

# United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region

2800 Cottage Way

Room E-1712

Sacramento, California 95825-1890

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

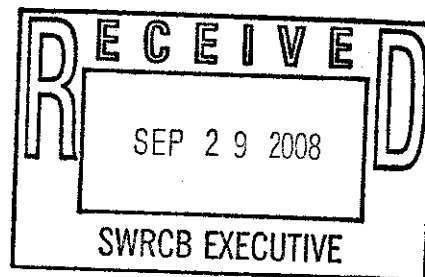
IN REPLY  
REFER TO:

September 29, 2008

By Hand Delivery

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

SUBJECT: Bay-Delta Fact Finding Issues



Dear Ms. Townsend:

This letter is in response to the State Water Resources Control Board (Board) "Request for Written Input on Factual Issues Regarding the Bay-Delta" (the Request). According to the Request, the Board will be undertaking, "... a comprehensive review of the Bay-Delta Plan, water rights and other requirements to protect fish and wildlife beneficial uses and the public trust. This ... includes fact-finding proceedings, or evidentiary hearings, by the State Water Board, with testimony and cross examination under oath on critical factual issues concerning the Bay-Delta's ecology and the impacts of water pollution and diversions on that ecology." The Request also states that the purpose of the evidentiary hearings is to render "findings of fact," which may be used to inform the Board's basin planning and environmental review activities, "and other Water Board processes."

In addition, the July 2008 Strategic Workplan describes these proceedings as, "... proceedings to receive evidence and make factual determinations concerning Delta ecological matters and also assure that an adequate range of alternatives is analyzed pursuant to CEQA to consider and implement potential changes to the water quality objectives in the Bay-Delta Plan or water rights, or to implement other measures to protect beneficial uses and the public trust." The United States Department of the Interior (Interior) has questions regarding the procedural aspects of the "evidentiary hearings" as well as substantive timing concerns.

We understand that the Board will later provide additional public notice of the evidentiary hearing, including the requirements for participation. However, we cannot determine from: (1) the current Request; (2) the enclosure to the Request; or (3) the Strategic Workplan, what the

legal ramifications of the “findings of fact” may be, which will apparently be rendered following the evidentiary hearings.

As you know, the Board follows procedures set forth under the California Code of Regulations, Title 23. These regulations set forth procedures for adjudicative, and rulemaking and informational proceedings. 23 C.C.R. §§ 648, 649. As set forth in the *Racanelli* decision, when the Board establishes water quality objectives, it acts in its legislative, or rulemaking capacity. In contrast, for water right actions, the Board acts in its adjudicatory capacity. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 112-13 (Cal. App. 1st Dist. 1986). We believe these proceedings are not intended to be either rulemaking or adjudicative, but rather informational. However, the imposition of cross-examination, normally associated with adjudicatory proceedings, is unusual. Please inform us whether this process is rulemaking, informational, or adjudicatory.

PROCEDURAL QUESTIONS: The Request, the enclosure to the Request, and the Strategic Workplan, all make vague references to the “findings of fact” being used to inform the Board about future proceedings, including water right proceedings. Does the Board envision that the “findings of fact” resulting from the “evidentiary hearings,” would be binding on a water right holder in future water right adjudicatory proceedings? If yes, under what authority would this occur? Will the “findings of fact” be binding on those parties who do not participate in the hearings? How? Will the “findings of fact” be appealable or judicially reviewable? Is participation as a “party” to the hearings required to appeal? Under what authority? Who are “parties” to these hearings?

We understand that the Board intends to follow the rules for cross-examination and testimony under oath. What other rules of evidence might apply?

The resolution of these procedural questions are fundamental and need to be addressed prior to Interior’s commitment to this process. If the Board would answer these questions prior to requiring any Notices of Intent to Appear, Interior could better determine how and whether it will participate in the evidentiary hearing process.

