



*To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.*

October 15, 2010

Department of Fish & Game  
Attn: Chad Dibble – Water Branch  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

Dear Mr. Dibble:

The Northern California Water Association (NCWA) has reviewed the Department of Fish and Game's (DFG) September 21, 2010 draft advisory report: "Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta."

As an organization that represents water users and local governments upstream of the Delta, we continue to remain concerned that the DFG is focused on a one-dimensional aspect of the Sacramento-San Joaquin River watershed—"water flow through the Delta."<sup>1</sup> We understand that the Department is responding to specific legislation passed last year (Water Code §85084.4.) and you acknowledge that "flow is not the only factor affecting ecosystem health and the decline of fish populations in the Delta." We nonetheless urge the DFG to avoid one-dimensional approaches to the complex, multi-dimensional, challenges facing the Delta and instead to recognize that the Department has broader responsibilities to help protect and advance public trust resources, including important aquatic resources upstream of the Delta; the Pacific Flyway and other avian habitat; and other terrestrial species upstream of the Delta. Most importantly, the DFG flow recommendations for the Delta, if implemented, would be detrimental to these upstream public trust resources and the areas managed by the DFG.

Rather than spend energy on one-dimensional approaches, the Sacramento Valley is committed to the new state policy on regional sustainability in Water Code §85021. Here, NCWA is working with water users, local governments and non-profit organizations through regional and local efforts to provide sustainable water supplies for farms, local communities, wildlife refuges and management areas, fisheries habitat and recreation. To provide a broad perspective on the water uses in the Sacramento Valley, we are attaching a water balance in the recent Department of Water Resources recent California Water Plan (Bulletin 160-09, Figure SR-2). We encourage the DFG to work with us in these continuing efforts for regional sustainability in the Sacramento Valley.

Sincerely,

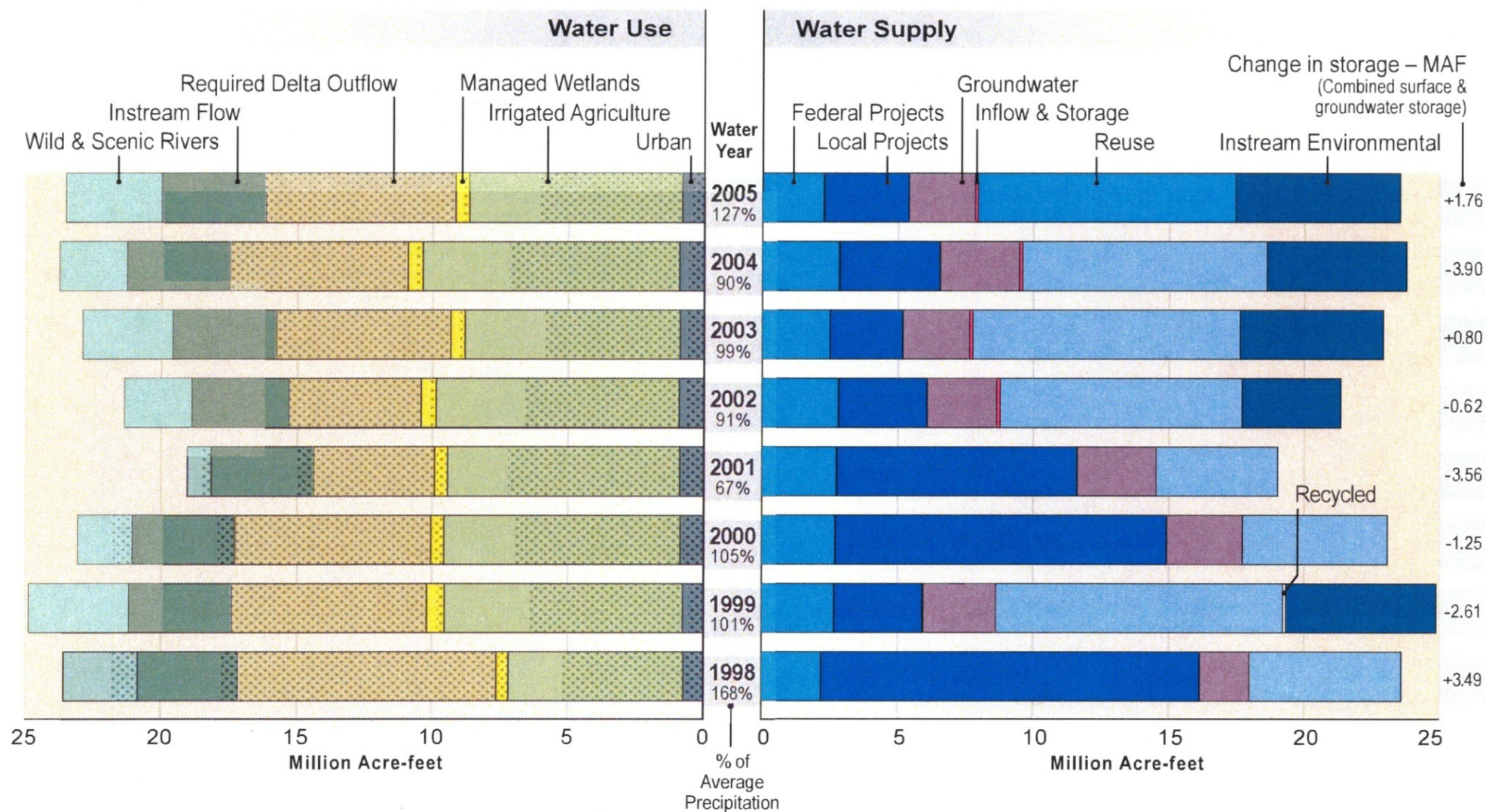
A handwritten signature in black ink, appearing to read "David J. Guy", is written over a light blue circular background element.

