

**MINASIAN, SPRUANCE,  
MEITH, SOARES &  
SEXTON, LLP**

ATTORNEYS AT LAW  
A Partnership Including Professional Corporations

1681 BIRD STREET  
P.O. BOX 1679  
OROVILLE, CALIFORNIA 95965-1679

Writer's email: pminasian@minasianlaw.com

Public Comment  
Bay-Delta Fact Finding Issues  
Deadline: 9/29/08 by 5:00 p.m.

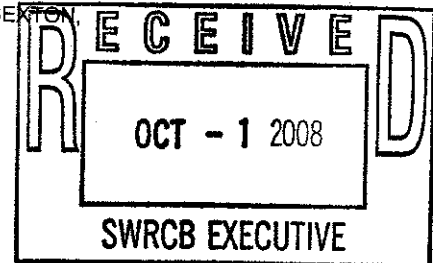
PAUL R. MINASIAN, INC.  
JEFFREY A. MEITH  
M. ANTHONY SOARES  
DAVID J. STEFFENSON  
DUSTIN C. COOPER

TELEPHONE:  
(530) 533-2885

FACSIMILE:  
(530) 533-0197

WILLIAM H. SPRUANCE,  
Of Counsel

MICHAEL V. SEXTON,  
Of Counsel



September 30, 2008

*Via California Overnight* – Tracking No.D10010187136746

**LATE COMMENT**

Tam M. Doduc, Chair  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Charles R. Hoppin  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Gary Wolff, P.E., Ph.D., Vice Chair  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Frances Spivy-Weber  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Arthur G. Baggett, Jr.  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**Re: Written Input on Additional Factual Issues Regarding the Bay-Delta  
SWRCB letter of August 29, 2008**

Ladies & Gentlemen:

In a mailing dated August 29, 2008, you asked for input on possible subjects for fact-finding hearings on critical factual issues which could serve to inform the Board and its staff and lead to findings which could improve Bay Delta conditions. We observe that there is a level of frustration with the SWRCB processes by the Board Members themselves and a genuine desire to provide leadership in identifying problems and devising solutions. May we suggest an additional set of issues which would provide valuable information and help chart a course for the Board.

To: Tam M. Doduc, Chair; Gary Wolff, P.E., Ph.D., Vice Chair; Arthur G. Baggett, Jr.; Charles R. Hoppin;  
Frances Spivy-Weber  
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**I. How could the Federal Endangered Species Act be coordinated with the historic principle that California water resources and water system operations should be determined by the State of California?**

1.0 The Federal Endangered Species Act has always contained an exemption procedure which can be applied for by the governor of a state; 15 U.S.C. 1536. The application for exemption can establish procedures to be utilized by the state for balancing and protecting species and for mitigating harm. The exemption also applies to later-declared endangered or threatened species. (Copies of those code sections are enclosed.)

2.0 The exemption procedure is designed for the extraordinary circumstances we are encountering in California. No modern society turns over the operations of its water supply system and its food sources to bureaucrats who are directed and required to consider only the health of one species without balancing and consideration of all impacts.

3.0 If the SWRCB would convene a fact-gathering and evidentiary hearing upon the effects and impacts of application of the Endangered Species Act upon operating California water storage and delivery systems and document the potential benefits of an exemption process in which:

(A) The State of California balanced the impacts from protection, the alternatives, and most important, the need for additional facilities and construction, we believe the factual record would cause the SWRCB to conclude that the Governor should be requested to make the application for exemption as contemplated in the ESA itself.

(B) If the exemption is granted, the SWRCB should use its existing powers to determine the proper operational conditions for water projects after considering the economic, social and physical impacts and affects upon all species . . . including the human species.

4.0 As an example, if the SWRCB called for a fact-finding hearing as to whether the current procedure of issuance of Federal biologic opinions without environmental impact studies and balancing of those impacts (and then Court interim orders when those biologic opinions are deemed legally deficient) is reasonable in light of

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the impacts upon public water supplies and systems, evidence in regard to the impacts and inefficiencies of the current procedures and the benefits and detriments of an alternative procedure for California established through the exemption procedure applicable to public water systems and public water supply use could be appraised. The case for or against an exemption order issued by the federal government could be documented by the SWRCB. Evidence never produced or considered in implementation of the ESA could be gathered.

5.0 Questions such as these could be considered:

(A) Can crop production lost by ESA orders be reproduced in other areas of the United States or the world and how long would it take to do so?

(B) Further, the current constraints upon the Bureau and State Water Project have required that groundwater be overdrafted in areas of the San Joaquin Valley. Subsidence of the land surface will occur at rates of in excess of two to three inches or more per year. Public facilities such as railroads, interstate highways, and water conveyance canals all must be reconstructed when these conditions occur and private homes are often damaged. What are these damages and how will they be funded?

(C) No one considered the impacts of rising food and fiber costs or the increased demand for electricity and diesel fuel for groundwater pumping upon air quality or climate warming. What are those impacts, and would an exemption process allow for thinking about planning for those impacts or alternatives?

(D) The effect on working families in urban and rural areas of increased water and sewerage bills, or the effect on the nation's balance of payments and the dollar is not known. A SWRCB hearing might just be the catalyst to thinking about different ESA procedures.

