California Advisory Committee On Salmon and Steelhead Trout

September 4, 2009

Senator Patricia Wiggins, Chairman
Joint Committee on Fisheries and Aquaculture
State Capitol, Room 4081
Sacramento, CA 95814

Re: AB1 and SB 1

The Salmon and Steelhead Advisory Committee is writing you to oppose passage of AB 1 and SB 1 in this legislative session. While the legislation that has been proposed may include some excellent concepts such as water conservation, instream flow standards, diversion measurement and reporting requirements, and Klamath Dam removal funding, it also includes provisions which are extremely damaging to California's salmon and steelhead resources, such as declaring the Public Trust Doctrine and water supply as co-equal goals.

California courts, including the state's Supreme Court have consistently ruled that water exported from the Bay-Delta estuary is subordinate to the environmental protection of the estuary's environment and that the beneficial uses of water in and upstream of the estuary are superior to the beneficial uses of water exported from the estuary. SB-1 and AB-1 undermine these precedential decisions and essentially tell the courts they're wrong.

Attached is a letter from Antonio Rossmann, a distinguished lecturer in water resources law at U.C. Berkeley's School of Law, discussing the negative implications of the water bill package.

This important issue should not be rushed through in the final moments of this legislative session. There has not been enough opportunity for public review and input.

Water, like energy, is too important to be patched together in last minute negotiations of a conference committee The Salmon and Steelhead Advisory Committee urges you to defer water legislation until the next legislative session when there is time to allow adequate public review and participation for the future of California's life's blood- its water.

Sincerely,

Vivian Helliwell, Chair
California Advisory Committee on Salmon and Steelhead
(707) 445-1976

Cc: Members of Water Legislation Conference Committee

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18 August 2009

Honorable Fran Pavley, Chair
Senate Committee on Natural Resources and Water
State Capitol
Sacramento, CA 95814

Honorable Jared Huffman, Chair
Assembly Committee on Water, Parks, and Wildlife
State Capitol
Sacramento, CA 95814

Re: 2009 Delta Water Bill Package (principally preprint SB 1)

Honorable Chairs and Members of the Water Committees:

This writer seeks to follow up on his testimony of last March at the invitation of the Senate Committee with suggestions to frame a contemporary California water and Delta policy. These observations are made in this writer's capacity as long-time teacher and practitioner of water resources law. They are not made on behalf of any client – with the possible exception of my pre-teen daughters, whom I hope will inherit California with its water resources governed more rationally than they are today. Effective water governance would enable their future choices to raise their own families within the state in which they were born.

This writer appreciates the time and professionalism that legislators and legislative staff have devoted to the bill package. Clearly the intent is to place us on a wiser and humbler course than that which has characterized the past forty years. Some suggestions are advanced here to make the intent become reality, and not prove to perpetrate, or even exacerbate, the current mismanagement of our water resources. Just as our nation has suffered from the collapse of a "sub-prime" economy, our state is at peril because of our ongoing expectation that we can continue to build California on sub-prime water. We need to create water supply reliability (and not necessarily expand entitlements) in a manner respectful of the inherent restraints of nature. And, in this writer's view, rather than repose Delta governance solely in either a State-appointed body

(as presently proposed), or solely in a locally-appointed body (as previously proposed), governance should be entrusted to a council with equal number of State and local members.

Preprint SB 1 forms the focus of these comments. The bill seeks to maintain the Blue Ribbon Task Force policy of pursuing environmental protection and supply reliability as "co-equal goals." Conforming that aspiration to both legal and ecological mandates requires refinement of the Blue Ribbon policy. The California Supreme Court's latest definition of the State's Bay-Delta responsibilities clearly provides that "water exports from the Bay-Delta ultimately must be subordinated to environmental considerations." (*In re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168 (emphasis added).) Stated differently, the goal of securing a reliable supply must in the end be realized by meeting the paramount needs of the environment. The first set of suggestions below seeks to conform the text of preprint SB 1 to this mandate. The second suggestion – redefining the composition of the Delta Stewardship Council – seeks to better balance the compelling statewide and local Delta interests in the protection of the Delta, and produce an outcome that will earn support from the Delta communities.

In the end, nature wins.