David J. Guy

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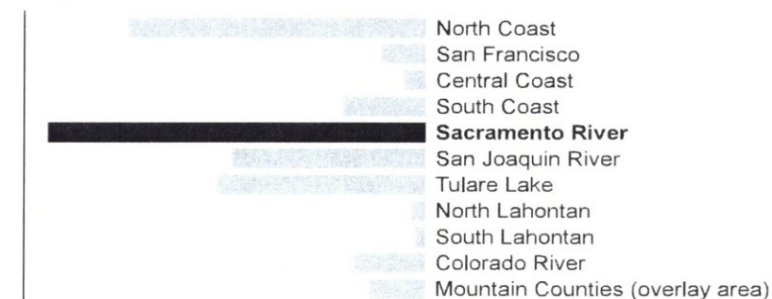
<sup>1</sup> The DFG report relies on the State Water Resources Control Board's flow report adopted earlier this year. Rather than repeating the same issues, we are attaching the comments we submitted to the SWRCB on July 29, 2010 and we incorporate by reference the previous comments and testimony provided by NCWA and the Sacramento Valley Water Users in the SWRCB proceeding.

**Figure SR-2 Sacramento River Hydrologic Region water balance summary, 1998-2005**



Stippling in bars indicates depleted (irrecoverable) water use (water consumed through evapotranspiration, flowing to salt sinks like saline aquifers, or otherwise not available as a source of supply)

**Comparison of 2005 total water use**



25 MAF





*To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.*

July 29, 2010

VIA ELECTRONIC AND U.S. MAIL

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

Re: Comment Letter – Draft Delta Flow Criteria Report

Dear Ms. Townsend:

The Northern California Water Association (NCWA) has reviewed the draft report entitled “Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem” (the “Draft Report”) that was released by the State Water Resource Control Board (the “SWRCB”) on July 21, 2010. Our comments can be summarized as follows:

- First, it is important that all parties to these proceedings – as well as other agencies of the federal and state governments – recognize the stringent limitations of the Draft Report. The SWRCB has properly conditioned the Draft Report in such a way that the report cannot and should not be the basis for regulatory efforts by the United States or the State of California. In particular, the Draft Report focuses exclusively on the water quantities needed by aquatic resources in the Delta and does not recognize: (i) the needs of the many public trust resources in the Bay Delta Estuary and its tributary areas, and (ii) the needs of consumptive users of water across California. This focus means that the flow criteria do not – and cannot as a matter of law – satisfy the criteria for coequal objectives that are to guide the development of the Delta Plan and cannot serve as the basis for water quality objectives.
- Second, in addition to the limits acknowledged by the SWRCB, NCWA notes that there are significant scientific problems with the analysis contained in the Draft Report. Those limitations – detailed below – should preclude the use of the Draft Report for any purpose.

- Third, and most important, the Draft Report repeatedly points out that the decline of the Delta ecosystem has been the result of many different stressors, such as contaminants, water quality parameters, loss of habitat, and invasive species. The Draft Report properly notes that reversing the decline of the Delta ecosystem must involve extensive efforts to address these stressors. Improvements that address these stressors would reduce or eliminate the need for increased flows that otherwise may be necessary to address the problems facing Delta aquatic public trust resources.

NCWA believes that these findings in the Draft Report provide the Delta Stewardship Council and the Bay-Delta Conservation Program with a scientific mandate to immediately focus on non-flow measures in the preparation of the Delta Plan. NCWA and its members stand ready to assist the Delta Stewardship Council in such efforts.

