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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of:

Informational Proceeding to Develop Flow Criteria for the Delta Ecosystem

# SACRAMENTO VALLEY WATER USERS' WRITTEN SUMMARY OF RESPONSES TO KEY ISSUE AND ASSOCIATED QUESTIONS

Pursuant to the Revised Notice of Public Informational Proceeding dated January 29, 2010, the Sacramento Valley Water Users ("SVWU")[1] submit this written summary in response to the key issue and associated questions identified in the Notice of Informational Proceeding dated December 16, 2009 ("Notice").[2]

[1] The individuals and entities comprising SVWU are identified in Attachment 1.

[2] The Notice states: "The key issue for this proceeding is what volume, quality, and timing of Delta outflows are necessary for the Delta ecosystem under different hydrologic conditions to protect public trust resources pursuant to the State Water Board's public trust obligations and the requirements of SB 1." (Notice, p. 6). The Notice also identifies the following questions: (1) What key information, in particular scientific information or portions of scientific information, should the State Water Board rely upon when determining the volume, quantity, and timing of water needed for the Delta ecosystem pursuant to the board's public trust obligations? For large reports or documents, what pages or chapters should be considered? What does this scientific information indicate regarding the minimum and maximum volume, quality, and timing of flows needed under the existing physical conditions, various hydrologic conditions, and biological conditions? With respect to biological conditions, what does the scientific information indicate regarding appropriateness of flow to control non-native species? What is the level of scientific certainty regarding the foregoing information?; (2) What methodology should the State Water Board use to develop flow criteria for the Delta? What does that methodology indicate the needed minimum and maximum volume, quality, and timing of flows are for different hydrologic conditions under the current physical conditions of the Delta?; (3) When determining Delta outflows necessary to protect public trust resources, how important is the source of those flows? How should the State Water Board address this issue when developing Delta outflow criteria?; (4) How should the State Water Board address scientific uncertainty when developing the Delta outflow criteria?

## I. IN DEVELOPING NEW FLOW CRITERIA FOR THE DELTA, THE SWRCB MUST (A) BE MINDFUL OF ITS OBLIGATIONS UNDER THE PUBLIC TRUST DOCTRINE, AND (B) RECOGNIZE THAT, AS A PRACTICAL MATTER, COMPREHENSIVE PUBLIC TRUST BALANCING AS REQUIRED UNDER *NATIONAL AUDUBON* CANNOT OCCUR IN THIS INFORMATIONAL PROCEEDING.

SB 1, enacted on November 12, 2009, adds the Sacramento-San Joaquin Delta Reform Act of 2009 to the Water Code. Section 39 of SB 1 establishes Water Code section 85086, which identifies the parameters of this proceeding. Section 85086(c)(1) provides that the State Water Resources Control Board ("SWRCB") "shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." There are three critical elements of this statutory language. First, the statute indicates that this proceeding shall be undertaken "pursuant to" the Board's "public trust obligations," thus making clear the Legislature's intent that this proceeding be subject to the requirements of the public trust doctrine as established under California case law. Second, the statute does not limit the public trust resources to be considered in this proceeding to public trust resources existing in the Delta. Rather, the statute refers to the need to "protect public trust resources" generally. Finally, section 85086(c)(1) states that the outcome of this informational proceeding "shall not be considered predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP."

Under the public trust doctrine, the SWRCB has an affirmative duty to take public trust resources into account when making decisions regarding the allocation of water resources. The discharge of this duty, however, 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) The California Supreme Court has stated:

> 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

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Specifically, what kind of adaptive management, monitoring, and special studies programs should the State Water Board consider as part of the Delta outflow criteria, if any?; and (5) What can the State Water Board reasonably be expected to accomplish with respect to flow criteria within the nine months following enactment of SB 1? What issues should the State Water Board focus on in order to develop meaningful criteria during this short period of time?

> 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 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 uses in a particular instance, the Board must decide whether protection of those uses, or what level of protection, is "consistent with the public interest." (*Id.*)

As a practical matter, the SWRCB must consider whether it would be feasible for the current water supply system to achieve any Delta flow criteria proposed in this proceeding because, if the water is not available to meet such criteria, then it would be meaningless for the SWRCB to adopt them. Section 85086(c)(1), however, does not provide the SWRCB with the amount of time, or allow for the quasi-adjudicatory procedures, that would be necessary for the SWRCB to appropriately balance consumptive and non-consumptive uses of water as required under *National Audubon*, and to adopt regulatory requirements that would bind the parties. Accordingly, the SWRCB's final report in this proceeding must recognize the foregoing limitations and the report should clearly indicate that it is not precedential in any future proceedings in which the SWRCB considers new regulatory standards for the Delta or if the SWRCB otherwise seeks to discharge its duties under the public trust doctrine.

## II. RESPONSES TO KEY ISSUE AND ASSOCIATED QUESTIONS

SVWU responds to the key issue and associated questions identified in the Notice as follows:

- The relationship between the condition of the Bay-Delta Estuary and Delta outflow (and its index, X2) is complex. The underlying causal mechanisms between Delta outflow and fish populations are not well understood.

