



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.

August 3, 2010

Mr. Phillip Isenberg
Chair, Delta Stewardship Council
650 Capitol Mall, 5th Floor
Sacramento, California 95814

Re: Third Draft Interim Delta Plan Comments

Dear Chairman Isenberg:

The Northern California Water Association (NCWA) provides the following comments for the Delta Stewardship Council's (Council) consideration in developing the third draft of the interim Delta Plan. The Sacramento Valley has and will continue to take the lead in the development of creative water management solutions that provide water for farms, fish, water fowl, habitat creation and local communities. These programs have and will continue to include rational consideration of appropriate flows within the Sacramento River and its tributaries and in the Delta. Unfortunately, the State Water Resources Control Board (SWRCB) Delta Flow Criteria Report (SWRCB Report) adopted today provides little help in this important effort. At best, it is merely an academic exercise that does not provide any real insight into how best to address the vexing issues that exist in the Delta; nor does it provide any assistance to water users and others who are committed to finding and implementing solutions to these issues.

While the SWRCB report has little if any real world utility, we do understand that its legislative creation cannot be ignored. In this context, it is important for the Council to view the report in light of the best available scientific information regarding the actual impacts and consequences of implementing the potential Delta flow criteria that is contained in the SWRCB Report. Specifically, NCWA will submit in the near future a more detailed evaluation by MBK Engineers of the results that would occur if the SWRCB's Delta flow criteria were implemented. In the meantime, to help portray the full picture of the report, MBK has evaluated DWR's Water Supply Modeling. To be clear--the impacts of implementing the SWRCB's potential Delta flow criteria would have devastating water-supply impacts throughout the state and would severely impact fish in the Delta's tributaries. The interim Delta Plan therefore should not incorporate the SWRCB's Delta flow criteria, or use those criteria as a tool for measuring any relevant factor, because those flow criteria are not consistent with the coequal goals that are the fundamental principles that guide all of the Council's work. Relying on those criteria

would not be faithful to the co-equal goals and it will add very little value to existing conditions. Instead, the Council should seek to add such value by identifying and encouraging non-flow measures that are outside the SWRCB's jurisdiction that would significantly improve Delta ecosystem conditions.

SWRCB's Flow Criteria and MBK's Participation in the SWRCB's Process

The SWRCB Report includes potential Delta flow criteria, which, in summary, state – not considering impacts to upstream fisheries or the state's water supplies, other ecosystem restoration measures, water rights or any other relevant factor – that the following streamflows are necessary to restore certain public trust resources in the Delta:

- 75% of unimpaired Delta outflow from January through June;
- 75% of unimpaired Sacramento River inflow from November through June; and
- 60% of unimpaired San Joaquin River inflow from February through June.

The SWRCB prepared its report after a public informational proceeding in March 2010. During that proceeding, Walter Bourez and Dan Easton of MBK Engineers provided the only hydrological testimony that discussed what effects various streamflow recommendations would have on the state's water system. As a result of that testimony, and MBK's expertise in hydrological modeling, MBK has met further with the staff of the SWRCB and the Department of Water Resources, who prepared what was Appendix B to the SWRCB July 20, 2010 Draft Report (hereinafter DWR Water Supply Modeling). Although the SWRCB struck Appendix B to the report, it nonetheless contained important information that identifies water-system impacts that the potential flow criteria would have if implemented. We are therefore hopeful that the Department of Water Resources (DWR) will provide this information to the Council in another form so the Council and California's citizens can fully understand the magnitude of this report. In the meantime, we will provide the Council with MBK's initial evaluation of DWR's Water Supply Modeling.