1. *The Draft Report Properly Identifies the Limits of Its Analysis*

The Draft Report forthrightly states that it responds to a very specific directive from the Legislature, which required the SWRCB to “develop new flow criteria for the Delta ecosystem necessary to protect public trust resources” within nine months from the effective date of the legislation. To address this question within the very limited timeframe, the SWRCB necessarily limited the scope of the Draft Report. Specifically:

- a. The Draft Report’s flow criteria determinations are limited to the protection of aquatic resources in the Delta (p. 2).
- b. The Draft Report’s flow criteria do not consider all of the matters that must be considered under the public trust doctrine and the SWRCB’s concurrent broad public interest inquiry such as the impacts of the flow criteria on other public trust resources, economics, power production, human health and welfare, and non-aquatic resources such as habitat for terrestrial species (p. 2). Many of NCWA’s member agencies, appearing in these proceedings as the Sacramento Valley Water Users, submitted a detailed discussion of these issues at the beginning of these proceedings, which is attached hereto as Exhibit 1 and incorporated herein by reference.
- c. Under the public trust doctrine, the SWRCB must determine whether the protection of public trust resources is “consistent with the public interest” and whether it is “feasible” to protect public trust values. The Draft Report does not make any determinations about the feasibility of the flow criteria or whether those criteria are consistent with the public interest (p. 2).
- d. The Draft Report does not consider “the allocation of water resources, the application of the public trust doctrine to a particular water diversion or use, water supply impacts, or any balancing between potentially competing public trust resources,” which are items that would be considered through an adjudicative or regulatory proceeding (p. 3). The flow criteria “do not consider any balancing of public trust resource protection with public interest needs for water.” (p. 4).

e. “None of the determinations in this report have regulatory or adjudicatory effect.” (p. 3).

f. “Nothing in either the Delta Reform Act or this report amends or otherwise affects the water rights of any person.” (p. 3).

g. “The flow recommendations in this report are not pre-decisional in regard to any State Water Board action.” (p. 3).

h. The SWRCB does not intend for the flow criteria to “supersede requirements for health and safety.” (p. 4)

i. The Draft Report does not contain any effort to discuss the “coequal goals” that lie at the heart of the Delta Stewardship Council’s mandate to develop a Delta Plan; consequently, the information in the Draft Report cannot be imported into the Delta Plan. (pp. 2-4).

These stringent limitations on the scope of the Draft Report necessarily limit the use, import, and effect of the Draft Report. For instance, the Draft Report calls for November to June flows in the Sacramento River to equal 75% of unimpaired inflow and for January to June Delta outflow to equal 75% of unimpaired inflow. It would be altogether too easy for regulatory agencies, planning agencies or others to “cherry pick” these specific sections of the Draft Report and ignore the many limitations on the report that the SWRCB has identified.

In particular, Appendix B to the Draft Report includes information that is essential to the Draft Report’s complying with the Legislature’s mandate in Water Code section 85086(c)(1) that the flow criteria describe the “volume, quality, and timing of water necessary for the Delta ecosystem under different conditions.” Appendix B provides the data necessary to demonstrate that the SWRCB has analyzed the true volume of water needed to meet the flow criteria and that the SWRCB has evaluated the timing of those flows, together with the consequent impacts on cold water pools and other elements of California’s water delivery system outside the legal Delta. Finally, Appendix B is necessary for the SWRCB to describe the different water quantities associated with its Category A and B criteria. That critical information that is required by statute is found nowhere else in the Draft Report.

Appendix B further provides the data needed to put the flow criteria in context, which is a key element of the Draft Report. It is important to recognize (and easy to forget) that the flow criteria contemplate the release of an average of 6 million acre-feet/year *over* baseline levels that include D-1641 and the biological opinions for delta smelt and chinook salmon. To put that number in context, 6 million acre-feet/year is roughly equal to the quantity of water diverted annually from the export pumps for use in Southern California, the San Joaquin Valley and the Central Coast. That quantity of water is also about 2/3 of the storage capacity of Shasta, Oroville and Folsom reservoirs *combined*. In the urban context, 6 million acre-feet/year is sufficient to supply the needs of 30 million people or approximately three times the population of Los Angeles County. To prevent the misuse of the Draft Report, the SWRCB properly limited the

use of the Draft Report to being merely one data point that should be considered in context by the Bay Delta Conservation Program and the Delta Stewardship Council.

