

DRAFT - FOR DISCUSSION PURPOSES ONLY

Statute:

79753(a) Funds allocated pursuant to this chapter may be expended solely for the following public benefits associated with water storage projects: ... (2) Water quality improvements in the Delta, or in other river systems, that provide significant public trust resources, or that clean up and restore groundwater resources.

Proposed regulations:

- a. “Public Trust Doctrine” means the legal doctrine that certain natural resources are held by the State of California in trust for the benefit of current and future generations
- b. “Public trust resources” means those resources held in trust for the public by the state of California under the Public Trust Doctrine. For the purposes of implementing Water Code Div. 26.7, Ch. 8, the public trust resources associated with water quality improvements are:
 1. Fisheries
 2. Fish and wildlife, including terrestrial, aquatic, and marine species
 3. The preservation of areas subject to the public trust doctrine in their natural state, so that they may serve, for example, as ecological units for scientific study, as open space, or as habitat for fish and wildlife
 4. Recreation, including water contact and non-water-contact recreation in or on a navigable body of water
- c. “Water quality improvements” means one or more improvements, above that required by compliance obligations, in the quality of water in the Delta or other river systems. “Quality of the water” has the meaning set forth in subdivision (g) of section 13050 of the Water Code.

Proposed guidelines: Scope of the Public Trust Doctrine

The Public Trust Doctrine protects many uses of navigable waterways, and is flexible to encompass changing public needs. (*Marks v. Whitney* (1971) 6 Cal. 3d 251, 259.) In administering the trust, the state is not burdened with an outmoded classification favoring one mode of utilization over another. (*Colberg, Inc. v. State* (1961) 67 Cal.2d 408, 422.) Traditionally, protected uses have included the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. (*Marks*, at p. 259 [internal citations omitted].) However, the preservation of tidelands waterways “in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area” is also a protected use under the Public Trust Doctrine. (*Id.* at 259–260.) The Public Trust Doctrine provides authority to apply water quality standards to protect fish and wildlife. (*State Water Resources Control Board v. United States (Racanelli)* (1986) 182 Cal.App.3d 82, 149–150.)

The Public Trust Doctrine applies to navigable bodies of water and can extend to other water resources under certain conditions. Protected water bodies include tidelands (*e.g. Marks v. Whitney* (1971) 6

DRAFT - FOR DISCUSSION PURPOSES ONLY

Cal.3d 251, 257–58 [Tomales Bay]; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [San Francisco Bay]), lakes, (e.g. *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 172 Cal.Rptr. 696, 625 P.2d 239 [Clear Lake]; *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 172 Cal.Rptr. 713, 625 P.2d 256 [Lake Tahoe]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434 [Mono Lake]), navigable rivers (e.g. *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138 [Sacramento River]; *Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [Russian River]; see also *National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at p. 435 fn. 17 [waters considered navigable for purposes of the Public Trust in water resources include water usable only by recreational craft]).

In *National Audubon*, the Supreme Court found that the Public Trust Doctrine “protects navigable waters from harm caused by diversion of non-navigable tributaries.” (*National Audubon v. Superior Court*, *supra*, 33 Cal.3d at p. 437.) However, the Court declined to consider whether the public trust extends to non-navigable streams. (*Id.* at 437, fn. 19). The question of whether the public trust extends to groundwater withdrawals that harm navigable waterways is currently being litigated. (*Environmental Law Foundation v. State Water Resources Control Board* (Super. Ct. Sacramento County, 2014, No. 80000583).)