



May 21, 2008

The Honorable Phil Isenberg & Members of the Delta Vision Task Force  
650 Capitol Mall,  
Sacramento, CA 95814

Dear Chairman Isenberg and Members of the Delta Vision Task Force:

Subject: Delta Vision submission

Attached is Environmental Defense Fund's submission in response to your request for comments regarding how Delta Vision's Strategy may best incorporate public trust and reasonable use principles into water management for purposes of its Strategic Plan.

This submission supplements (1) the paper on Environmental Reliability previously submitted to the Task Force, (2) comments on governance, finance and ecosystem restoration, including EDF's proposal for a Delta Water Master, submitted jointly by EDF, The Bay Institute, the Natural Resources Defense Council, Defenders of Wildlife and Sierra Club California, and (3) comments on water supply for California submitted jointly by EDF and The Bay Institute.

Thank you for your consideration of our views. We look forward to continued participation in the Delta Vision process.

Sincerely,

A handwritten signature in blue ink that reads 'Laura Harnish'.

Laura Harnish  
Regional Director

A handwritten signature in blue ink that reads 'Spreck Rosekrans'.

Spreck Rosekrans  
Senior Water Analyst



## **INCORPORATING THE DOCTRINES OF REASONABLE USE AND PUBLIC TRUST INTO WATER POLICY MAKING**

EDF commends the Delta Vision Task Force for placing the constitutional principle of reasonable use and the public trust doctrine at the center of its vision for the Delta. The discussion below also relates to your request for recommendations regarding governance.

***The Strategic Plan should incorporate public trust and reasonable use principles in all water management decision making.***

We concur with the submissions provided by Professors Dunning, Gray and Kelso, and by Tony Rossmann, last fall. In particular, these highly respected scholars correctly point out that the reasonable use and public trust doctrines are synergistic and reinforcing: “A use of water violative of elements of the public trust is not reasonable.”

As Professors Dunning et al., discussed, the constitutional requirement of “reasonable use” and the even more ancient doctrine of the public trust are twin foundations of California water law. The right to use water is limited to the amount of water reasonably required for the beneficial use to be served. The right does not extend to waste, or to unreasonable methods of diversion. What constitutes reasonable use must take into account not only the rights of other water users but the broader public interest. Under the California constitution, Art 10, sec 2, no one in this State can have a protectable interest in the unreasonable use of water.

The public trust doctrine provides that the people of California own all of its waterways and lands beneath and that the State government serves as “trustee of a public trust for the benefit of the people.” *National Audubon Society v Superior Court*, 658 P.2d 709 (1983). The doctrine imposes on the state an ongoing duty to protect “trust resources” which include explicitly fish, aquatic habitats, and even scenic beauty. In practical terms, the public trust means that – as is true under the reasonable use doctrine – no one can obtain a vested right in a use of water that harms trust resources. At best water rights are burdened with an ongoing examination of the water flow requirements needed to ensure the long-term health of trust resources.

*National Audubon*, decided a quarter century ago, remains the pre-eminent statement of California law on this issue. The court held that the public trust is not simply an affirmation of the power of the state to use water for general public purposes, even the important public purpose of providing drinking water. Rather, the public trust is “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands, and tidelands, surrendering that right only in rare cases where abandonment is consistent with the purposes of the trust.” Thus, as the professors pointed out, all elements of state government have the duty to protect, preserve and even restore the State’s public trust resources, such as fish, habitat and wildlife.

For the purposes of Delta Vision, the great benefit of *National Audubon* is that it provides a roadmap for integrating long-standing water rights with the duty to ensure environmental health. The court declined to hold that **all** past water allocations harmful to trust resources were improper, but strongly confirmed the State’s obligation to correct past mistakes regardless of the longevity of water rights. Key to this holding was the court’s rejection of the argument that

‘vested’ water rights preclude the application of public trust or reasonable use principles to an environmental problem. Indeed, the high court reiterated eight separate times within the opinion that no one can acquire vested rights to use water in a manner harmful to trust resources.

So how to integrate the public trust and reasonable use doctrines into water policy making?

*National Audubon* accomplishes this integration through a weighted balance. The public trust imposes a substantive duty on the State to affirmatively protect fish and other water-related resources “whenever feasible.” The State must “avoid or minimize any harm” to those resources. Thus, while appropriative rights are an important part of California’s water system, the exercise of these rights may not cause harm to the public trust barring extremely unusual circumstances.

We recommend five specific ways in which Delta Vision’s Strategic Plan should incorporate reasonable use and public trust doctrines into water policy making for the Bay-Delta.

1. Set an overriding ecological health objective that embodies a sufficient level of protection for trust resources for the long-term.
2. Recommend that the State Water Resources Control Board to determine the freshwater flows and other resources necessary to attain and then maintain this ecological health objective.
3. Ensure that all water management decisions are predicated on achieving and then maintaining this ecological health objective.
4. Recognize that changes in water use throughout the Bay-Delta watershed will be required.

5. Adopt the 6-element program of environmental reliability outlined in the **EDF's Vision For Environmental Reliability** which was submitted to Delta Vision on May 9, 2008.

**1. *The Strategic Plan should set an overriding ecological health objective that embodies a sufficient level of protection for trust resources for the long term.***

Reasonable use and public trust principles both require that water diversions must be compatible with a healthy environment. Setting a high standard for ecological health that covers changing conditions as the foundation for water policy is one of the most important ways that Delta Vision's Strategic Plan could incorporate these principles into water management going forward.

In the past, the State has felt constrained even when environmental harm was the anticipated result of proposed diversions. In 1940, when it issued the water rights permits to Los Angeles that would later be at issue in *National Audubon*, the State Board knew that its actions were going to cause grave harm to Mono Lake. The Board characterized this result as "indeed unfortunate," but stated that "there is apparently nothing that this office can do to prevent" the diversions. *National Audubon*, 658 P.2d at 714, citing Division of Water Resources Decs. 7053 et al (April 11, 1940).

