



NATURAL RESOURCES DEFENSE COUNCIL

September 16, 2014

Felicia Marcus, Chair  
State Water Resources Control Board  
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Sent via email to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**RE: Comments on the draft Order Denying Petitions for Reconsideration and Addressing Objections**

Dear Chair Marcus and Members of the Board:

On behalf of the Natural Resources Defense Council, I am writing to submit the following comments on the draft Order Denying Petitions for Reconsideration and Addressing Objections (“Draft Order”). NRDC filed one of the petitions for reconsideration and several objections that are addressed in the Draft Order. We recognize the difficult decisions that the drought has forced, and we greatly appreciate the Draft Order’s requirement to submit a draft operations plan for 2015 to the SWRCB for public comment and review in advance of 2015 operations. Given the possibility that the drought may continue to 2015, it is important to plan ahead and better understand the tradeoffs and balancing of beneficial uses proactively.

Unfortunately, the Draft Order does not adequately respond to our Request for Reconsideration and objections. However, because we recognize that many of our objections and our request for reconsideration are largely moot, we focus our comments on key issues in the Draft Order to better prepare should the drought continue in 2015. To that end, we recommend several modifications to the Draft Order that focus on four key points:

- 1) The SWRCB should provide more guidance regarding the Draft Operations Plan for 2015 (New Condition #11 of the Draft Order);
- 2) The Draft Order should require an accounting of estimated total water diversions, environmental flows, and impacts of ESA pumping restrictions in 2014, in addition to reporting on conserved water and preparing estimated water balances (Conditions #4-5).
- 3) The Draft Order fails to adequately consider and protect fall run Chinook salmon (Condition 6 and New Condition #12 of the Draft Order); and,
- 4) The SWRCB’s statement that spring run Chinook salmon are not currently in the Stanislaus River is erroneous and should be stricken (Footnote 17 of the Draft Order).

Each of these issues is addressed on the pages that follow.

1) The SWRCB Should Provide Additional Guidance on the Draft Contingency Plan for Operations in 2015

NRDC supports new condition 11 in the Draft Order, which requires the agencies to develop a draft operations plan for 2015 by October 15 and provides for public review and comment before any action by the Executive Director. One of the primary issues NRDC raised in our objections was the need for comprehensive planning in order to better understand the tradeoffs involved. See Draft Order at 30.

2014 was the third year of drought, and there is no question that the drought is causing significant adverse impacts to farmers, cities, fisheries, birds, and other beneficial uses. However, it is also apparent that the allocation decisions by the CVP and SWP significantly constrained the ability to meet upstream water temperature needs for salmon required under Decision 90-5 and to meet downstream water quality standards for fish and wildlife uses under Decision 1641. Water balance information provided by the SWRCB, and temperature modeling in the 2014 Drought Operations Plan, indicated early in the year that there was insufficient water to meet all beneficial uses and that 2014 operations would result in high water temperatures in the Sacramento River (and other rivers) that would lead to significant mortality of fall run Chinook salmon and likely other salmon runs. The initial CVP allocation and diversions by other senior water rights holders exacerbated temperature conditions and also made relaxation of delta outflow standards all but inevitable. But there appears to have been inadequate consideration of reducing allocations to, and diversions by, upstream senior water rights holders, despite the significant environmental impacts that are resulting.<sup>1</sup>

Going into 2015, the SWRCB should provide additional guidance to the state and federal agencies preparing to Draft Contingency Plan required by Condition 11. First, the SWRCB should require that the Draft Contingency Plan begin with the assumption of compliance with D-1641 unless certain criteria are met. The Bay-Delta Water Quality Standards and D-1641 (and the biological opinions) provide substantially weaker environmental protections in dry and drought years, so the initial operating assumption for 2015 must be compliance with existing standards. Survey results for many native fish and wildlife populations suggest they are at very low levels of abundance as a result of drought and other impacts.<sup>2</sup> In addition, the impacts of the drought and water management on salmon and steelhead populations will not be known for several years because of these species' life cycles. However, the California Department of Fish and Wildlife has warned that, "... survival of eggs and juvenile fish in these systems over the coming months is likely to be extremely low as the current

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<sup>1</sup> Similarly, with respect to NRDC's objections to modification of the Vernalis flow standards, the Draft Order fails to address NRDC et al's argument that the SWRCB needs to consider reductions in diversions by senior water rights holders / reductions in allocations to CVP senior water rights contractors to meet carryover storage targets. The Draft Order also fails to respond to NRDC's argument that meeting the Vernalis flow standard would provide additional exports by the CVP/SWP, including for wildlife refuges and the Exchange Contractors.

<sup>2</sup> For instance, the 2014 20 mm survey results for Delta smelt were the second lowest on record, see <ftp://ftp.dfg.ca.gov/Delta%20Smelt/MEMO2014%20DS%2020-mm%20Index.pdf>, and the 2014 summer townet survey results for delta smelt were also one of the lowest on record, see <http://www.dfg.ca.gov/delta/data/townet/indices.asp?species=3>. It is likely that longfin smelt populations will also be at low levels, given the extremely low outflows in 2014 and the low abundance indices in 2013.

drought conditions continue.”<sup>3</sup> Maintaining environmental protections for these native fisheries in 2015 will be critical, should the drought end in 2015.

However, if operational projections indicate an inability to maintain salinity control in the Delta or an inability to meet minimum health and safety needs, then modification of water quality standards likely would be appropriate and the Draft Contingency Plan should identify operational responses and potential tradeoffs that may be involved. Second, the 2015 Draft Contingency Plan should not presume or guarantee diversions by senior water rights holders and upstream contract holders in both the San Joaquin and Sacramento basins, and instead should analyze the tradeoffs involved in limiting diversions by senior water rights holders (including but not limited to CVP senior water rights holders on the Stanislaus and Sacramento River, as well as SWP Settlement Contractors on the Feather River) if modeling shows that water quality or other environmental permit terms and conditions are unlikely to be met, including upstream water temperature requirements. Finally, the Draft Contingency Plan should include upstream reservoir storage targets to both ensure adequate water supply for health and safety needs in 2016 and to address upstream temperature requirements for salmonids in 2014 and 2015.<sup>4</sup>

- 2) The Draft Order should require an accounting of estimated total water diversions, the fate of full natural flows, and impacts of ESA pumping restrictions in 2014, in addition to reporting on conserved water (Conditions #4 and 5)

As noted above, it is clear that the drought is impacting many beneficial uses of water, and we recognize that the SWRCB and other agencies have strived to balance these impacts this year. In order to make accurate decisions and to explain to the public the basis for these decisions, it is essential that the SWRCB and public have accurate information about where and how water is being used during the drought.

NRDC generally supports the requirements of Condition 4, which requires DWR and USBR to provide a monthly accounting of water conserved as a result of the Draft Order. To date, it is our understanding that relaxation of Delta outflow standards in 2014 resulted in more than 350,000 acre feet of water conserved in upstream reservoirs, based on information provided by the Department of Water Resources. Although the reduction in Delta outflow has significant adverse environmental impacts, it

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<sup>3</sup> Memorandum from Charlton H. Bonham to Sonke Mastrup, July 22, 2014, available online at: [http://fgc.ca.gov/meetings/2014/aug/Exhibits/9.1\\_Merced\\_MemoAndSOPERA.pdf](http://fgc.ca.gov/meetings/2014/aug/Exhibits/9.1_Merced_MemoAndSOPERA.pdf)

<sup>4</sup> NRDC strongly urges the SWRCB to impose conditions on the water rights of the SWP and CVP requiring compliance with upstream storage requirements, such as the requirements established in the 2014 Drought Operations Plan, those that are identified in the 2015 Drought Contingency Plan should it be implemented, or other requirements established by the SWRCB. The Draft Order appropriately recognizes that the SWRCB has not formally imposed such requirements because, to date, “DWR and Reclamation have met the targets identified in the DOP.” Draft Order at 17. However, some water contractors have sought leave to file litigation seeking damages for compliance with the carryover storage requirements in the DOP, despite the mandate under state and federal law to meet these minimum requirements. While we read the Draft Order and Condition 12 as making clear that meeting minimum carryover storage targets is required by state and federal law, the Draft Order could be more clear on this point.

does make additional water available for both water supply and water temperature (protecting salmon) purposes.

In contrast to DWR's compliance with Condition 4, we are not aware of compliance by DWR and USBR with Condition 5, which requires USBR and DWR to prepare an estimated monthly water balance showing Delta inflows, North of Delta contract deliveries, exports, Delta outflows, and other channel depletions. Such non-compliance is unacceptable, particularly since such operational modeling and estimates are critical for assessing the potential impacts of deviations from D-1641. While the SWRCB prepared several monthly water balances early in the year, we have not seen any subsequent modeling by the SWRCB, DWR or USBR.

In addition, some stakeholders have made misleading claims about the impact of protections for endangered species and other environmental requirements on water supply this year. While the data on conserved water helps to rebut these unwarranted claims, the SWRCB should require greater disclosure and accounting than currently required by Condition #4. For instance, the State Water Contractors, Metropolitan Water District of Southern California, and other export contractors admitted in a court filing in June of this year that pumping restrictions under the Endangered Species Act, "have minimally affected water deliveries over the past six months." See Attachment 1 at 1-2. Likewise, the executive director of the San Luis and Delta Mendota Water Authority admitted in an email to the director of the Bureau of Reclamation that ESA pumping restrictions during the February 2014 storm resulted in a likely water supply impact of only 10,000 acre feet. See Attachment 2. More broadly, NRDC et al presented an analysis to the SWRCB at its May 6, 2014 meeting showing that approximately two thirds of the full natural flow from February 1 to April 15 was stored in upstream reservoirs or diverted. See Attachment 3.

NRDC requests that in addition to the information required by these conditions, the SWRCB modify Condition 4 and 5 to require DWR and USBR to present monthly accounting of full natural flows over the prior month, the water supply impact of ESA pumping restrictions, and the estimate of total water diversions. Such information helps the SWRCB and the public assess the balancing of beneficial uses that the drought requires.

3) The Draft Order Fails to Adequately Protect Fall Run Chinook Salmon, and Condition #6 and Proposed Condition #12 Should be Modified to Explicitly Include Fall Run Chinook Salmon

One of the primary issues raised in NRDC's objections and request for reconsideration was the failure to consider impacts to fall run Chinook salmon, which forms the backbone of the State's salmon fishery. The SWRCB's mandate under Porter-Cologne and the Public Trust is far broader than the Endangered Species Act, and protecting fall run Chinook salmon and the salmon fishery is a key obligation of the SWRCB. Unfortunately, to date decisions have largely ignored the impacts to fall run Chinook salmon, and not surprisingly, this has led to likely significant impacts to wild spawning fall run Chinook salmon this year.

For instance, the Sacramento River Temperature Task Group's temperance modeling on the Sacramento River indicates that high water temperatures will persist through at least the end of October. See

Attachment 4. This will likely cause substantial mortality of fall run Chinook salmon eggs, and it is exacerbated by allocation decisions by the CVP and SWP early in 2014 and resulting reservoir storage levels. Redd dewatering of fall run Chinook salmon has also been a problem in recent years. While emergency triage measures like egg injection may be one of the only actions available to help fall run Chinook salmon this year, more can be done to plan for 2015. Condition #6 in the Draft Order focuses on “listed species” (and other beneficial uses), and Condition #12 in the Draft Order focuses exclusively on development of plans to address and mitigate temperature and redd dewatering impacts to winter run Chinook salmon in 2014 and 2015. The SWRCB should modify Condition #6 to explicitly require consideration of impacts to fall run Chinook salmon, and the SWRCB should modify Condition #12 to explicitly include fall run Chinook salmon, consistent with the SWRCB’s legal responsibilities under the Public Trust doctrine and the Bay-Delta Water Quality Control Plan.

