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February 2, 2012

Via Email to eircomments@deltacouncil.ca.gov

Attn: Terry Macaulay
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: SUPPLEMENTAL Comments on the Delta Stewardship Council's "Draft Delta Plan Program Environmental Impact Report."

Dear Mr. Macaulay:

These comments are supplementary to comments which the Central Delta Water Agency ("CDWA") has jointly submitted with the County of San Joaquin and South Delta Water Agency and to those submitted by other representatives of the CDWA.

For better or for worse, the Legislature has imposed a rather herculean task on the shoulders of the Delta Stewardship Council ("DSC"). Worst of all, the Legislature has imposed an extremely unrealistic time frame (January 1, 2012) for the DSC to prepare a meaningful, comprehensive Delta Plan and meaningfully subject that plan to the CEQA (and NEPA) processes.

The DSC and its staff have undoubtedly been proceeding in good faith to produce and adopt such a plan as soon has practicable. Unfortunately, and by no means surprisingly, there is still a tremendous amount of work left to prepare such a plan as well as a meaningful EIR (and EIS) to support that plan.

It is respectfully requested that the DSC not hastily rush this process to meet unrealistic and unnecessary deadlines. The instant topic is far too complex and critical to the state as a whole to proceed in haste and risk ending up with a plan that is not as carefully thought out as it should be and does more harm than good.

Thank you for the opportunity to comment on this matter and the CDWA looks forward to working with the DSC to help prepare and implement a meaningful plan.

1. The Draft Program EIR's ("DEIR") Discussion and Analysis of the Regulatory Framework is Substantially Deficient.

Appendix "D" of the DEIR is entitled, "Regulatory Framework," and purports to identify and discuss the various "Federal and State plans, policies, regulations and laws, and regional or local plans, policies, regulations, and ordinances" pertaining to various environmental resources affected by the Delta Plan. That identification and discussion surprisingly omits some very critical "plans, policies, regulations and laws" that directly pertain to the Delta Plan. Those omissions include the following:

- The "Delta Protection Act of 1959" (Wat. Code, § 12200 et seq.);
- The "Watershed Protection Act" (Wat. Code, § 11460 et seq.);
- The "County of Origin" laws (Wat. Code, § 10505 et seq.);
- Prohibitions on Exports from "Protected Areas" (Wat. Code, § 1215 et seq.);
- State and Federal "Anti-Degradation Laws" (see SWRCB Resolution 68-16 & Wat. Code, § 13000; and 40 C.F.R. 131.12);
- Delta Levee Maintenance (Wat. Code, § 12980 et seq.);
- The "Davis-Dolwig Act" (Wat. Code, § 11900 et seq.; 11912 [SWP contractors are required to pay the costs for "preservation" of fish and wildlife]);
- The "San Joaquin River Act" (Wat. Code, § 12230 et seq.); and
- In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings (2008) 43 Cal. 4th 1143, 1168 ("[B]ay-Delta ecosystem restoration to protect endangered species is mandated by both state and federal endangered species laws, and for this reason water exports from the Bay-Delta ultimately must be subordinated to environmental considerations."

The fact that many of the foregoing acts or laws were not mentioned in the DEIR is particularly alarming in light of the fact that the Delta Reform Act of 2009 itself expressly makes it clear that those acts and laws are not only relevant, but cannot be "dimish[ed], impair[ed], or otherwise affect[ed]" by the Delta Plan. Acts and laws such as the Delta Protection Act of 1959, the Watershed Protection Act and the County of Origin laws could not be more applicable to the application of the so-called co-equal goals and, in essence, to the entirety of the Delta Plan. Such acts and laws should be at the top of the list of acts and laws forming the regulatory framework for the Delta Plan and at all times at the forefront of the development and implementation of that plan and its EIR.

Merely identifying and briefly describing the various plans, policies, regulations, laws and ordinances pertaining to the environmental resources affected by the Delta Plan is not enough. Instead, CEQA requires the EIR to discuss the consistency of the proposed project with those plans, policies, regulations, laws and ordinances.

For example, CEQA Guidelines section 15125, subdivision (d), provides:

> The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation plans, regional blueprint plans, plans for the reduction of greenhouse gas emissions, habitat conservation plans, natural community conservation plans and regional land use plans for the protection of the coastal zone, Lake Tahoe Basin, San Francisco Bay, and Santa Monica Mountains.

(Emphasis added.)

In addition to the foregoing mandatory consistency discussion, the "feasibility" of the proposed project, and all of the proposed mitigation measures and alternatives necessary to mitigate its potentially significant impacts, is something the EIR must also discuss and address. And to meaningfully address such feasibility, the consistency of the proposed project, and its mitigation measures and alternatives, with all of the applicable plans, policies, regulations, laws and ordinances must be throughly addressed and discussed.

The concept of "feasibility" permeates the entire EIR process largely on account of the fact that one of the most substantive, if not the most substantive, provisions of CEQA is the mandate that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Pub. Resources Code, § 21002.1, subd. (b), emphasis added.)

As Public Resources Code section 21002 explains:

> The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make

infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

(Emphasis added.)

Pursuant to Guidelines section 15364, "'feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Emphasis added.)

The duty to discuss the legal and other factors impacting the feasibility of the project and its mitigation measures and alternatives can be found in numerous CEQA provisions, including the following (with emphasis added):

> **Mitigation Measures.** See Guidelines section 15126.4(a)(1): "(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy." (See also, § 15126.4 subd. (a)(1)(B) ["Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified"].)
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> **Alternatives.** See Guidelines section 15126.6: "(a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. . . . . Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. . . .
>
> (c) Selection of a range of reasonable alternatives. The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects. The EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency's determination. . . .

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(f) [T]he EIR need examine in detail only the [alternatives] that the lead agency determines could feasibly attain most of the basic objectives of the project. The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making. (1) Feasibility. Among the factors that may be taken into account when addressing the feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent). . . ."

Cumulative Impacts. See Guidelines section 15130, subdivision (b)(5): "An EIR shall examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects."

With regard to the proposed project itself, it is at least implicit, if not explicit, that the DEIR must discuss any inconsistencies of the proposed project with any applicable plans, policies, regulations, laws and ordinances. (It is indeed explicit with regard to "plans" [see Guidelines, § 15125, subd. (d), discussed above].)

While it may not be the norm to have a proposed project that, by its very nature, could potentially clash with numerous plans, policies, regulations, laws and ordinances, when you have a very complex and far-reaching project like the instant Delta Plan which must be driven and shaped by those plans, policies, regulations, law and ordinances, and where the potential for such clashes is readily apparent, the lead agency has an unmistakable duty under CEQA to meaningfully analyze and discuss, and ultimately inform the public and the decision makers of, those clashes in its EIR.

Moreover, to the extent the proposed project or its proposed mitigation measures and alternatives do indeed result in such clashes, then the project and those measures and alternatives fail to meet the basic requirements that the they be feasible. Accordingly, in such a situation, other feasible project components, measures and alternatives must be devised to replace them (unless the DSC runs into the situation where there are no potentially feasible project components, measures or alternatives, in which case the EIR must thoroughly explain what that is the case [and the project is effectively dead on arrival]).

For these reasons, a meaningful discussion in the DEIR of the consistency of the proposed project and its proposed mitigation measures and alternatives with the various applicable plans, policies, regulations, laws and ordinances is necessary to meaningfully assess the feasibility of the project and those measures and alternatives and such assessment is necessary to meet CEQA's various requirements, not the least of which is to fulfill one of the EIR's fundamental purposes to foster informed decisionmaking and public participation. (See

e.g., Guidelines, § 15126.6, subd. (a).)

The various clashes with the Delta Plan (including clashes with the potential future component of that plan, the BDCP) with applicable plans, policies, regulations, laws and ordinances are discussed more thoroughly in the CDWA's comments on the BDCP Notices of Preparation enclosed herewith and CDWA's other comments on the instant DEIR submitted concurrently herewith.

The DEIR must thoroughly discuss those clashes, and the proposed project and its proposed mitigation measures and alternatives must be reshaped to avoid those clashes, for the DEIR to comply with CEQA (as well as for the Delta Plan to ultimately comply with those plans, policies, regulations, laws and ordinances to which it is clashing).

2. The Bay Delta Conservation Plan ("BDCP").

While the BDCP has not yet been adopted and, hence, it remains to be seen what the BDCP will ultimately consist of, the current proposal for the BDCP includes some type of an isolated facility. It is difficult to imagine a facility that could be more inherently destructive to the Delta and to the Delta watershed and more contrary to the numerous statutory and other protections and promises afforded to the Delta and its watershed than the currently proposed BDCP.

The CDWA has previously submitted comments on the BDCP's various Notices of Preparation of its own EIR which set forth numerous concerns and issues. Because the DEIR is also required to analyze the BDCP under CEQA, the CDWA hereby incorporates the following comments it submitted on those notices and is enclosing copies of those comments herewith:

- The CDWA's May 14, 2009 comments entitled, "Comments on the Department of Interior's Notice of Intent to Prepare (Dated February 13, 2009), and the CA Department of Water Resources' Notice of Preparation of (Dated February 13, 2009), an EIS/EIR for the Bay Delta Conservation Plan."

- The CDWA's May 14, 2009 comments entitled, "Scoping BDCP NOI 74FR7257 (Feb. 13, 2009) and NOP State Clearinghouse No. 2008032062 (Feb. 13, 2009)."

Those comments are likewise directly pertinent to the instant DEIR because, as discussed more fully below, the DEIR is required to fully examine the potential impacts from the BDCP.

a. The BDCP is Contrary to the Policy to Reduce Reliance Upon the Delta as well as Numerous other Policies in the Delta Reform Act of 2009 and Beyond.

In addition to the numerous other policies and laws which an isolated facility would be squarely contrary to (many of which are discussed in the above-referenced comments on the

BDCP), such an isolated facility would likewise be squarely contrary to the Delta Reform Act of 2009's own policy "to reduce reliance on the Delta." Water Code section 85021 provides:

> The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

The very nature and purpose of the BDCP's proposed isolated facility is to support and secure greater reliance on the Delta to meet the needs of Delta exporters. To comply with section 85021, the tens of billions of dollars proposed to be spent on an isolated facility must, instead, be devoted to reduce reliance on the Delta by investing in projects that improve the exporters' "regional self-reliance." Investment in an isolated facility which fosters increased reliance on the Delta is completely contrary to section 85021.

An isolated facility is also completely contrary to numerous other provisions and policies in the Delta Reform Act of 2009 including the following (just to name a couple).

Water Code section 85054 provides:

> The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

An isolated facility will unquestionably destroy and/or substantially impair, rather than "protect" or "enhance" all of those values.

Water Code section 85020 provides:

> The policy of the State of California is to achieve the following objectives that the Legislature declares are inherent in the coequal goals for management of the Delta: . . .
>
> (b) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.
>
> (c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.
>
> (d) Promote statewide water conservation, water use efficiency, and sustainable water

use.

(e) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta. . . .

Subdivision (b) was discussed immediately above. Removing up to 15,000 cfs of fresh water from the Delta is obviously inconsistent which subdivision (c), and, instead of "promot[ing] statewide water conservation, water use efficiency, and sustainable water use" as required by subdivision (d), the investment of tens of billions of dollars into the construction and operation of an isolated facility will do the exact opposite by devoting and diverting that tremendous amount of resources towards a facility that, by definition and by design, will "reduce" rather than "promote" those objectives and, hence, deprive the state of a tremendous amount of resources that could be devoted to projects that actually do promote those objectives.

The DEIR must be revised to fully address and discuss the consistency of the reasonably foreseeable features of the BDCP, including an isolated facility, with all the statutory and other provisions, policies and protections governing the Delta, including, in particular, those set forth in the Delta Reform Act of 2009.

b. **The BDCP and the Delta Plan Must be Examined Together in the Same EIR.**

Under CEQA a "'[p]roject' means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ." (Guidelines, § 15378, subd. (a), emphasis added.) As the court explains in Orinda Assn v. Board of Supervisors (1986) 182 Cal.App.3d 1145, at page 1171:

> A public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole. "The requirements of CEQA, 'cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial.' [Citation.]" [Citation].

In the Delta Reform Act of 2009, the Legislature has mandated that the BDCP become a part of the "whole of [the] action" that makes up the Delta Plan if certain conditions are met:

> If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), the council shall incorporate the BDCP into the

Delta Plan. The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council.

(Wat. Code, § 85320, subd. (e), emphasis added.)

Because the DSC "shall incorporate the BDCP into the Delta Plan," the BDCP is unquestionably a foreseeable part of the "whole of [the] action" that makes up the Delta Plan and, thus, must be treated as part of that whole of the action in the EIR currently being prepared for that plan.

Thus far, the DEIR fails to so treat the BDCP as part of the whole of the action of the Delta Plan and fails to subject the BDCP to the thorough analysis CEQA requires for parts of that whole of the action. What DSC has committed is the "fallacy of division whereby a larger, whole project was improperly divided into component parts for piecemeal consideration [which is] clearly prejudicial because [the] decision-makers and the public were thereby deprived of the essential information and environmental analysis that CEQA mandates." (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272.)

c. **The Level of Detail of Analysis of the BDCP in the DEIR is Inadequate.**

Assuming arguendo that the BDCP can be legally separated from the "whole of the action" that makes up the Delta Plan and, hence, can be separately analyzed outside the Delta Plan's EIR, the Delta Plan's EIR must still meaningfully analyze the BDCP within the context of its cumulative impacts analysis and otherwise. Thus far, that analysis is far too general and lacks the level of detail that is readily available and, hence, required.

Guidelines section 15003, subdivision (i), explains that "CEQA does not require technical perfection in an EIR, but rather adequacy, completeness, and a good-faith effort at full disclosure." Guidelines section 15151 further explains that "[a]n evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible."