SUBPOENAS. At the Board’s recent September 17 workshop regarding San Joaquin issues, many people questioned whether subpoena powers would be invoked for the “evidentiary hearing” under 23 C.C.R. § 649.6. I bring your attention to the Ninth Circuit Court of Appeals decision of *In re Elko County Grand Jury v. Ben Siminoe*, 109 F.3d 554 (1997). In this case, the Court held that the state court lacked jurisdiction to issue a subpoena against the federal government, to include its employees, for the production of information. Please be aware that employees of Interior are not subject to any such administrative proceeding subpoenas. Persons seeking testimony of Interior employees should also be aware that it is Interior’s general policy not to allow its employees to testify or to produce Department records upon simple request or by subpoena. 43 C.F.R. § 2.81. However, a request for testimony or Department records may be

made under the procedures set forth under Interior's *Touhy* regulations (named after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)), at 43 C.F.R. § 2.80 *et seq.*

Substantively, we understand that the Board would like to take evidence on the following:

- Sources of salt to the Bay-Delta Estuary
- Biological impacts of constant or variable salinity on fisheries
- Biological benefits (if any) of fish screens in the legally defined Delta
- Biological impacts of ammonia discharges
- Biological impacts of toxic substances (other than ammonia)
- Biological impacts of net outflow objectives.

In addition, the Board is looking for any additional issues which may be brought to the Board's attention following the Board's Request. We believe this list is a good starting point, however, this is premised on the understanding that the Board is undertaking only an informational proceeding. If this proceeding is not an informational hearing, or if it is, at some future point, transformed into either a rulemaking or adjudicatory proceeding, it is Interior's position that the list of relevant subjects would change accordingly, and potentially greatly.

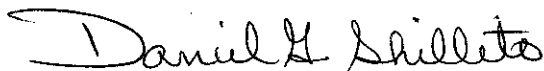
The Board is currently planning for the evidentiary hearings to begin in early 2009, between February and May. We believe that it would be beneficial for the Board to begin the evidentiary proceeding focusing: (1) first on the biological impacts of ammonia discharges, and other toxic substances and then, (2) addressing fish screens and sources of salt to the Bay-Delta Estuary. Interior requests that the Board delay hearing on the issues of the biological impacts of net outflow and constant and variable salinity on fisheries until completion of the ongoing Endangered Species Act Section 7 consultations regarding continued long-term operations of the Central Valley Project (CVP) and State Water Project (SWP).

As you know, the Fish and Wildlife Service (Service) is in the process of completing its Biological Opinion regarding the effects of the continued long-term operation of the CVP and SWP on delta smelt (Service BiOp). The United States District Court, Eastern District of California has set a deadline for completion of the Service BiOp in December 2008. Further, the National Marine Fisheries Service is also preparing a Biological Opinion analyzing the effects of the continued long-term operation of the CVP and SWP on federally listed salmonids and green sturgeon (NMFS BiOp). The NMFS BiOp is scheduled for completion in March 2009.

We believe that the Board's evidentiary hearing on the issues of the biological impacts of net outflow and constant and variable salinity on fisheries would be more efficient if it took place following issuance of the Service BiOp and NMFS BiOp, so that any changes to operations affecting those topics can be considered as part of the hearing. In any event, staff from Interior's agencies will be unavailable to testify on the issues of the biological impacts of net outflow and constant and variable salinity on fisheries until after both the Service and NMFS BiOps are issued.

We look forward to contributing to the Board's future evidentiary proceedings regarding the Bay-Delta in any manner that is the most helpful to the Board, keeping in mind the legal constraints on federal employees. If you have any questions, please contact Ms. Amy Aufdemberge at (916) 978-5688 or Ms. Kaylee Allen at (916) 978-5686.

Sincerely,

A handwritten signature in cursive script that reads "Daniel G. Shillito". The signature is written in black ink and is positioned above the printed name.

Daniel G. Shillito  
Regional Solicitor