4) Footnote 17 of the Draft Order, Regarding Spring Run Chinook Salmon in the Stanislaus River, Is Not Supported by Substantial Evidence and Should be Stricken

Footnote 17 of the Draft Order makes claims regarding spring run Chinook salmon in the Stanislaus River that lack evidentiary support and should be stricken. In recent years, improved monitoring has identified persistent, small populations of both adult and juvenile spring run Chinook salmon in the Stanislaus and Tuolumne Rivers. For instance, in 2014, Fishbio<sup>5</sup> reported adult salmon migrating upstream of the Stanislaus River weir (RM 31) between February to June, which are likely spring run Chinook salmon:

Jan 13 to Feb 2:	14 Chinook salmon
Feb 3 to Feb 16:	2 Chinook salmon
Feb 17 to March 2:	3 Chinook salmon
March 3 to March 23:	2 Chinook salmon
March 24 to April 11:	1 Chinook salmon <sup>6</sup>

Similarly, NMFS has acknowledged the existence of spring run type Chinook salmon in the Tuolumne and Stanislaus Rivers in recent years, including both adults migrating upstream and juveniles. See Final Environmental Assessment for Nonessential Experimental Population Designation and 4(d) Take Provisions for Reintroduction of Central Valley Spring-run Chinook Salmon to the San Joaquin River

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<sup>5</sup> The periodic reports from Fishbio are available online at <http://archive.constantcontact.com/fs015/1101950876839/archive/1104451591126.html>. They are incorporated by reference.

<sup>6</sup> Stanislaus River weir monitoring for adults ended on April 11, 2014. However, monitoring on the Tuolumne River continued until May 2, and additional adult salmon were identified migrating upstream on the Tuolumne River during that period. These fish are also likely to be spring run Chinook salmon. We have not included additional information regarding spring run Chinook salmon on the Tuolumne River because Footnote 17 focused on the Stanislaus River, but the lack of monitoring data in subsequent months likely understates the number of spring run Chinook salmon in the Stanislaus River this year.

Below Friant Dam,<sup>7</sup> at 3-17 to 3-21 (acknowledging existence of spring running salmon in the Tuolumne and Stanislaus Rivers in recent years). For instance, NMFS concluded that in the months of May and June 2013, 82 adult salmon migrated upstream on the Stanislaus River, a period of time consistent with migration patterns of spring run Chinook salmon. *Id.* at 3-20. In addition, in its response to comments on the draft EA, NMFS stated that, “Recent video weir data on the Stanislaus and Tuolumne rivers for the past few years indicate that there are a fair number of salmon returning annually to these systems, which historically would coincide with spring-run Chinook timing. This information is sufficient for NMFS to assume potential populations in these water ways.” Final EA, Appendix 1: Comment Letters and Responses to Comments, at Response to Comments #32;<sup>8</sup> *see also Id.*, Response to Comments #36 (noting the “current documentation of spring run” in the Tuolumne River); *id.*, Response to Comments #71 (“The spring-run Chinook on the Stanislaus and Tuolumne Rivers are of unknown genetic origin and are even less abundant than Deer and Mill Creek populations.... These fish are important on the Stanislaus and Tuolumne Rivers as possible remnants or recolonizers of possible spring-run Chinook populations (See sections 3.3.2.2 and 3.3.2.3 of the EA).”).

Contrary to the language in footnote 17 of the Draft Order, there is scientific evidence that small populations of spring run Chinook salmon persist in both the Tuolumne and Stanislaus Rivers, including fish observed in 2014. The SWRCB should therefore strike footnote 17 of the Draft Order.

## **CONCLUSION**

NRDC greatly appreciates the efforts of Board members and staff to respond to the drought. While we may disagree with some of the Board’s prior decisions and some of the reasoning in the Draft Order, we are focused on preparing for 2015 and are pleased that the SWRCB is requiring contingency planning for 2015 in advance, with a better opportunity for public comment and review before decisions are made. We believe that the comments above will lead to a better outcome should the drought continue into 2015.

Thank you for consideration of our views. Please contact us at your convenience if you have any questions, and we look forward to discussing this matter further at the September 23, 2014 SWRCB Board meeting.

Sincerely,



Doug Obegi

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<sup>7</sup> This document is available online at:

[http://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/San%20Joaquin/san\\_joaquin\\_reintroduction\\_10j\\_final\\_environmental\\_assessment\\_123013.pdf](http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/San%20Joaquin/san_joaquin_reintroduction_10j_final_environmental_assessment_123013.pdf). It is incorporated by reference.

<sup>8</sup> This document is available online at:

[http://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/San%20Joaquin/san\\_joaquin\\_10j\\_desingati\\_on\\_environmental\\_assessment\\_appendix1\\_response\\_to\\_comments\\_123013.pdf](http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/San%20Joaquin/san_joaquin_10j_desingati_on_environmental_assessment_appendix1_response_to_comments_123013.pdf). It is hereby incorporated by reference.

# **ATTACHMENT 1**

Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, & 11-16662

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,  
Plaintiffs-Appellees,

CALIFORNIA DEPARTMENT OF WATER RESOURCES,  
Plaintiff-Intervenor-Appellee,

v.

KENNETH LEE SALAZAR, *et al.*,  
Defendants-Appellants, and

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,  
Defendants-Intervenors-Appellants

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On Appeal from the United States District Court for the Eastern District of  
California, 1:09-cv-00407-LJO-DLB

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**MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF  
APPELLEES KERN COUNTY WATER AGENCY,  
COALITION FOR A SUSTAINABLE DELTA, STATE WATER  
CONTRACTORS, AND METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA'S PETITION FOR  
REHEARING EN BANC**

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**MOTION FOR LEAVE TO FILE A REPLY**

Appellees Kern County Water Agency, the Coalition for a Sustainable Delta, the State Water Contractors, and the Metropolitan Water District of Southern California (“Appellees”) respectfully move for leave to file the attached Reply to the oppositions filed by Federal-Defendants and Defendant-Intervenors in response to Appellees’ Petition For Rehearing En Banc. The Reply is limited to four specific points that are central to this Court’s determination whether to grant en banc review. In particular, it addresses claims by Federal Defendants and Defendant-Intervenors that could not have been addressed in the Petition, including claims regarding the state of the record, the effect of the agency action under review, and whether particular arguments have been preserved.

Respectfully submitted,

DATED: June 23, 2014

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**REPLY IN SUPPORT OF APPELLEES' PETITION FOR  
REHEARING EN BANC**

Appellees respectfully submit this Reply to address four points in Defendants' responses to the petitions for rehearing en banc.

1. Appellees seek en banc review of a divided panel opinion sustaining the lawfulness of a biological opinion ("BiOp") that substantially restricts the delivery of water from two of the nation's largest water projects. Defendants argue that the BiOp has "not significantly affected" state water users or California's economy. *See, e.g.*, Response by Federal-Def. Appellants to the Pets. for Rehearing ("Fed. Def. Resp.") at 24; *see also* Def.-Intervenors-Appellants Opp'n to Pl. Parties' Pets. For Rehearing En Banc ("NRDC Resp.") at 2-3. That claim is not serious to anyone familiar with this case, including the panel majority, which acknowledged the "enormous practical implications of [its] decision," *San Luis & Delta-Mendota Water Authority v. Jewell*, No 11-1587, slip op. (Op.) at 25 (9th Cir. March 13, 2014), affirming the BiOp's reasonable and prudent alternatives ("RPAs") "affecting millions of acres of land and tens of millions of people," *id.* at 52.

Defendants' nominal claim is that "The RPA Has Not Significantly Affected Water Deliveries In California." Fed. Def. Resp. at 24 (Section IV Heading). But that is an optical illusion, because their actual argument relates only to "water deliveries *in 2014*." *Id.* (emphasis added). Defendants fail to acknowledge that the RPAs have minimally affected water deliveries over the past six months only

because this year has been unique: precipitation levels have been so low that there likely would be very little water to distribute to water project users even absent the BiOp restrictions in this particular year.

Defendants omit that in more typical years—and across wet and dry years—the BiOp has an enormous effect, which is precisely why this litigation has been so hard fought and has received such widespread attention and amicus participation. The expert state agency responsible for managing one project has represented to this Court that the “BiOp’s implementation will have *dramatic supply effects*” on the State Water Project, which “provides water to approximately 23 million people in California, about 60 percent of the State’s population.” Pl.-Intervenor-Appellee Dep’t of Water Resources’ Pet. for Rehearing En Banc (“DWR Pet.”) at 2 (emphasis added and quotations omitted). More than 450 California water agencies and other providers have represented that this “case is of paramount public importance,” because the BiOp has “resulted in a severe curtailment of water deliveries to more than 20 million California water users served by the Central Valley Project and State Water Project (perhaps the two largest and most important water projects in the United States).” Brief of Amici Curiae Ass’n of

California Water Agencies et al. in Supp. of Pets. for Rehearing En Banc, ECF No. 147-2, at 2-3 (citation and quotation marks omitted).<sup>1</sup>

2. There is no merit to Defendants' argument that the en banc court should not review the panel's holding with respect to the express requirement of the Endangered Species Act ("ESA") that a biological opinion rest on the best available scientific evidence. Fed. Def. Resp. at 2-4.

Defendants do not seriously contest that, in order to determine the flow rate at which pumping begins to pose an unwarranted risk to delta smelt, the *best* scientific data is normalized data. By contrast, the raw numbers used by FWS do

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<sup>1</sup> In any event, the RPAs have significantly affected the delivery of water even in this dry year. The RPAs limit the water projects' ability to redirect and store water during wet years. A California Department of Water Resources ("DWR") study calculated that in one wet year, the RPAs would "reduce CVP and SWP exports and require additional upstream releases totaling *1.1 MAF [million acre feet]* (a 27% increase in releases and a 70% decrease in exports in September and October)." 3 SER 817-18 (emphasis added); *see also* Appellees Kern County Water Agency et al.'s Pet. for Rehearing En Banc ("Kern Pet.") at 9-10 (citing AR 001869-001870, which estimates that, if 2009 was a wet year, the RPAs would result in water losses of 1.1 million acre feet, with an average annual loss over time of 440,000 acre feet). Water stored in wet years would be used for agriculture and human consumption in dry years like 2014. Thus, in 2013, DWR announced that although "November and December were relatively wet, ... between November 1 and February 28, restrictions to minimize harm to native fish prevented DWR from pumping more than 550,000 acre-feet of water from the Delta to store at San Luis Reservoir," which is "a critical summer supply pool for the SWP and the federal Central Valley Project." *See DWR Decreases Water Delivery Estimates* (Mar. 22, 2013), [http://www.water.ca.gov/news/newsreleases/2013/032213swp\\_allocations.pdf](http://www.water.ca.gov/news/newsreleases/2013/032213swp_allocations.pdf). To put that in perspective, in 2012, the entire San Diego region (which includes more than 3 million residents) used less than 550,000 acre-feet of water. *See* <http://www.watersmartsd.org/faq/how-much-water-does-san-diego-region-use>; <http://www.sdcwa.org/key-water-authority-facts>.



not account for the obvious confounding factor of population fluctuations year to year, which can be an order of magnitude or more. *See* Kern Pet. 5-8. Indeed, Federal Defendants expressly acknowledge that “normalizing the salvage take might ‘more accurate[ly] reflect[] the relative impact of OMR flows on the smelt population.’” Fed. Def. Resp. at 9 (citation omitted).

But Defendants argue that, although normalized data is the best scientific evidence, it is not the best *available* scientific evidence, *see* 16 U.S.C. § 1536(a)(2), because using normalized data “would require considerable additional research, which is not required.” Fed. Def. Resp. at 8. That assertion is factually false. The district court found, and Defendants do not dispute, that the U.S. Fish and Wildlife Service (“FWS”) *already had* the relevant normalized data, and in fact had used it elsewhere in the BiOp. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 890 (E.D. Cal. 2010); 4 ER 852. That is no surprise: FWS “normalizes” data merely by accounting for the fish population in a given year, which is data the agency already possesses.