At this point, the separate draft EIR for the BDCP is nearly ready for distribution to the public. Accordingly, there is a tremendous amount of detailed environmental, engineering, geotechnical and other information regarding the BDCP that is readily available to the DSC for use in the DSC's EIR. In furtherance of the requirements to provide a "good-faith effort at full disclosure" and to provide the level of analysis that "is reasonably feasible," CEQA requires the DSC to utilize that available information in its DEIR, which the DSC has thus far failed to do.

The DEIR is replete with statements to the effect that the potential for various impacts must be determined using future site-specific data. For example, section 11 of the DEIR entitled, "Geology and Soils," explains:

> The precise magnitude and extent of project-specific geology- and soil-related impacts would depend on the type of action or project being evaluated, its specific location, its total size, and a variety of project and site-specific factors that are undefined at the time of preparation of this program-level EIR. Project specific geology- and soil-related impacts would be addressed in project-specific environmental studies conducted by the lead agency at the time the projects are proposed for approval.

With regard to the BDCP, the BDCP's "specific location, its total size, and a variety of [its] project and site-specific factors" are very precisely defined at this point and readily available, again, so much so that the BDCP's separate EIR is nearly ready for public release.

With regard to potential geological impacts and concerns, the DEIR makes the following statements at page 11-24:

> "The potential for seismically induced soil compaction and settlement must be determined using site specific data."

> "The potential for liquefaction-induced soil-bearing capacity loss must be determined using site-specific data."

> "The potential for lateral spreading must be determined using site-specific soil data and topographic information."

> "The potential for increased earth lateral pressure due to liquefaction must be determined using site specific data at the locations of walls and buried structures."

> "The potential for buoyancy due to liquefaction must be determined using site-specific data at the locations of buried pipes and structures."

For the BDCP, a substantial amount of such site-specific data presently exists. Attached hereto as Exhibit "A" are the first three pages from DWR's "Presentation Outline, Additional Information to assist with the [Water] Commission's Role in Eminent Domain," dated August 17, 2011. As indicated at the bottom of page three:

> To date [DWR] [has] completed 62 CPT [Cone Penetration Tests], 37 drill holes, and 37 overwater holes, an additional 6 CPT and 11 drill holes are scheduled to be completed by the end of September 2011.

All of that data is readily available to the DSC and provides the precise site-specific data necessary for the DEIR to address the above-referenced potential geological impacts. Accordingly, none of those impacts can be deferred as they pertain to the BDCP and its proposed

facilities, i.e., tunnels, canals, forebays, intakes, fish screens, etc.

Also attached hereto as Exhibit "B" is a copy of DWR's BDCP webpage which further describes the various environmental and geotechnical activities DWR has been conducting to gather site-specific information for the BDCP. The DEIR must be revised to properly utilize and take into consideration all of that readily available information.

3. The DEIR's Scope is Inadequate.

The Delta Plan states: "The Delta Plan has a long-term scope. It is intended to serve as California's guiding policy document for the next 88 years, with frequent updates." (5th Draft Plan, p. 7.) Notwithstanding that 88 year duration, the EIR only covers through 2030: "[T]his EIR considers a study period that extends until 2030." That 58 year gap is inappropriate and contrary to CEQA. The DEIR must be revised to cover the full 88 year duration of the plan.

4. The Thresholds of Significance for Water Resource Impacts are Misplaced and Deficient.

The DEIR's "thresholds of significance" for "water resources" state that "an impact related to water resources is considered significant if the proposed project would: . . . 'Substantially change water supply availability to water users located outside of the Delta that use Delta water.'" (DEIR, p. 3-77.)

While an *increase* in water supply availability would certainly be a significant impact, a *reduction* would not. The policy of the state is in fact to reduce such availability in favor of regional self-reliance. (See e.g., Wat. Code, § 85201.) Moreover, numerous other statutes and policies including the Delta Protection Acts of 1959 and 1992 and the Watershed Protection Act, likewise mandate reductions in such availability in favor of protecting and providing for the water needs of users within the Delta and the Delta watershed.

The obvious threshold which is prejudicially missing is "substantially change water supply availability to water users located [*within*] the Delta [watershed]." Any reductions of such availability in favor of increased availability for water users located *outside* the Delta would not only be significant, but would be squarely illegal if such reductions were not reductions in water that was truly surplus to the needs of the water users within the Delta Watershed.

5. The DEIR Fails to Discuss the Potential Impacts from the Proposed Mitigation Measures.

Guidelines section 15126.4 subdivision (a)(1)(D) provides: "If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed."

It appears the DEIR has failed to so discuss any such effects for the numerous proposed mitigation measures. The DEIR must accordingly be revised (and re-circulated as discussed below) to correct this deficiency.

6. The DEIR Fails to Properly Discuss the Economic and Social Effects of the Proposed Project.

As the court explains in Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1205:

> [I]f the forecasted economic or social effects of a proposed project directly or indirectly will lead to adverse physical changes in the environment, then CEQA requires disclosure and analysis of these resulting physical impacts. [Citations.] Subdivision (e) of Guidelines section 15064 provides that when the economic or social effects of a project cause a physical change, this change is to be regarded as a significant effect in the same manner as any other physical change resulting from the project. [Citation.] Conversely, where economic and social effects result from a physical change that was itself caused by a proposed project, then these economic and social effects may be used to determine that the physical change constitutes a significant effect on the environment. [Citation.] Guidelines section 15131, subdivision (a) provides, "An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes in turn caused by the economic or social changes. The intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes."

(Emphasis added.)

Because of its sheer breadth, the Delta Plan will indeed result in significant economic and social effects. However, a meaningful analysis of those impacts and the physical changes resulting therefrom is thus far lacking in the DEIR and needs to be added.

7. Additional Issues that Have Not Been, and Must Be, Meaningfully Investigated, Discussed and Analyzed in the DEIR.

Some particular issues which do not appear to have been meaningfully discussed in the DEIR and which should be fully investigated, discussed and analyzed in the DEIR include the following.

- The potential for evaporative losses from flooded islands, flood plains, above-ground isolated facilities, forebays, wetlands and the like that may result from implementation of the Delta Plan.

- The extent to which the Delta pool serves as a very large fresh water reservoir by, in essence, storing and holding upstream fresh water flows, and the extent to which isolated facilities or other components of the Delta Plan will impair the ability to store such water via increasing the salinity within that reservoir or otherwise.

- On pages 2A-88 and 2A-89 of the DEIR it states that in the event levee failures cause increased amounts of saline water to flow into the Delta, such saline water "could be present near the intakes/diversions of . . . south Delta SWP and CVP pumping plants . . ." and, as a result, "[o]perations of the intakes/diversions would cease until freshwater conditions were reestablished because the water treatment plants and water users could not tolerate salt water." The DEIR should more thoroughly explain why water treatment plants and water users could not tolerate such salt water. For example, for water treatment plants, it would appear that this Delta water could be blended with other water supplies and, if so, what would be the resulting salinity content of the water that actually goes through any particular treatment plant? The potential for blending of such water with other sources should be fully discussed and to the extent there are not sufficient facilities to accomplish such blending, then the creation of new above or below ground storage facilities to facilitate such blending should be proposed as potential mitigation measures. Also, what type of other infrastructure improvements would be necessary to upgrade the respective treatment plants to temporarily handle saltier Delta water that has been blended with less salty sources or even not blended? How would those costs compare to the costs to construct and operate an isolated facility or canal?

- A meaningful investigation, discussion and analysis of the earthquake vulnerability of all other aspects of the SWP and CVP facilities, and not just the relatively short segment that passes through the Delta, has been sorely lacking in nearly all discussions of earthquake risks to the SWP and CVP. The DSC should buck that trend and fully embrace such an investigation, discussion and analysis in the DEIR. Why neither the DSC nor anyone else seemingly concerned about earthquake impacts to the SWP and CVP has so embraced that topic to date is truly mind-boggling and disingenuous.

- On the matter of earthquake vulnerability, the DSC should also use the above-referenced geotechnical data which DWR has secured over the last several years for the BDCP and meaningfully investigate, discuss and analyze the earthquake vulnerability of all of the proposed BDCP facilities, including its proposed tunnels, canals, forebays, intakes, etc., which will all be built within the heart of the Delta where concern over the instability, variability, liquefaction potential, etc. are allegedly very high. The DEIR's statements to the effect that there will not be any problem (i.e., no potentially significant impacts) because the facilities will be

designed according to various earthquake standards provides little assurance. For example, what standards are there to sufficiently earthquake proof an unprecedented 40 plus mile, 30 foot diameter tunnel, which at times will bear the tremendous weight and pressure from 15,000 cfs of flow, through unconsolidated, unstable, highly variable, liquefiable Delta soils? The DEIR should do considerably more to discuss those standards and confirm to the public that they do exist and will indeed guarantee there will be no potentially significant risk of harm to such a tunnel or to the surrounding lands from earthquake impacts on the stability or other integrity of that tunnel.

8. It Remains to be Seen Whether CEQA's Mandated Notice Procedures Have Been Properly Complied With.

Public Resources Code section 21092.3 provides: "The notices required pursuant to Sections 21080.4 [notice of preparation of an EIR] and 21092 [notice of draft EIR] for an environmental impact report shall be posted in the office of the county clerk of each county in which the project will be located and shall remain posted for a period of 30 days."

Because environmental impacts from the instant project will occur throughout a substantial portion of the state (if not the entire state), such notices must be posted in nearly every county of the state. Without having access to information attesting to the postings of such notices, CDWA hereby alleges that the DSC has failed to properly and timely file those notices in all of the respective counties as required by section 21092.3.

With regard to the notice of the Draft EIR, that notice must also be posted via one of the three methods in Public Resources Code section 21092, subdivision (b): (1) "Publication . . . in a newspaper of general circulation in the area affected by the proposed project"; (2) "Posting of notice . . . on- and off-site in the area where the project is to be located"; or (3) via "Direct mailing to the owners and occupants of contiguous property . . . ." CDWA once again lacks access to information to verify the DSC's compliance with one of these methods and, accordingly, hereby alleges the DSC has failed to properly and timely provide notice of its DEIR pursuant to section 21092.

Because "substantial rather than complete compliance with CEQA-mandated notice procedures [is] an abuse of discretion requiring vacating of the administrative decision," the failure to properly comply with the foregoing and any other CEQA-mandated notice procedures would be a fatal error that must be corrected. (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 922-923.)

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9. Some Brief Comments on the Proposed Delta Plan.

Table C-2 on page C-7 of the DEIR's Appendix C seemingly suggests that "[a]griculture-related non-residential on-farm structures without substantial employees" are "[n]ot acceptable" if they are protected by levees that do not meet the so-called "HMP" standards. If that is indeed what that Table is saying, then that should be revised to allow such structures since there are many levees systems that do not yet fully meet the HMP standards. Moreover, those standards are a moving target, e.g., large storms could damage the levees and render portions of them out of compliance with those standards. To generate the funding necessary to meet and maintain those standards, the above-referenced structures should be allowed to ensure that farming can economically continue on such lands and help raise revenue to properly meet and maintain those standards. Prohibiting those structures could substantially impact farming and thereby substantially impact the ability to generate the requisite funding necessary to meet and maintain those standards (which, of course, would be contrary to the general objective to meet and maintain those standards and to overall increase the flood protection within the Delta).

Another brief comment on the Delta Plan is the obvious disconnect between the proposed restoration of tens of thousands of acres of land within the Delta for habitat purposes pursuant to the BDCP or otherwise and the objective to "[p]rotect and enhance the unique . . . agricultural values of the California Delta as an evolving place." (Wat. Code, § 85020; see also Pub. Resources Code, § 29702, part of "The Delta Protection Act of 1992" ["The Legislature further finds and declares that the basic goals of the state for the Delta are the following: . . . (b) Protect, maintain, and, where possible, enhance and restore the overall quality of the Delta environment, including, but not limited to, agriculture . . ."].)

To the extent any of those tens of thousands of acres of land for habitat purposes involve the conversion of agricultural land for such purposes, then agricultural land has, by definition, not been "protected" or "maintain," and by no means "enhanced" or "restored." Thus, the Delta Plan needs to be modified to recognize and avoid any such conversions. The currently flooded islands that have not be reclaimed, such as Franks Tract and Mildred Island, and others lands that are not currently devoted to agriculture should be fully taken advantage of for habitat purposes so as not to violate the core principles of the Delta Reform Act of 2009 and acts such as the Delta Protection Act of 1992 which mandate the protection and maintenance of agricultural lands.

Also, the vast and extensive channel islands located within the middle of nearly all of the waterways within the Delta would seemingly provide a tremendous opportunity for enhancement to maximize their habitat benefits and would do so without converting any agricultural land. Why there has been no substantial, widespread effort to make the most of those extensive channel islands (as well as the flooded islands, such as Franks Tract and Mildred Island) is another mind-boggling matter that the DSC should gets its arms around and thoroughly explore.

///

10. The DEIR Must be Recirculated after its Various Deficiencies are Corrected.

Guidelines section 15088.5, subdivision (a), explains:

> A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not "significant" unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement.

To properly correct the DEIR's deficiencies alleged herein, and in other comments by the CDWA and others, a large amount of "significant new information" within the meaning of section 15088.5, subdivision (a), must necessarily be added to the DEIR. Accordingly, the DEIR will have to be recirculated to afford all interested persons and agencies the opportunity to meaningfully review and comment on that new information.

Thank you for your time and attention to these comments and concerns.

Very truly yours,

Dante John Nomellini, Jr.
Attorney for the CDWA

Exhibits/Enclosures:

Exhibit "A" Excerpt from DWR's "Presentation Outline, Additional Information to assist with the [Water] Commission's Role in Eminent Domain," dated August 17, 2011.

Exhibit "B" DWR's BDCP webpage which describes the various environmental and geotechnical "Field Studies" DWR has been conducting for the BDCP.

Enclosure No. 1: The CDWA's May 14, 2009 comments entitled, "Comments on the Department of Interior's Notice of Intent to Prepare (Dated February 13,2009), and the CA Department of Water Resources' Notice of Preparation of (Dated February 13,2009), an EIS/EIR for the Bay Delta Conservation Plan."

