(c)(1).) Those obligations require the SWRCB to consider a wide variety of factors. Under the common-law public trust doctrine, the SWRCB has an affirmative duty to take public trust resources into account when

² These questions, of course, do not begin to address other considerations that the SWRCB would take into account in revising the Water Quality Control Plan, and that are set forth in Water Code section 13241.

making decisions regarding the allocation of water resources.³ The SWRCB's consideration of the public trust does not occur in a vacuum. Instead, the SWRCB considers the "public trust" at the same time it considers other uses of water, including other public trust uses. (See *Nat. Audubon Society v. Superior Court (Los Angeles Dept. of Water & Power)* (1983) 33 Cal.3d 419, 446 (*Nat. Audubon Society*) [SWRCB has authority to authorize uses that will not promote, and sometimes harm, public trust uses].) This consideration, or balancing of public trust uses against diversions or other public trust uses, occurs when the SWRCB makes allocation decisions. (See *id.* at p. 446).

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible As a matter of practical necessity[,] the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation omitted], and to preserve, so far as consistent with the public interest, the uses protected by the trust. (*Nat. Audubon Society* at pp. 446-47.)

The public trust doctrine does not require that conflicts between public trust values and competing water uses must be resolved in favor of protecting the public trust. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778 (Robie, J.)) Rather, the SWRCB determines which public trust uses are "feasible" to protect; in resolving whether it is "feasible" to protect certain public trust values in a particular instance, the SWRCB must decide whether protection of those values, or what level of protection, is "consistent with the public interest." (*Ibid.*)

1. The SWRCB Should Determine Which Public Trust Resources it Seeks to Protect in the Delta, and When, and Weigh those Values Against Other Public Trust Values, Including Public Trust Values Upstream

The Notice does not identify which public trust resources are being protected. Public trust uses have included uses such as water-related commerce, navigation, fishing, bathing and swimming, boating, hunting and other recreational purposes, land preservation for scientific study, and wildlife habitat, including birds and wild animals. (See generally, *Nat. Audubon Society, supra*, 33 Cal.3d 419; *Center for Biological Diversity, Inc. v. FPL Group, Inc., supra*, 166 Cal.App.4th 1349.) The public trust is, of course, not limited to the Delta. Instead, the public trust extends upstream.

³ Recently, the California Supreme Court carefully distinguished the common-law public trust doctrine from state agencies' statutory public trust obligations. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 515.) The SWRCB's public trust obligations derive from the common-law. In contrast, the First District Court of Appeal has explained that DFG, by statute, is the trustee of the state's fish and wildlife resources. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1367.)

In applying the public trust doctrine as interpreted by California's appellate courts, the SWRCB must carefully evaluate the benefits of the public trust resources in the Delta in relation to other public trust resources. Such an evaluation will require the consideration of scientific evidence of the water supply needs of public trust resources throughout the Sacramento-San Joaquin watershed, and is clearly beyond the scope of the present proceeding. The evaluation of the benefits of public trust resources in the Delta in relation to other public trust resources should occur in future proceedings where the SWRCB exercises its legislative or adjudicatory authority consistent with its public trust and statutory obligations. The SWRCB cannot assume that developing Delta outflows to protect public trust values in the Delta will not negatively affect public trust resources elsewhere. For example, requiring additional Delta outflows would likely cause numerous changes to the Sacramento-San Joaquin River ecosystems that could harm upstream fisheries, waterfowl and wildlife habitat. Prior to making any determination that additional Delta outflows are necessary, the SWRCB must consider how additional outflow would affect suitable physical habitat for fish, turbidity, scouring, and potential depletion of spawning gravels, food supply, water temperatures for upstream spawning and rearing, threats from predation and invasive species, and the like.

2. Even if the Delta Public Trust Values are Prioritized Above all Others, the SWRCB Must Balance the Delta Public Trust Values Against the Public Interest

Before water is dedicated to public trust uses, there must be a careful balancing and weighing between the costs and the benefits associated with existing uses of water and the protection of public trust values. As the Supreme Court explained:

The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. California's Constitution, its statutes, decisions, and commentators all emphasize the need to make efficient use of California's limited water resources: all recognize, at least implicitly, that efficient use requires diverting water from in-stream uses. Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel. (*Nat. Audubon Society, supra*, 33 Cal.3d at pp. 446, internal citations omitted.)

