

# TAYLOR & WILEY

A PROFESSIONAL CORPORATION

## ATTORNEYS

2870 GATEWAY OAKS DR., SUITE 200  
SACRAMENTO, CALIFORNIA 95833

TELEPHONE: (916) 929-5545

TELEFAX: (916) 929-0283

JOHN M. TAYLOR  
JAMES B. WILEY  
JESSE J. YANG  
KATE A. WHEATLEY  
MATTHEW S. KEASLING

OF COUNSEL  
KATHLEEN R. MAKEL

### Via E-Mail

January 17, 2012

Department of Water Resources  
California Water Commission  
1416 Ninth Street  
P.O. Box 942836  
Sacramento, CA 94236-0001  
cwc@water.ca.gov

Re: Additional Comments on California Water Commission Resolution  
of Necessity No. 2012-23 for DWR Parcel DCAE-5

Dear Chairman Saracino and Members of the Commission:

Taylor & Wiley represents the Tsakopoulos Family Trust ("Trust") in various land use matters. In September 2011, we submitted the attached letter in opposition to a proposed resolution of necessity for the Trust's property located in the town of Hood.<sup>1</sup> The Trust has, since that time, communicated with Department of Water Resources ("DWR") staff in an attempt to better understand the true nature and scope of the proposed project. Despite these discussions, we continue to have serious concerns about the legality of DWR's proposed geotechnical testing and the impacts of these activities on the Trust's property. Accordingly, we request that the Commission consider our previously submitted comments as well as the additional items set forth below.

Inaccurate Statement in Staff Report. As a preliminary matter, the Commission's January 18, 2012 staff report for this item contains an inaccurate summary of the Trust's position with respect to the proposed resolution of

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<sup>1</sup> After submitting this letter, the Trust was notified by CWC staff that its item was removed from the agenda for the CWC's September meeting.

necessity. Under item 1 in the section entitled "Property Owner," the report states: "Owner has not identified any specific concerns in relation to geotechnical activities." This is not true. Beginning on Page 5, the attached letter details the Trust's concerns with respect to geotechnical testing on its property, namely, that DWR's ill-defined "geotechnical explorations" have the potential to cause significant interference with existing farming operations as well as damage to subsurface irrigation and gas lines.

Pending Requests for Additional Information. The Trust has been communicating with DWR staff<sup>2</sup> in an attempt to better understand the true nature and scope of DWR's proposed geotechnical testing. In the course of these discussions, the Trust has requested the opportunity to review previous geotechnical studies as well as other information relied upon by DWR in identifying the Trust property as a location for testing. At the time of submission of these comments, we are still waiting to receive some of this documentation, including the results of any previously-conducted geotechnical testing related to the East Option. At approximately 1:00 p.m. today, DWR staff provided one of the documents requested by the Trust on January 5, 2012, entitled "Conceptual Engineering Report, Isolated Conveyance Facility, East Option." Due to DWR's delay in responding, we have not yet had an opportunity to review this approximately 350 page document. The Trust submits that it is premature for the Commission to consider a resolution of necessity for this property until the Trust is given an adequate opportunity to review these documents.

Lack of Adequate Project Description. As noted in our previous letter, a public agency cannot make the findings required by Section 1240.030 of the Code of Civil Procedure unless and until the agency provides affected property owners with an adequate description of the proposed project. (See attached, pp. 4-5.) Several details regarding the proposed testing are still lacking, including an accurate legal description of the proposed easement areas and access road, and a more specific timeline for DWR's proposed drilling activities.<sup>3</sup> Moreover, while some additional details have been provided by DWR in the course of our discussions, including the depth of the proposed testing (100 feet maximum) and

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<sup>2</sup> These communications include numerous e-mail exchanges and a meeting with staff at DWR offices on October 6, 2012.

