

ELLISON, SCHNEIDER & HARRIS L.L.P.

CHRISTOPHER T. ELLISON
ANNE J. SCHNEIDER
JEFFERY D. HARRIS
DOUGLAS K. KERNER
ROBERT E. DONLAN
ANDREW B. BROWN
GREGGORY L. WHEATLAND
CHRISTOPHER M. SANDERS

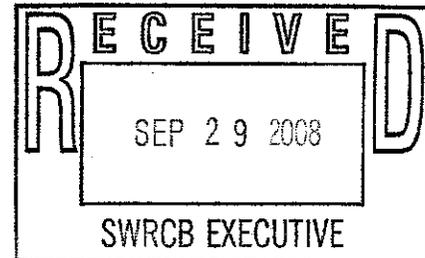
ATTORNEYS AT LAW

2015 H STREET
SACRAMENTO, CALIFORNIA 95811-3109
TELEPHONE (916) 447-2166 FAX (916) 447-3512

10/8/08 Public Workshop
Bay Delta Periodic Review
Deadline: 10/1/08 by 12 noon

ELIZABETH P. EWENS, OF COUNSEL
TERESA W. CHAN
JEDEDIAH J. GIBSON
JEREMY D. GOLDBERG
LYNN M. HAUG
CHASE B. KAPPEL
PETER J. KIEL

September 29, 2008



State Water Resources Control Board
c/o Jeanine Townsend
1001 I Street, 24th Floor
Sacramento, CA 95812-2815

Re: Comments in Advance of Workshop on Periodic Review of the Water Quality Control Plan for the San Francisco Bay / Sacramento-San Joaquin Delta Estuary (2006 Bay-Delta Plan)

Dear Members of the Board:

These comments are submitted on behalf of the San Francisco Public Utilities Commission ("SFPUC") in anticipation of the October 8, 2008 Workshop on the 2006 Bay-Delta Plan. Pursuant to the Revised Notice of Public Workshop on the 2006 Bay-Delta Plan published today, September 29, 2008, it is our understanding that on October 8, 2008, the Board will take up the issue of the evidentiary hearings discussed in the Bay Delta Strategic Workplan. Accordingly, this letter is to address concerns voiced to the Board during the September 17, 2008 Workshop on San Joaquin River Flow Objectives regarding the ultimate purpose of the planned evidentiary proceeding, the procedures that will be used during the hearing, and how the findings of fact rendered at its conclusion will be used.

From the Bay Delta Strategic Workplan and the SWRCB's August 29, 2008 Request for Written Input, it appears that the ultimate purpose of the evidentiary hearing is to receive evidence on critical factual issues and render findings of fact. At this stage, it is unclear what is meant by the phrase "render findings of fact." Will these rendered findings of fact be considered by the SWRCB and staff as findings to be applied in all SWRCB proceedings, including proceedings related to the Water Quality Control Plan or its implementation through water rights or other enforcement proceedings? Related to this, it also is unclear whether the findings of fact will be given the effect of binding precedent, or whether they will be subject to review or challenge in other proceedings. One concern among many is that if the findings of fact are considered to be binding in subsequent proceedings, it may preclude the presentation of further, possibly more accurate or more current, testimony and evidentiary data on a given issue.

The practicality of holding the evidentiary hearings, or the net benefit that is expected to be achieved by these proceedings, also should be examined. The SWRCB has announced its

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intention "to inventory and summarize the findings of well-documented data-base scientific analyses."¹ This ignores the fact that if existing, peer-reviewed work did exist and was capable of answering the outstanding and confounding questions regarding the Delta, there would not be a need for the extraordinary efforts still underway to try to define what is wrong with the Delta and how to fix it. It would appear to be far more logical at this stage to focus on current efforts that are underway to answer the outstanding questions and to solve the problems that exist.

We also have a number of concerns about the procedures to be employed during the hearings to ensure that the stakeholders' rights to due process are protected and preserved. It is understood that formal notice is to be provided in advance of the evidentiary hearing regarding the requirements for participation and the order of the proceedings. Substantial advance notice is necessary, however, for a true evidentiary hearing, particularly assuming that the SWRCB will follow its standard practice of requiring testimony to be submitted in written form in advance of a hearing. In order for a full and fair hearing to occur, provision also needs to be made for limited discovery in advance of the hearing, subpoenas, opportunity for cross-examination during the hearing, assurances that expert witnesses will need to be qualified as experts, and arrangements for the hearing to be transcribed by a court reporter.

In sum, we request that the SWRCB provide the public with its own legal analysis of the purpose of the evidentiary hearing, including an examination of the procedures that will need to be employed in order for the SWRCB to render findings of fact. Consistent with the above, the public should be provided with the SWRCB's assessment of what is expected to be gained by these proceedings, and the uses that can and will be made of any findings of fact that are rendered by the Board. It is critical that the public be given the formal, noticed opportunity to comment on the SWRCB's analysis and on the issues of what should occur in the planned proceedings from a legal, due process and practical perspective.

Your consideration of the above is greatly appreciated.

Sincerely,



Elizabeth P. Ewens

¹ August 29, 2008 Request for Written Input, p. 1.