The SWRCB therefore will be required to consider many factors, including operational concerns such as reservoir storage, water-supply impacts and hydrological feasibility/operational concerns when it eventually sets new numeric Delta outflow objectives.

3. A Water Right Cannot be Curtailed to Promote Delta Public Trust Values
Absent any Evidence that Exercising the Right Harms Those Values

While the Notice explains that whatever results from this proceeding will not be binding in other SWRCB proceedings, it bears emphasis that a water right holder cannot be required to forego diversions to protect the public trust, or to improve water quality generally, absent evidence that the water right holder's diversions are harming the public trust or result in degradation of water quality. (See, e.g., *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 967.)

C. Conclusion

The SWRCB should clarify that the purpose of this informational proceeding is not to develop numeric Delta outflows that will affect future determinations of such outflows, because it is clear that better science will be available in the near future, and the SWRCB must comply with other laws in order to adopt binding outflow objectives. Instead, this proceeding should provide for the development of a matrix of key factors and informational items related to Delta outflows that will be utilized in subsequent proceedings to set specific flow standards or objectives. This phased approach is necessary because, for the SWRCB to comply with its "public trust obligations" in protecting public trust resources in the Delta, it also must consider the resulting impacts on other public trust resources, the feasibility of implementing whatever Delta standards it considers, and the water-supply impacts. In addition, as a practical matter, this type of balancing cannot occur in this informational proceeding given the relatively short time frame allotted for it.

We appreciate the SWRCB's consideration of these comments, and look forward to participating in the pre-proceeding conference on January 7, 2010.

Sincerely,

SOMACH SIMMONS & DUNN

By 

Andrew M. Hitchings, Attorneys for
Glenn-Colusa Irrigation District, County of Sacramento,
Sacramento County Water Agency, and County of Yolo

DOWNEY BRAND LLP

By Kevin M. O'Brien

Kevin M. O'Brien, Attorneys for
Reclamation District 108, Calaveras County Water
District, Carter Mutual Water Company, Howald Farms,
Inc., Meridian Farms Water Company, Natomas Central
Mutual Water Company, North Delta Water Agency, Oji
Brothers Farm, Inc. and Oji Family Partnership, Pelger
Mutual Water Company, Pleasant Grove-Verona Mutual
Water Company, Reclamation District 2068, Richter
Brothers, River Garden Farms Company, South Sutter
Water District, Sutter Extension Water District, Sutter
Mutual Water Company, Tisdale Irrigation and Drainage
Company, and Windswept Land and Livestock
Company

BARTKIEWICZ, KRONICK & SHANAHAN

By Alan B. Lilly

Alan Lilly, Attorneys for
Browns Valley Irrigation District, City of Folsom, City
of Roseville, San Juan Water District, and Yuba County
Water Agency

Attachment

cc (via email): Charles R. Hoppin, SWRCB Chair
Frances Spivy-Weber, SWRCB Vice Chair
Arthur G. Baggett, Jr.
Tam M. Doduc
Walter G. Pettit
Erin Mahaney

AMH:cr

EXHIBIT 1

Browns Valley Irrigation District
Calaveras County Water District
Carter Mutual Water Company
City of Folsom
City of Roseville
County of Sacramento
County of Yolo
Glenn-Colusa Irrigation District
Howald Farms, Inc.
Meridian Farms Water Company
Natomas Central Mutual Water Company
North Delta Water Agency
Oji Brothers Farm, Inc. and Oji Family Partnership
Pelger Mutual Water Company
Pleasant Grove-Verona Mutual Water Company
Reclamation District 108
Reclamation District 2068
Richter Brothers
River Garden Farms Company
Sacramento County Water Agency
San Juan Water District
South Sutter Water District
Sutter Extension Water District
Sutter Mutual Water Company
Tisdale Irrigation and Drainage Company
Windswept Land and Livestock Company
Yuba County Water Agency