The way to best incorporate these principles in water policy making is to ensure that specific environmental health objectives are guiding water management. To accommodate and account for the uncertainties that we know are coming in connection with climate change, we propose the following to serve as the reasonable use and public trust standard for the Bay-Delta:

**Self-sustaining fisheries and habitat over the next 100 years capable of withstanding uncertainties involving global climate change.**

This goal recognizes that the public trust and reasonable use doctrines do not require a “return to a state of nature.” But it also moves past the unsustainable approach of recent years in regulating up to the brink of extinction. The long-term health and sustainability of fish, habitat and wildlife is the basic standard required by California law.

The additional advantage of this goal is that it explicitly recognizes that conditions in the estuary are going to continue to change, and therefore what constitutes reasonable use of water, and the biological requirements of trust resources, will continue to change over time.

**2. The Strategic Plan should recommend that the State Board determine the freshwater flows and other resources necessary to attain and then maintain this ecological health objective.**

The State Board -- as trustee for trust resources and as the agency most directly responsible for ensuring that water use throughout the state complies with the reasonable use requirement -- is the logical agency to undertake the task of determining the freshwater flows needed to achieve and then maintain the goal above.

This assessment should be a three-step process:

- (1) Identifying the trust resources of the Bay-Delta estuary and its watershed;
- (2) Analyzing the biological requirements of these resources; and
- (3) Determining a reasonable “risk cushion” to cover uncertainties and contingencies associated with climate change or other changed circumstances.

After the State Board has determined the biological requirements necessary to ensure that Delta dependant fisheries and their habitat can be self-sustaining for the next century, it should then analyze the available alternatives that would lead to this result and their reasonably likely cost. As the State Board determined in D-1631, worst case speculation as to these costs should not serve as the basis for determining whether or to what level fishery and other trust resources can be restored.

In addition, the Strategic Plan should provide that any cost analysis must include a full examination of the continuing cost to all parties – including the commercial and sport fishing industries, and the ecosystem -- of *failing* to provide ecological health to the Delta and its fisheries. The costs associated with fisheries declines are significant. Moreover, there are substantial economic benefits to be gained from eliminating future biological crises, both for water users and the fishing industry.

**3. The Strategic Plan should provide that all water management decisions will be predicated on achieving and then maintaining the ecological health objective.**

The reasonable use and public trust objective is relevant only to the extent that it is a guiding principle of water management. There are a number of tools available to help achieve this objective, as outlined in EDF's accompanying Vision for Environmental Reliability:

(1) Establishment of a new state water right allowing for the “appropriation” of water for fish and other environmental purposes.

(2) Establishment of a new operational regime for the state and federal water projects elevating attainment of the ecological objectives on par with other responsibilities.

(3) Move responsibility for the state and/or federal water projects to a new entity with co-equal responsibility for water supply reliability and environmental reliability.

Additional recommendations in this regard are discussed in our submission on water supply.

**4. *The Strategic Plan should recognize that changes in water uses throughout the Bay-Delta watershed will be required.***

The Task Force's Vision includes a number of critical findings and characterizations that relate to incorporation of reasonable use and trust principles, and the Strategic Plan should build on them. Of particular relevance to this discussion:

\* Recognizing that ecosystem function and water provision should be co-equal values driving water management; (Delta Vision Report at 8)

\* Recognizing that reasonable use principles require a high degree of efficiency in our use of water supplies; (Delta Vision Report at 10)

\* Recognizing the that "application of the twin constitutional principles of reasonable use and public trust is the best way to determine how the competing values" of environmental protection and provision of water for the State; (Delta Vision Report at 11)

\* Recognizing that sufficient water must be provided to support the Delta system, and that “policies affecting diversions throughout the Delta watershed” should be protecting needed flows. (Delta Vision Report at 12.)

Taken together these observations lead not only to changes in water use, but to reducing the amount of water that has been diverted out of the ecosystem over the last decade. As discussed in EDF’s Vision for Environmental Reliability, despite the considerable effort and resources devoted to environmental restoration over the last fifteen years, more and more water has been extracted from the Bay-Delta watershed. The resulting demise of salmon and other fisheries, like the damage to Mono Lake, has been long-predicted.

One of the most defining features of both the reasonable use and public trust doctrines is that rights to use water are inherently unstable and change over time to accommodate both changing conditions, new information and evolving notions about what constitutes a reasonable use of water. As the impacts of global climate change unfold, changes will be an even larger part of California’s water future. The Strategic Plan should include provisions to ensure that reasonable use concepts and public trust needs are revisited regularly, perhaps on a 5 year cycle.

**5. The Strategic Plan should adopt the 6-element program of environmental reliability outlined in the attached Vision For Environmental Reliability.**

Water supply reliability and environmental reliability are innately linked. Supply reliability has suffered, and most likely will continue to do so, as Bay-Delta fisheries are pressed beyond the limits of basic ecological health. We believe that the six points listed below and discussed at greater length in EDF’s Vision for Environmental Reliability, are the key components necessary to securing both environmental and water supply reliability:

- (1) Provide sufficient freshwater flows as needed to meet the ecological health objective.
- (2) Provide secure funding over time to support the full restoration effort, including purchases of water and water rights.
- (3) Establish performance measures as enforceable mandates to be accomplished by specific dates.
- (4) Provide new tools to manage water such as an environmental water right and new operational regimes.
- (5) Establish non-discretionary accountability mechanisms that are automatically triggered by failures to meet environmental goals or program lapses.
- (6) Put in place legal safety nets in the event that these new efforts falter.