Defendants next argue that the panel majority correctly excused it from using normalized data as a matter of law because “[d]etermining the exact impact of flows on the smelt is impossible because processes that influence salvage are highly complex and much is unknown.” Fed. Def. Resp. at 8; *see also* Op. at 59-61. But the statute still requires the agency to use the “best” data that is

“available,” even if imperfect. *See* Br. of Amici Curiae States of Nebraska et al. in Supp. Of Pet. for Rehearing (En Banc), ECF No. 130, at 10 (“The ESA prohibits [FWS] from disregarding available scientific evidence that is in some way better than the evidence it relies on; it cannot ignore available biological information or fail to develop projections relevant to an analysis of the effects of a proposed action”). FWS is not permitted to make the perfect the enemy of the good data available to it. The panel’s holding accordingly conflicts with decisions of this Court and other circuits that the ESA “prohibits [an agency] from disregarding available scientific evidence ... [e]ven if the available scientific and commercial data were quite inconclusive.” *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000); Kern Pet. at 12-14 (collecting cases).

Contrary to Defendants’ submission, ignoring the best evidence is not a “conservative” approach, much less one authorized by the ESA. *Contra* Fed. Def. Resp. at 8-9. Defendants assert that it is “reasonable” for agencies to “overestimat[e] known parameters” so as to “protect the maximum absolute number of individual smelt.” Fed. Def. Resp. at 8-9. That argument highlights FWS’s erroneous construction of the statute, which the panel majority embraced. FWS is under no obligation to protect the “maximum” number of delta smelt; its duty instead is to use the best data to produce alternatives that are both “reasonable” and “prudent.” Indeed, the ESA requires agencies to exercise their

judgment only *after* having looked at the best available evidence, precisely so that agency officials do not “zealously but unintelligently pursu[e] their environmental objectives.” *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

In any event, because FWS did not consider normalized data, it could not *know* whether it “overestimated known parameters.” Raw salvage data does not identify a more “conservative,” species-protective break point; it simply risks identifying *the wrong* break point. Normalized data might well show that the RPAs are insufficiently protective—for example, if there was an unusually low fish population when the data was collected. After the break point is accurately identified using the best available scientific data, but not before, FWS may make regulatory determinations to which it is entitled to deference under the ESA.<sup>2</sup>

3. Defendants’ attempt to evade further review of FWS’s failure to account for the effect of the RPAs on third parties is premised on mischaracterizations of the record and case law.

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<sup>2</sup> Defendants also make several erroneous assertions with respect to the fall X2 action. Fed. Def. Resp. at 11. For example, Defendants assert, without citation, that “[w]hen X2 moves, the smelt follow,” as if it is a truism. *Id.* Scientific evidence contravenes this statement. *See, e.g.*, Decl. of Frederick V. Feyrer In Supp. Of Defs.’ Opp’n to Pls.’ Mot. For Injunctive Relief, 1:09-CV-00407, Doc. 994, ¶ 8 (stating: “Sommer et al. (2011) also noted the year-round presence of delta smelt in an upstream freshwater region of the system in the general Cache Slough/Sacramento Deep Water Shipping Channel, suggesting that there may be some portion of the delta smelt population that probably does not utilize the low salinity zone”).

a. Defendants do not dispute that the panel held that an agency is precluded from considering an RPA's impact on third parties. Fed. Def. Resp. at 18-20. And they do not deny that the holding is important to the ESA's implementation in a broad range of contexts.

Instead, they assert that the panel's holding is unreviewable because "none of the plaintiffs made this argument in their merits briefs." Fed. Def. Resp. at 18. That is a *non sequitur*: this Court has made clear that en banc review of *sua sponte* panel rulings is perfectly appropriate—as it obviously must be. Otherwise, erroneous panel decisions would evade correction. *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001).

In any event, Appellees did raise this issue. They argued in their briefing (as well as in the administrative proceedings) that the RPAs were infeasible because they required drastic reductions in water deliveries to third parties. Appellees collected their citations in their Rule 28(j) letter addressing the Fourth Circuit's decision that gives rise to the circuit conflict, *Dow AgroSciences LLC v. National Marine Fisheries Services*, 707 F.3d 462, 464 (4th Cir. 2013) (hereafter "*Dow*"). See ECF No. 111 (attached hereto as App. A) (citing Appellee State Water Contractors' Principal and Resp. Br. ("SWC Br."), ECF No. 42, at 40-43, 46-47, 49); see also Answering Br. for Pl.-Intervenor-Appellee DWR, ECF No. 44, at 28-29 (explaining it had argued that the "fall X2 location target" was "likely to be

infeasible” because it “would have dramatic water supply effects”) (citations omitted); *id.* at 34 (noting the legislative history of the term “reasonable and prudent alternative” explains: “The value of the term ‘reasonable’ is that it permits members of the Endangered Species Committee to consider a wide range of factors. It is the intent of the Environment and Public Works Committee that the Cabinet-level panel established by S. 2899 in evaluating alternatives examine not only engineering ‘feasibility,’ but also environmental and *community impacts*, economic feasibility and, other relevant factors.”) (citing 24 Cong. Rec. 21590 (1978), emphasis added).<sup>3</sup>

b. Defendants do not deny that the Fourth Circuit’s decision in *Dow* conflicts with the panel’s holding that the agency need not even *explain* its conclusions regarding the non-jeopardy factors. *See* 707 F.3d at 475 (noting FWS did not “address[] the economic feasibility of its proposed” RPA and holding that “[t]his failure provides another basis for our conclusion that the BiOp was arbitrary and capricious”); *see also* Br. of Amici Curiae Farm Credit West et al. in Supp. of Appellees’ Pets. for Rehearing En Banc, ECF No. 134, at 11 (“the panel opinion

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<sup>3</sup> Defendant-Intervenors erroneously suggest that Appellees agree that third party effects are irrelevant by quoting a passage from the district court’s opinion. *See* NRDC Resp. at 22. In fact, that language argued that FWS was not required to “*balance* the benefit to the species against the economic and technical burden on the industry.” SWC Br. at 47 (quoting 760 F. Supp. 2d at 955) (emphasis added). NRDC omits that Appellees made clear that FWS was required to “provide a rational explanation of how the RPA is consistent with” the non-jeopardy factors, *id.* at 49, including in light of “water supply needs” for third parties, *id.* at 48.

conflicts with ... [*Dow*] regarding whether and how FWS must consider economic impacts ... when determining whether an alternative is ‘feasible.’”). Instead, they assert that there is no conflict on the separate question of whether the alternatives must account for effects on third parties. *See* Fed. Def. Resp. at 20; NRDC Resp. at 19-20. That is not correct, as Federal Defendants themselves previously acknowledged to this Court. In their own Rule 28(j) letter addressing *Dow*, Federal Defendants forthrightly acknowledged *Dow*’s holding “that economic feasibility should be based on costs to end users (the public at large).” ECF No. 110 (attached hereto as App. B). As a consequence, Federal Defendants acknowledged that *Dow* “conflicts with the district court’s decision” in *In re Consolidated Salmonid Cases*, 795 F. Supp. 2d 802 (E.D. Cal. 2011), which “held that economic feasibility concerns were limited to the costs to the action agency or applicant.” App. B., at 2. The panel in this case adopted the same rule as the district court in the *Consolidated Salmonid Cases*.

Federal Defendants now reverse course without explanation, adopting a new interpretation of the Fourth Circuit’s decision. They point out that the plaintiffs in *Dow* were pesticide companies that needed to apply for a permit from the U.S. Environmental Protection Agency. All the Fourth Circuit held, Defendants *now* say, is that an agency must explain in its BiOp why “an RPA measure was

economically feasible for an *applicant*, not the public.” Fed. Def. Resp. at 20 (emphasis in original); *see also* NRDC Resp. at 19-20.

Not even the panel majority in this case adopted that reading, *see* Op. at 114 n.42, no doubt because nothing in the opinion so limits the Fourth Circuit’s holding. Indeed, in describing the economic consequences of the RPA in that case, the Fourth Circuit never even mentions the applicants. *See* 707 F.3d at 473-75. Moreover, the buffers at issue imposed legal obligations and costs on *farmers* who used the pesticides, not on the applicant pesticide manufacturers. *See id.* at 466. Nor have Defendants offered any explanation why the statute or regulations would consider whether an alternative is “reasonable” and “prudent” in light of the *indirect* costs it imposes on an applicant, while deeming irrelevant as a matter of law the much more damaging *direct* consequences for the farmers or the public at large. *See* Br. of Amici Curiae National Hydropower Association et al. in Supp. of Pet. for Rehearing En Banc, ECF No. 139, at 11-14 (discussing statutory interpretation of “reasonable and prudent” requirement).

### CONCLUSION

For the foregoing reasons, the Court should grant en banc review of the panel’s March 13, 2014 decision regarding the delta smelt BiOp.

Respectfully submitted,

DATED: June 23, 2014

**GOLDSTEIN & RUSSELL, P.C.**

By: /s/ Thomas C. Goldstein

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DATED: June 23, 2014

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# Appendix A



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April 10, 2013

**VIA OVERNIGHT COURIER**

Molly Dwyer, Clerk of the County  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

Re: San Luis & Delta Mendota Water Authority v. Salazar, No. 11-15871; Response to Supplemental Authorities Letter from DWR (March 28, 2013, ECF No. 108) Under Fed. R. App. P. 28(j) Regarding *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013) (“*Dow*”)

Dear Ms. Dwyer:

Appellee State Water Contractors (“SWC”) submits this response to the California Department of Water Resources’ March 28, 2013 letter regarding citation to *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013) (“*Dow*”).

*Dow* is important to this Court’s review of the arguments related to 50 CFR section 402.02. In *Dow*, the Fourth Circuit rejected the Fisheries Service’s interpretation of the regulation, holding that a reasonable and prudent alternative (“RPA”) must be more than simply “economically possible” and that the feasibility of RPAs must be justified, particularly when “potential economic consequences” are apparent. *Dow* shows that the conservation purposes of the Endangered Species Act do not preclude such analysis. See *id.* (harmonizing *TVA v. Hill*, 437 U.S. 153 (1978) and 50 CFR §402.02). SWC agrees with Federal Defendants that *Dow* holds “that economic feasibility should be based on costs to end users (the public at large)...” (ECF No. 110), because the Fourth Circuit found that an RPA precluding certain industry activities “readily calls for some analysis of its economic and technological feasibility.” Accordingly, the appellate court vacated the biological opinion (“BiOp”) because the Fisheries Service failed to properly analyze and explain its choices.

Here, the district court concluded that FWS failed to articulate any connection between the facts in the record and the conclusion that the Delta Smelt BiOp RPA met the non-jeopardy RPA elements of the regulation. 1:ER:218. SWC’s briefing has supported the court’s



**BEST BEST & KRIEGER**  
ATTORNEYS AT LAW

Molly Dwyer, Clerk of the Court  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
April 10, 2013  
Page 2

conclusion and maintained the position that economic feasibility as to end users must be addressed in undertaking the required Section 402.02 analysis. SWCBrief:46 (noting water user impacts “raised serious concerns about whether [the RPA] was ... economically feasible”). Thus, *Dow*’s holdings, including those related to economic feasibility as to end users, are pertinent not only to DWR’s brief, but also to SWC’s brief. *See* SWCBrief:40-43, 49 (relevant to *Dow*’s holding regarding explaining and providing analysis of RPA elements); SWCBrief:47 (relevant to *Dow*’s harmonizing of *TVA* and Section 402.02).

Therefore, this Court should consider *Dow*’s holding when reviewing FWS’s failure to provide support for the Delta Smelt BiOp RPA’s non-jeopardy elements.