Enclosure No. 2: The CDWA's May 14, 2009 comments entitled, "Scoping BDCP NOI 74FR7257 (Feb. 13, 2009) and NOP State Clearinghouse No. 2008032062 (Feb. 13, 2009)."

Exhibit "A"

Presentation Outline
Additional Information to assist with the Commission's Role in Eminent Domain
August 17, 2011

INTRODUCTION OF STAFF

PURPOSE OF THIS PRESENTATION

To provide the California Water Commission (CWC) with additional information to assist in their role in the eminent domain process.

Presentation Overview:

Additional Authority (*Legal*)

Geotechnical Information

- Types of exploration, Background of drill site locations, Geotechnical history

Additional Authority of DWR

A. Project description
B. State of California's Interest in Managing Water Resources
C. Authority of DWR
D. Authority to Acquire Property
E. The Department Has Ample Authority to Study Water Resources Issues

Types of exploration:

Drill Hole, Cone Penetration Testing (CPT), Test Pits

Drill Hole

- Time to complete: up to 14 work days (includes site reconnaissance/restoration and drilling)
- Diameter and Depth of hole: 4.5-8.5-inch and up to 300 feet
- Backfill procedures: Cement Bentonite grout
- Information to be obtained: Continuous soil sample profile, SPT-N values, and strength of material (lab test)

CPT

- Time to complete: 4-6 hours
- Diameter and Depth of hole: 2-inch and up to 200 feet
- Backfill procedures: Cement Bentonite grout
- Information to be obtained: Soil behavior type, shear wave velocity, liquefaction potential, and ground water level.

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Test Pits

- Time to complete: 2-4 hours
- Size of pit: approximately 3 feet x 12 feet x 15 feet
- Backfill procedures: refill pit with original material
- Information to be obtained: Bulk sample, examine and perform density test, view of soil profile.

Background of drill site locations:

Sites were selected with respect to the alignments identified in the Conceptual Engineering Report (CERs) and after consultation with members of the DHCCP team, which included environmental, real estate, engineering, and geotechnical. The criteria established by the team representatives was to obtain relevant soil information for preliminary and final design of facilities and permitting requirements (US Army Corps of Engineers, Division of Safety of Dams, etc...), providing consistency with Temporary Entry Permit language and landowner concerns, to implement and follow the Mitigated Negative Declaration language and required permits, and species to avoid to minimize overall impacts. Majority of the sites were selected to provide information and data primarily for the intakes, river crossings, Intermediate Forebay, and the Byron Tract Forebay. Additional sites were selected for the Pipeline/Tunnel Option.

Geotechnical History:

2008, 2009, 2010, 2011 Geotechnical Plan Development and Implementation.

2008 Geotechnical Exploration Plan Development

- Began development of plan in April 2008 based on conceptual alignments, barrier, and intake locations. Plan included drill holes along the Eastern, Through Delta, and Western options, and at the Intake locations.
- No exploration was performed on any of the proposed facilities during 2008.

Presentation Outline
Additional Information to assist with the Commission's Role in Eminent Domain
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2009 Geotechnical Exploration Plan Development

- Continued development of plan in April 2008 based on conceptual alignments, and intake locations. Plan included 9 overwater drill holes.
- Drilling completed in 2009:
  - 32 CPT and 18 drill holes along the Eastern, Through Delta and Western Alignments were completed. 11 overwater drill holes were also completed.

2010 Geotechnical Exploration Plan Development

- Continued refinement of plan in January 2010 based on refinement of the proposed conceptual alignments, with focus on Pipeline/Tunnel option, and the intake locations.
- No land drilling was conducted during the 2010 calendar year.
- Overwater drilling began in August 2010.
  - 26 overwater boring were completed at the proposed intake locations and along the Pipeline/Tunnel option.

2011 Geotechnical Exploration Plan Development

- The 2011 exploration plan was basically unchanged from the November 2010 exploration plan. The plan called for drilling on signed Temporary Entry Permit and court ordered entry parcels . In June 2011, the plan was changed to focus on the signed parcels due to court decision. Drilling commenced on May 31, 2011 and is still currently underway.
- Refinement of the current exploration plan continued. The refinement removed approximately 10 exploration locations at each of the intake locations and the nine (9) test pits located at the Intermediate Forebay.
- Although the current plan includes approximately a total of 220 CPT, 186 drill holes, and 94 overwater drill holes, the goal is to complete 119 CPT, 115 drill holes, and 6 test pits in 2012.
- To date we have completed 62 CPT, 37 drill holes, and 37 overwater holes, an additional 6 CPT and 11 drill holes are scheduled to be completed by the end of September 2011 .

Environmental Documentation

Exhibit "B"

Field Studies & Land Access

Overview

Field studies have been conducted throughout the Delta region to support the preparation of a thorough and accurate EIR/EIS for the BDCP. To date, these studies have gathered environmental and engineering data where potential habitat conservation and water conveyance options may take place.

Some properties located within the planning area have been selected for further study in order to improve the accuracy of the evaluation. In these cases, DWR representatives have sought access to properties through the use of a Temporary Entry Permit (TEP). TEPs grant field crews temporary access to private property so that studies may be conducted. If a particular parcel is chosen for further study, one or more of the following activities may be conducted: ground and aerial surveys, and geotechnical, biological, geological, archaeological, floral and faunal studies.

Permits Obtained

- Department of Fish and Game 1600 Agreement
- National Marine Fisheries Service Compliance
- United States Fish and Wildlife Service Compliance
- U.S. Army Corps of Engineers Compliance
- California Regional Water Quality Control Board 401 Certification

- 2010 NOI
- 2010 NOD
- DWR Final MND 9-23-10
- Mitigation Monitoring Program
- Appendix A: Response to Comments
- Appendix B: BDCP Public Comments

Current Geotechnical Work

The Department of Water Resources will begin geotechnical explorations (drilling) for the BDCP's environmental review process on June 1, 2011 and continue through fall 2011. DWR has attained the necessary approval to access the desired sites. DWR will only be accessing properties that are owned by the state or with expressed permission to enter. Data gathered from the drilling will allow the field crews to gather information to develop a thorough and accurate EIR/EIS.

For more information about geotechnical work, contact Rebecca Nicholas at (916) 679-2341.

Current Field Studies

Beginning on April 1, 2011, DWR will conduct environmental studies in the Delta to support the EIR/EIS. This ongoing effort will supplement existing data gathered in 2010 to further the anlaysis of potential habitat restoration and water supply options. These focused studies will begin with botany surveys and end with vernal pool studies.

For more information about current environmental field studies, contact Rebecca Nicholas at (916) 679-2341.

View maps of the proposed conveyance options

Read a fact sheet regarding the TEP process

Read some frequently asked questions regarding the TEP process

Learn more about past geotechnical work

901 P Street, Sacramento, CA 95814
1-866-924-9955

CENTRAL DELTA WATER AGENCY
235 East Weber Avenue • P.O. Box 1461 • Stockton, CA 95201
Phone 209/465-5883 • Fax 209/465-3956

May 14, 2009

Via Email at BDCPcomments@water.ca.gov

Ms. Delores Brown, Chief
Office of Environmental Compliance
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236

Via Email at lori_rinek@fws.gov

Lori Rinek
Sacramento Fish and Wildlife Office
2800 Cottage Way, W-2605
Sacramento, CA 95825

Re: Comments on the Department of Interior's Notice of Intent to Prepare (Dated February 13, 2009), and the CA Department of Water Resources' Notice of Preparation of (Dated February 13, 2009), an EIS/EIR for the Bay Delta Conservation Plan.

Dear Ms. Brown and Rinek:

The Central Delta Water Agency (CDWA) and South Delta Water Agency (SDWA) previously submitted comments on the federal "Notice of Intent" to prepare an EIS/EIR for the BDCP on March 24, 2008. The CDWA further submitted comments on the DWR's "Notice of Preparation" of an EIS/EIR for the BDCP on May 30, 2008. Since all of such comments are applicable to the topics at issue herein, those comments are hereby incorporated by reference and enclosed herewith. We hereby take the opportunity to supplement those comments with the following.

1. **The NOI and NOP are Still Unlawfully Premature.**

While the prematurity of the May 2008 NOI and NOP, are discussed at length in the attached documents, it bears re-emphasizing that such prematurity continues to be an overarching and fatal flaw. The NOP, e.g., contains statements such as the following which plainly confirm

such prematurity (with emphasis added):

- "[Conservation] measures *will be* identified through the planning process." (NOP, p. 1)
- "The BDCP covered activities *may* include, but are not limited to: . . . ." (NOP, p. 4)
- "[T]he list [of species to be evaluated for inclusion in the BDCP] *may change* as the planning process progresses." (NOP, p. 5)
- "The BDCP *will likely* consist of three major elements: . . . ." (NOP, p. 6)
- "Potential habitat restoration measures . . . *may* involve . . . ." (NOP, p. 6)

The issuance of the instant NOI and NOP in light of such lack of specificity is unfair and unlawful under NEPA and CEQA. The NOI and NOP must be reissued when, at a minimum, a complete draft of the BDCP is available for public review which fully describes and discloses the specifics of that plan.

2. **Project Objectives.**

The project's objectives must not be so narrowly draw so as to require the "construction and operation of facilities for movement of water entering the Delta from the Sacramento Valley watershed to the [Projects'] pumping plants located in the southern Delta" as a project objective. (NOP, p. 3.) While the construction of such facilities may be one way to meet various objectives, such construction should not itself be any part of the project's basic objectives.

The same is true of the objective to improve the ecosystem by "reducing the adverse effects to certain listed species of diverting water by relocating the intakes of the SWP and CVP." (NOP, p. 3.) That objective is likewise far too narrow and the objective, if anything should be something along the lines of "to improve the ecosystem by modifying the operation or nature of the SWP and CVP." Relocating intakes is merely one method to meet the objective.

There is a major difference between what the project proponent prefers to do to meet the project's basic objective and the project's basic objective's themselves. The NOI and NOP currently fail to recognize that difference and have improperly included preferred methods to meet the objectives as part of the objectives themselves.

Moreover, "relocating the intakes" is ambiguous since it's unclear whether it means the relocation of *all* SWP and CVP intakes, or just the Tracy pump intakes? And, if it means all, does it mean only intakes within the legal Delta, or intakes anywhere that may affect the Delta? And, furthermore, for the intakes that it is intended to cover, does it mean the intakes will be relocated such that the existing intakes will no longer be used? For example, does that mean a so-called "dual conveyance" alternative would be contrary to the objective?

In the end, it would constitute a fundamental deficiency, not to mention be fundamentally

unfair in multiple respects, if the objectives are defined in a manner that attempts to avoid the consideration of alternatives that include reduced, or, even, the elimination of, exports from the Delta.

Lastly, the following so-called objective takes the cake and is entirely too narrow, entirely too vague, entirely unfair and entirely unlawful:

> "Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of State and federal law and the terms and conditions of water delivery contracts and other existing applicable agreements." (NOP, p. 3.)

For starters, this process cannot call the project a "Bay Delta Conservation Plan" if the foregoing is any part of the plan's objectives. Restoring and protecting exports from the Delta has nothing to do with "conservation" of the Bay Delta. For example, what parts of the Bay Delta are being "conserved" by such restoration and protection?

Secondly, the objective assumes there have been times when the Projects have been able to deliver their full contract amounts, i.e., "restore" such ability. Where is the evidence to support that? It further assumes that there will indeed be times when the hydrology and laws, etc. will allow for such delivery? Again, where is the evidence to support that?

Thirdly, this objective was obviously created to limit the range of potential alternatives in the EIS/EIR. In light of this objective, the project proponents would undoubtedly argue that any alternative that does not restore the ability to deliver up to the full contract amounts would be dead on arrival. Presumably, so would any alternative that attempts to conserve the Delta environment by reducing exports and developing non-export water to replace such reduced exports, and any alternative that seeks to satisfy the Project's contractor's needs with water developed by non-Project facilities.

It is, again, startling that such an objective can, with a straight face, be included as part of a plan entitled "Bay Delta Conservation Plan." This objective should be deleted in its entirety. It cannot be legally or fairly included as part of any so-called "Natural Community Conservation Plan" or "Habitat Conservation Plan" which the Bay Delta Conservation Plan is intended to serve as. Such an objective simply has nothing to do with conserving the "natural community" or "habitat" (or the Bay Delta).

3. **Emergency Proclamations.**

The EIS/EIR should fully discuss and explain how the proposed project and all of the alternatives will ensure that the various state, federal and local laws protecting matters such as Delta water quality, fish and wildlife, etc. will be upheld and enforced during all state, federal or

local emergency, disaster or other proclamations. The EIS/EIR should in particular explain what protection beneficial users, including fish and wildlife, downstream of the intakes of any isolated facilities will have all such laws fully upheld and enforced during such proclamations.

4. **State of the Art Fish Screens on Current Export Facilities.**

The EIS/EIR should fully discuss and explain why such screens are not currently in place, and were not installed and operational by 2006, as required by the 2000 CALFED Record of Decision, and how having such screens in place would have impacted the Wanger decisions and other export pumping restrictions on account of fishery concerns. Such screens should be a part of *all* projects and alternatives discussed in the EIS/EIR that intend on using such export pumps to pump any amount of water "through the Delta."

5. **The First Seven Years Following the 2000 CALFED Record of Decision.**

Similar to the above, the EIS/EIR should fully explain what was supposed to happen as far a measures to make the "through Delta" conveyance successful, such as the installation of the above-described fish screens and extensive levee improvements, etc., and what actually happened. Any differences should be fully explained. The history of failing to carry out matters that were intended to be carried out is relevant to the validity of claims that matters, including mitigation measures, etc., intended to be carried out pursuant to the instant project will actually be carried out.

6. **Alternatives**.