2. *The Draft Report Suffers From Fatal Scientific Flaws*

The SWRCB released the Draft Report on July 21, 2010 and has asked for comments a mere eight days later. Because of the very short review time, NCWA has not been able to have the Draft Report reviewed by scientific experts. However, even our preliminary review of the Draft Report indicates that it suffers from fatal scientific flaws. Consequently, the Draft Report cannot be used by the SWRCB, the Delta Stewardship Council or the Bay Delta Conservation Program as a basis for any future efforts. Our specific concerns are set forth in Exhibit 2, which is hereby incorporated herein, and are summarized below.

- a. The Delta outflow criteria are based on weak statistical correlations, not more fundamental causal processes.
- b. The flow criteria, as noted above, do not protect all public trust resources (notwithstanding the Legislature's mandate).
- c. There is no correlation between Delta outflows and the abundance of delta smelt.
- d. The flow criteria do not consider the effects of changing ocean conditions or other factors that cannot be captured in a statistical analysis.
- e. The modeling performed by the Department of Water Resources at the direction of SWRCB staff failed to evaluate the potential impacts of the flow criteria on groundwater resources, which, in turn, could further affect streamflows and public trust resources.

3. *The Draft Report Properly Concludes that Improvement of the Delta Ecosystem Should Focus on Non-Flow Related Measures and that Such Improvements Will Reduce Flows Needed by Public Trust Resources*

To its credit, the Draft Report recognizes that the solution to the problems of the Bay-Delta Estuary does not lie in merely providing more and more water for fish. The Draft Report notes at the outset that:

While folks ask "How much water do fish need?" they might well also ask, "How much habitat of different types and locations, suitable water quality, improved food supply and fewer invasive species that is maintained by better governance institutions, competent implementation and directed research do fish need?" The answers to these questions are interdependent. (p.1).

The Draft Report also recognizes the: "habitat value of the Delta ecosystem for favorable species can be improved by habitat restoration, contaminant and nutrient reduction, changes in diversions, control of invasive species, and island flooding. Each of these non-flow factors has the potential to interact with flow to affect available aquatic habitat in Delta channels." (p. 7)

These non-flow stressors “contribute to higher than necessary demands for water to provide resource protection.” Consequently, the “flow criteria identified in this report highlight the need for the BDCP to develop and integrated set of solutions, to address ecosystem flow needs, including flow and non-flow measures.” (p. 7).

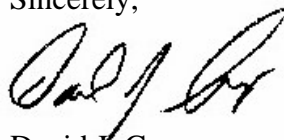
Focusing on non-flow related measures is a sound approach for the Draft Report to use. Appendix B to the Draft Report demonstrates that – if implemented fully – the flow criteria recommended in the Draft Report would – effectively – shut down California. Appendix B notes that water deliveries north of the Delta, which include diversions under many of the most senior water rights in the Central Valley, would be reduced by 67%. NCWA’s members include many of the Sacramento River Settlement Contractors (SRSCs), which are the senior rights on the Sacramento River system that have contracts with the United States limiting reductions in water deliveries to 25% of contract quantity. As implemented in the CALSIM model runs used in the Draft Report, meeting the flow criteria would require that deliveries to the SRSCs would be reduced by 88% (not the 25% contemplated by these contracts). For comparison purposes, even during 1976-77, which was the driest year on record, the SRSCs only had their deliveries reduced by 25%. Deliveries to State Water Contractors south of the Delta would be further reduced from a long-term average of 60% of contract quantities to about 45% of contract quantities. Again, for comparison purposes, this would mean that the *average* water year would now look like 1992, which was a critically dry year and the last year of a six year drought.

Rather than countenance such impacts, the Delta Stewardship Council and the Bay-Delta Conservation Program should take the lead on developing an integrated plan that incorporates non-flow measures. The failure to address such water supply impacts would leave the SWRCB (or others) open to a claim that the flow criteria are inconsistent with article X, section 2 of the California Constitution in that the flow criteria mandate an unreasonable use of water.

#### 4. *Conclusion*

For the reasons described above, NCWA and its members believe that the findings contained in the Draft Report represent a mandate for the Delta Stewardship Council and the Bay-Delta Conservation Program to focus attention on addressing non-flow related measures. The Draft Report demonstrates that just throwing water at the environmental problems in the Delta to try to make a difference to these problems would shut down the economy of California. Instead, the Draft Report intelligently directs the attention of the Delta Stewardship Council and the Bay-Delta Conservation Program at efforts to restore habitat, to reduce contaminants, to improve water quality and to eradicate invasive species. NCWA and its member strongly support such efforts and stand ready to work with the Delta Stewardship Council and/or the Bay-Delta Conservation Program to implement such measures.

Sincerely,



David J. Guy  
President