<sup>3</sup> Currently, the proposed easements allow DWR access to the property for testing for "two six month periods between May 1<sup>st</sup> through October 31<sup>st</sup> in the years 2012 and 2013."

the duration of testing (one day) on the Trust property, these items are not reflected in the Commission's staff report. The staff report is also less than clear when describing the type of testing that will occur on the Trust's property. The first page indicates that DWR is asking to conduct three different types of exploration (drill hole, CPT and test pits). It is not until the sixth page of the report that DWR clarifies that it only seeks the ability to conduct one CPT within the proposed easement area on the Trust's property. It is not possible for the Trust to fully assess DWR's proposal, nor is it legally possible for the Commission to adopt the proposed resolution, until these details are clarified and incorporated into the relevant documents.

On a related point, the Trust has reviewed the maps of the various proposed conveyance options available on the BDCP website. The scale and legend on these maps makes it very difficult to determine where the various alignments and intake facilities sit in relation to the Trust's property. Accordingly, we have asked DWR staff for a parcel-level map of the alignments and intake facilities. The Trust should be provided an opportunity to review this information, and comment on the same, prior to the Commission's adoption of a resolution of necessity.

No Demonstration That Testing Necessary. In order to adopt a resolution of necessity, the Commission must find that the property sought to be acquired is necessary for the project. (Code Civ. Proc., § 1240.030, emphasis added.) DWR has not demonstrated that that the information it seeks to obtain by testing on the Trust property could not be obtained elsewhere, either via similar testing on adjacent publicly-owned property or from testing on adjacent privately-owned property.<sup>4</sup> As such, adoption of the proposed resolution of necessity is not proper.

Protection Against Additional Damages. Finally, the Trust reserves its rights to later present evidence at trial on the issue of adequate compensation

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<sup>4</sup> Item 12 on the agenda for the Commission's January 18, 2012 meeting is the consideration of a Resolution of Necessity for Delta Ranch, the property located immediately adjacent to (and to the south of) the Trust's property. It appears that, since this matter was originally heard by the Commission in September, the drill site on Delta Ranch has been relocated to the east, in line with the proposed East Option. If the Commission adopts a resolution of necessity allowing testing in this location, immediately to the south, it would appear that the proposed testing on the Trust property would not be necessary.

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and to seek severance damages pursuant to Code of Civil Procedure Sections 1260.210 and 1263.420, respectively.

Based on the foregoing, as well as the points raised in the attached letter, the Trust urges the Commission not to adopt the proposed resolution of necessity.

Very truly yours,

A handwritten signature in blue ink that reads "Kate Wheatley". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Kate A. Wheatley

Enclosures

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### Via E-Mail

September 19, 2011

Department of Water Resources  
California Water Commission  
1416 Ninth Street  
P.O. Box 942836  
Sacramento, CA 94236-0001  
cwc@water.ca.gov

Re: Comments on California Water Commission Resolution of  
Necessity No. 2011-07 for DWR Parcel DCAE-5

Dear Chairman Saracino and Members of the Commission:

Taylor & Wiley represents the Tsakopoulos Family Trust ("Trust") in various land use matters. We are in receipt of the Commission's August 30, 2011 Notification of Consideration Re: Resolution of Necessity No. 2011-07 ("Notification"). The purpose of the proposed Resolution of Necessity appears to be the acquisition of a portion of the Trust's property, identified in the Notification as Parcel No. DCAE-5, to allow the Department of Water Resources ("DWR") to gather unspecified "geotechnical information" in support of certain environmental documents and engineering studies being prepared by DWR. We have reviewed the Notification and have serious concerns regarding the proposed Resolution of Necessity, namely (1) the lack of an adequate description of the proposed project; and (2) the potentially significant impact of geotechnical testing on the Trust's property. Accordingly, we hereby submit to the Commission our comments in opposition to the proposed Resolution of Necessity. Additionally, this letter serves as notification that Taylor & Wiley intends to appear on behalf of the Trust at the Commission's September 21, 2011 meeting addressing this issue. (Cal. Code Civ. Proc. § 1245.235, subd. (b).)

1. The Commission May Not Adopt the Resolution of Necessity Because the Notification Fails to Provide an Intelligible Description of the Proposed Project.

