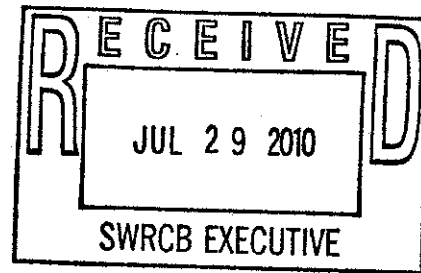


July 29, 2010

Charles R. Hoppin, Chair
c/o Jeanine Townsend, Clerk
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814-0100



Dear Chairman Hoppin and Members of the Board:

Our organizations collectively represent hundreds of thousands of Californians concerned about keeping the Bay-Delta Estuary alive and healthy and restoring our dwindling salmon and other aquatic species. We applaud the draft that you have prepared identifying the flow needs of the Estuary's public trust resources, and particularly commend your careful analysis of the overwhelming scientific support that has demonstrated for many years that we are, and have been, extracting too much water from the Estuary and its watershed to support those trust resources sustainably. We respectfully recommend that the Executive Summary would benefit substantially from several clarifications, and also recommend that Appendix B, which was not the subject of this proceeding, be deleted from the final document. Our specific recommendations are below:

- 1. Clarify that substantially increased flows are essential, if not alone sufficient, to protect trust resources.** The body of the report makes this point, but it is somewhat buried in the Executive Summary under qualifications and caveats and repeated emphasis on "other stressors." We concur that factors beyond flows must be addressed to restore and protect the Estuary and to protect the health of public trust resources. However, the Executive Summary should be revised to state clearly that increased flows are an essential part of this equation that cannot be addressed by focusing exclusively, or primarily, on non-flow stressors (many of which themselves have flow components).
- 2. Clarify that the Board has based its determinations on best available science and put the issue of "certainty" in context.** The report variably describes the science as the "best available" or merely "sufficient." We recommend that the Board clarify that it has in all cases based its recommendations on the "best scientific information available."

as the statute requires. (If it has indeed used information failing to meet this standard, the Board should explain why it is using scientific information that is not the "best available.") Related to this, the draft Summary indicates that there is "uncertainty" regarding some of the more specific flow criteria. However, the standard for agency decision making is not "certainty" but rather substantial evidence. It would be helpful for the final Executive Summary to clarify this point.

- 3. Quote from the relevant section of the statute or controlling Supreme Court law rather than paraphrasing.** At several points, the Executive Summary describes the legislative mandate rather than simply providing it. We recommend that the clearer and least controversial way of characterizing what the law requires is to simply quote the law itself.¹ Similarly, the description of the public trust doctrine and what it requires from the State is not entirely accurate or as precise as it could be, and relies on an appellate court case law dealing mainly with water quality standards rather than controlling California Supreme Court precedent. To avoid unnecessary conflict in this context, we recommend simply quoting the relevant legal standard in its entirety:

"Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *National Audubon Society v Superior Court* (1983) 33 Cal. 3d 419, 446.

The decision further holds:

"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. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. 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 and to preserve, so far as consistent with the public interest, the uses protected by the trust." [citations and footnotes omitted] *Id.*

- 4. Clarify how the flow criteria will be subsequently used in other proceedings.** The Executive Summary as drafted indicates in "next steps" that the flow criteria will inform the Bay Delta Plan, the Bay Delta Conservation Planning process and the State Board's own ongoing and subsequent proceedings. We concur with this. However, the discussion of the same issues in the "future use of this report" section is confusing and muddies this point. We concur that the flow criteria were not developed in a regulatory

¹ In this spirit, the second paragraph of the Executive Summary should be changed to say that the Bay-Delta Reform Act adopted a policy of sustainable water supply management to provide for a "more" reliable water supply for the State, rather than "ensuring a reliable water supply." See Sec. 85001(c)

proceeding and are not pre-decisional, as the statute itself provides, and that the flow criteria themselves do not alter any water rights.

