

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

INFORMATIONAL PROCEEDING TO DEVELOP FLOW CRITERIA FOR THE DELTA
ECOSYSTEM NECESSARY TO PROTECT PUBLIC TRUST RESOURCES

COMMENTS OF AMERICAN RIVERS AND NATURAL HERITAGE INSTITUTE ON
DRAFT REPORT

American Rivers and Natural Heritage Institute hereby submit comments on the draft report released July 21, 2010.

General

We support the flow criteria (p. 5, Tables 22 – 23) which the draft report recommends to protect public trust resources in the Delta, “assum[ing] the current physical system and climate” (p. 6). We agree with the conclusion (p. 5) that criteria which track unimpaired flow from each tributary will best preserve ecosystem functionality. We agree (p. 4) that these flow criteria are based on sufficient scientific information in the record of this proceeding. And we agree (pp. 5-6) that more effective management of the many other stressors of public trust resources, such as availability of floodplain habitat, will affect flow needs.

Recommended Changes

We recommend the following changes to the draft report.

1. The final report should include the anticipated schedule for the next steps (pp. 9-10, 14-16) which the State Water Board will take to use the criteria in adjudicatory or regulatory proceedings. These include: (i) amendment of the point of diversion for the Central Valley Project and State Water Project to implement the Bay Delta Conservation Plan (p. 9); (ii) review and development of water quality objectives for the San Joaquin River (p. 10); (iii) comprehensive update to the Bay-Delta Water Quality Control Plan (*id.*); and (iv) amendment to water rights for non-project diversions to implement that update (*id.*). The schedule for these next steps should be expeditious, given the reality that Delta as ecosystem, water supply, and place is in crisis (Water Code section 85001(a)).

2. The draft report states a biological objective for the flow criteria: namely, to “provide sufficient flow to increase abundance of desirable species” (p. 43). The final report should acknowledge that this biological objective will not constrain the objectives which may be adopted in subsequent adjudicatory or regulatory proceedings. The Delta

Reform Act, the public trust doctrine, and other applicable laws require restoration of the sustainability of trust resources, not just improvement in a degraded baseline. For example, Water Code section 85302(c) calls for "viable populations of native resident and migratory species," and section 85302(e) calls for "self-sustaining, diverse populations of native and valued species...." Similarly, the public trust doctrine is "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441 (1983); *see also* Fish and Game Code section 5937 ("good condition").

3. The draft report includes an Appendix B which reports modeling by Department of Water Resources (DWR) staff to estimate reductions in water supply and reservoir storage associated with the flow criteria. The final report should omit this appendix. It addresses an issue that the State Water Board expressly excluded from the limited scope of the hearing, which solely concerned flow criteria necessary for protection of public trust resources. *See, e.g.*, "Notice of Public Informational Proceeding" (Dec. 16, 2009), p. 6. That excluded issue is: impacts of flow criteria on cost, feasibility, or reliability of water supply, or more generally, the balancing of beneficial uses. *See* Pre-Hearing Notice, *supra*, p. 7. For that reason, we and many other parties did not submit any evidence on that issue. As acknowledged in the draft report (p. 2), the State Water Board must and will take evidence and otherwise address this issue before amending any water right or making any other adjudicatory or regulatory decision. DWR's preliminary modeling should remain in the record of this hearing for use in such subsequent proceeding.

We recommend that the State Water Board adopt this draft report, which is consistent with the requirements of the Delta Reform Act. We offer our thanks to the State Water Board for your excellent work and timely conclusion in this matter.

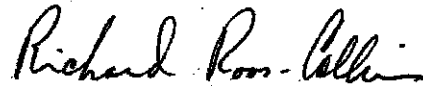
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Respectfully submitted,

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