Sincerely,

s/ Gregory K. Wilkinson  
Gregory K. Wilkinson  
of BEST BEST & KRIEGER LLP

GKW:djg

9th Circuit Case Number(s) 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, 11-16662

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**Case Name:** San Luis & Delta-Mendota Water, et al v. Natural Resources Defense Coun, et al  
**Case Number:** [11-15871](#)  
**Document(s):** [Document\(s\)](#)

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Filed (ECF) Appellee State Water Contractors in 11-15871, Appellant State Water Contractors in 11-16617, - State Water Contractors in 11-16621, 11-16623, 11-16624, 11-16660 citation of supplemental authorities. Date of service: 04/10/2013. [8585630] [11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, 11-16662] (GKW)

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# Appendix B

**U.S. Department of Justice**

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April 5, 2013

Ms. Molly Dwyer  
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95 Seventh Street  
San Francisco, CA 94103-1526

Re: *San Luis & Delta Mendota Water Authority v. Salazar*, No-11-15871, argued on September 10, 2012, before Circuit Judges Rawlinson, Bybee, and Arnold (8th Cir., by designation)

Dear Ms. Dwyer:

Appellants-Federal Defendants submit this response to the letter filed with the Court on May 28, 2013, by Appellee California Department of Water Resources (“DWR”) under Federal Rule of Appellate Procedure 28(j). DWR’s letter cites and attaches the Fourth Circuit’s decision in *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013) (“*Dow*”). In *Dow*, the Fourth Circuit held that because the definition of “reasonable and prudent alternative” (“RPA”) found at 50 C.F.R. § 402.02 requires that an RPA be “economically \* \* \* feasible,” the biological opinion at issue had to expressly address this issue. *Dow*, 707 F.3d at 474-75.

The Fourth Circuit’s decision errs in not addressing the deference due Fish and Wildlife’s interpretation of 50 C.F.R. § 402.02, written by FWS and the National Marine Fisheries Service, that a biological opinion does not require an express finding of economic feasibility where neither an action agency nor an applicant has raised the issue in consultation process. As the Federal Defendants pointed out in their opening brief (pp. 67-68), the Supreme Court has held that an agency’s interpretation of its own regulation is controlling unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Supreme Court reaffirmed this principle a few weeks ago in *Decker v. Northwest Environmental Defense Center*, 2013 WL 1131708, 11 (2013). An agency is entitled to deference even if its interpretation “comes \* \* \* in the form of a legal brief.” *Auer*, 519 U.S. at 462. The Fourth Circuit’s never explains why NMFS’s interpretation did not receive deference..

Additionally, *Dow* seems to hold that economic feasibility should be based on costs to end users (the public at large), while the district court held that economic feasibility concerns were limited to the costs to the action agency or applicant. See Opening Brief at 64 & n. 1. No party has appealed that ruling by the district court, and *Dow*'s broader holding conflicts with the district court's decision.

In short, *Dow* is unhelpful to the panel that will decide this case.

Very truly yours,

/s/ Robert H. Oakley  
Robert H. Oakley  
United States Department of Justice  
Environment and Natural Resources Division  
P.O. Box. 23795  
Washington D.C. 220026-3795  
(202) 514-4081  
robert.oakley@usdoj.gov

cc: counsel of record by ECF system

**From:** ca9\_ecfnoticing@ca9.uscourts.gov

**Sent:** Friday, April 05, 2013 1:51 PM

**To:** Taylor, Amy R.

**Subject:** 11-15871 San Luis & Delta-Mendota Water, et al v. Natural Resources Defense Coun, et al "File Correspondence to Court"

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**United States Court of Appeals for the Ninth Circuit**

**Notice of Docket Activity**

The following transaction was entered on 04/05/2013 at 1:50:41 PM PDT and filed on 04/05/2013

**Case Name:** San Luis & Delta-Mendota Water, et al v. Natural Resources Defense Coun, et al

**Case Number:** [11-15871](#)

**Document(s):** [Document\(s\)](#)

**Docket Text:**

Filed (ECF) - James E. Caponiti, Michael L. Connor, DHS, FEMA, William Craig Fugate, Donald Glaser, Rowan Gould, Ray LaHood, Ren Lohofenor, Maritime Administration, J. William McDonald, Jeanette A. Myers, Janet A. Napolitano, Kenneth Lee Salazar, USDOT, USFWS, DOJ, United States Army Corps of Engineers, United States Bureau of Reclamation, United States Department of the Interior, EPA and Robert Van Antwerp in 11-15871, Appellees James E. Caponiti, Michael L. Connor, DHS, FEMA, William Craig Fugate, Donald Glaser, Rowan Gould, Ray LaHood, Ren Lohofenor, Maritime Administration, J. William McDonald, Jeanette A. Myers, Janet A. Napolitano, Kenneth Lee Salazar, USDOT, USFWS, DOJ, United States Army Corps of Engineers, United States Bureau of Reclamation, United States Department of the Interior, EPA and Robert Van Antwerp in 11-16617, 11-16621, Appellants James E. Caponiti, Michael L. Connor, DHS, FEMA, William Craig Fugate, Donald Glaser, Rowan Gould, Ray LaHood, Ren Lohofenor, Maritime Administration, J. William McDonald, Jeanette A. Myers, Janet A. Napolitano, Kenneth Lee Salazar, USDOT, USFWS, DOJ, United States Army Corps of Engineers, United States Bureau of Reclamation, United States Department of the Interior, EPA and Robert Van Antwerp in 11-16623, 11-16624, Appellees Rowan Gould, Kenneth Lee Salazar, USFWS and DOJ in 11-16660, Appellees Rowan Gould, J. William McDonald, Kenneth Lee Salazar, USFWS and United States Bureau of Reclamation in 11-16662 Correspondence: Response to 28(j) letter filed by Appellee-California Department of Water Resources. Date of service: 04/05/2013 [8579101] [11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, 11-16662] (RHO)

**Notice will be electronically mailed to:**

Mr. Robert Harris Oakley, Attorney  
Mr. Srinath Jay Govindan  
Mr. Michael M. Edson, Deputy Attorney General  
Mr. George Matthew Torgun, Attorney  
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Brenda Washington Davis, Attorney  
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Steve Sims  
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The following document(s) are associated with this transaction:

**Document Description:** Main Document

**Original Filename:** San Luis 28(j) response to DWR.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1106763461 [Date=04/05/2013] [FileNumber=8579101-0]

[30b3ee3098f898c10c6d5ffbe30a93a221457dd7031cc11104b4a3dd0f34e7cf23a1d87ce459654c93d68b2f21019a4f91699153b7ecfd7c110656d44deaec4b]]

**From:** ca9\_ecfnoticing@ca9.uscourts.gov

**Sent:** Friday, April 05, 2013 2:29 PM

**To:** Taylor, Amy R.

**Subject:** Re-send: 11-15871 San Luis & Delta-Mendota Water, et al v. Natural Resources Defense Coun, et al "File a Citation of Supplemental Authorities (FRAP 28(j) Letter)"

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**United States Court of Appeals for the Ninth Circuit**

**Amended 04/05/2013 14:28:58: Notice of Docket Activity**

The following transaction was entered on 04/05/2013 at 1:50:41 PM PDT and filed on 04/05/2013

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**Case Number:** [11-15871](#)

**Document(s):** [Document\(s\)](#)

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# **ATTACHMENT 2**

## Obegi, Doug

---

**From:** Poole, Kate  
**Sent:** Friday, May 30, 2014 9:56 AM  
**To:** Obegi, Doug  
**Cc:** Schmitt, Monty  
**Subject:** FW: FW: Water not diverted last event

I think Shana meant this for us, not Monty.

**From:** KAPLAN, SHANA [<mailto:skaplan@usbr.gov>]  
**Sent:** Friday, May 30, 2014 9:48 AM  
**To:** Schmitt, Monty  
**Cc:** Poole, Kate  
**Subject:** Fwd: FW: Water not diverted last event

Hi Monty,

David asked me to follow up and provide you with some information that he committed to back at an April 17th meeting. I believe you inquired about ESA impacts during the Feb. 10-18 timeframe.

Below is some information from an email exchange we had with some of our contractors. I wouldn't focus on all of the details contained within but more on the fact that we agreed that about 10,000 af was related to OMR and the rest was to others.

I hope this information is helpful.  
Have a nice weekend.

Shana

----- Forwarded message -----

**From:** Dan Nelson <[dan.nelson@sldmwa.org](mailto:dan.nelson@sldmwa.org)>  
**Date:** Sat, Feb 22, 2014 at 8:00 PM  
**Subject:** RE: FW: Water not diverted last event  
**To:** "Murillo, David" <[dmurillo@usbr.gov](mailto:dmurillo@usbr.gov)>  
**Cc:** "[parroyave@usbr.gov](mailto:parroyave@usbr.gov)" <[parroyave@usbr.gov](mailto:parroyave@usbr.gov)>, "[jphillips@usbr.gov](mailto:jphillips@usbr.gov)" <[jphillips@usbr.gov](mailto:jphillips@usbr.gov)>, "[tbermingham@westlandswater.org](mailto:tbermingham@westlandswater.org)" <[tbermingham@westlandswater.org](mailto:tbermingham@westlandswater.org)>

David,

My understanding is that the 10,000 af loss reflects only the impact due to OMR.

What you are probably hearing about are concerns about the water that was foregone due to cumulative restrictions by OMR, D1641, or outflow standards.

Records indicate that during the period of February 10 - 18th that the total exports at Banks was 46,981 af, and Jones PP was 38,579 af. Had the pumps been pumping at their capacity during this period (note that during this period the water was available to support capacity pumping), Banks could have pumped 106,826 af during this period and Jones could have

pumped 73,563 af. This adds up to as much as 95,000 af from Feb 10th to Feb 18th of foregone pumping. Please let us know if we've miscalculated.

If these nu

m

bers are correct and given the crisis that we're in, it seems reasonable to note that we had the opportunity to move up to an additional 95,000 af of water to communities south of the delta where we have over 3 million acres without a water supply. . . and we apparently chose not to. This water could have been used to keep close to 30,000 acres of trees alive or could have converted close to 50,000 acres from dry fallowed land to crops, while providing work to the unemployed. This would have assisted in the human, health and safety impacts that all of our rural communities will be experiencing this summer. I frankly don't think that the 95,000 af, or at least a good portion of it was more useful as outflow.

Sorry to preach to the choir here David but apparently we will be having another opportunity this next week. Seems appropriate to start raising the issue about how we're going to operate when the inflows increase again. All things considered, we think that its more than reasonable to initiate discussions with the state and federal regulatory agencies on both a technical and policy level.