However, the criteria do have substantial weight and represent the Board's assessment of the Estuary's public trust flow needs in the context of future feasibility analyses. In the absence of new and equally compelling scientific evidence to the contrary, these criteria cannot be ignored or set aside as a marker of what constitutes the Estuary's public trust flow needs in the context of a request for a change in point of diversion related to a new conveyance facility. Certainly, as the draft stresses, regulatory changes will require the Board's full consideration of other issues as well. But the Executive Summary should clarify that this assessment, being based on the best available science, stands as the Board's position regarding the flows needed to protect trust resources. We recommend merging the "next steps" section with the "future use of this report sections" to clarify these issues. Failure to do so may lead to future conflict.

For the same reasons, we also recommend eliminating the section entitled "limitations on the state board's approach," which is repetitious. The limitations of the flow criteria are spelled out in the legislation which is controlling here.

- 5. Description of the BDCP and its Relationship of the flow criteria.** The description of the BDCP process focuses on the issuance of permits allowing the take of endangered species while not clearly stating that the primary purpose of the conservation planning process is to ensure the recovery of key listed species that are also covered by the State Board's public trust obligations. This should be clarified. We also suggest including Section 85086(c)(2) regarding the relationship between the flow criteria and the conveyance facility under consideration in the BDCP process which provides:

"Any order approving a change in the point of diversion of the State Water Project of the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section. The flow criteria shall be subject to modification over time based on a science-based adaptive management program that integrates scientific and monitoring results, including the contribution of habitat and other conservation measures, into ongoing Delta water management."

- 6. Clarify that flow needs may change – and may not – based on what is learned going forward.** Our organizations concur with the Board's emphasis on the value of adaptive management. However, it is the nature of such an approach that it cannot be predicted; complying with the Board's ongoing duty of care for the Estuary's trust resources may require more or less flow in the future based on the best available science that will become available over time. The Executive Summary should reflect this reality. [See Flow Criteria and Conclusions #5, 8th bullet point]
- 7. Clarify that changes in flow criteria must be tied to achievement of biological performance targets.** We concur that habitat improvements are essential and may well provide additional protection for trust uses. However, reduction of flows otherwise needed to protect public trust resources in the Delta must be conditioned on actually meeting biological performance targets. [See Flow Criteria and Conclusions #5, 3rd bullet point]

- 8. Delete Appendix B and references to water supply costs.** Finally, we request that appendix B, the preliminary water supply cost analysis, be deleted as well as references to it in the Executive Summary. No testimony was submitted and this issue was not part of the Board's extensive analysis or the required public process. The modeling conducted does not in any way meet the rigorous standards of evidence that have been applied to the biological, hydrological and other information that was submitted as part of the public proceeding connection with the Board's review, nor were these model runs reviewed by the Board's own outside experts.

We concur that analysis of impacts to supply of any potential changes to actual permits is essential and must be conducted. We respectfully suggest that this was beyond the scope of this proceeding, and the other reasons above, it would not be appropriate for the Board to include this appendix or otherwise include it in its transmissions to the DSC or BDCP process.

In sum, we commend you for your excellent work in compiling, synthesizing and analyzing the wealth of scientific information regarding the flow needs of the Bay-Delta Estuary, and believe that these flow criteria are a critical step forward. While we recommend the relatively minimal changes to the Executive summary addressed above, we strongly urge you to adopt this report at the August 3, 2010 Board meeting.

Thank you for your consideration of our views. We look forward to working with the Board and staff on this important issue going forward.

Sincerely,



Cynthia Koehler
Environmental Defense Fund



Doug Obegi
Natural Resources Defense Council



Gary Bobker
The Bay Institute



Carolee Krieger
California Water Impact Network



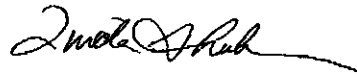
Kim Delfino
Defenders of Wildlife



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Linda Sheehan
California Coastkeeper Alliance



Bill Jennings
California Sportfishing Protection Alliance