

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
JAMES E. MIZELL, III

OF COUNSEL
KATHLEEN R. MAKEL

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.¹ 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

¹ 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.4th 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.4th 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. 4th 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.4th 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.)

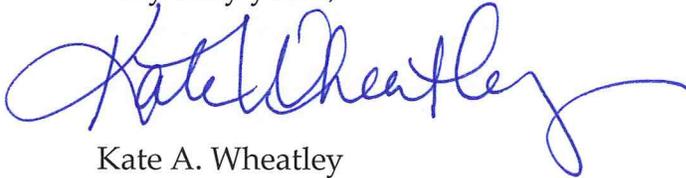
One of the criteria which the Commission must satisfy in order to make its finding of “public necessity” is that the project has been planned or located in the manner that will be most compatible with the greatest public good and the least private injury. (Cal. Code Civ. Proc. § 1240.030, emphasis added.) 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 blue ink that reads "Kate A. Wheatley". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Kate A. Wheatley

Enclosures

ATTACHMENT 1:
Affidavit of Drosoula Tsakopoulos

AFFIDAVIT OF DROSOUA 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

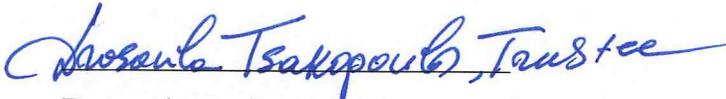

Drosoula Tsakopoulos

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



PIPE LINE