In addition to the others discussed in the attached documents, the following should be included in the EIS/EIR range of reasonable alternatives:

-- The Delta Corridor's proposal being developed by Russ Brown.

-- A comprehensive regional self-sufficiency alternative as set forth in "A Water Plan For the 21st Century: Regional Self-Sufficiency Scenario," dated 7/23/07 (a copy of which is enclosed herewith)

-- A no export alternative (i.e., no exports from the Delta watershed through the Tracy pumping plants). This alternative should be combined with everything possible that could be done to supply water to areas currently receiving exports from such pumping plants, including an unprecedented devotion of resources to developing self-sufficiency measures in importing areas such as 1) water conservation; 2) water reclamation, including desalting brackish and if necessary sea water; 3) storm water capture and reclamation; 4) higher levels of treatment of sewage effluent to allow for safe use of effluent for irrigation of golf courses and landscaping, industrial use, and in suitable cases human consumption; 5)

installation of dual water systems particularly in new developments; 6) installation of brine lines; and 7) improvements to water treatment facilities so that water from less desirable sources can be beneficially used. The devotion of resources should be at least as much as the *total* economic and environmental costs incurred in the planning, construction, mitigation, operation, etc. of any isolated facility.

-- There should also be a reduced export alternative which gradually reduces exports over time by a unprecedented devotion of resources to developing self-sufficiency measures as discussed above.

-- An alternative that gradually ends all deliveries of Delta watershed water to areas south of the Tehachapi Mountains and includes the above-described unprecedented devotion of resources to developing self-sufficiency in such areas should also be included.

Also, there should be alternatives to the project "as a whole," rather than alternatives focused solely on one or more components of the project, such as the conveyance component. The NOP at page 6, seems to indicate that the process is already heading down the wrong and unlawful path of only considering alternatives to the conveyance component.

In the end, the EIS/EIR's range of alternatives should include *numerous* alternative courses of action that meet "most" of the project's basic objectives and reduce one or more of the proposed project's potentially significant impacts. In light of the breadth of the objectives, it should be simple to craft and include within that range *many* potentially feasible alternative courses of action. And in light of the magnitude of what is at stake, informed decision making requires nothing less.

7. **Additional Impacts Which Should be Analyzed.**

In addition to other noted impacts, the following impacts should be fully analyzed and discussed:

– The flood control impacts from any facilities, such as isolated facilities, including, e.g., water elevation impacts resulting from any non-underground crossings through rivers and streams.

– Salt water intrusion into groundwater basins as a result of the various alternatives.

– All economic and socio-economic impacts associated with the proposed project and all alternatives.

– Evaporation loses from increased surface areas associated with isolated facilities, as well as increased surface areas from any intended abandonment, and, hence,

permanent flooding, of Delta islands.

8. **The Delta Pool as a Fresh Water Reservoir.**

The EIS/EIR should fully analyze and discuss the extent to which the Delta pool serves as a fresh water reservoir by, in essence, storing and holding upstream fresh water flows. The extent to which isolated facilities or other actions which increase the salinity of the Delta will adversely impact such a reservoir should be fully analyzed and discussed.

9. **Unlawful Segmentation and/or Piecemealing of the Project.**

DWR has unlawfully inverted the CEQA process by starting out with very site-specific, physically intrusive activities contained in the ongoing Delta-wide "Field Study," rather, than starting out with a broad or "programmatic" level of analysis of the Bay Delta Conservation Plan, and, then, "tier off" that programmatic analysis and focus in on more detailed, site-specific analysis/activities. Starting out with the broader level of analysis is essential, among other reasons, since, CEQA prohibits agencies from "segmenting" or "piecemealing" a project into smaller individual sub-projects or into separate phases in order to avoid the responsibility of considering the environmental impact of the project *as a whole*. CEQA provides numerous types of Environmental Impact Reports (EIRs) that can be used to avoid such segmenting and piecemealing such as "Staged EIRs," "Program EIRs," and "Master EIRs." (See Guidelines, §§ 15167, 15168 & 15175, respectively.) By initiating and carrying out the site-specific Field Study activities in advance of, rather than subsequent to, the required broader environmental analysis of the Bay Delta Conservation Plan project as whole, the current CEQA process is contrary to law.

10. **Conclusion.**

Thank you for your time and consideration of these comments and concerns.

Very truly yours,

Dante John Nomellini, Jr.
Attorney for the CDWA

DJR/djr
Enclosures

A
WATER PLAN
FOR THE 21st CENTURY:

REGIONAL
SELF-SUFFICIENCY
SCENARIO

A WATER PLAN FOR THE 21ST CENTURY: REGIONAL SELF-SUFFICIENCY SCENARIO

INTRODUCTION

As the population of California continues to grow, the imbalance intensifies between the demands for water supplies in the primarily arid regions growing the fastest and the regions where water supplies originate, whose needs for their local supplies also grow. Sooner or later California must unshackle itself from dependence upon transfers of water from North to South, especially during periods of least supply (dry years) when water presently exported is often not surplus to the needs in the north, and develop regional self sufficiency. The Sacramento-San Joaquin Delta is at the bottom of all the river systems of the Central Valley of California and is currently experiencing a meltdown of its ecosystem, largely as a result of the over commitment of the water resources, especially during drier years, which would naturally, and normally, flow through it on their way through Suisun, San Pablo, and San Francisco Bays. Failure to reverse this trend will soon lead to extirpation of important aquatic species, some of which are already listed under the Endangered Species Act; further reductions will surely lead to wholesale destruction of one of the most important agricultural and environmental areas in the world and eventually to loss of infrastructure which supports the economy of the Western United States.

Proposals to build Peripheral Canals do not address the need to find better ways to balance the supply-demand equation, they merely redistribute the deficiency in the current system to the areas in which the waters originate, and to the environment. The solution cannot be found without looking beyond the Delta. We can, and must, do better, especially as we face significant changes in the earth's climate which threaten to greatly aggravate these problems.

HISTORY

To begin to visualize a solution to this dilemma it helps, as always, to look to see how we got into the problem.

Before the Gold Rush and the ensuing settlement of the Central Valley there were no major dams or flood control levees in and around the Central Valley. Snow fell and accumulated in the Sierras in the winter and rain and snow melt filled the rivers into the Central Valley in the winter and spring, overflowing the river banks as flows peaked, filling the rivers' flood plains to the extent of three to five million acres depending upon the severity of the weather. These flood plains, characterized by forests, riparian vegetation and marshes, supported large populations of antlered animals, bears, smaller mammals and vast populations of migratory and resident birds. As the rivers drained in the drier weather, the flood plains drained into the rivers, providing a steady supply of fresh water to the Delta and Bays throughout the spring and summer months, except in the very driest years, supporting native aquatic and terrestrial resources.

Mining in the mountains and urbanization and farming to house and feed the growing population of Northern California began to change the picture. Dams were built to supply the hydraulic mining operations, to prolong the agricultural water supply and to provide some flood protection to the growing urban communities. Flood control levees were built to protect against flood plain inundation, to move hydraulic mining debris through the system, and to allow reclamation of overflow lands. This had the consequence of pushing more and more of the flood waters and mining debris farther downstream, exacerbating flood problems in the Delta which, by about 1910, had virtually all been reclaimed from the flood plain by a system of levees in accordance with a state-incentives program to create more farm land. As agriculture expanded, farmers distant from the rivers sank wells and began mining ground water to grow their crops, especially in the more arid San Joaquin Valley and the Tulare Lake Basin. Eventually the Central Valley Project was built by the U.S. Bureau of Reclamation to divert the San Joaquin River to supplement over-drafted ground water supplies on the east side of the valley, while supplying the downstream users with water

from the Sacramento River dammed at Shasta and diverted from the Delta near Tracy into the Delta Mendota Canal. Only waters surplus to the needs of areas where the waters originated were intended to be transferred. The promises made to the north are clear and well supported in historical references and law.

> "On February 17, 1945, Acting Regional Director R.S. Calland of the Bureau of Reclamation stated in a letter to the Joint Committee on Rivers and Flood Control of the California State Legislature that it was the view of the Bureau that the intent of [California Water Code Section] 11460 is 'that no water shall be diverted from any watershed which is or will be needed for beneficial uses within that watershed.' The letter continued: 'The Bureau of Reclamation, in its studies for water resources development in the Central Valley, consistently has given full recognition to the policy expressed in this statute by the Legislature and the people. The Bureau has attempted to estimate in these studies, and will continue to do so in future studies, what the present and future needs of each watershed will be. The Bureau will not divert from any watershed any water which is needed to satisfy the existing or potential needs within that watershed....'" (See SWRCB [formerly State Water Rights Board] Decision D-990, Pages 70 and 71.)

An October 12, 1948 statement by Secretary of the Interior Krug included the following:

> "There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later." (See Decision D-990, Pages 70 and 71, for this and other Bureau Policy Statements.)

A King Salmon population estimated at 100,000-200,000 fish was eliminated as the San Joaquin River bed was dewatered below Friant Dam, and the water quality of the San Joaquin River deteriorated as it became dominated by agricultural and urban drainage.

Next, the State Water Project was conceived and authorized in a hotly contested state-wide bond election in 1959, accompanied by solemn legislative commitments to take only water surplus to the needs of the areas in which the water originated, including the Delta, for export to the water deficient areas of the State south of the Delta. Water supply contracts were executed which

expressly recognized that the Project might not be able to develop a water supply sufficient to meet the contracted amounts, leading to deficient deliveries to the contractors.[1]

As presented to the voters in the 1959 election, the State Water Project was to build dams not only at Oroville on the Feather River but also on several north coast rivers to augment its supply of water as demand in the areas of origin trumped the exporters' rights and demand in the export areas increased. We reproduce here an excerpt from Bulletin 76 (Preliminary Edition, 12/1960) reflecting the thinking of the Department of Water Resources at the time of the election:

> "The natural availability of good quality water in the Delta is directly related to the amount of surplus water which flows to the ocean. The graph to the right indicates the historic and projected availability of water in the San Joaquin River at Antioch containing less than 350 and 1,000 parts chlorides per million parts water, under long-term average runoff and *without* specific releases for salinity control. It may be noted that even under natural conditions, before any significant upstream water developments, there was a deficiency of water supplies within the specified quality limits. It is anticipated that, without salinity control releases, upstream depletions by the year 2020 will have reduced the availability of water containing less than 1,000 ppm chlorides by about 60 percent, and that exports will have caused an additional 30 percent reduction.

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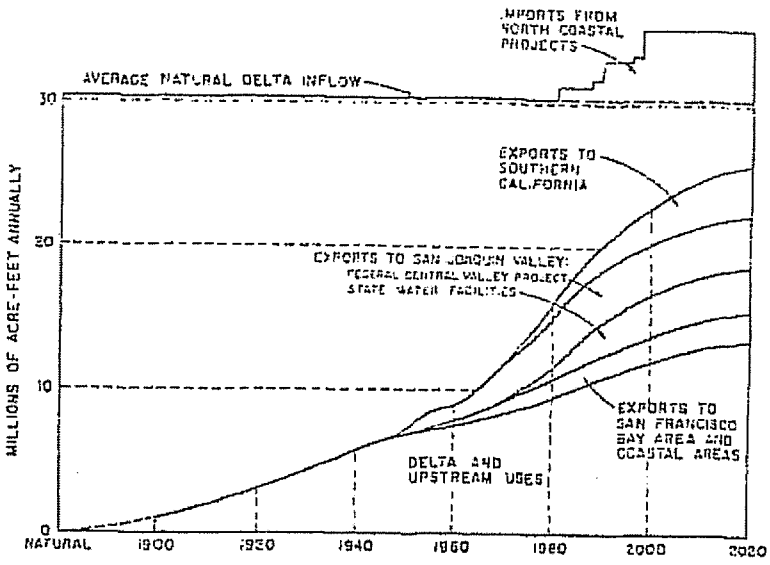
[1] The protections for the "north" are now primarily reflected in (1) the "County of Origin Statute" Water Code Sections 11461, Water Code Section 11128, Water Code Section 12931, Water Code Section 12200, et. seq., and can be summarized as follows:

(1) Only water surplus to the present and future needs of the "areas of origin" can be exported by the SWPand CVP. (See 12200, et. seq., and 11460, et. seq.)

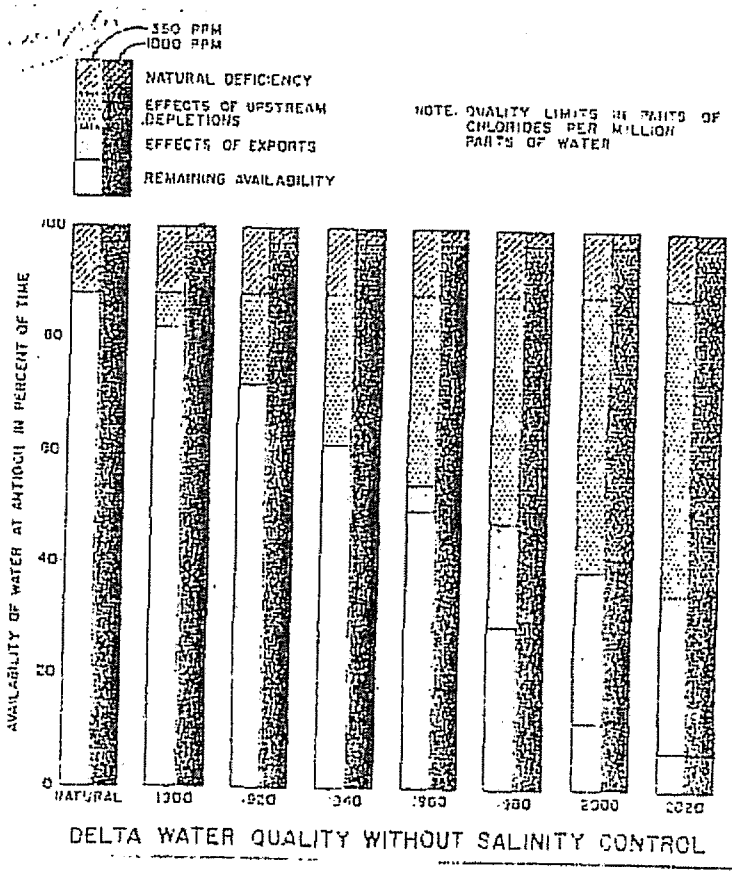
(2) Water utilized by the projects can be recaptured by the areas of origin" whenever needed. (See 11460, et. seq.)