Thank-you for your tireless efforts David,

Dan

--

Shana Kaplan  
Chief of Staff  
Mid-Pacific Region  
U.S. Bureau of Reclamation  
(916) 978-5016

# **ATTACHMENT 3**



# Temporary Urgency Changes During California's Drought

May 2014



Doug Obegi, Natural Resources Defense Council

# California Drought

- 2014 will be a very tough year for farmers, some cities and rural communities, native fisheries and migratory birds
- The water management decisions we make during droughts last decades:
  - Winter run Chinook salmon were listed under the ESA in 1989/1990, and listed as endangered in 1994
  - Winder *et al* 2011: water management during drought facilitates invasive species in the Bay Delta

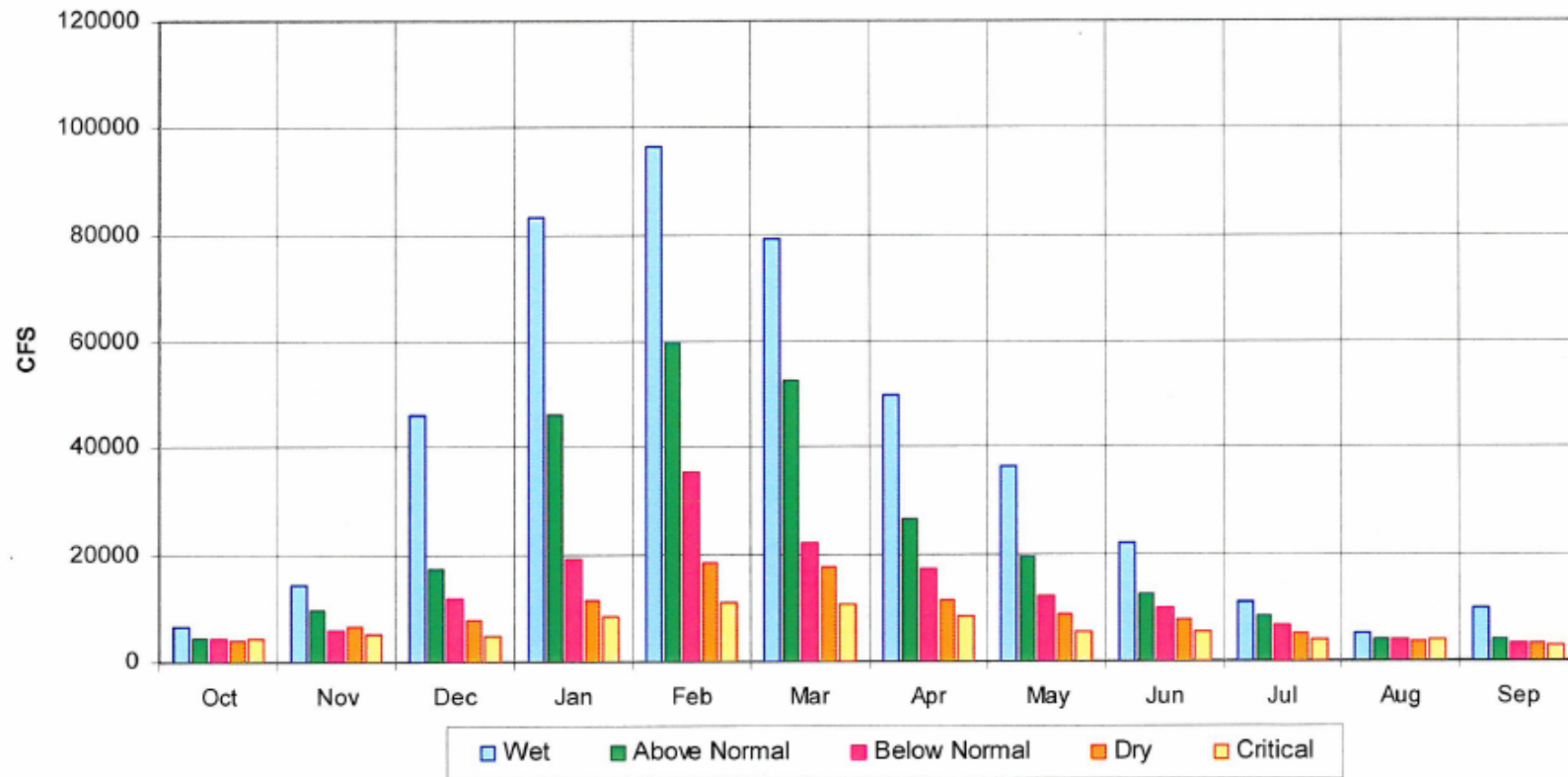
# Drought and Delta Outflow

- Under Decision 1641 and the biological opinions, environmental protections for the Bay-Delta are already significantly weaker in dry years
- For instance, D-1641 requires significantly lower Delta outflow during dry and drought years than wetter years



# Average Delta outflows under D-1641

**EXHIBIT SVWU-4**  
**D-1641 DELTA OUTFLOWS**  
 AVERAGE MONTHLY BY WATER-YEAR TYPE FOR 1922-2003



Source: Sacramento Valley Water Users / MBK Engineers 2010

# Why NRDC did not Protest the January 31, 2014 Order

- NRDC did not object because this Order relaxed delta outflow requirements in order to conserve upstream storage for both environmental and water supply purposes
  - *But what happened to the conserved water?*

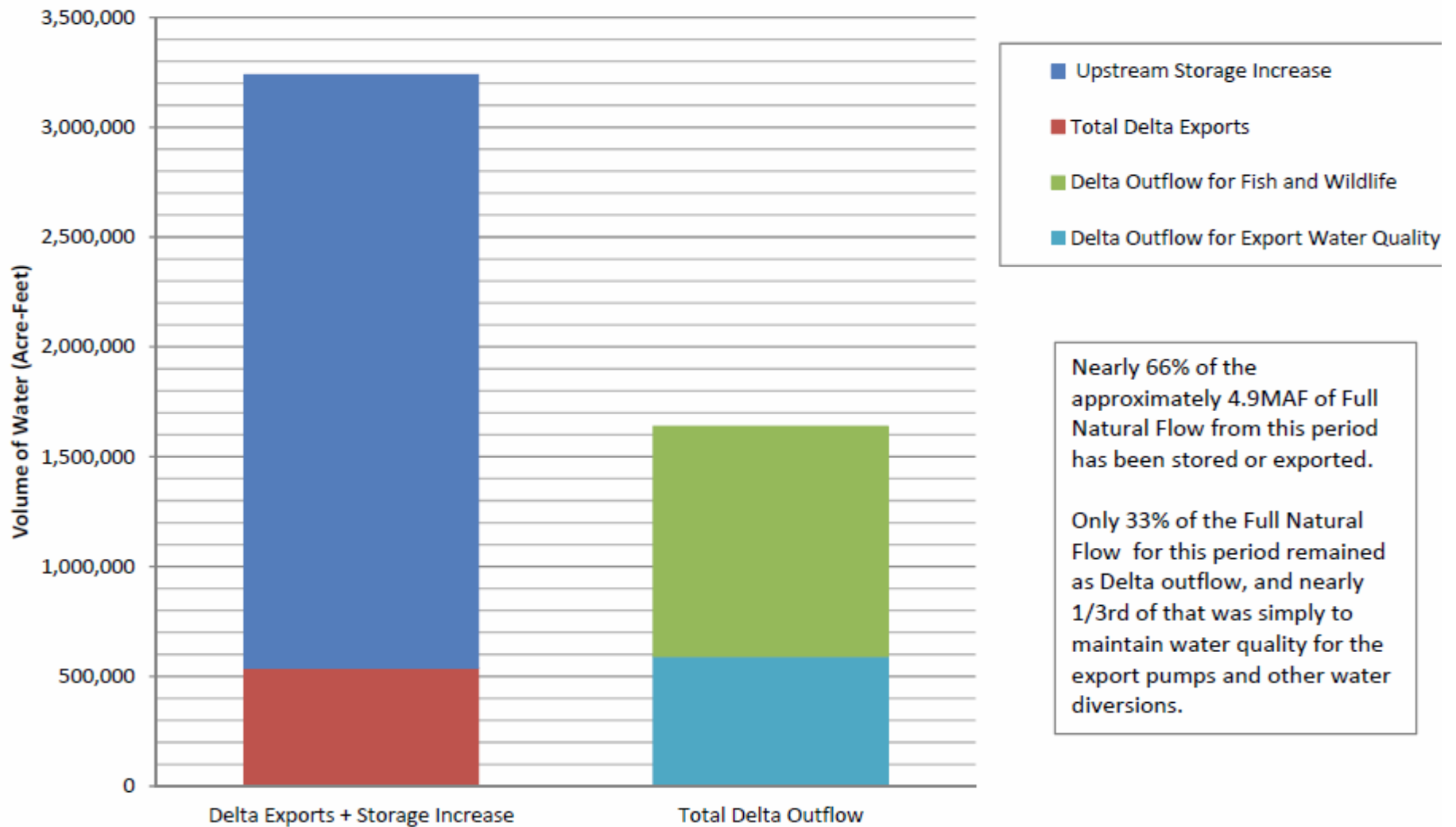
# Why NRDC protested the March 18, 2014 Order

- Order permitted increased exports without meeting minimum outflow requirements
- **No** benefits to upstream reservoir storage from this Order
- Significantly reduces Delta outflow
- Connected to waiver of minimum ESA pumping restrictions to protect migrating winter run Chinook salmon

# Why NRDC Protested the April 11, 2014 Order

- Reduced San Joaquin River inflows which are critical to protecting migrating salmon and steelhead
- Order results in **reduced** Delta exports (~42,000 acre feet)
- Connected with waiver of ESA pumping restrictions for steelhead
- No analysis of impacts to fall run Chinook salmon

## Preliminary Water Balance for February 1 to April 15, 2014 in the Bay-Delta Watershed



Nearly 66% of the approximately 4.9MAF of Full Natural Flow from this period has been stored or exported.

Only 33% of the Full Natural Flow for this period remained as Delta outflow, and nearly 1/3rd of that was simply to maintain water quality for the export pumps and other water diversions.

# Preliminary Water Balance for Feb 1-April 15

- Only ~33% of the 4.9 MAF of unimpaired flow (Full Natural Flow) during this period remained as Delta outflow.

## Trends in Destinations and Uses

Period	Average Annual Total (MAF)	Outflow	in-Delta	Exports	Delta Watershed
1930 to 1949	25.80	81%	5%	0%	14%
1950 to 1969	31.71	67%	4%	4%	24%
1970 to 1989	34.34	51%	5%	15%	29%
1990 to 2005	32.85	48%	4%	17%	31%

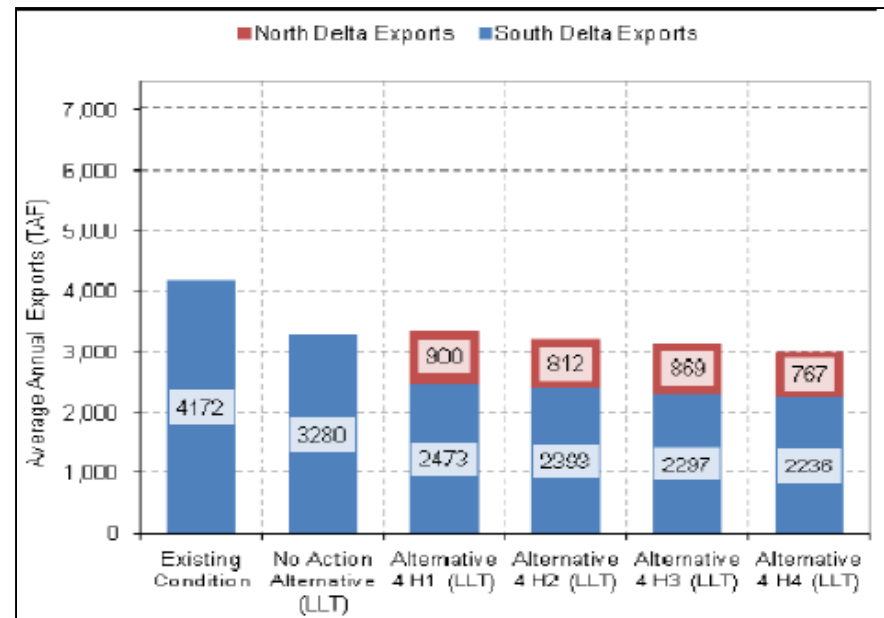
Source: Delta Stewardship Council 2012

# Impacts of Drought and Water Management on Native Fisheries

- Endangered Winter run Chinook salmon:
  - very low survival for juvenile fish migrating in 2014
  - could lose half or as much as the entire year class in 2015 (depends on summer/fall water temperatures)
- Fall run Chinook salmon –
  - Anticipate significant losses for fish spawning this fall
  - Likely very low survival of wild spawned fish this year
- Invasive species? (Winder 2011)

# What does this mean for BDCP?

- BDCP proposes *lower* exports in dry and critical years. But will the rules be followed?
- Will water quality for ag and M&I customers in the Delta be maintained under BDCP?





# Protecting the Bay-Delta Protects Fishing Jobs and Delta Farmers

California's salmon fishery was closed in 2008 and 2009, for the first time in the State's history. The State of California estimated that the closure resulted in thousands of lost jobs and hundreds of millions of dollars of lost income each year.