DWR's Water Supply Modeling Demonstrates That Implementation of the SWRCB's Delta Flow Criteria Would Have Devastating Water-Supply Impacts

The DWR Water Supply Modeling only reflects a limited set of the impacts that implementing the SWRCB's Delta flow criteria would have. Based on MBK's work to review, evaluate, and summarize the analysis contained in DWR's Water Supply Modeling, implementing the SWRCB's Delta flow criteria would have the following effects, among others:

- A. Violations of cold-water pool standards for salmon protection. Implementation of the SWRCB's Delta flow criteria would cause violations of cold-water storage standards set by the National Marine Fisheries Service to support salmon, even if all north-of-Delta water deliveries from the CVP and the SWP were stopped (which would violate longstanding settlement contracts, water rights and area-of-origin laws in any case);
- B. Rendering reservoirs useless for any purpose more frequently. Implementation of the SWRCB's Delta flow criteria would increase, by three to more than ten times, the frequency of Shasta, Folsom, Oroville, potentially many other reservoirs being drawn down to dead pool. When a reservoir is drawn down to dead pool, there is no water in the reservoir to release for any purpose, resulting not only in 100% water-supply shortages to communities that rely on deliveries from such reservoirs, but also in a complete cessation of water releases to support fisheries in the river below the relevant dam.

Also, DWR's Water Supply Modeling further demonstrates that implementation of the SWRCB's Delta flow criteria would:

- A. Require more than an annual average of **5,500,000 acre-feet** of additional water be released to the ocean – which is equal to 2/3 of the amounts of water delivered for urban use in California annually;¹

Information submitted to the SWRCB by the Center for Watershed Sciences, University of California – Davis² demonstrated that the annual average difference between unimpaired and historical Delta outflow for the 1986-2005 period is about 10,000,000 acre-feet. When considering reductions in use due to SWRCB D1641, CVPIA, smelt and salmon Biological Opinions, and other actions the difference in outflow is reduced to about 8,000,000 acre feet. Given that total use is about 8,000,000 acre feet, a reduction of more than 5,500,000 acre feet is significant.

- B. Significantly reduce Sacramento River streamflows below Keswick Dam in the summer and fall, when listed salmon species are present in that reach of the River; and
- C. Increase CVP diversions from the Trinity River watershed, which would cause Trinity Lake to be drawn down to dead pool more often and cause serious impacts to the Trinity River's listed salmon populations.

¹See 2009 California Water Plan, p. 3-13 (“Urban water use is estimated to be 8.3 MAF [million acre feet] for 2005”). 5,500,000 is approximately 2/3 of 8,300,000.

² On Developing Prescriptions for Freshwater Flow to Sustain Desirable Fishes in the Sacramento-San Joaquin Delta, January 2010

- D. Decrease deliveries to refuges and other managed wetlands comprising the Pacific Flyway.
- E. Decrease in hydropower production forcing California to rely on fossil fuels for energy thereby increasing green house gas emissions.
- F. Cause increased reliance on groundwater that is likely to result in lower groundwater tables causing loss of critical habitat in smaller streams that are supplied from groundwater.
- G. Loss of habitat created by agriculture that necessary for endangered species such as the giant garter snake

The Council's development of the Delta Plan is governed by, among other laws, Water Code section 85300, subdivision (a), which states in relevant part:

On or before January 1, 2012, the council shall develop, adopt, and commence implementation of the Delta Plan pursuant to this part that furthers the coequal goals.

Water Code section 85054 defines the "coequal goals" as follows:

"Coequal goals" means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.

The Council has chosen to make the interim Delta Plan a framework for the long-term Delta Plan, so the interim Delta Plan should comply with these statutes as well. (See second draft interim Delta Plan, dated July 14, 2010, pp. v-vi ("It is important that the Interim Plan provide a framework that transitions well to the Delta Plan. The first requirement for smooth transition is consistency in use of legal authority provided in the Act".))

DWR's Water Supply Modeling further demonstrates that the SWRCB's Delta flow criteria cannot possibly help achieve the coequal goals because their implementation would devastate not only water supplies throughout California, but also would have very significant negative impacts on stream conditions that support fish that migrate through the Delta and are therefore part of its ecosystem.

The fact that implementation of the SWRCB's Delta flow criteria would result in upstream reservoirs being drawn down to dead pool three to ten times as often as under baseline conditions is particularly telling. This fact means that those criteria's implementation would devastate spawning and rearing salmon and steelhead in the Delta's tributaries, even if water-supply deliveries and hydropower generation were dramatically reduced.