- Delta outflow is only one of many factors affecting fish populations in the Delta. The relationships between populations of fish species to Delta outflow have changed over time, and often have become weaker. Many other factors have been implicated in the decline of the Delta ecosystem. The relative importance of these other factors should be thoroughly

investigated before any new numerical outflow criteria are adopted.

- The new federal delta smelt and salmonid Biological Opinions are in the earliest stages of implementation and the efficacy of the measures contained in these Biological Opinions has not yet been evaluated. These Biological Opinions effectively include new flow criteria for the Delta. The SWRCB should allow adequate time for these Biological Opinions to be implemented and evaluated before any new numeric flow criteria for the Delta are adopted.

- The ongoing Delta studies and the intense suite of investigations initiated in connection with the Pelagic Organism Decline program, and the ongoing evaluation of D-1641 and the federal delta smelt and salmonid Biological Opinions provide a robust opportunity for understanding the relative importance of various factors in relation to in-Delta public trust resources and the relationship of outflow to each factor. The studies to date, however, do not provide a reliable basis for adopting another set of Delta outflow criteria, in the absence of management actions to address the other factors that may be impacting public trust resources in the Delta.

- Based on the foregoing, the SWRCB should proceed with the understanding that more modifications to Delta outflow criteria, without other measures to address the various factors that may affect the Delta ecosystem, are unlikely to substantially improve ecosystem health.

- The proposals to modify Delta outflow advanced by the Bay Institute and certain faculty of the University of California, Davis, if implemented, would cause severe adverse impacts on other existing beneficial uses of water (including, potentially, and without limitation, irrigation, domestic, municipal, industrial and hydroelectric power generation uses) and on public trust resources outside the Delta. In particular, those proposals would severely limit the amount of carryover storage available in reservoirs throughout the Sacramento-San Joaquin watershed. As a result, for example, it would become impossible in many hydrologic scenarios to meet flow and temperature requirements on the Sacramento River and its tributaries, to the detriment of state and federally-listed salmonids and other fish species. (SVWU Exhibits 1 through 60)

- The SWRCB should treat this proceeding as a first step toward addressing the protection of public trust resources in the Delta in a manner consistent with, as Water Code section 85086(c)(1) puts it, the SWRCB's "public trust obligations." The existing numeric

outflow requirements – including those in the Biological Opinions – represent a reasonable starting point given the substantial scientific uncertainty that exists about the role of other factors in the Delta and the effect of outflow on those factors. A matrix showing the current numeric Delta outflow requirements is set forth in Attachment 2.

- In addition to the existing numeric outflow requirements, the SWRCB should adopt narrative criteria that incorporate the following principles:

  - Delta outflow requirements must be based on reliable scientific evidence addressing (i) what flows are needed to support a particular public trust resource; and (ii) how such flows vary by season or by water-year type.

  - Delta outflow requirements must be based on reliable scientific evidence addressing (i) what water quality considerations (e.g., temperature, pH, salinity) are needed to support this public trust use in the relevant portion of the watershed; and (ii) how such factors vary by season or by water-year type.

  - Delta outflow requirements must be based on reliable scientific evidence addressing (i) how the flows needed to support a particular public trust resource in the Delta relate to the needs of other public trust uses, both in the Delta and outside the Delta; and (ii) whether the flows needed to support a particular public trust resource in the Delta must be balanced with the needs of other public trust resources elsewhere in order to protect the public trust generally.

  - Delta outflow requirements must be based on reliable scientific evidence addressing (i) how the flows needed to support a particular public trust resource in the Delta relate to the needs of other water users in the Delta or outside the Delta (including, without limitation, irrigation, domestic, municipal, industrial and hydroelectric power generation uses); and (ii) whether the flows that would maximize public trust resources in the Delta and elsewhere would be consistent with the public interest.

- In any future proceedings to address the protection of public trust resources in the Delta, the SWRCB must address how to undertake the comprehensive public trust balancing required by *National Audubon.*

- The SWRCB should be mindful that any of its actions, including the development of Delta flow criteria in this proceeding, are subject to the prohibition against waste and

unreasonable use of water in article X, section 2 of the California Constitution.