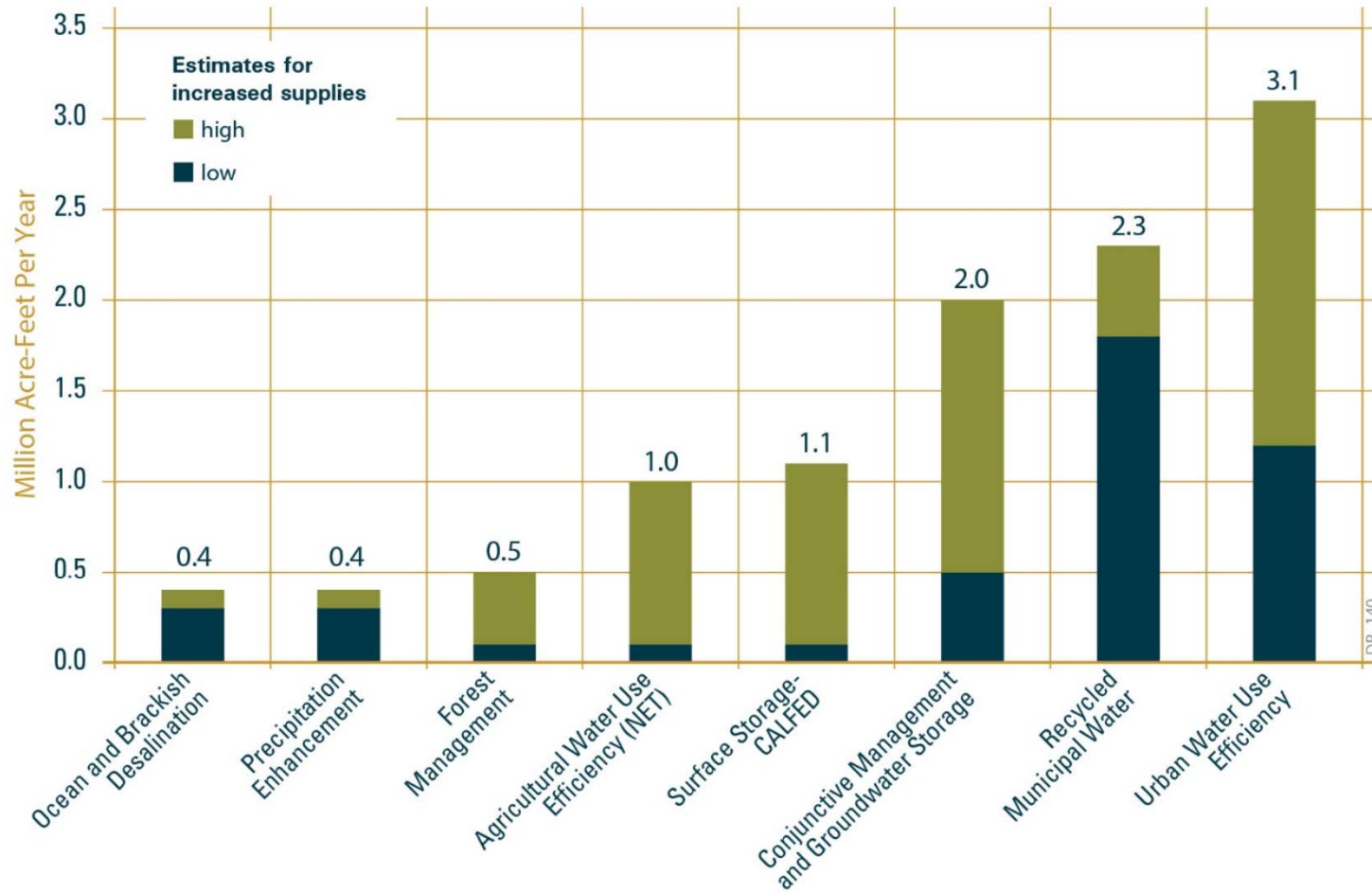


# Conclusion

- The SWRCB should overturn the order on Vernalis flows in April and May to protect the environment and water supplies.
- The SWRCB should complete the update of the Bay-Delta Water Quality Control Plan.
- The SWRCB should revise procedures regarding Temporary Urgency Change Petitions.
- We all need to reduce reliance on water supplies from the Delta watershed.

# California's Water Future

## California's Wealth of New Water Supplies



Source: Delta Stewardship Council 2012

# **ATTACHMENT 4**

# **Sacramento River Temperature Task Group Meeting**

**August 28, 2014**

**1:00 pm**

**Conference Line: 877-718-6527**

**Pass code: 1954134**

## **Agenda**

1. Introductions
2. Fishery update
3. Hydrology & Operations update
  - a. 90% forecasts \*\*\*
  - b. Sacramento Temperature Summary Table \*\*\*
4. Discussion of recent temperature model runs
  - a. Temperature studies packet \*\*\*
5. Next meeting

\*\*\*handouts

August 90%

**Storages**

**Federal End of the Month Storage/Elevation (TAF/Feet)**

		Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	
Trinity		865	707	642	585	556	558	564	599	667	732	751	722	537
	Elev.	2218	2209	2199	2195	2195	2196	2202	2212	2222	2224	2220	2191	
Whiskeytown		238	238	230	230	225	206	206	206	238	238	238	238	
	Elev.	1209	1207	1207	1205	1199	1199	1199	1199	1209	1209	1209	1209	
Shasta		1575	1287	1122	1066	1105	1176	1297	1498	1823	1971	1810	1416	1052
	Elev.	910	896	891	895	901	910	925	947	956	946	919	890	
Folsom		406	361	317	270	265	270	284	344	467	609	691	673	580
	Elev.	397	390	382	381	382	384	394	412	429	438	437	426	
New Melones		626	523	439	419	424	429	435	446	457	435	389	316	215
	Elev.	862	844	839	840	842	843	846	848	843	832	813	781	
San Luis		289	175	133	71	90	217	382	427	516	480	391	337	177
	Elev.	369	372	383	407	438	471	490	505	501	494	480	460	
<b>Total</b>		3291	2884	2641	2665	2856	3167	3519	4136	4464	4269	3702	2799	

**State End of the Month Reservoir Storage (TAF)**

Oroville		1252	1044	988	910	941	992	1070	1225	1454	1669	1599	1427	1101
	Elev.	671	662	650	655	663	675	696	725	749	742	722	679	
San Luis		168	124	186	326	490	641	803	970	1052	1038	1051	951	895
<b>Total San Luis (TAF)</b>		457	299	319	397	580	857	1184	1397	1567	1518	1442	1288	1071

**Monthly River Releases (TAF/cfs)**

Trinity	TAF	28	27	23	18	18	18	17	18	36	92	47	28
	cfs	450	450	373	300	300	300	300	300	600	1,498	783	450
Clear Creek	TAF	7	9	12	12	12	12	11	12	11	12	9	7
	cfs	120	150	200	200	200	200	200	200	190	190	150	120
Sacramento	TAF	507	298	283	208	200	200	180	200	304	523	654	619
	cfs	8250	5007	4600	3500	3250	3250	3250	3250	5114	8500	11000	10071
American	TAF	97	85	86	47	50	49	44	49	59	92	89	130
	cfs	1575	1430	1400	796	805	800	800	800	1000	1500	1500	2117
Stanislaus	TAF	16	14	35	12	12	13	12	16	34	33	21	18
	cfs	267	240	577	200	200	213	214	268	563	531	350	300
Feather	TAF	123	74	61	48	49	49	44	49	48	86	119	215
	cfs	2000	1250	1000	800	800	800	800	800	800	1400	2000	3500

**Trinity Diversions (TAF)**

	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul
Carr PP	129	36	41	24	1	8	3	1	37	35	37	160
Spring Crk. PP	120	34	30	19	12	3	3	8	8	30	30	152

**Delta Summary (TAF)**

	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul
Tracy	38	45	45	46	152	190	58	160	45	63	99	45
USBR Banks	0	0	0	0	0	0	0	0	0	0	28	0
Contra Costa	5.6	6.4	7	8.4	9.2	9.2	7	7	6.4	6.4	6.4	4.9
<b>Total USBR</b>	44	51	52	54	161	199	65	167	51	70	133	50
<b>State Export</b>	60	110	189	200	193	190	211	118	45	29	68	58
<b>Total Export</b>	104	161	241	254	354	389	276	285	96	99	201	108
<b>COA Balance</b>	-282	-191	-191	-91	-55	-55	0	0	0	0	0	-59

Old/Middle River Std.												
Old/Middle R. calc.	-1,724	-2,526	-3,005	-3,399	-4,541	-4,930	-3,786	-3,520	-1,181	-1,440	-2,805	-1,763

Computed DOI	2993	3009	3595	3496	3497	6279	7096	8313	7194	6312	4236	3091
Excess Outflow	0	0	602	0	0	1773	0	1204	1311	2310	0	0
% Export/Inflow	19%	32%	42%	49%	62%	53%	43%	35%	15%	16%	31%	19%
% Export/Inflow std.	65%	65%	65%	65%	65%	65%	45%	35%	35%	35%	35%	65%

**Hydrology**

	Trinity	Shasta	Folsom	New Melones
Water Year Inflow (TAF)	366	2,636	972	322
Year to Date + Forecasted % of mean	30%	48%	36%	30%

CVP actual operations do not follow any forecasted operation or outlook; actual operations are based on real-time conditions.

CVP operational forecasts or outlooks represent general system-wide dynamics and do not necessarily address specific watershed/tributary details.

CVP releases or export values represent monthly averages.

CVP Operations are updated monthly as new hydrology information is made available December through May.

8/8/2014

Temperature and Release Summary for Shasta and Trinity - July 2104

(Updated twice a week November through April)