Section 85020. Subsection (b)(6) should be revised to eliminate "appropriate balance," a term with the potential to misinterpret public trust preservation as merely equal to, or even subordinate to, allocation and appropriation. Substitute wording could read, "Establish sufficient reservation of water for public trust and ecosystem restoration purposes, to enable appropriate allocation for other beneficial uses."

Section 85022. Subsection (c)(2) should be revised to establish protection of the Delta's natural and scenic resources as "the" paramount concern to present and future generations. Only *one* mandate can be "paramount," fulfilling the word's definition as "overriding; having superior power and influence; supreme in rank, power, and authority."

Section 85022. Subdivision (d)(1) should specify restoration as an unqualified mandate, leaving only enhancement to be qualified by a test of "feasibility." Mono Lake, for example, was not just "maintained"; it was restored "to a close approximation of its natural potential" (applying the fitting definition of section 85065).

Section 85022. Subdivision (d)(2) should remove the words "orderly" and "balanced," words which usually (and here) telegraph an intent to keep things as they are.

Section 85023. This section is in this writer's view a more accurate statement of existing law than the originally-proposed text, which equated the reasonable use and public trust doctrines as constitutionally-based. While the public trust doctrine derives from constitutional provisions applicable to submerged lands, the foundation of its

application to water appropriation is less clear. But in stating the existing law accurately, section 85023 then begs for the Delta package to include a constitutional amendment to place the public trust doctrine on a constitutional footing equal to that of reasonable use. This writer's public trust proposal (new article X, section 8) implements the Supreme Court's Mono Lake decision (*National Audubon Society v. Superior Court (Department of Water and Power)* (1983) 33 Cal.3d 419) and more recent *Bay-Delta* decision by creating a presumption that the trust must be protected unless an opponent of the trust establishes infeasibility, in both administrative and judicial proceedings. "Infeasibility" must be defined not by the comparatively permissive standards of CEQA, but the more rigorous standards of, for example, section 4(f) of the federal Department of Transportation Act – incapable of engineering or overcoming other extraordinary circumstances, rather than the preference of the water appropriator.

Failure of the Delta package to include a public trust constitutional amendment represents an invitation to further disaster. Under existing law and law practice, the Delta has been placed in peril; the Legislature should not consciously allow this circumstance to be perpetuated (and actually exacerbated with new opportunities created for over-appropriation of water and over-allocation of paper "entitlements"). We know today that contractors from the federal and state projects deny the constitutional basis of the public trust doctrine, and know from their litigation tactics in the Monterey Amendment and QSA proceedings (more on them in the conclusion of this letter) that the contractors will employ whatever measures they can to avoid or postpone a judicial determination of public trust protection. The Legislature must address and correct the existing abuses if it is to promise real Delta protections.

Section 85031. This section's recitation that the Delta package does not "diminish, impair, or otherwise affect" area of origin protections represents failure to provide needed strength to this doctrine. Operators and contractors of the federal and state projects vigorously contest area of origin claims under existing law, and at least one judicial decision reads area of origin as treating all users within the San Joaquin watershed as equals under that doctrine. Upstream counties and water users are justified in being dissatisfied with maintenance of this unacceptable status quo.

Section 85054 restates the "coequal goals," but fails to define "reliable." The latter word deserves definition, to mean capable of providing a given quantity of water consistently in multi-year drought scenarios – not inherently an increase in water supply "entitlements."

The definition in chapter 4 also affords an opportunity to define "feasible" for public trust purposes according to, for example, the rigorous, objective criteria used by the United States Supreme Court to interpret section 4(f) (*Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 411-413 ("unusual factors" of "extraordinary magnitude")), and not the comparatively relaxed standards employed in CEQA. The California Supreme Court's public trust doctrine recognizes that non-judicial public trust duties are *similar* to those of CEQA (33 Cal.3d at p. 446, fn. 27). However, the *Court*-defined trust duties are not *identical*, but more stringent in protecting water resources

("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...)(*id.* at p. 441).