The consequences of implementing the SWRCB’s Delta flow criteria would be so severe for both water supplies and tributary fisheries that their implementation would not only be inconsistent with the coequal goals, but in fact would violate California’s constitutional “reasonable use” standard. Article X, section two, of the California Constitution establishes that standard, which the Legislature declared to be a “foundation of state water management policy and . . . particularly important and applicable to the Delta” when it enacted Water Code section 85023 in 2009. In longstanding “reasonable use” decisions, the California Supreme Court has rejected demands that the use of large amounts of water be foregone to achieve unrelated or only marginally related downstream benefits. (See *Town of Antioch v. Williams Irrigation Dist.* (1922) 188 Cal. 451 (rejecting injunction against Sacramento Valley water uses to maintain in-Delta margin of fresh and salt water); *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673 (rejecting injunction to prevent upstream storage in order to flush salts out of downstream property); *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351 (similar); *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316 (rejecting order requiring that use of very large amounts of water be foregone to ensure groundwater percolation to support downstream senior rights); see also *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249-1250 (citing *Peabody* and *City of Lodi*); *United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 142 (citing *Gin S. Chow* and *Peabody*).)² Any measures intended to promote public trust resources must comply with this line of longstanding decisions. (*National Audubon Soc’y v. Superior Court* (1983) 33 Cal.4th 419, 443 (“All uses of water, including public trust uses, must now conform to the standard of reasonable use”).)

For these reasons, the interim Delta Plan should not incorporate, or rely on as a tool for measuring progress toward the coequal goals’ achievement, the SWRCB Report and the potential Delta flow criteria it contains.

The Interim Delta Plan Should Focus On Identifying and Encouraging Non-Flow Measures That Could Improve the Delta Ecosystem

The SWRCB Report admirably and correctly recognizes the limits of streamflow standards as tools for improving the Delta ecosystem:

The flow improvements that the State Water Board identifies in this report as being necessary to protect public trust resources illustrate the importance of addressing the negative effects of these other stressors that contribute to higher than necessary demands for water to provide resource protection. Future habitat improvements or changes in nutrients and contaminants, for example, may change the response of fish to flow. Addressing other stressors directly will be necessary to assure protection of public trust resources and could change demands for water to provide resource protection in the future. (P. 7)

²Given the longstanding nature of this line of decisions, it is particularly noteworthy that, in enacting Water Code section 85023, the Legislature chose to refer to “the longstanding principle of reasonable use.”

For example, the SWRCB acknowledged that its Sacramento River inflow recommendations were not intended to address a particular need for streamflow in the Delta, but rather as a tool to protect juvenile salmon in the Delta so that they would not be injured by in-Delta stressors such as degraded rearing habitat, invasive species and higher predator populations. (pp. 53-54.)

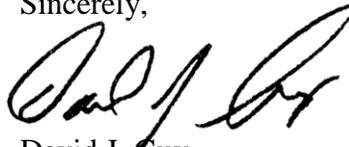
The Council's unique role is to identify measures that can be taken by other agencies to improve Delta conditions, to encourage agencies to take those measures and to ensure that agencies' relevant activities are coordinated. The Council can begin this work immediately by identifying the stressors to Delta species that are outside of the SWRCB's jurisdiction, identifying the agencies with the legal authority to address those stressors and catalyzing actions by those agencies to address those stressors. For example, the Council immediately could seek to prompt the Fish and Game Commission to stop encouraging growing populations of striped bass – a major predator of juvenile salmon – by incorporating such an action into the interim Delta Plan. Such measures could begin the Delta ecosystem's improvement in the very near term.

Conclusion

The Council has the opportunity to make a real difference in improving current conditions quickly by challenging other agencies to modify their unsuccessful standard approaches to addressing Delta's problems. The Council should not begin its work by merely incorporating what the SWRCB has said about Delta flows, particularly given implementing the SWRCB's Delta flow criteria would have devastating effects of water supplies and fish in the Delta's tributaries. Not only would that be inconsistent with both the coequal goals but it also violates longstanding constitutional principles of reasonable and beneficial use. The Council's efforts would be much better spent identifying and advocating measures that could improve the Delta ecosystem that currently are languishing due to a lack of coordination among the relevant agencies.

Please call me if you have any questions.

Sincerely,



David J. Guy
President

cc: Council Members
Joe Grindstaff