California's Eminent Domain Law (Cal. Code Civ. Proc. §§ 1230.010 *et seq.*) requires that a public entity identify a "project" with a public purpose before condemning private property. (*Id.* §§ 1240.010, 1240.030.) As a preliminary step, the entity must adopt a resolution of necessity which describes the proposed project and establishes that public interest and necessity require the project. (*Id.* § 1240.040.) Ordinarily, an adopted resolution of necessity is viewed as conclusively establishing the "public necessity" finding required by the eminent domain statutes. (*Id.* § 1240.250.) However, "[a] resolution of necessity does not have [such conclusive effect] to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body." (*Id.* § 1245.255, subd. (b).)

Although the Notification provided to the Trust indicates that the Commission intends to consider a resolution of necessity, it fails to adequately describe the specific project being proposed. The Notification simply notes that the Resolution of Necessity would "authorize the State to acquire property owned by [the Trust], identified as DWR Parcel No. DCAE-5." The Notification mentions "geotechnical explorations" but gives no description of the type, manner or specific location of these "explorations." Moreover, the Commission has not provided the Trust with a copy of the proposed Resolution of Necessity, or any other documentation which clearly describes the project.<sup>1</sup> After repeated requests to DWR staff, the Trust was finally provided a copy of the Commission's staff report for the proposed geotechnical activities on September 19, 2011. Although this report includes a map depicting the location of two easements sought by DWR and gives slightly more information about the type of testing that might occur within that easement area, the report fails to identify the proposed location for this testing within the approximately 10,000 square foot

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<sup>1</sup> On August 2, 2011, the State provided the Trust with an offer to purchase a temporary construction easement and a temporary access easement across the referenced parcel (DCAE-5; APN 132-0120-001-0000). Although the offer includes a map depicting the location of the proposed easements, it provides no detail about the type of geotechnical explorations that will occur, nor does it identify the proposed location for these "explorations" within the approximately 10,000 square foot easement area.

easement area, the depth of the proposed drilling or the timeline associated with these activities.

As discussed in more detail below, the Commission's failure to provide the Trust with an adequate description of the proposed project deprives the Trust of an opportunity to provide meaningful public comment, and prevents the Commission from making the essential findings needed to adopt the Resolution of Necessity.

- a. Adoption of the Resolution would deprive property owners of due process because the Notification fails to provide an adequate description of the proposed project.

A resolution of necessity may not be adopted until the public agency gives affected parties notice and an opportunity to be heard. (Cal. Code Civ. Proc. § 1245.235; *Conejo Recreation & Park Dist. v. Armstrong* (1981) 114 Cal.App.3d 1016.) California case law has established that identification of the project is an "integral component" of the property owner's right to procedural due process. As one case notes:

The public entity must engage in a "good faith and judicious consideration of all of the pros and cons of the condemnation issues," and its finding of necessity must be supported by substantial evidence adduced at the hearing. (Citation omitted.) If the governing body does not have before it a definable project for which the property is sought to be taken, any discussion of the pros and cons of the condemnation would be an empty gesture and the necessity findings rendered at the conclusion of the hearing would be devoid of real meaning.

(*City of Stockton v. Marina Towers, LLC* (2009) 171 Cal.App.4<sup>th</sup> 93, 108-109.)

The Commission has not provided the Trust with any real detail about the proposed project. Moreover, the only relevant (though general) information provided to the Trust was included in the Commission's staff report which the

Trust received a mere two days before the Commission's hearing on the Resolution of Necessity. The State's failure to provide an adequate and detailed description of the proposed project in a timely fashion prevents the Trust from meaningful participation in the hearing process, i.e., presenting relevant evidence at the hearing regarding whether public interest and necessity require the proposed action. Moreover, the Commission's failure to provide an adequate project description constitutes a gross abuse of discretion which would deprive any adopted resolution of necessity of its conclusive effect. (*City of Saratoga v. Hinz* (2004) 115 Cal.App.4<sup>th</sup> 1202, 1221 (noting that gross abuse of discretion occurs where the public agency fails to follow required procedures and give the required notifications before condemning the property).)

- b. The Commission cannot make the requisite finding of public necessity for the adoption of the Resolution because no project description has been provided.