(3) A common pool of water will be maintained in the Delta to serve both Delta users and the export projects. (See Water Code Section 12202 and Water Code Section 11207.)

(5) Releases from storage into the Delta for use outside the area will be integrated to the maximum extent possible to provide salinity control and an adequate water supply sufficient to maintain and expand agriculture, industry, urban and recreational development in the Delta. (See Water Code Section 11461 and Water Code Section 12202.)



USE OF DELTA WATER SUPPLIES



DELTA WATER QUALITY WITHOUT SALINITY CONTROL

The magnitude of the past and anticipated future uses of water in areas tributary to the Delta, except Tulare Lake Basin, is indicated in the diagram [above]. It may be noted that, while the present upstream use accounts for reduction of natural inflow to the Delta by almost 25 percent, upstream development during the next 60 years will deplete the inflow by an additional 20 percent. By that date about 22 percent of the natural water supply reaching the

Delta will be exported to areas of deficiency by local, state and federal projects. In addition, economical development of water supplies will necessitate importation of about 5,000,000 acre-feet of water seasonally to the Delta from north coastal streams for transfer to areas of deficiency."

The State Water Project contracted to supply 4.3 million acre feet per year of water to its contractors, on a 'best efforts' basis, with preference for serving its urban customers based on the large premium they paid for the project's costs.

We now know that only Oroville Dam; with a nominal dry period yield of one million acre feet, was constructed. Elimination of the North Coast facilities began when Governor Reagan decided not to proceed with damming the Eel River in the late 1960's, and was solidified by passage of the Wild and Scenic River legislation. We also now know that the river flows through the Delta required to support fisheries were badly underestimated and much larger flows were, and still are, recognized (if not fully imposed) by the federal environmental and fish agencies and by the State Water Resources Control Board which had reserved jurisdiction to set appropriate water standards to meet fishery needs once they were understood.

In August 1978, the SWRCB in D-1485 in failing to provide complete protection of the public trust acknowledged:

> "While the standards in this decision approach without project levels of protection for striped bass, there are many other species, such as white catfish, shad and salmon, which would not be protected to this level. To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps...."

> "Full protection of Suisun Marsh now could be accomplished only by requiring up to 2 million acre-feet of fresh water outflow in dry and critical years in addition to that required to meet other standards. This requirement would result in a one-third reduction in combined firm exportable yield of state and federal projects...." (SWRCB D-1485, p.14.)

THE PROBLEM

So how can the San Joaquin Valley, the Tulare Lake Basin, and now Southern California and some of the Bay Area, rely for their water needs on water

projects that never developed their base supplies, badly underestimated environmental needs and expected to have supply diminish as demands grew in the areas where the water originated? And add to these problems future population growth, ground water deplenishment, global warming effects on snow pack and sea levels and you have a system, already in triage, headed for major disaster.

THE SOLUTION: REGIONAL SELF SUFFICIENCY

What is the way out of this dilemma? Certainly not tinkering with various forms of Delta conveyance, which do nothing to cure the supply-demand problem, but merely shift the burdens of the dry period imbalance.

SOUTHERN CALIFORNIA

After the passage of the 1982 Referendum decisively rejecting the Peripheral Canal, member agencies of the Metropolitan Water District of Southern California ('MWD") began to push for regional solutions to "drought proof" Southern California by reducing reliance, during dry periods, upon regional imports of water. Offstream storage, especially the project now named Diamond Valley Reservoir, was built to store wet year supplies from the Colorado River and the State Water Project. Storm water retention dams and basins were constructed to back flood waters into infiltration basins. Extraction and treatment facilities were constructed at the lower end of depleted, but polluted, ground water basins to reactivate those basis for carry-over storage. Wetlands were created to help recycle the extracted and treated polluted ground water, creating wildlife benefits. Demand reduction programs, including aggressive conservation, were implemented. Desalinization plants for brackish and sea water were designed and constructed, often in conjunction with coastal-sited energy facilities, taking advantage of pre-heated cooling waters and existing ocean discharge facilities.

With the new stratagems and facilities, MWD says it will be able to meet the

needs of a growing Southern California population without future increases in dry period exports from the Delta, and presumably without the increases which occurred as Diamond Valley was being filled over the last several years.

In dry years, MWD's share of total Delta exports by the CVP and SWP is about 25%. The balance goes mostly to agricultural contractors of the two projects, especially in the drier years. In the wetter years, when the most water would be available without adverse impact upon the areas of origin and the Bay-Delta ecosystem, agricultural demand decreases because precipitation meets more of the crop needs and because of lack of facilities to store water for future use in drier years.

THE CENTRAL VALLEY REGIONAL SUPPLY

The lack of ability to utilize and store water in the Central Valley during the wetter years also aggravates flooding problems in the Valley and, especially, in the Delta. With literally millions of acres of the Valley floor converted from secondary flood plain to farm land and urban areas over the last 150 years, flood peaks at the lower end of the Valley and the Delta have increased dramatically and will increase even further if global warming produces more rain run-off in place of snow melt from the Sierras as is expected. In addition, traditional Sierra and foothill reservoirs will be less effective at flood control as flood reservations approach and exceed reservoir capacity and less control is available for larger rainfall events.

How then can the Central Valley, and especially Central Valley agriculture, prepare itself for a future of more concentrated rainfall events and less dry-year import availability from the Delta via the CVP and SWP and become regionally self-sufficient?

The California Water Atlas reports that there is over one-half billion acre feet of ground water storage space in the San Joaquin Valley alone, much of which has been vacated by the massive ground water mining which has sustained the growth of agriculture and urban areas from Red Bluff to Bakersfield and which hasn't been rectified by the billions of dollars invested in the CVP and

SWP which were constructed for that purpose. Deficiencies in imported water supplies have been noted and bemoaned, but not addressed. Ground water overdrafting continues largely unabated, with wells periodically deepened and power consumption escalating.

A simplified view of this situation helps to illustrate the problem. Agriculture in the Central Valley is constantly searching for markets for its production. The scarcity of robust markets impacts the economics of farming to such a degree that a "one year at a time" mentality prevails. Over supplied markets cause agricultural land, often in flood-prone areas, to be converted to urban development without proper attention to flood threats and flood control.

What can be done to get us out of this mess?

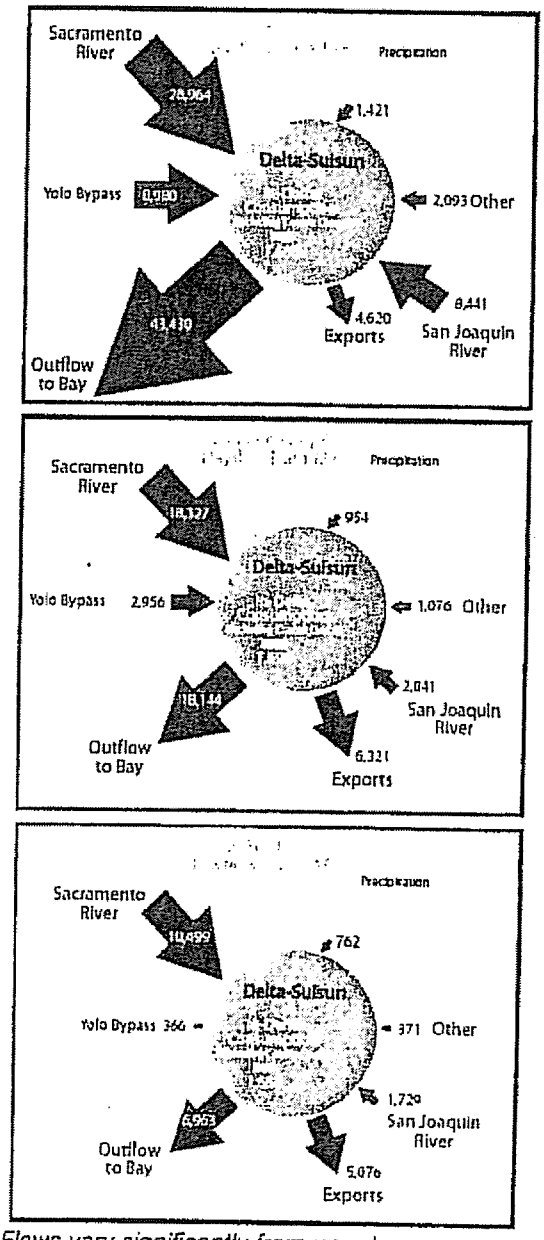
IT ALL STARTS WITH FLOOD CONTROL

First, we need a real flood management plan for the Central Valley which addresses the current situation and plans for the future of global warming. Until the "design flood" is determined, we can't design a system to contain it and we won't know where to expand our cities. This problem has been recognized and discussed recently in sessions organized and conducted by the University of the Pacific's Natural Resources Institute, and the development of a flood management plan for the Central Valley is now called for in SB 5 (Machado) currently before the legislature.

It is important that such a plan anticipate future climate change possibilities so that "room for the rivers" and appropriate flood works expansions can be reserved in flood management plans.

Second, we must recognize that meeting water needs in the Central Valley will be dependent upon controlling and conserving portions of these flood flows for future use. The recently completed DWR publication "Status and Trends of Delta-Suisun Services," May 2007, contains an important illustration of this problem. At page 18 (reproduced here) the authors present a chart entitled "Delta Water Balance" depicting Delta inflows, outflows and exports for three recent water years, 1998 (wet), 2000 (average) and 2001 (dry). Of particular note is the finding that exports from the Delta by the CVP and SWP were <u>less in the wet year</u> which experienced almost 50 million acre-feet of inflow <u>than in the dry year</u> in which less than 14 million acre feet entered the Delta from precipitation and its tributaries. <u>What kind of a surplus water export system is this?</u> And how much of the 5,076,000 million acre-feet of exports in the dry year were produced by carry-over storage from project reservoirs as opposed to current year unimpaired flows to which senior water rights and public trust entitlements would generally attach?

Delta Water Balance



Flows vary significantly from year to year

Status and Trends of Delta-Suisun Services

May 2007

HOW TO PREPARE FOR DROUGHT

A simple exercise is illustrative of this point. Average annual exports by the CVP and SWP from the Delta total about 5 million acre-feet, whereas average annual inflows are about 30 million acre-feet. Thus if less than 20% of the annual inflow to the Delta was exported in each year, total exports would increase, while exports during the driest years would be limited to 1 to 2 million acre-feet in each such year allowing sufficient Delta outflow to maintain good water quality in the estuary and support a healthy ecosystem.

It is interesting to note that Dr. Michael Rozengurt, a prominent Russian hydrologist testified in the SWRCB Bay-Delta Estuary Hearing (on July 14, 1987) leading up to D-1379 that every estuary in the world which had significantly reduced its cyclical natural river in-flows has experienced serious ecosystem harm. There is a growing scientific consensus that greater outflow, especially in the drier years, will be necessary to support a healthy ecosystem in the estuary, and of the need to determine what the "safe export yield" of the Delta will be after reserving sufficient outflow. Recently, the Pelagic Organism Decline recovery team of scientists has recommended immediate export reductions in the range of 1.5 million acre-feet per year as a measure to avoid elimination of pelagic species.

Should we not be redesigning our massive export projects (and perhaps some others) to increase exports during wetter years while decreasing exports in drier years, all in line with such "safe yield" limits?

The Southern California SWP contractors have already taken steps to accommodate themselves to such an approach with off stream storage and ground water recharge capabilities, as well as with demand management initiatives. But the Central Valley customers have done little. Neither Friant Dam (Millerton Reservoir) nor the Federal share of the San Luis facilities provide much carry-over storage relative to the annual demands of the CVP contractors. Both are largely operated on an annual fill and empty strategy. More wet year storage is needed, but where is it to be found?

Some of it might be provided by new or expanded reservoirs in the mountains, but this is unlikely given the current economics (especially without

urban subsidies of agricultural supplies), environmental problems, and the impacts of global warming on yield of traditional storage reservoirs.

More than likely it would best be provided by flood plain management on the valley floor, more like it was 150 years ago.

It should be noted that quite a bit of this is already happening. Flood management for the Sacramento Valley is largely provided not by foothill reservoirs, but by a system of bypasses and floodways on the valley floor. Although not much emphasis is placed on flood flow retention and ground water recharge in these by-passes and floodways today, it could be in the future.

The Tulare Lake Basin presents a model for the areas south of the Delta. Much of the larger flows of the Kings River are planned to flow into the basin where they are confined to leveed areas and used for carried-over irrigation supplies. These operations could be expanded to include flood waters that are now pushed to the San Joaquin River.

Similarly, the Kern County Water Bank is operated to store excess waters in wet years in a previously over-drafted ground water basin for subsequent use.

Investigation will reveal many other opportunities to retain storm waters on the valley floor in historical flood plains for carry-over use and ground water recharge. Some of these may utilize temporary retention in the by-passes and basins of the Sacramento Valley for subsequent transfer to storage and recharge on the floor of the San Joaquin Valley and Tulare Lake, finally utilizing wetter year export capacity of the CVP and SWP when fewer environmental consequences can be anticipated. Other opportunities will be found around Los Banos in the depleted basins under the San Joaquin River accessed from areas like Madera Ranch, the San Luis Refuge, the Grasslands and from the restoration of flows in the San Joaquin River itself. An intriguing opportunity will be presented as the Department of the Interior pays to retire vast acreages (200,000 or more) of the Westlands Irrigation District impaired by perched ground water without drainage but overlying an over-drafted ground water basin beneath the Corcoran Clay.