Day	Sacramento River Water Temperatures in Degrees F Collected from CDEC (California Data Exchange Center) except for TCD, SPP and Control Point												Mean Daily Release in CFS			Mean Daily Air Temp Degrees F			
	TCD Wt. Avg.	SHD minus TCD (Diff)	Shd	SPP Wt. Avg	Kwk	Control Point 3/1 to 3/27 Bsf	Jlf	Bnd	Rdb	Lws	Control Point 3/28 to 7/31 Ccr	Igo	Shasta Generation EI 815	Spring Crk Powerplant Release	Keswick Total Release	RDD	BSF	RDB	LWS
Jun	54.7		52.5	54.0	54.5	56.8	58.8	59.3	62.1	52.2	55.9	55.4	7,888	1,192	8,972	79.2	76.5	77.4	68.7
Jul																			
1	53.3	(2.7)	50.6	56.3	? 54.3	57.6	59.5	60.2	63.8	52.9	55.9	57.8	7,145	2,501	9,244	87.5	83.2	83.0	78.8
2	53.5	(2.9)	50.6	56.3	54.3	57.2	59.1	59.7	63.0	52.4	55.8	58.0	5,733	3,109	9,251	84.0	81.1	80.4	78.0
3	53.2	(2.9)	50.3	56.5	54.7	57.1	59.2	59.8	63.0	52.6	56.0	58.1	6,195	3,174	9,248	84.5	81.0	80.2	76.2
4	53.3	(2.9)	50.4	56.6	54.4	57.4	59.3	60.0	63.0	52.7	55.8	58.2	6,856	2,906	9,252	84.5	81.1	80.3	75.2
5	52.8	(2.6)	50.2	56.6	54.5	57.0	58.8	59.3	62.4	52.6	55.8	57.8	6,216	3,185	9,243	80.5	77.2	77.2	75.4
6	52.8	(2.6)	50.2	56.7	54.4	57.0	58.8	59.4	62.2	52.4	55.7	57.7	6,296	3,096	9,242	84.5	80.3	81.5	76.4
7	53.1	(2.9)	50.2	56.7	54.1	57.0	58.7	59.3	62.1	52.1	55.5	58.0	6,238	3,172	9,263	86.5	79.2	80.1	80.0
8	53.5	(3.3)	50.2	56.8	54.2	57.0	57.8	58.5	61.3	51.1	55.1	57.1	6,200	2,961	9,253	86.0	79.1	82.5	77.8
9	52.7	(2.3)	50.4	56.8	53.9	56.8	58.3	58.8	61.3	51.9	55.3	58.4	6,133	2,970	9,217	90.0	83.5	80.7	80.6
10	52.1	(1.5)	50.6	56.8	54.0	56.7	58.8	59.4	62.2	52.0	55.4	58.1	7,072	2,329	9,077	83.0	79.6	78.8	77.9
11	52.1	(1.4)	50.7	56.8	54.0	56.9	58.5	59.2	62.6	52.6	55.2	58.3	6,820	2,523	9,204	82.0	78.6	77.8	76.5
12	52.1	(1.4)	50.7	56.8	53.8	56.7	58.4	59.0	62.2	52.3	55.2	58.4	6,887	2,303	9,285	84.0	80.4	79.5	78.0
13	52.6	(1.1)	51.5	56.8	54.0	56.8	58.7	59.3	62.7	52.0	55.3	58.6	7,034	2,308	9,238	87.5	82.5	80.8	79.1
14	52.3	(1.5)	50.8	56.8	54.3	57.0	59.0	59.6	63.0	52.2	55.7	58.4	7,315	2,266	9,359	90.5	86.5	87.7	79.0
15	52.3	(1.6)	50.7	56.8	53.9	56.8	58.4	59.1	62.7	52.4	55.1	57.7	6,782	2,285	9,221	85.0	81.6	81.3	80.9
16	52.7	(1.6)	51.1	56.8	53.8	56.6	58.0	58.7	61.5	52.3	54.9	58.1	7,056	2,355	9,193	84.0	79.5	78.3	80.1
17	52.5	(1.5)	51.0	56.8	54.0	56.6	58.2	58.8	62.1	53.0	55.2	58.5	7,045	2,382	9,230	81.0	78.7	76.6	81.2
18	52.8	(1.5)	51.3	56.9	54.1	57.1	58.7	59.3	62.6	53.1	55.4	58.8	6,717	2,460	9,207	82.0	79.0	78.4	80.0
19	53.4	(2.0)	? 51.4	57.0	54.4	57.2	59.0	59.6	62.8	53.3	55.7	58.9	6,756	2,420	9,277	83.5	79.9	78.9	81.7
20	53.5	(2.1)	51.4	57.0	54.8	57.5	59.5	60.1	63.3	52.5	56.2	59.0	6,709	2,402	9,275	84.5	79.6	78.9	78.3
21	52.9	(1.8)	51.1	57.1	54.8	57.5	58.8	59.5	62.7	52.4	55.8	58.2	7,299	2,270	9,300	77.0	73.2	72.8	70.1
22	52.3	(1.6)	50.7	57.2	54.2	57.0	58.1	58.6	61.6	52.1	55.5	58.2	6,997	2,238	9,039	77.5	74.8	74.7	69.6
23	52.7	(1.8)	50.9	57.2	53.8	56.9	58.4	59.0	62.1	52.3	55.2	58.4	7,196	2,256	9,250	75.0	74.1	73.0	69.7
24	52.5	(1.4)	51.1	57.2	54.1	56.4	58.1	58.6	61.6	52.2	55.4	58.4	6,674	2,610	9,297	80.0	76.5	78.4	70.1
25	52.7	(1.4)	51.3	57.2	54.0	56.9	58.5	59.0	61.8	52.4	55.4	58.5	6,967	2,411	9,307	87.5	79.5	79.6	73.1
26	52.9	(1.4)	51.5	57.1	54.1	56.7	58.3	58.8	62.0	52.1	55.4	58.6	7,132	2,419	9,285	84.5	80.1	81.7	75.6
27	53.1	(1.8)	51.3	57.1	54.3	56.9	58.0	58.6	61.5	51.7	55.4	58.1	6,729	2,405	9,277	88.5	83.0	82.6	75.8
28	53.3	(1.4)	51.9	57.0	54.1	57.0	58.6	59.1	61.5	51.9	55.6	58.6	7,558	2,160	9,246	85.5	80.7	81.5	78.0
29	53.7	(1.9)	51.8	57.0	54.6	57.3	58.9	59.5	62.2	52.3	55.9	58.7	6,480	2,419	8,758	85.5	81.4	81.8	79.2
30	52.8	(1.4)	51.4	57.0	54.8	57.6	59.5	60.1	62.9	52.3	56.2	58.6	6,391	2,079	8,902	88.0	83.3	84.0	77.7
31	53.2	(1.8)	51.4	56.9	54.6	57.8	59.7	60.3	63.2	52.4	56.3	59.0	6,176	2,276	8,838	90.0	85.0	84.7	79.8
Avg	52.9		50.9	56.9	54.2	57.0	58.7	59.3	62.4	52.3	55.6	58.3	6,736	2,537	9,203	84.3	80.1	79.9	77.1
Tot cfs													208,804	78,650	285,278				
Tot af													414,163	156,002	565,849				

# = Station out of service    ^ - estimated (7 hours or less available)    ? = Avg. includes estimated data  
 ! = 17 hours or less of readings    & = 18 to 23 hours of reading    ND = No hourly readings or incorrect

Control Point: Balls Ferry 3/1/2014 to 3/27/2014 56.0; Clear Creek 3/28/2014 to 4/24/2014 58.0; Clear Creek 4/25/2014 to 7/31/2014 56.0.

Temperature and Release Summary for Shasta and Trinity - August 2104

(Updated twice a week November through April)

Day	Sacramento River Water Temperatures in Degrees F Collected from CDEC (California Data Exchange Center) except for TCD, SPP and Control Point												Mean Daily Release in CFS			Mean Daily Air Temp Degrees F			
	TCD Wt. Avg.	SHD minus TCD (Diff)	Shd	SPP Wt. Avg	Kwk	Control Point 3/1 to 3/27 Bsf	Jlf	Bnd	Rdb	Lws	Control Point 3/28 to Ccr	Igo	Shasta Generation EI 815	Spring Crk Powerplant Release	Keswick Total Release	RDD	BSF	RDB	LWS
Jul	52.9		50.9	56.9	54.2	57.0	58.7	59.3	62.4	52.3	55.6	58.3	6,736	2,537	9,203	84.3	80.1	79.9	77.1
Aug																			
1	53.2	(1.4)	51.8	57.0	54.4	57.6	59.1	59.8	63.0	52.6	55.8	58.6	7,207	1,982	8,563	88.0	83.7	84.8	76.9
2	53.4	(0.5)	52.9	57.0	54.5	57.4	58.9	59.6	62.4	52.5	55.8	58.6	6,374	2,609	8,630	86.0	81.8	83.0	77.3
3	53.8	(1.6)	52.2	57.0	54.6	57.4	58.9	59.4	61.9	52.3	56.0	58.4	6,479	2,378	8,638	80.0	75.8	76.2	75.9
4	53.9	(1.5)	52.4	57.0	54.6	57.3	58.1	58.7	61.1	52.3	55.6	57.9	7,530	1,830	8,581	78.0	74.1	73.4	74.7
5	54.1	(1.8)	52.3	57.0	54.5	56.5	56.9	57.4	58.9	51.9	55.2	57.3	6,086	2,357	8,640	69.5	69.4	70.8	69.4
6	54.8	(1.8)	53.0	57.2	54.4	56.7	58.0	58.1	58.8	52.4	55.8	58.6	7,684	1,467	8,424	79.5	75.2	73.9	75.9
7	54.5	(1.5)	53.0	57.1	54.9	57.2	58.8	59.3	61.8	52.1	56.2	58.9	7,513	1,082	8,407	85.0	81.2	79.8	76.5
8	53.6	(1.2)	52.4	57.1	55.3	57.7	59.6	60.2	62.7	52.3	56.5	58.9	6,211	2,242	8,149	85.0	81.4	80.2	75.5
9	52.6	(1.2)	51.4	57.1	55.1	58.0	59.9	60.6	63.0	52.8	56.8	58.9	6,080	2,419	7,979	84.5	79.3	78.2	75.6
10	53.0	(1.3)	51.7	57.1	54.4	57.9	59.4	60.2	62.9	52.8	55.9	58.6	5,768	2,282	7,987	82.0	78.0	76.4	75.5
11	53.6	(0.9)	52.7	57.1	54.5	57.6	58.5	59.3	62.1	52.8	55.7	58.5	5,620	2,432	8,047	82.0	78.2	78.1	76.5
12	53.1	(0.9)	52.2	57.1	54.8	57.5	58.5	59.1	60.9	52.5	55.8	58.0	5,277	2,562	7,767	77.0	73.8	74.3	71.8
13	53.5	(1.5)	52.0	57.1	54.7	57.8	58.9	59.4	61.0	52.8	56.1	58.4	5,567	2,265	7,570	75.5	71.3	71.7	69.2
14	53.1	(1.1)	52.0	57.1	54.8	58.0	59.2	59.9	61.6	53.2	56.3	58.6	5,259	2,034	7,570	78.5	74.9	76.2	69.8
15	53.7	(1.2)	52.5	57.1	54.8	58.2	59.3	60.0	61.8	53.2	56.3	58.4	5,773	2,224	7,351	80.5	75.8	77.5	72.7
16	53.6	(1.0)	52.6	57.1	54.9	58.1	59.2	60.0	61.8	53.2	56.3	58.6	5,331	2,301	7,381	82.5	77.0	78.8	73.8
17	53.8	(1.3)	52.5	57.1	55.3	58.5	59.5	60.0	61.7	53.4	56.7	58.4	5,251	2,207	7,380	80.5	75.8	77.7	73.6
18	53.3	0.1	53.4	57.1	55.3	58.3	59.4	60.1	61.8	53.4	56.6	58.3	5,064	2,557	7,382	80.0	74.8	75.4	73.5
19	53.4	(1.0)	52.4	57.1	55.1	58.4	59.6	60.2	61.8	53.1	56.7	58.4	5,161	2,119	7,126	79.5	74.6	74.3	73.2
20	53.6	(0.8)	52.8	57.1	54.8	58.4	59.7	60.5	62.3	53.3	56.4	58.8	5,440	1,933	7,117	77.5	73.4	72.8	73.2
21	53.1	(0.5)	52.6	57.1	55.0	58.3	59.5	60.2	62.2	53.4	56.5	58.9	5,340	2,264	7,143	79.5	75.1	75.0	73.2
22	53.2	(0.3)	52.9	57.1	54.9	58.5	59.8	60.5	62.2	53.4	56.5	58.7	5,415	1,813	7,177	77.5	74.8	74.7	70.0
23	53.4	(0.4)	53.0	57.1	55.2	58.5	59.5	60.2	62.0	52.6	56.6	58.7	5,097	2,116	7,205	80.5	77.0	78.5	72.0
24	53.8	(0.4)	53.4	57.1	54.8	58.4	59.5	60.1	61.8	52.5	56.4	58.5	6,171	1,424	7,216	82.0	74.7	75.2	71.8
25	54.0	(0.3)	53.7	57.2	55.0	58.4	59.3	60.0	61.8	52.3	56.3	58.6	5,669	1,318	7,201	78.5	73.7	73.5	70.4
26	53.3	(0.2)	53.1	57.3	55.2	58.3	59.3	59.9	61.5	52.7	56.5	58.5	6,452	853	7,414	79.5	75.6	75.0	71.9
27		0.0																	
28		0.0																	
29		0.0																	
30		0.0																	
31		0.0																	
Avg	53.6		52.6	57.1	54.8	57.9	59.1	59.7	61.7	52.8	56.2	58.5	5,955	2,041	7,771	80.3	76.2	76.4	73.5
Tot cfs													154,819	53,070	202,045				
Tot af													307,083	105,264	400,756				