Section 85084. Subdivision (b) should authorize commencement of a study to transfer the State Water Project to a separate *State* public agency. DWR's mismanagement of the State Water Project in the past decade and a half merits consideration of whether a new state manager should be created. However, under no circumstances should the project be transferred to an entity consisting of, or controlled by, the State Water Contractors. The contractors' and a prior DWR Director's role in creating the present Delta distress by secretly negotiating, and then secretly implementing, the Monterey Amendments has been well documented in public literature and the press. Moreover, DWR's acquiescience in the contractors' requests for unsustainable levels of pumping helped precipitate the Delta crisis. The study called for in this subdivision should thoroughly ventilate for the Legislature and the public that circumstance. But the Legislature must equally and upfront foreclose transfer to any entity controlled by the contractors. This writer recognizes the contractors' ambitions; they are similar to the ambitions of the health insurers to continue their domination of health care economics, and of the investment bankers to continue to define the marketplace of high-risk securities. The Legislature should recognize that California water is too important to enable such an outcome for the State Water Project.

<u>The pendulum's proper place: neither the State nor the Locals trump the other</u>.

Last session, seeking to break the Delta impasse, Senator Simitian proposed a governance council consisting entirely of Delta county supervisors. This session, preprint SB 1 proposes a council appointed exclusively by the Governor and Legislature. This writer respectfully asks, "Why not recognize the benefits of joint governance by both State- and locally-appointed members?"

Section 85200 could be revised to specify an equal number of members (no more than four, for management's sake) from supervisorial districts within the Delta, appointed collectively by all Delta county supervisors, and four members appointed by the Governor. It might make sense for the State representatives to consist of the Directors of Fish and Game, and of Water Resources, and the Secretaries of Resources and of Food and Agriculture; equally, one of the Delta representatives could be the chair of the Delta Protection Commission.

This group would then be empowered collectively to appoint the last member, or last three members, to create an odd number of members and provide as much parity as possible in the composition of the council.

Given the well-understood resistance of the Delta communities and counties to new State initiatives in the Delta, composing the council in this way might offer a break in the impasse. And while this writer has in the past (back to 1982, as moderator of the

State Bar debates on the Peripheral Canal referendum, proposition 9) taken a publicly-neutral position on Delta conveyance and Delta governance proposals, this time he deems both worthy and determinative the Delta communities' resistance to current proposals.

That resistance flows from the writer's professional experience in both the Monterey Amendment and QSA litigations, and by misguided expressions by State political leaders that the present conflict in the San Joaquin Valley should be seen as that between "people and fish" – as if, ecology aside, the harvesting and consumption of fish did not serve human needs as much as the harvesting and consumption of land-grown crops. The California water establishment has regrettably in recent decades earned a heap of distrust from those not considered within its brotherhood, and if that distrust is to be vitiated by the Legislature, it cannot expect measures that essentially continue the existing order and way of business to merit statewide acceptance.

In closing, this writer expresses regret that a present, month-long absence from California has delayed the formulation of these remarks and foreclosed his attendance at your committees' meetings this week and early next week. Should the committees conduct an additional session on 27 August, this writer will endeavor to be present at that time.

With thanks to the chair, members, and staff for consideration of these remarks,

Respectfully,

ANTONIO ROSSMANN

SENATE CONSTITUTIONAL AMENDMENT

The people of the State of California do amend the State Constitution as follows:

SECTION 1. Article X, section 8 is added to the Constitution as follows:

SECTION 8. All waters, tidelands, marshlands, and submerged lands of this State are impressed with the public trust of the people's common heritage. The public trust embraces navigation; fishing; commerce; and the preservation of waters, lands, and the air in their natural state, to serve as ecological units for scientific study, as open space, as environments that provide food and habitat for wildlife, and environments that favorably affect the State's scenery and climate. The State and its agencies as administrators of the public trust holds a continuing power that extends to the revocation of previously granted rights and to the enforcement of the trust against waters and lands long thought free of the trust. The State and its agencies have an affirmative duty to take the public trust into account in the planning and allocation of water resources, to protect public trust uses whenever feasible, and to preserve, so far as consistent with the public interest, the uses protected by the trust. In exercising their sovereign power to allocate water resources in the public interest, the State and its agencies are not confined by past allocation decisions that may be incorrect in light of current knowledge or inconsistent with current needs. The State and its agencies accordingly have the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained. Judicial review of determinations under this section shall be conducted by the exercise of independent judgment.

SECTION 2. This measure expresses existing law as declared by the California Supreme Court in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 319.