Reoperation of existing reservoirs will be more feasible with operable flood control basins.

Other opportunities will be presented by the need to create a system of

weirs and gates to supply flood by-passes and retention basins as the weather changes south of the Delta from snow to rain. These may extend all the way into the Delta, with flood easements acquired on currently farmed acreages for temporary flooding or wetlands creation on lands that don't include critical infrastructure, i.e., controlled flooding and timely pump-out to avoid levee failure and impacts to adjacent lands, to provide better flood protection to urban areas and critical infrastructure.

Easement programs should be developed, perhaps through the creation of a Conservancy, to target critical habitat areas, both aquatic and terrestrial, not already in public ownership, and to help compensate for loss of farming and development opportunities.

It is important to point out that the additional dry-year water that can be supplied by this type of redesign of the CVP and SWP does not need to be exported from the Delta in dry years since it is already at or near the sites where it is needed, recharging depleted ground water basins, recreating historical wetlands and providing carry-over water supplies.

Another important feature is that those projects are primarily designed for flood control, traditionally a non-reimbursable feature of water project development. The resulting water supply may therefore be one that agricultural users could actually afford.

WHAT NEEDS TO BE DONE IN THE DELTA ITSELF?

The Delta is much more than a cross-roads for water development or a vast and fertile farming area. Probably because its land is relatively flat, relatively unpopulated and relatively inexpensive, much important infrastructure has been sited in and across the Delta, all of which is vulnerable to catastrophic levee failures. Increasingly urban development is encroaching into the Delta as well. It is also home to one of the great and most varied ecosystems in the world, both aquatic and terrestrial, as well as a multi-faceted recreational paradise easily accessible to a large and growing population. All of these assets – farming, infrastructure, urban areas, environment, recreation -- are as vulnerable to catastrophic levee failure as are the water export facilities, although the exports

facilities draw the most political attention.

In simple terms, agriculture built and maintains the levees, now with modest support from the State through the Levees Subvention Program. The levees protect the homes, highways, aqueducts, pipelines, gas fields, deep water channels, recreation facilities and ecosystem found in the Delta. Water development squeezes as much water as it can out of the Delta during the drier years putting enormous and destructive pressure on the ecosystem and the local uses. In the wetter years, upstream development dumps as much flood water as it can into the tributaries putting enormous pressure on the Delta levees. Is it any wonder that commentators now consider the Delta, if current trends continue ("business as usual"), to be "unsustainable" in the face of future changes?

The "drivers of future change" identified in the Delta Risk Management Study are:

- Subsidence
- Global climate change - sea level rise
- Regional climate change - more winter floods
- Seismic activity
- Introduced species
- Population growth and urbanization

How do we deal with these "drivers"?

SUBSIDENCE

Subsidence has occurred both with levees and the lands protected by the levees. As river flood stages have increased due to upstream activities causing constrictions on the flood plain and due to global warming, levees have been increased in width and height. Where constructed on compressible soil foundations (peats and clays), the additional weight has compressed these foundations, causing settlement and necessitating further construction, more weight, and more settlement. Each time new levee height or width is required, the process repeats itself until the foundation soils are fully compressed and

stabilized. Stabilization has largely occurred in many parts of the Delta, especially toward the edges.

The second form of subsidence has occurred mainly through oxidation of organic soils which were dried out (and sometimes burnt for weed control)for farming, and to some degree, by compression of the dewatered soils from the weight of farm equipment, not unlike the first form of subsidence discussed above for the levees. This form of subsidence slows down, and eventually stops, as the organic soils are depleted which has also occurred in most of the Delta. It is estimated by local interests well familiar with current soil conditions, that less than 100,000 of the 600,000 acres in the Delta still contain enough organic material to further subside. Most of these conditions existing in the west-central portions of the Delta, and these soils usually occupy just portions of islands, not the entire island.

Subsidence of the farmed lands has no impact upon levee stability per se. The levee structures support themselves and the "design levee" is only dependent upon a swath of land 200-400 feet wide, which is the foundation upon which the levee is built.

Although farmed land subsidence can increase the volume of water which the leveed island will contain if flooded, it doesn't contribute significantly to the stability of the levee itself.

Generally speaking, normal levee maintenance has kept up with the problems created by subsidence. The bigger challenges are presented by the next subjects.

GLOBAL CLIMATE CHANGE - SEA LEVEL RISE

Modest sea level rise has been documented at the Golden Gate since the original reclamation of the Delta, about 6 inches since reliable measurements began. Most observers feel this phenomenon is increasing and will produce further rises in a broad range of one to eight feet over the next 50-200 years. At the upper end of this range the world will be dealing with more difficult issues than the Delta, and many coastal areas and bays don't currently have levee protection.

Because the Delta is already protected by levees (which have few encroachments), it is possible to build higher, wider, stronger levees. It also becomes more expensive as levee building material gets scarcer and more remote. It is critical to protect and expand local sources of scarce material, such as dredged materials from deep water channel maintenance activities and the rock revetment material from nearby quarried deposits, which are under constant regulatory pressure.

At some point "Dutch" solutions should be considered, especially if the rate of sea level rise trends toward the higher estimates. Such solutions include joining groups of islands together behind common levees ("polders") to reduce the miles of levees which need major improvement. In many cases locks would be appropriate to retain waterway access for recreational and commercial uses.

Consideration should likewise be given to the possibility of constructing closable surge barriers west of the Delta if it looks like sea level rise will trend toward the highest estimates, mimicking the Rotterdam Storm Surge barrier types which Dutch engineers are now studying for the Lower and Upper Mississippi River. It would be helpful to have the assistance of the Dutch engineers to help plan an effective future flood control plan.

REGIONAL CLIMATE CHANGE - MORE WINTER FLOODS

Our responses to this "driver of future change" have been described earlier. Suffice it to repeat here that we need a Central Valley Flood Management Plan that will identify opportunities to attenuate flood peaks and incorporate methodologies for future use of the attenuated flows through flood plain retention and ground water recharge.

SEISMIC ACTIVITY

This is the real "wild card" of the drivers of future change. Although the Delta has never experienced levee failure from an earthquake, it could tomorrow. Hence, we should be preparing today.

The seismic vulnerability of the Delta is focused overwhelmingly in the

westernmost Delta because of closest proximity to known active faults, poorest levee foundations vulnerable to seismic events, and exposure of the CVP, SWP, and CCWD to potential sea water intrusion at their intake facilities induced by a western Delta island failure. As much as 60-70% of the risk of seismic failure is concentrated on Sherman Island alone, according to the risk studies, and much of the remaining risk is to Jersey, Twitchell and Bradford Islands.

In spite of the fact that most of the lands on these westernmost Delta Islands are already in public ownership, little is being done to reduce seismic vulnerability beyond "hand-wringing." Subsidence is presumably continuing under the farming practices of the tenant farmers and major seismic reinforcement of the most vulnerable portions of the levees is not being accomplished. We believe the public ownership needs to react quickly to the perceived seismic threat. Since these westernmost islands are also the closest and most accessible to the Bay Area population, there is a significant opportunity to meet recreational and educational needs if portions of these lands need to be converted from agriculture to attain seismic protection.

Our engineers tell us that a good defense against seismic failure is to widen the levee so that slumping caused by foundation liquefaction does not take the whole levee section resulting in a breach. In the process, a lot of material has been "stockpiled" at the site which can be used to respond to slumping damage as it occurs.

It should be noted that as you move eastward into the Delta, the seismic risk decreases, as does the risk of induced salinity intrusion which affects intake facilities of the in-Delta diversions. If the westernmost islands don't fail, the exposure of the export facilities is greatly reduced. By way of example, the recent June failure of the Jones Tracts' levees did not significantly impact export water quality. In the Eastern Delta, storm flood is a more significant risk, although as protection for urbanized areas is designed, seismic protection should be incorporated at appropriate levels.

INTRODUCED SPECIES

Introduced species have been identified as a big concern only in the last twenty-five years or so. In fact, some of the species we are now concerned about saving (Striped Bass, Threadfin Shad) are themselves introduced.

The Asian-variety clams and crabs that have become problems weren't "invented" in the last 25 years, and ocean-going commerce (and bilge water dumping) has existed since at least the 1930's. Why are they pervasive now, competing for food with the "desired" organisms?

The answer most likely lies in the changes to the aquatic environment which have taken place as a result of upstream diversion and Delta exports of fresh water which would otherwise run through the Delta to Suisun, San Pablo and San Francisco Bays.

The effect has been dampening of seasonal flow and quality fluctuation and, contrary to the mistaken assertions upon which the PPIC Report authors based their conclusions, a saltier Suisun Bay and Delta. The "null" or "mixing" zone where the forces of the Delta fresh water outflows and the ocean tides achieve balance in the spring and summer used to be found in Suisun Bay, which is very wide, typically shallow, and (before the construction of the Montezuma Slough gate), used to have many dendridic excursions into sloughs extending into the Suisun Marsh. Because the null zone is the most nutritionally productive area of the estuary, the combination of primary food production and channel configuration provided a productive nursery area for the aquatic creatures of the system.

Now the mixing zone has been relocated by reduction of Delta outflow an average of seven miles further upstream into the deep, dark, steeply banked channels of the western Delta, conditions in which the "preferred" species do not thrive. The more salt-loving Asiatic clams have taken hold in Suisun Bay and "filter" the zooplankton and other primary food supplies out of the system.

The best, and perhaps only, solution to this problem is to return the null or mixing zone to Suisun Bay by reducing exports from the system during the drier years, which is proposed earlier in this paper. If the water supply offshore from

Suisun Marsh was re-established at quality necessary to grow preferred plants in the Marsh, the dendric sloughs could be re-opened into the Suisun Bay which would undoubtedly help support the "nursery function" of Suisun Bay.

POPULATION GROWTH AND URBANIZATION

The population is probably going to continue to grow and that may not be avoidable, or necessarily bad. The key is to keep it from growing into flood-threatened areas.

We have a big problem. Locally governed land use authority allows urban development to occur in areas that turn out to lack adequate flood protection for existing or newly urbanized areas. The federal government doesn't adequately respond to flood threats, and to floods. As a group, the local, state and federal authorities don't have a flood management plan.

This problem transcends the entire Central Valley, although it is most evident in the Delta. We need to develop a plan whereby we have a common flood management plan that the local, state and federal authorities can work together to implement and stop pushing the blame (and liability) back and forth amongst each other.

Earlier in this paper we called for the development of a Flood Management Plan for the Central Valley which will assess current and future conditions. With such a plan we can determine how to operate flood control features of water storage projects, where to build our levees, and which portions of the historical flood plain we need to reactivate or recreate "to provide room for the rivers." Then we will know where, and where not, to build our cities. And there will be a sound basis for dividing governance responsibility between local, regional and state agencies on the basis of designated uses.

CONVEYANCE

Once all these "drivers" have been addressed as discussed above, we can "tinker" with Delta conveyance strategies to optimize the system without mere reallocation of shortage.

From a Delta perspective, we are fearful that mechanisms that make it possible to short the Delta of its water supply will be used, ultimately, to short the Delta of its water supply. We also believe that little has been done to consider the implications of isolated transfer since the 1982 Referendum and dispute the recent statement attributed to the Governor that isolated Delta conveyance "has been studied to death." We have the following concerns about isolated transfer facilities:

- The fresh water inflow to the Delta has already been greatly reduced by bypassing the Delta exports south from Friant, west from the Tuolumne, and west from the Mokelumne. The inflow is also reduced by the consumptive use of upstream water to grow food and support urban growth. If a Peripheral Canal were used to also keep Sacramento water out of the Delta, there would inevitably be further substantial increase in the salinity of water in Delta channels. Exports from Delta channels would then be deemed too salty. The canal would, therefore, have to convey all the water that is now exported south and west from Delta channels.

- The Peripheral Canal would be a barrier to flood waters from south and east of the Peripheral Canal alignment. During major floods that exceed the capacity of the San Joaquin and Mokelumne channels, the flood stage would increase against levees that protect tens of thousands of homes. The canal itself becomes a potential threat to flood adjacent areas if it breaches (and we are advised that current design and cost estimates do not include seismic protection).

- The Peripheral Canal would require vast expenditures to construct massive new levees on both sides of a 42 mile alignment through the very areas where we now have problems maintaining levees.

- If billions of dollars are spent on a Peripheral Canal, those funds won't be available to improve existing Delta levees, and to implement measures that could impede the flow of Bay water into the Delta in the event of multiple levee break if it occurs at a time when outflow to the Bay is not maintained by flood flows.

- If the basic configuration of Delta channels and land uses is not maintained, there will be an increase in the tidal actions which brings Bay water

into the Delta exacerbating water surface elevation during flood flows and loss of water to meet net Delta outflow requirements. Numerous Peripheral Canal proponents propose that levees be breached and/or allowed to fail for lack of maintenance or repair. As each island flooded it would increase Bay water encroachment. "Water use" by evaporation from the surface of flooded lands exceeds agricultural use of water from farmed lands by about two acre-feet per acre. It would also increase wave erosion on other levees. If the basic configuration is not maintained, the Delta will become a salty inland bay.

- As the Delta became an inland bay, the levees that protect roads, housing, utilities, railroads, recreation facilities, etc., would experience substantial wave and seepage problems. Their ability to protect the public's interests would be seriously diminished. It may be far cheaper to fortify the existing levees that protect the infrastructure than to relocate or fortify the infrastructure itself.

- Delta agriculture now produces food on about half a million acres of Delta lands. The production would be largely destroyed by increased salinity and by the uncertainty of levee protection caused by a Peripheral Canal. Agricultural Code 411 states that California must not become dependent on a net import of food due to failure to provide an adequate agricultural water supply. Using a Peripheral Canal to increase salinity and destroy half a million acres of food production in the Delta is incompatible with that mandate.

- The salinity increase caused by a Peripheral Canal would cause a violation of most, if not all, of the SWRCB's salinity standards and contracts with Delta water agencies.

