

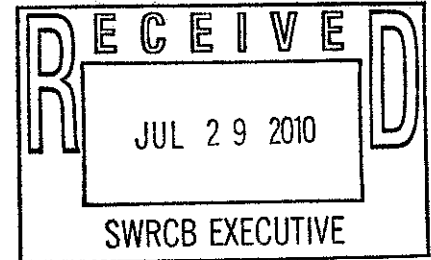


Westlands Water District

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By Electronic Mail: commentletters@waterboards.ca.gov
and U.S. Mail

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



Re: **COMMENT LETTER – DRAFT DELTA FLOW CRITERIA REPORT**

Ms. Townsend:

Westlands Water District (Westlands) appreciates this opportunity to comment on the State Water Resource Control Board's (State Water Board) Draft Report on the Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (Draft Report).

Westlands appreciates the difficulty the State Water Board's faced in satisfying the mandate imposed on it by the California Legislature to develop flow criteria for the Delta ecosystem to protect public trust resources. However, as explained in more detail in the comment letter submitted by the State and Federal Contractors Water Agency, the Draft Report contains numerous conceptual and scientific flaws that substantially undermine its proposed criteria.

Moreover, the Draft Report demonstrates a flow-centric approach to protecting and restoring the Delta ecosystem that is neither sustainable nor feasible. Indeed, one of the key deficiencies in the Draft Flow Report consists in its failure to provide the balancing and analysis required by the public trust doctrine.

The Sacramento-San Joaquin Delta Reform Act of 2009 provides that the "longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." (Water Code, § 85023 (emphasis added).) The Act also mandated:

For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the [State Water Board] shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. . . .

(Water Code, § 85086(c)(1) (emphasis added).)

The references to the "public trust doctrine" in declaring the policy of the State and to the State Water Board's "public trust obligations" when directing that it develop flow criteria are critically important because the public trust doctrine demands balancing the needs served by the appropriation of water against the needs of public trust resources and a determination of what is in the public interest. These concepts were first articulated by the California Supreme Court in *National Audubon Society, et al. v. Superior Court*, 33 Cal.3d 419 (1983). The Court stated, under the public trust doctrine:

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.

(*National Audubon v. Superior Court* (1983) 33 Cal.3d 419, 447, citations and footnotes omitted).

The Draft Report does acknowledge that the State Water Board's public trust obligation involves more than an analysis of the quantity of flow required to protect fish. In the Draft Flow Report, the State Water Board writes:

Under the public trust doctrine, the State Water Board must take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.) Public trust values include navigation, commerce, fisheries, recreation, scenic, and ecological values. "[I]n determining whether it is 'feasible' to protect public trust values like fish and wildlife in a particular instance, the [State Water] Board must determine whether protection of those values, or what level of protection, is 'consistent with the public interest.'" (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778.)

(Draft Flow Report, p. 2 (emphasis added).)

However, the Draft Report continues:

The State Water Board does not make any determination regarding the feasibility of the public trust recommendations and consistency with the public interest in this report.

* * *

In this forum, the State Water Board has not considered the allocation of water resources, the application of the public trust to a particular water diversion or use, water supply impacts, or any balancing between potentially competing public trust resources (such as potential adverse effects of increased Delta outflow on the maintenance of coldwater resources for salmonids in upstream areas). Any such application of the State Water Board's public trust responsibilities, including any balancing of public trust values and water rights, would be conducted through an adjudicative or regulatory proceeding. Instead, the State Water Board's focus here is solely on identifying public trust resources in the Delta ecosystem and determining the flow criteria, as directed by Water Code section 85086.

(Draft Flow Report, pp. 2-3.)

The proposed criteria would render California's water system virtually inoperable. They would have a devastating impact not only on the communities of the Central Valley and Southern California but on water users north of the Delta as well. And they would be equally destructive to the environment and a wide range of threatened and endangered species as they would be to the state's economy. It is precisely for this reason that the law requires a balancing.

Given this failure to analyze the feasibility of the flow criteria or their consistency with the public interest, it is critically important that the Delta Stewardship Council, members of the Legislature, and the public understand that the flow criteria described in the Draft Report may never be implemented. For this reason, the repeated caveats expressed in the Draft Report by the State Water Board concerning the future use of the report are particularly helpful and appropriate.

Thank you for your consideration of these comments.

Very truly yours,



Thomas W. Birmingham
General Manager