(E) All of this information could be made available to you in a fact-finding proceeding, the contents of which could be then utilized by you and Governor Schwarzenegger to determine if the circumstances are sufficiently inefficient and dire to call for application for ESA exemption and a proposal to utilize state government to implement the principles of the Endangered Species Act in regard to water resources and systems in a more efficient and effective manner.

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6.0 Recommendations to the Governor of a way of melding the federal and state Endangered Species Act into the SWRCB authority over water diversions, use and operations makes additional sense in light of the following:

(A) The historical principle that federal water projects should be subject to state jurisdiction and governance is based on the sound idea that locals can best balance the use of water. Why would locals be incapable of judging measures to preserve native species? The current operations of the Endangered Species Act places the Courts in the unfortunate position of having to enforce uni-direction federal determinations species-by-species without any authority to balance water system operations for the benefit of all species, environmental conditions, or the like. The Courts are begging for your help. Changes in the ESA will not occur until we have another "crisis in Washington". The exemption process allows us to avoid a disaster, which seems to be a requirement for action.

(B) The nationwide financial crisis has a message applicable to the role of the SWRCB. Agriculture and water use is just as much the "grease" which keeps society orderly as is money. Perhaps it is more important. Relying upon Congress or federal executive officers to understand and to properly regulate the consideration of endangered species and then to even contemplate how that laudable goal could screw up a functioning water delivery system in an arid state is beyond the federal government's ability. It is obvious that federal government inaction is capable of projecting California food production – which the nation depends upon – and its residents into total chaos. Just as the federal government did not know there was a crisis with its monetary system, it will not know that its actions or inaction will destroy water supply and delivery systems . . . until they are destroyed. Local consideration and governance by locally-appointed and elected officials through the ESA exemption process does not guarantee success, but it guarantees attention to the problems and a return of the SWRCB to a role of leadership.

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**II. Subject: Federal and State Fishery Agencies and Environmental Groups have over the last 2 decades asked the SWRCB to adopt flow and temperature requirements, requiring massive amounts of stored water to create fishery conditions argued to be beneficial to compensate for blockage of anadromous species from higher elevation spawning and rearing areas blocked by dams. We have had these regimes in place for 8 to 10 years upon the Yuba, Feather and Sacramento Rivers and for similar periods on other tributaries. No one reports to the SWRCB the results of these "experiments". Are they showing greater survivability and returning adults than streams without these regimes?**

Are these programs anything more than creating artificial hatcheries in streambeds at elevations and in conditions where anadromous fish species historically never reared and spawned, at great water costs?

7.0 At a factual hearing on this subject, the Board could monitor how its Orders are scoring in aiding anadromous fish. The SWRCB Board Members might discover that measures ordered by biologic opinions and the SWRCB itself in the past for the purposes of protecting anadromous fish species, such as more flow, colder temperatures or reduced pumping, and which do not address predation of anadromous fish, often can result in destruction of other species or even damage to the species sought to be protected.

(A) If colder water temperatures or increased flows cause species to delay or advance their migration times and the Delta or ocean or other conditions are adverse at that time, damage to the species sought to be protected by the very measures imagined as beneficial can occur.

(B) Predator species used to die off when flows were minimal in rivers and streams. Now the rivers and streams are required to flow water year-round and the predator species flourish.

(C) Additionally, evidence could be invited in regard to other experiments. We have been "experimenting" for many years in regard to anadromous fish, yet no one comes before the SWRCB with facts or evidence to explain whether the survival rates are better upon the Yuba or Sacramento Rivers where temperatures and flows have been substantially altered, as an example.

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(D) After investing more than a billion or so dollars in fish screening, fish studies and romantic notions, were these experiments really was the best use of funds? As an example, if only 1% to 2% of the juveniles return from the ocean, was it just a romantic notion that millions of dollars should be spent in "saving the baby fish"? Would the money have been better spent on properly operated and maintained hatcheries and trucking or curtailing ocean harvest?

(E) Dams blocked access to historic spawning and rearing areas DFG imagined with cold water and massive flows creating "natural hatchery conditions" in area below dams. Did these efforts create any better survivability? Were the expenditures in water reasonable? Even government should occasionally ask whether its notions are performing and yielding results.

### Conclusion

The fact-finding process and evidentiary proceedings could be most valuable if they were aimed at devising a factual basis for exemption of public water systems from the ESA and asserting the SWRCB authority and that of the State of California to administer the Federal FSA as it applies to the water systems and operations in this State.

A fact-finding hearing in regard to the actual results of the "experiment" that anadromous fish populations can be increased by creating artificial flow and temperature conditions below dams would allow the SWRCB to gauge the success of the Orders issued by it and the massive re-diversion of water resources and monies. Are these measures producing results? Are there better uses for the resources, and in some cases are we harming the fish sought to be protected?

Very truly yours,

MINASIAN, SPRUANCE,  
MEITH, SOARES & SEXTON, LLP

By: 

PAUL R. MINASIAN

PRM:df/vlh

Enclosures

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responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a) (2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A) (i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3) (A) (i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b) (3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; or

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned. Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2) (A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section; and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(l) Review by Secretary of State: violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(l) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.]. *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

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(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a) (2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of Title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a) (1) (B) and (C) of this title or any regulation promulgated to implement either such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b) (4) (iii) of this section shall not be considered to be a taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 401 or 402 of the Disaster Relief Act of 1974 [42 U.S.C.A. §§ 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub.L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub.L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3732; Pub.L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub.L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426.)

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