Prior to adopting a resolution of necessity, a public agency must review the evidence presented to it and make a finding of public necessity. (*Id.* § 1240.030.) This finding consists of three criteria: (1) that public interest and necessity require the project; (2) that the project has been planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and (3) that the property sought to be acquired is necessary for the project. (*Id.*; *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal. App. 4<sup>th</sup> 141, 149.) Case law has established that these findings cannot be made, as a matter of law, if the public entity has not provided affected property owners with an adequate description of the proposed project. As the Third District Court of Appeal noted in the *City of Stockton* decision:

It is both a physical and legal impossibility for legislators to make a determination that public interest and necessity require 'the project,' that 'the project' is located or planned in a manner consistent with the greatest public good and least private injury, and that the property sought to be acquired is necessary for the 'project' if the resolution contains no intelligible description of what the project is.

(*City of Stockton, supra*, 171 Cal.App.4<sup>th</sup> 93, 108.)

As mentioned above, the State has failed to provide the Trust with any real detail about the proposed project. Although the Commission's staff report provides a map depicting the easement area it wishes to acquire and indicates the type of geotechnical testing that may occur, the report fails to identify the precise location for this testing within the approximately 10,000 square foot easement area. The report also fails to indicate the proposed timing of this testing, the depth of this testing, and the access and equipment needs associated with this testing. As noted in the *City of Stockton* decision, such a description fails to inform the Trust what project is intended for its property, and is not an adequate basis for the Commission to make the findings needed to adopt the Resolution of Necessity.

2. **The Commission Can Not Adopt the Resolution of Necessity Because It Can Not Make the Required Finding of "Public Necessity" Due to the Likelihood of Significant Private Injury to the Trust's Property.**

As discussed above, the Trust feels strongly that it is improper for the Commission to consider the Resolution of Necessity prior to providing a more detailed description of the proposed project. However, in the event the Commission does decide to move forward with the proposed Resolution of Necessity, the Trust hereby submits for the Commission's consideration the following evidence addressing the potential impact of the unspecified "geotechnical explorations" on its property.

The real property that is the subject of the Resolution of Necessity is designated by DWR as Parcel No. DCAE-5 (the "Subject Property"). The Subject Property is located in Sacramento County adjacent to the Stone Lakes National Wildlife Refuge in the town of Hood within the Sacramento-San Joaquin Delta. (Affidavit of Drosoula Tsakopoulos, ¶ 2, hereinafter "Tsakopoulos Affidavit", attached hereto as Attachment 1.) Portions of the 377.5 acre site are classified as "prime" and "unique" farmland by the California Department of Conservation, a designation which indicates foremost agricultural value. (Tsakopoulos Affidavit, ¶ 4.) The majority of the site is actively farmed by a local company, Hunn & Merwin & Merwin, Inc. (Tsakopoulos Affidavit, ¶ 5.) In addition, the Subject

Property is used for the extraction of natural gas and contains a variety of infrastructure for this purpose, including gas pipelines and pump stations. (Tsakopoulos Affidavit, ¶¶ 6 and 7.)

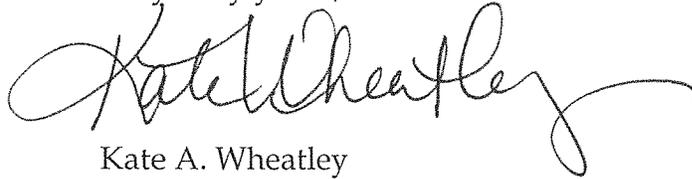
One of the criteria which the Commission must satisfy in order to make its finding of "public necessity" is that the project has been planned or located in the manner that will be most compatible with the greatest public good and the least private injury. (Cal. Code Civ. Proc. § 1240.030, emphasis added.) Due to the lack of an adequate project description in the Notification, it is impossible to determine definitively whether the proposed project will result in the least private injury. However, based on information contained in the Commission's staff report, the Trust submits that the potential private injury is substantial. The report indicates that DWR is proposing to conduct one cone penetration test (CPT) within the 10,000 square foot temporary construction easement area, but fails to describe the precise location of the testing within that large area. Neither the Notification, the staff report nor any other document provided to the Trust indicate the proposed timeline for this testing, the proposed depth of this testing, or the equipment proposed to be used. In addition, the information in the staff report does not indicate whether the CPT drilling will be completely vertical, and thus completely contained within the temporary easement area, or whether such drilling will be diagonal or lateral.