DATED: February 16, 2010

DOWNEY BRAND LLP

By: _____

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# ATTACHMENT 1

## SACRAMENTO VALLEY WATER USERS

**Downey Brand LLP**

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, Sacramento Municipal Utility District, Reclamation District 2060, 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

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# ATTACHMENT 2

## X2 OBJECTIVES AND DELTA OUTFLOW STANDARDS

| Document Source(s) | X2 Objective | Minimum Delta Outflows |
|---|---|---|
| **2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary**<br><br>**1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary**<br><br>**SWRCB Water Right Decision 1641 (Dec. 29, 1999, revised Mar. 15, 2000) ("D-1641")** | Chipps Island and Port Chicago for a specified number of days each month between February and June based on the previous months Eight River Index, a 14-day running average of 2.64mmhos/cm or 3-day running average of net Delta outflows of 11,400 cfs and 29,200 cfs, respectively. (See attached "Table 4. Number of Days When Maximum Daily Average Electrical Conductivity of 2.54 mmhos/cm Must Be Maintained at Specific Location.")[1]<br><br>Chipps Island is 75 km upstream of the GG Bridge. Port Chicago is 64 km upstream of the GG Bridge. (See attached annotated CCWD photograph.) | <u>Net Delta Outflow Requirement for Fish & Wildlife Beneficial Uses</u><br><br><u>January:</u><br>4,500 cfs (All Years);[2] 6,000 cfs if the Eight River Index for December is greater than 800 TAF[3]<br><br><u>February-June:</u><br>Minimum daily of net outflow of 7,100 cfs (All Years) based on 3-day running average; or 14-day running average of EC at Collinsville Gauge is less than or equal to 2.64 mmhos/cm.<br><br>If Eight River Index for January is more than 900 TAF, then daily average or 14-day running average EC at station C2 shall be less than or equivalent to 2.64 mmhos/cm at least one day between February 1 and February 14.<br><br>If Eight River Index for January is 650 TAF-900 TAF, Exec Dir. of SWRCB delegated to decide whether requirement applies.<br><br>If Eight River Index for February is less than 500 TAF, then standard may be relaxed in March upon recommendation from operations group, with any disputes resolved by CALFED policy group. (Note: In D-1641, this stated that DWR and USBR could request that the March standard be relaxed, subject to the approval of the SWRCB Executive Director.)<br><br>The standard does not apply in May and June if May estimate of Sacramento River Index is less than 8.1 MAF at the 90% exceedence level. Under this circumstance a minimum 14-day running average flow of 4,000 cfs is required in May and June. |

[1] This table appears in the 2006 and 1995 Water Quality Control Plans for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and D-1641. The information in this table in each document is exactly the same.

[2] Water year-type is based on the Sacramento Valley 40-30-30 Index. This index equation is 0.4*X + 0.3*Y + 0.3*Z, where X is the current year's April-July Sacramento Valley unimpaired runoff, Y is the current October-March Sacramento Valley unimpaired runoff, and Z is the previous year's index (which has a cap of 10.0 MAF). Sacramento Valley unimpaired runoff for the current water year

# ATTACHMENT 2

## X2 OBJECTIVES AND DELTA OUTFLOW STANDARDS

| Document Source(s) | X2 Objective | Minimum Delta Outflows | | |
|---|---|---|---|---|
| | | July:<br>Wet & Above Normal: 8,000 cfs<br>Below Normal: 6,500 cfs<br>Dry: 5,000 cfs<br>Critical: 4,000 cfs | August:<br>Wet-Below Normal: 4,000 cfs<br>Dry: 3,500 cfs<br>Critical – 3,000 cfs | September:<br>All Years: 3,000 cfs |
| | | October:<br>Wet-Dry – 4,000 cfs<br>Critical – 3,000 cfs | Nov–Dec.:<br>Wet-Dry – 4,500 cfs<br>Critical – 3,500 cfs<br>(See p.15, t.3.) | |

| Document Source(s) | X2 Objective | Minimum Delta Outflows |
|---|---|---|
| **U.S. Fish & Wildlife Service Smelt Biological Opinion (2008)** | September and October:<br>Wet – X2 no greater than 74 km from GG Bridge<br>Above Normal – X2 no greater than 81 km from GG Bridge[4]<br><br>November:<br>Wet – X2 no greater than 74 km<br>Above Normal – X2 no greater than 81 km from GG Bridge<br><br>December:<br>Any increase in storage during November shall be released to augment outflow requirements in D-1641<br>(See pp. 282-283.) | September and October:<br>Wet – approx. 13,000 cfs required<br>Above Normal – approx. 8,000 cfs required<br><br>November:<br>Wet – approx. 13,000 cfs required<br>Above Normal – approx. 8,000 cfs required<br>(See pp. 373-375.) |

is a forecast of the sum of the following locations: (1) Sacramento River above Bend Bridge, near Red Bluff; (2) Feather River, total inflow to Oroville Reservoir; (3) Yuba River at Smartville; (4) American River, total inflow at Folsom Reservoir. (See 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, p. 23.)

[3] The Eight-River Index refers to the sum of the unimpaired runoff from: the Sacramento River at Bend Bridge near Red Bluff; Feather River, total inflow to Oroville Reservoir; Yuba River at Smartville; American River, total inflow to Folsom Reservoir; Stanislaus River, total inflow to New Melones Reservoir; Tuolumne River, total inflow to Don Pedro Reservoir; Merced River, total inflow to Exchequer Reservoir; and San Joaquin River total inflow to Millerton Lake.

[4] Water year type is calculated based on the Sacramento Basin 40-30-30 Index. (See Smelt BO at p. 283.)