- The reallocation of an inadequate water supply and other consequences of a Peripheral Canal would violate the Delta Protection Statutes, water rights law, and the Environmental Protection Act.

- The initial effect of the Peripheral Canal on Delta fishery is controversial. The entire Sacramento River anadromous fishery (Salmon, Steelhead, Shad, Sturgeon, Striped Bass, etc.) would need to pass by its intake and no fish screen of this magnitude has ever been proven effective. Delta Smelt will follow the fresh water in the Delta to the pump intakes (whether they are at Tracy or Hood) when water quality deteriorates below the point of export.

- It is not clear that there is a routing available for a Peripheral Canal with all of the urbanization that has occurred since 1982, without relocating it westward into the very areas that are thought to be vulnerable to flooding because of subsidence, poor foundation material and seepage problems.
- Who would be willing to pay for it? The 1982 Referendum illustrated the reluctance of the voters and a recent court decision reconfirms the obligation of the State to submit bond proposals to the voters.

The proposals to improve the efficiency of passage of water through the interior of the Delta bear more promise from both a political perspective and a "reversibility" perspective, including the recent suggestions of ways to separate the streams carrying fish from the flows being exported in the South Delta while still maintaining sufficient flow through the Delta to maintain a common pool of fresh water for use within and without the Delta.

Recent proposals incorporating such separations include "Straw Proposal 2" the so-called "Eco-Crescent" presented to the Delta Vision Stakeholder Coordination Group at its recent workshop in Courtland on June 13 and 14, and Dr. Russ T. Brown's "Proposal to Reconnect the San Joaquin River to the Estuary" dated March 23, 2007. Many features of these concepts included within the "Flexible Delta" Scenario being developed by the Delta Visions Stakeholder Coordination Group may fit within this concept, although others would not. In fact, a group composed of representatives of the North, Central and South Delta Water Agencies and some environmental groups submitted a tributary corridors concept to CALFED several years ago which included a physical barrier to separate San Joaquin River Salmon at the head of Old River to keep the fish in the main stem of the San Joaquin River away from the influence of the export pumping from Old River while enhancing other environmental features of Old and Middle Rivers.

All of these proposals appear to provide protection to important Delta fisheries without negatively impacting Delta water quality, such as is the case with isolated (peripheral) transfer facilities, and are worthy of study and consideration in conjunction with the other suggestions made here.

BLUE RIBBON TASK FORCE ISSUE ASSESSMENT

Before concluding, we wish to point out how the approach recommended in this paper responds directly or by implication to the issues which the Governor has addressed to the Blue Ribbon Task Force in his Executive Order 5-17-06 initiating the Delta Vision Process:

- The environment, including aquatic and terrestrial functions and biodiversity.

Our approach is to restore enough of the historical Delta outflow pattern necessary to return the mixing zone to the Suisun Bay to reclaim the ecological vitality of the Bay-Delta Ecosystem, while replacing displaced exports with flood plain recapture, ground water replenishment, and demand management initiatives. This approach will benefit aquatic and terrestrial populations in the entire Central Valley through enhanced drier year stream flow, water quality and wetland restoration, while providing protection to the largest fresh water estuary in the Americas and the 700+ native species of fish, animals and plants that depend upon it.

- Land use and land use patterns, including agriculture, urbanization, and housing.

Developing and implementing a Flood Management Plan for the Central Valley will help resolve existing governance problems by designating, from a regional perspective, where urbanization can safely occur and where agriculture and other open-space uses must remain, and by providing financing to implement the plan. Such a Flood Management Plan would also help determine whether it is more cost effective to protect legacy communities, roads, and other Delta infrastructure by strengthening existing levees or by constructing ring levees or consolidating and armoring utility corridors.

- Transportation, including streets, roads, highways, waterways, and ship channels.

This paper favors maintaining the existing land patterns in the Delta to appropriate risk levels given the protected use. Seismic concerns would be stressed in the westernmost Delta and for levees that protect urban areas. Flood

risks would be addressed through a combination of flood attenuation in upstream flood plains and rehabilitation and maintenance of Delta levees, in accordance with sound engineering practices. Greater risk would be assigned to levees which don't protect important infrastructure, recognizing the need for both a flood easement program and robust emergency response.

Delta Engineers assure us that there are techniques to protect Delta levees to address seismic risk and future conditions relating to global warming. If global warming begins to reflect higher estimates, "Dutch solutions," such as polders and tidal surge barriers, should be considered for timely implementation.

- Utilities, including aqueducts, pipelines and gas/electric transmission corridors.

As noted above, levee systems that protect at-risk infrastructures should be maintained to less at-risk standards. The utilities themselves are currently involved in this type of planning and construction, including multiple routing and consolidation.

- Water supply and quality, municipal/industrial discharges and urban and agricultural runoff.

The current system of regulation is adequate to meet existing and emerging public health and safety objectives, and to incorporate new technologies as they appear. Public funding needs to be available to address unusual issues, emergencies and environmental justice concerns.

- Recreation and tourism, including boating, fishing and hunting.

This paper's approach would enhance aquatic and terrestrial resources throughout the Central Valley and specifically preserve and support recreation and tourism through appropriate land-use designations established by a Central Valley Flood Management Plan, and by the restoration of a robust fresh water environment in the Delta consistent with its history.

- Flood risk management, including levee maintenance.

This paper calls for establishment and maintenance of levees throughout the Delta appropriate for the protection of the assets they protect and the stresses they will face, and a robust Emergency Response Plan for when, and if, they fail. Ultimately, it is either extremely expensive or impossible, to only protect

some of the levees in the Delta.

- Emergency response.

No mater how well designed and constructed, any levee can fail, if not from earthquake, floods or beavers, then maybe from acts of terrorism. We must have a robust Emergency Response Plan, including quick financial response capability. Delta interests have promoted and participated in emergency response planning, including a set-aside of Propositions I-E and P4 funding to jump start emergency response.

- Local and state economies.

Too often discussion about Delta Vision focuses on water export interruption and ignores the devastating impact a major flooding in the Delta would have on the ecosystem, transportation, utilities and urbanized populations. Any viable Delta Vision cannot envision long-term loss of any significant portion of the Delta land mass or the levees that provide its protection. This paper also describes a methodology for providing the water supply to the Delta exporters which they were supposed to get from the expansion of the water project in a way that addresses flood issues meaningfully with the prospect of global warming and is sensitive to environmental issues.

CONCLUSION

We have become dependent, perhaps unwittingly, upon the Delta to support a wide variety of functions, from ecosystem, to agriculture, to transportation of people, water, energy, and commodities, to urban communities and their recreation needs. We need to develop a plan that deals with all of these functions, not just inter-regional water transfer. We need to look beyond the Delta for solutions.

This plan needs to look forward and anticipate changes that appear certain to occur in the twenty-first century and beyond, and not be tied to concepts developed to deal with the past.

We hope that you have found this paper to be useful in that regard.

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May 30, 2008

Via Email at delores@water.ca.gov

Ms. Delores Brown, Chief
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Re: Comments on the Notice of Preparation for the EIS/EIR for the Bay Delta Conservation Plan

Dear Ms. Brown:

The Central Delta Water Agency and South Delta Water Agency previously submitted comments on the *federal* "Notice of Intent" to prepare an EIS/EIR for the BDCP on March 24, 2008. Since such comments relate to the same topic at issue herein, those comments are hereby incorporated by reference and enclosed herewith. We hereby take the opportunity to supplement those comments with the following.

1. **The Feasibility of "the Project" Has Not Yet Been Demonstrated and Must be Demonstrated *Prior to* the Initiation of the CEQA Process.**

CEQA at least implicitly, if not explicitly, assumes that the "project" which is subjected to environmental analysis under CEQA is a project that is feasible. Guidelines section 15364 defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."

CEQA is not meant to be the process to determine whether the proposed project is feasible. (CEQA *is*, however, an appropriate process to evaluate whether *alternatives* to the project are feasible.) Thus, before the CEQA process ever begins the project must be fairly determined to be feasible. This is especially important since EIS/EIRs are inevitably biased towards justifying why the project should be carried out and why all the alternatives to the project are not feasible and should be rejected. Moreover, it would involve a colossal waste of the resources of all of the public responsible and trustee agencies as well as the general public

and stakeholders to embark on the CEQA process with a project that, from the get-go, has not been proven to be fesible, i.e., "capable of being accomplished in a successful manner within a reasonable period of time . . . ." (Guidelines, § 15364.)

While as discussed below the project at issue has not yet been defined, and, as a result, this entire Notice of Preparation and Scoping Process is legally inadequate and premature, it is clear that at the present time it would be unwarranted and unlawful for the ultimate project to include any form of an isolated conveyance facility. In its "Vision for the California Delta," the Delta Vision's Blue Ribbon Task Force, which was specifically directed by the Governor to "develop a durable vision for sustainable management of the Delta" (Governor's Exec. Order No. S-17-06 (Sept. 28, 2006)), readily recognizes and concedes that the feasibility of any isolated conveyance to accomplish the purposes for which it is sought has not yet been demonstrated. For example, the Task Force explains:

> "One way to manage water exports is to create isolated facilities that take water around the Delta. *Perhaps* this would enhance the reliability of exports, create fewer problems for selected species, be less exposed to seismic risk, and result in higher water quality. *But at this point, there is not sufficient specific information to guarantee these outcomes.*
>
> Similarly, the concept of a "dual" conveyance, joining an isolated facility to improved conveyance through the Delta, *might* increase reliability and capture more high-water flows, but again, *not enough information is available at this point to ensure this.*" (Delta Vision, Blue Ribbon Task Force's "Our Vision for the California Delta," p. 13.)

Once the lead agencies for the BDCP EIS/EIR figure out and articulate what basic objectives they are trying to accomplish, then *before* the lead agencies develop the project which they believe is the preferred course of action (i.e., alternative) to accomplish those objectives, the lead agencies must ensure under CEQA, as well as the rule of good faith and fair dealing and other laws and principles, that whatever project they develop and bias the entire EIS/EIR process in favor of is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364.)

a. **An Isolated Conveyance Facility Is Not "Legally" Feasible.**

With regard to "legal" feasibility, two paramount questions regarding any form of an isolated facility include whether such a facility can be legally constructed and, if so, whether such a facility can be legally operated in a manner which successfully accomplishes the purposes for which it is constructed. Unless existing law is substantially overhauled the answer is "no" on both counts.

i. **Delta Protection Act of 1992.**

"The Legislature finds and declares that the Sacramento-San Joaquin Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state *to recognize, preserve, and protect those resources* of the delta for the use and enjoyment of current and future generations." (Pub. Resources Code, § 29701, emphasis added.)

"The Legislature further finds and declares that the basic goals of the state for the delta are the following:

(a) *Protect, maintain, and, where possible, enhance and restore* the overall quality of the delta environment, including, but not limited to, *agriculture, wildlife habitat, and recreational activities.*

. . .

(c) Improve flood protection by structural and nonstructural means to ensure an increased level of public health and safety." (Pub. Resources Code, § 29702, emphasis added.)

"The Legislature further finds and declares as follows:

(a) The delta is an agricultural region of great value to the state and nation and *the retention and continued cultivation and production of fertile peatlands and prime soils are of significant value.*

(b) The agricultural land of the delta, while adding greatly to the economy of the state, also provides a significant value as open space and habitat for water fowl using the Pacific Flyway, as well as other wildlife, and the *continued dedication and retention of that delta land in agricultural production contributes to the preservation and enhancement of open space and habitat values.*

(c) *Agricultural lands located within the primary zone should be protected from the intrusion of nonagricultural uses.*" (Pub. Resources Code, § 29703, emphasis added.)

The construction of a huge isolated facility through the Delta will constitute a massive "intrusion of nonagricultural uses" by taking considerable acreage of agricultural land out of production, and, hence, result in the destruction of the associated economic, open space and habitat values associated therewith, which is squarely contrary to State's goal and policy to "recognize, preserve, and protect" such agricultural lands and values. (Pub. Resources Code, §§ 29703 & 29701, respectively.)

Similarly, with regard to the "operation" of an isolated facility, how is the diversion of substantial amounts of fresh water flows into such a facility consistent with the basic goal of the state to "*[p]rotect, maintain, and, where possible, enhance and restore the overall quality of the delta environment*, including, but not limited to, agriculture, wildlife habitat, and recreational activities"? (Pub. Resources Code, § 29702.) Clearly, it is not.

ii. **Water Code sections 12980 et seq.**

> "The Legislature finds and declares that the delta is endowed with many invaluable and unique resources and that *these resources are of major statewide significance*." (Wat. Code, § 12981, subd. (a), emphasis added.)
>
> "The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, *the physical characteristics of the delta should be preserved essentially in their present form; . . .*" (Wat. Code, § 12981, subd. (b), emphasis added.)

Neither the construction of a huge isolated facility through the Delta, nor the diversion of fresh water inflows into such a facility, come anywhere near "preserv[ing]" "the physical characteristics of the delta . . . in their present form; . . . ." (*Ibid.*) Such construction and operation constitute an obvious and drastic alteration of the present physical characteristics of the Delta in direct contravention of the Legislature's finding and declaration in section 12981.

iii. **Delta Protection Act of 1959.**

> "The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220, Chapter 2, of this part, *and to provide a common source of fresh water for export to areas of water deficiency* is necessary to the peace, health, safety and welfare of the people of the State . . . ." (Wat. Code, § 12201, emphasis added.)

If water is exported at the northernmost tip of the Delta via an isolated facility, then such water is plainly *not* providing a "*common* source of fresh water for export," instead, it is providing an *isolated* source of fresh water for export which is entirely devoid of common benefits to essentially the entirety of the Delta and, hence, which is squarely contrary to section 12201 and "to the peace, health, safety and welfare of the people of the State."

Moreover, Water Code section 12205 provides:

"It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates *shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part.*" (Emphasis added.)