As mentioned above, the Subject Property is farmed throughout the year. (Tsakopoulos Affidavit, ¶ 5.) Irrigation lines supporting these agricultural operations run beneath much of the site, as do natural gas lines and associated infrastructure. (Tsakopoulos Affidavit, ¶ 6.) Please refer to Exhibit A to the Tsakopoulos Affidavit for a depiction of the Subject Property, including agricultural operations, natural gas lines and associated infrastructure. Depending on the location, depth, direction and timing of the proposed geotechnical explorations within the temporary easement area, there is a significant risk that such activities will interfere with the farming operation. Additionally, DWR's undefined geotechnical explorations have the potential to damage the Trust's subsurface irrigation lines and/or gas pipelines. Given these potentially significant impacts, the Trust submits that the Commission cannot find "that the project has been planned or located in the manner that will be most compatible with the greatest public good and the least private injury." (Cal. Code Civ. Proc. § 1240.030.) Accordingly, the Commission should refuse to adopt the Resolution of Necessity.

Chairman Saracino and Members of CWC  
September 19, 2011  
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Thank you for the opportunity to comment on this proposal.

Very truly yours,

A handwritten signature in black ink, reading "Kate A. Wheatley". The signature is written in a cursive style with a long, sweeping tail that extends to the right.

Kate A. Wheatley

Enclosures

**ATTACHMENT 1:**  
Affidavit of Drosoula Tsakopoulos

AFFIDAVIT OF DROSOULA TSAKOPOULOS

I, Drosoula Tsakopoulos, declare:

1. I am Trustee of Tsakopoulos Family Trust, dba Tsakopoulos Investments, located at 7423 Fair Oaks Boulevard, Suite 10, Carmichael, CA 95608. I make this affidavit in support of Tsakopoulos Family Trust's comment letter on California Water Commission Resolution of Necessity No. 2011-07 for DWR Parcel DCAE-5 (dated September 19, 2011).

2. The Trust's property that is the subject of this litigation (hereinafter referred to as the "Subject Property") is located in the Sacramento-San Joaquin Delta in the town of Hood. The site is designated as Sacramento County Assessors' Parcel Number 132-0210-001-0000 and is approximately 377.5 acres in size.

3. As Trustee, I am familiar with the properties owned by the Tsakopoulos Family Trust, including the Subject Property. I am also readily familiar with the business operations conducted at that location.

4. According to the California Department of Conservation and the County of Sacramento Agricultural Commissioner, the Subject Property contains both prime and unique farmland. These designations reflect the high value of that site's soils for optimum and sustained agricultural production. Due to the value of the soil, there are numerous County policies to protect the continued agricultural use of the property.

5. The Subject Property is currently farmed under contract by Hunn & Merwin & Merwin, Inc. That company cultivates the property and produces a variety of crops throughout the year. Irrigation lines run underground throughout the Subject

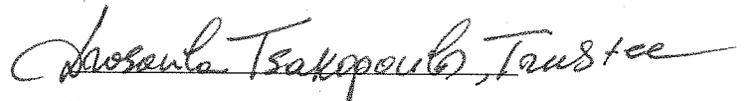
Property to support these agricultural operations. The agricultural operations occupy the entire Subject Property.

6. The Subject Property has been under contract with Archer Exploration, Inc. ("Archer") for the extraction of natural gas. Archer installed a variety of infrastructure for this purpose, including pumps and pipelines. Archer has also obtained the rights to extract natural gas on several adjacent properties and has installed a series of pipelines linking its facilities.

7. Attached hereto as Exhibit A is an aerial photograph of the Subject Property. The locations of natural gas pipelines and associated infrastructure are identified in black.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Date: September 19, 2011

  
Drosoula Tsakopoulos

**EXHIBIT A:**  
Map of APN 132-0210-001-000  
DCAE-5



GAS LINE

HIGH LINE

PIPE LINE

PUMP STATION

PIPE LINE

S. River Rd  
S. River Rd  
S. River Rd

E9

160

160

Lambert Rd

1000 ft