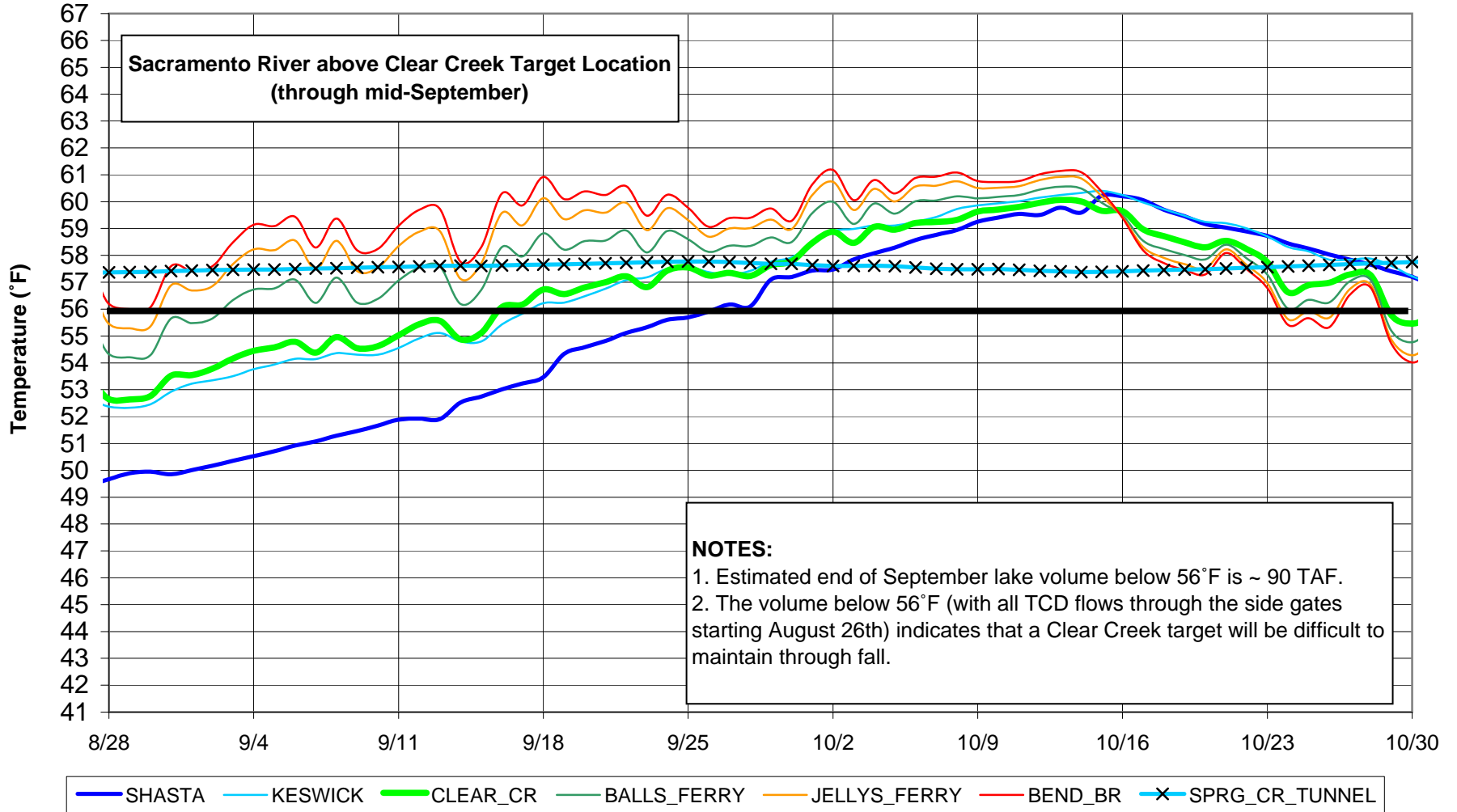
# = Station out of service    ^ - estimated (7 hours or less available)    ? = Avg. includes estimated data  
 ! = 17 hours or less of readings    & = 18 to 23 hours of reading    ND = No hourly readings or incorrect

Control Point: Balls Ferry 3/1/2014 to 3/27/2014 56.0; Clear Creek 3/28/2014 to 4/24/2014 58.0; Clear Creek 4/25/2014 to present 56.0.

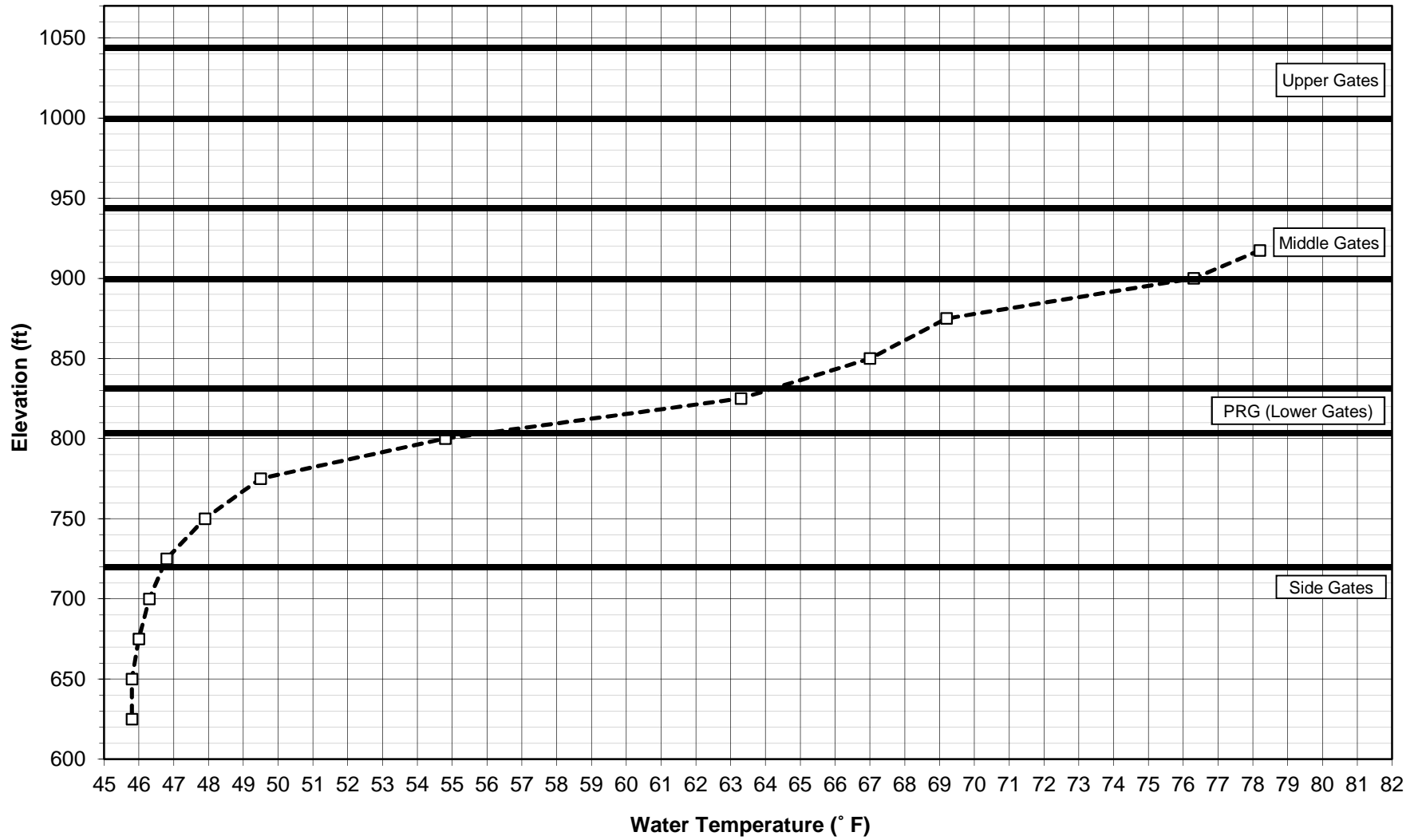
# PRELIMINARY



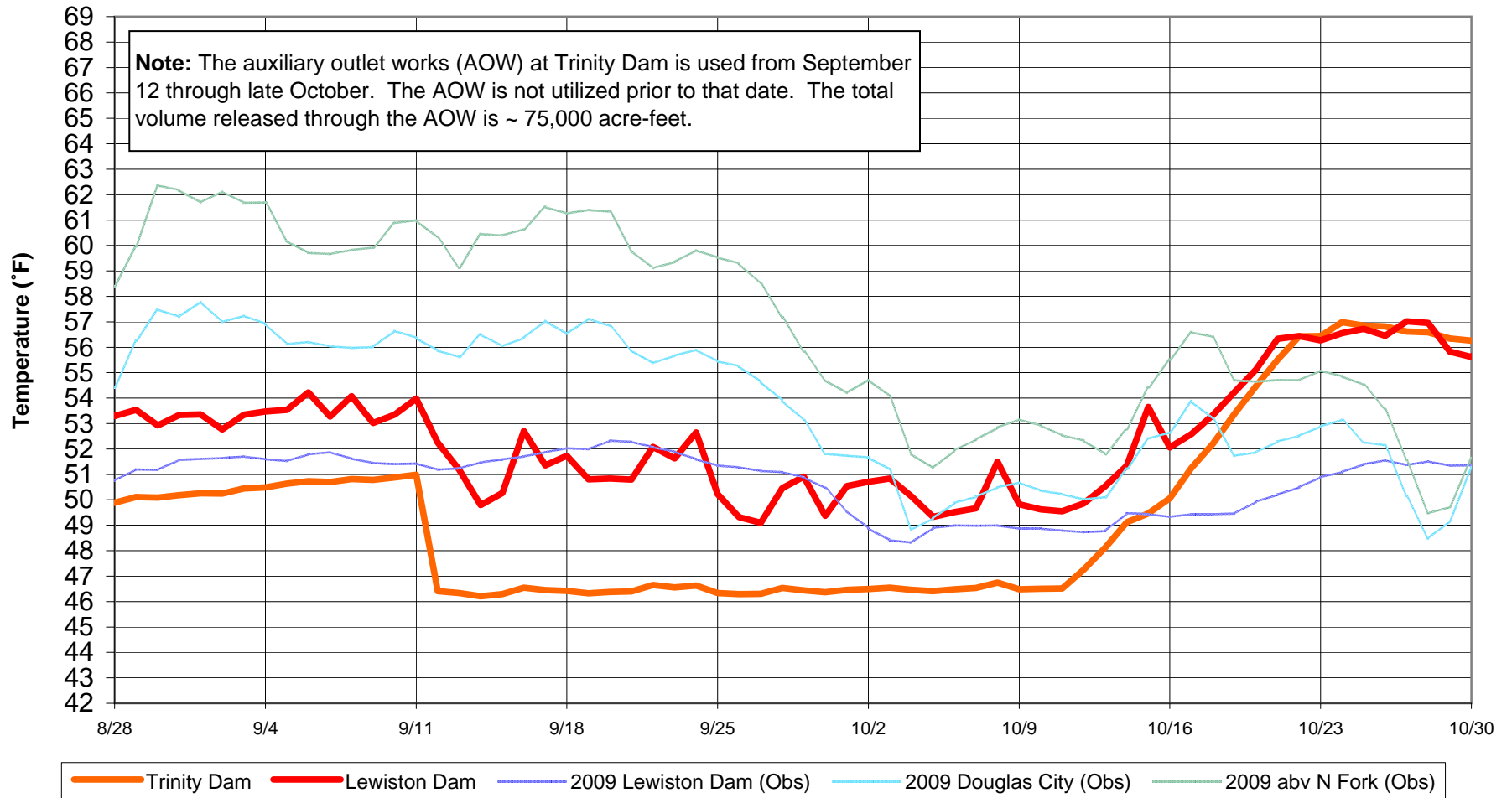
## Sacramento River Modeled Temperature 2014 August 90%-Exceedance Outlook



Lake Shasta Temperature Profile - 8/26/14



**Trinity River - 2014 August 90%-Exceedance Outlook  
"Critically Dry Year" Release Schedule  
Mean Daily Water Temperature**



### Clear Creek - Igo Modeled Temperature 2014 August 90%-Exceedance Outlook

