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JAMES M. BOYD, JR., Of Counsel

December 12, 2008

The Honorable Mike Chrisman  
Chair, Delta Vision Committee  
650 Capitol Mall  
Sacramento, California 95814

Re: Comments on the Delta Vision Strategic Plan; Legal Analysis of Proposals  
for Regulatory Reallocations of Water to Delta Ecosystem Uses

Dear Secretary Chrisman:

We appreciate the opportunity to comment on the Delta Vision Committee's consideration of the Delta Vision Strategic Plan, which wisely recommends a comprehensive approach to addressing the crisis in the Delta (including proposing ecosystem restoration, new Delta conveyance infrastructure and development of new surface water and groundwater supplies). Unfortunately, the Strategic Plan also recommends a number of unnecessarily adversarial implementation strategies. The Delta Vision Strategic Plan has several proposals (discussed briefly below) that would require the reallocation through regulatory actions of water from existing Delta-watershed uses to Delta ecosystem uses. In response to a request from the Delta Vision Task Force, a Deputy Attorney General issued a July 9, 2008 memorandum that asserts that the state has authority to reallocate water from water users when needed for ecosystem protection under Article X, section 2, of the California Constitution, the public trust doctrine and nuisance law. We have enclosed our analysis that reviews this legal memorandum and concludes that the state does not have authority to reallocate water from existing uses to Delta ecosystem uses except where: (1) the proposed reallocation would mitigate for the targeted water use's environmental impacts; and (2) the mitigation requirement would be in proportion to these impacts. In addition, we respectfully submit that attempting to impose greater reallocations of water on Delta-watershed communities would be counterproductive because it would trigger disputes that would undermine any Delta solution.

### *The Delta Vision Strategic Plan's Proposes Uncompensated Reallocations of Water*

The November 2007 Delta Vision Principles and the October 2008 Delta Vision Strategic Plan include many proposals, the implementation of which would require the reallocation of millions of acre-feet of water supplies from current uses, primarily through uncompensated regulatory actions.

Set forth below are some examples:

- “A revitalized Delta ecosystem will require reduced diversions -- or changes in patterns and timing of those diversions upstream, within the Delta, and exported from the Delta -- at critical times ... .” (Recommendation 7 of Delta Vision Principles, November 2007)
- “Diversions from the Delta watershed -- upstream, within, and exported from the Delta -- are an issue of statewide importance and directly impact restoration of the Delta and the reliability of the state's water supply.” (Strategic Plan Goal 4 at page 32)
- “Request the State Board to use its authority to determine reasonable use of water over the coming decades to evolve away from the generally accepted practices of diverting surface water for irrigating agriculture.” (Action 4.1.3 at page 95)
- Recommendations to increase flows to the Delta from upstream water supplies, including:
  - adopting new SWRCB requirements by 2012 to increase spring Delta outflow (Action 3.4.3 at page 86)
  - adopting new SWRCB requirements by 2012 to increase fall Delta outflow (Action 3.4.4 at page 86)
  - increasing the frequency of upstream floodplain inundation and establishing new floodplains that would allow the Yolo bypass to flood at least 60 days continuously between January and April every other year, except during critical years (Action 3.1.1 at page 71)
  - having the Department of Fish and Game develop additional streamflow recommendations for high priority rivers and streams in the Delta watershed by 2012 and for all major rivers and streams by 2018 (Action 3.4.1 at page 85)
- “Achieving the flow targets of this strategy can be done through combinations of: *releasing more water from storage to improve flow conditions*, altering conveyance of water exports to the export pumps, or *reducing the amount of water diverted from the Delta ecosystem*. From an ecosystem perspective, flow targets are achieved far more effectively by reducing water diversions through the use of alternative supplies, conservation, increased efficiency, retiring marginal agricultural lands, recycling, desalination, conjunctive use of surface and groundwater supplies, *regulatory reallocations*, and market transactions.” (Emphasis added; Strategy 3.4 at page 85)
- Delta-solution financing principles should “create no expectation of public payment for any water required for ecosystem revitalization.” (Action 7.3.1 at page 134)
- Coordinate the authoritative oversight of the State Water Board and the Regional Boards to ensure compliance with the *reasonable use and public trust doctrine* [presumably, as interpreted by the Deputy Attorney General, as discussed below] and applicable water quality requirements by water diverters within, and exporting from, the Delta watershed. (Action 7.1.5 at pages 127-128)

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*Regulatory Reallocations Of Water Must Be Based On Causation And Proportionality Under California Law*

Page 17 of the Deputy Attorney General's July 9, 2008 memorandum states its core conclusion:

[T]he harm done to public trust resources in the Delta [is] due to the incremental diversions of all who take water from the Delta or its tributaries, whether upstream, in the Delta, or for export from the Delta. [¶] It may be possible to allocate responsibility for addressing harm to public trust uses based on the proportionate amount of water diverted by each water user.

Although diversions upstream from the Delta, in-Delta and Delta-export diversions have very different *impacts* on Delta resources, the Deputy Attorney General's memorandum suggests that this fact is not relevant, and that the state may reallocate water from any water user in the Delta watershed based on its diversion's *size*. As our analysis states, we believe that California law supports only regulatory water reallocations that are based on determinations of causation and proportionality.

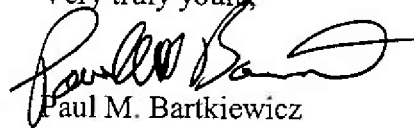
No California court decision under the public trust or the California Constitution's Article X, section 2 -- the "reasonable use" provision -- has reallocated water from a water user: (1) to address environmental impacts caused by others; or (2) in an amount that exceeds the water user's own proportional impacts. For example, the *National Audubon* decision concerned direct impacts on Mono Lake resources caused by the City of Los Angeles' diversions. The importance of causation and proportionality is highlighted by two decisions that the Deputy Attorney General's memorandum did not discuss, in which the courts held that the public trust doctrine did *not* authorize reallocations of water to benefit public trust uses. (See *Golden Feather Community Ass'n. v. Thermalito Irr. Dist.* (1989) 209 Cal.App.3d 1276; and *Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363.) Causation and proportionality also govern mitigation measures under the California Endangered Species Act. (Fish & Game Code Section 2052.1: such measures "shall be roughly proportional in extent to any impact on [the] species that is caused by" the project.)

*Conclusion*

Delta-watershed communities have invested billions of dollars in water facilities to maximize their self-sufficiency. We represent such communities in the Sacramento Valley and the Sacramento metropolitan area. California law does not support reallocating water from these communities for the Delta's ecosystem unless state regulatory agencies find, based on evidence and after hearings, that: (1) these communities' diversions have caused an environmental impact; and (2) the mitigation measure would be proportional to this impact. To avoid the severe conflicts that uncompensated regulatory reallocations of water would cause, we urge the Delta Vision Committee instead to emphasize and facilitate voluntary transfers of water and other collaborative processes. As they have throughout California's water history, Delta-watershed communities can assist the rest of the state in meeting the coequal goals of restoring the Delta ecosystem and providing reliable water supplies for California through these voluntary and collaborative arrangements.

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Very truly yours,



Paul M. Bartkiewicz

PMB:af

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Enclosure

cc (w/encl.):

Hon. Linda S. Adams  
Hon. Dale E. Bonner  
Hon. A.G. Kawamura  
Hon. Michael R. Peevey