Since, as just noted, one of the "objectives of this part" is to "provide a *common* source of fresh water for export" (Wat. Code, § 12201), the Projects have a duty to integrate their releases from storage into the Delta "to the maximum extent" possible to provide that "common" source. Diverting any amount of such releases in an isolated canal, which by definition is entirely devoid of the required commonality of benefits, is obviously not providing the "common" source of fresh water to the maximum extent possible. Rather, it would be blatantly disregarding that mandate.

Water Code sections 12203 and 12204, respectively, provide:

"It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled."

"In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter."

Even assuming that the "common pool" mandate can somehow be disregarded, before one drop of water is placed in an isolated facility, there needs to be a comprehensive analysis regarding how many drops of water, and at what times of year, and during what hydrological and ecological situations, etc., can such drops of water be legally deemed to be surplus to what "users within [the] Delta are entitled" (Wat. Code, § 12203) and surplus to what is "necessary to meet the requirements of Sections 12202 and 12203 of this chapter." (Wat. Code, § 12204.) Once that amount of water is determined, then, and only then, can the economic and other feasibility considerations be fairly and meaningfully evaluated.

iv. **Watershed Protection Act.**

Water Code section 11460 provides:

"In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, *shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the*

beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Similar to the discussion immediately above, in order to fairly and meaningfully evaluate the feasibility of an isolated facility, there needs to be a comprehensive determination of what amount of water, at what times of year, and under what hydrological and ecological situations, etc., is "reasonably required to adequately supply the [human and environmental and public trust, etc.] beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." Assuming the result of that determination reveals that there is indeed some amount of water that is surplus to such needs, does it make sense, economically or otherwise, to construct such a massive and expensive, and economically and environmentally disruptive, facility for the purpose of exporting that amount of water?

As noted above, whereas prior to the use of such an isolated facility water diverted into the Delta for export from the southern Delta provides some measure of "common" benefits, with an isolated facility any and all such common benefits are eliminated thereby making the deprivation of area of origin needs reasonably foreseeable, if not, clearly inevitable.

v. State and Federal Anti-degradation Laws.

The Federal Environmental Protection Agency ("EPA") requires all states to adopt an "antidegradation policy" similar to the State Water Resources Control Board's ("SWRCB") Resolution 68-16. (40 C.F.R. 131.12.) Resolution 68-16 is further intended to, and does, implement Water Code section 13000 which requires the SWRCB to regulate all "activities and factors which may affect the quality of the waters of the state" such that they "attain the highest water quality which is reasonable."

The State Water Resources Control Board's ("SWRCB") "Resolution 68-16 [commonly referred to as the SWRCB's "Anti-Degradation Policy"] provides in pertinent part:

> "Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies."

This Anti-Degradation Policy is yet another example of a policy which must be duly assessed before the feasibility of any proposed project which proposes to substantially disrupt the current distribution of water throughout the Delta, such as what an isolated facility would do, can be meaningfully determined. It does not take a degree in hydrodynamics to recognize the clear

potential, if not inevitability, of a substantial reduction in water quality in the Delta as the result of a substantial diversion of fresh water inflow into an isolated canal that would otherwise flow into the Delta.

This policy along with all other applicable policies and laws must be duly assessed before any project is deemed feasible and worthy of subjection to the CEQA process as "the project" and, hence, as the "preferred project alternative" course of action which the EIS/EIR process will inevitably be biased towards implementing.

b. **The EIS/EIR's Range of Alternatives Must Also be Comprised of Feasible Alternatives.**

In a similar vein, since Guidelines section 15126.6, subdivision (a), provides that "[a]n EIR *shall* describe a range of reasonable alternatives to the project, or to the location of the project, *which would feasibly attain* most of the basic objectives of the project" (emphasis added), not only does the feasibility of the project itself need to be assessed but so does the feasibility of all of the alternatives in that range. Potential alternatives which include an isolated facility or other unlawful component and, thus, which cannot pass the *legal* feasibility test, cannot not be properly credited for CEQA purposes as being included within the EIS/EIRs mandatory "range" of *feasible* alternatives.

2. **The Instant Notice of Preparation and Scoping Process Are Premature and Legally Inadequate.**

Guidelines section 15082, subdivision (a)(1) provides:

> The notice of preparation shall provide . . . sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response. At a minimum, the information shall include: (A) Description of the project, (B) Location of the project . . . , and (C) Probable environmental effects of the project.

The NOP is inadequate since it does not provide "sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response." Instead, the NOP makes it clear that the project has not even been developed at this stage. For example, the NOP states:

> [DWR] is initiating preparation of a joint [EIS/EIR] for the [BDCP], that will include analysis of improved water conveyance infrastructure and other habitat conservation measures *that will be developed* to advance the goals and objectives of the BDCP.

[¶] The planning effort for the BDCP *is in the preliminary stages of development*, ...

(NOP, p. 1, emphasis added.)

Because the project has not yet been developed the NOP cannot, and does not, sufficiently describe the actual project, the location of the project nor the probable environmental effects of the project as required by Guidelines section 15082.

The NOP states:

> The purpose of the scoping process is to solicit early input from the public and responsible, cooperating and trustee agencies regarding the development of reasonable alternatives and potential environmental impacts to be addressed in the EIR/EIS for the BDCP.

(NOP, p. 1.)

Because neither the project itself, nor its location, are adequately described, meaningful comment on the potential environmental impacts of the project is thwarted. With regard to the development of reasonable alternatives to the project, Guidelines section 15126.6, subdivision (a), provides:

> An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which [1] would feasibly attain most of the basic objectives of the project but [2] would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

Meaningful comment on proposed alternatives to the project is also substantially thwarted since neither the project's "basic objectives" nor the potentially significant effects of the project have been articulated.

With regard to the project's basic objectives, the NOP states:

> Although the BDCP planning efforts are in the preliminary stages, the collective goals of the [Potentially Regulated Entities] *will provide the basis for* the project objectives under CEQA and the purpose and need statement under NEPA.

(NOP, p. 4, emphasis added.) "[W]ill provide the basis for" suggests that those goals will provide the basis *for the establishment of* the project's basic objectives or, in other words, the project's basic objectives will be derived from those goals. Whatever the case, the NOP does not adequately describe the project's basic objectives which the lead agency will ultimately use to

accept and/or reject proposed alternatives to the project. As a result, meaningful comment on proposed alternatives is thwarted and the lead agency's rejection of any suggested alternatives during this scoping process on the grounds that such alternatives do not have the potential to feasibly attain most of the project's basic objectives would be fundamentally unfair and entirely misplaced. (See Guidelines, § 15126.6, subd. (c) ["The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency's determination"].)

For similar reasons, the mandatory "scoping meeting" required by CEQA, as well as the "Notice of Intent" and "scoping process" requirements of NEPA, are likewise unduly premature and legally inadequate. (See Guidelines, § 15082, subd. (c)(1) and 40 C.F.R. § 1508.22 & 1501.7, respectively.)

3. **Inadequate Identification and Description of the Project's Basic Objectives.**

Since the project's basic objectives play such a critical role in the lead agency's decision of which alternatives should be included in the EIR's detailed analysis of a "reasonable range" of alternatives to the project, as well as the lead agency's ultimate decision of which alternative it should ultimately select to carry out, the lead agency must very clearly identify and describe the precise "basic objectives" of the project. As discussed above, thus far, the lead agency has not done so.

The NOP states on page 4:

> The BDCP is being developed to set out near-term and long-term approaches to meet the objectives of providing for the conservation of covered species and their habitats, addressing the requirements of the federal and State endangered species laws, and improving water supply reliability.

If those three objectives are meant to the be the project's basic objectives, then, once again, the NOP and upcoming EIS/EIR must make it crystal clear that those are the project's basic objectives. While the project's basic objectives must be sufficiently broad to enable a broad range of alternative courses of action to be formulated to meet most of those objectives, the objective of "improving water supply reliability" needs some more specificity to avoid confusion and disputes as to what that objective really means.

For example, improving water supply reliability *for whom*? For water users within the Central Delta Water Agency? For *all* water users using water from the Delta watershed? For just those water users that use that watershed water in areas located *outside* that watershed? For just the so-called "Potentially Regulated Entities" or PREs?

What constitutes an "improvement" of water supply "reliability" in the eyes of the lead

agencies? This objective must ultimately be broad enough to allow for consideration of alternatives that seek to make the water supplies of the Project's export contractors more reliable by providing *non*-Delta watershed water supplies to those contractors in lieu of the inherently unreliable and variable Delta water supplies.

As you are aware, the legal sufficiency of the CALFED Bay-Delta Programmatic EIS/EIR under CEQA is currently under review by the California Supreme Court. One of the central disputes in that case is in fact, "what are the project's basic objectives"? While none of the project's "basic" (or even "secondary") objectives stated that total annual Project exports from the Delta must increase, the lead agency, and other export interests, unfairly argued that any alternative that did not increase such exports was somehow contrary to the project's basic objectives. Such monkey business, for a lack of a better word, with regard to the project's basic objectives should be avoid at all costs in the instant EIS/EIR.

Accordingly, great care should be given to the articulation of the project's basic objectives and the EIS/EIR should clearly articulate what those objectives are and it should use the terminology of "basic objectives" so that it tracks CEQA's language and there is no confusion as to what constitutes the basic objectives of the project.

4. **Proposed Alternatives**.

While as noted above, the suggestion of potential alternatives is substantially thwarted at this stage by the lack of articulation of the project's basic objectives as well as the lack of identification of the potentially significant impacts from the project, not to mention the lack of a meaningful description of the "project" itself, some alternatives concepts which should be consider either as stand alone alternatives or components of various alternatives include the following:

Alternatives which comply with the statutory "common pool" mandate and, thus, do not have any form of an isolated facility, dual or otherwise.

An alternative of "regional self-sufficiency" where Peter (human and environmental water users within the Delta watershed) are not robbed to pay Paul (i.e., export contractors). Instead, every feasible effort is made to the maximum extent possible to develop new non-Delta watershed water and/or make better use of existing non-Delta watershed water to meet the needs of export contractors. The intended result being, that such export contractors can ultimately wean themselves off Delta watershed water, substantially or entirely, such that the Delta watershed water can be used to meet the needs within that watershed.

Ultimately there should be several alternatives which contemplate a *reduction* in exports from the Delta over historical levels.

With regard to the feared apocalyptic collapse of numerous Delta levees from an earthquake. Numerous alternatives should be considered to address such a collapse. To the extent the desire is to avoid the disruption of export deliveries the EIS/EIR should first thoroughly explain as precisely as possible what the water quality will likely be under existing conditions should the Projects desire to continue exporting water during such a apocalyptic failure. Then the EIS/EIR should clearly explain how long that water quality will likely remain in that state assuming the recently adopted emergency preparedness plans are in place, etc. to close those levee breaches. The EIS/EIR should then thoroughly explain whether the Projects can still divert and utilize water of that level of quality for agricultural beneficial uses, urban, etc. in either blended form with water stored in San Luis or blended with other water supplies. Assuming the water cannot be used in its current "degraded" state, the EIS/EIR should explain what facilities could be constructed to desalinize that water, or better allow for the blending of that water will other higher quality supplies, etc., and the costs of the construction and operation of such facilities.

In the event, the Projects simply cannot feasibly use the water in the Delta after an apocalyptic levee failure and/or cannot get by with other supplies while the levees breaks are being repaired, then the fortification of various master levee scenarios should be considered to minimize the intrusion of bay waters in the event of such failures much like what is already being implemented at the present time. So called "polders" should also be considered whereby areas are protected by master levees such that not all levees need to be substantially upgraded. Rather, only "master" levees need to be so upgraded which would serve to protect the polders or various sections of land within the Delta.

Tidal gate structures should also be evaluated to help repel bay salinity in the event of such a massive failure.

The forgoing measures to protect against an apocalyptic levee failure could also serve the additional benefit of protecting the Delta from reasonably anticipated sea level rise.

In addition, with regard to the apocalyptic earthquake, the EIS/EIR's analysis should thoroughly examine the likelihood of such a magnitude earthquake near all of the Project's major export facilities, not the least of which is the export pumping facilities themselves as well as the California Aqueduct and Delta-Mendota canals which essentially track major fault lines. Alternatives to protect against damage and disruption of export supplies resulting from such earthquakes should be thoroughly evaluated.

With regard to protecting fishery resources within the Delta, actual, state of the art, fish screens on all Project export facilities should be evaluated to enable water that is truly surplus from the needs of the Delta, assuming there is any such water, to be exported with minimal impacts to fish. If an actual, state of the art fish screen is included for an isolated facility in any alternative which includes such an isolated facility, then such a screen must naturally also be included in all the alternatives that do not involve an isolated facility and should be installed on

all exiting Project export facilities.

An alternative should be considered that includes substantially increased Delta outflows. Such an alternative could draw sensitive fishery species away from the existing export facilities, thereby increasing the "reliability" of such exports, and also enable the restoration of the Suisun Marsh which could provide tremendous benefits to numerous fishery species.

The EIS/EIR should include an extensive discussion of desalinization options in order to promote regional self-sufficiency. Such a discussion would be in furtherance of Water Code section 12946 which provides:

> It is hereby declared that the people of the state have a primary interest in the development of economical saline water conversion processes which could eliminate the necessity for additional facilities to transport water over long distances, or supplement the services to be provided by such facilities, and provide a direct and easily managed water supply to assist in meeting the future water requirements of the state.

Opportunities for environmentally friendly desalinization of ocean waters as well as brackish ground waters (as well as the saltier Delta waters which presumably will result from a massive levee failure) should be thoroughly examined.

To the extent the objectives of the BDCP are ultimately to "provid[e] for the conservation of covered species and their habitats, address[] the requirements of the federal and State endangered species laws, and improv[e] water supply reliability" (NOP, p. 4), it is easy to see that weaning the export contractors off the Delta watershed such that exports from the Delta could be ultimately substantially reduced would seemingly satisfy those objectives better than any other alternative. Accordingly, as stated above, multiple alternative scenarios which seek to accomplish such weaning should be thoroughly considered.

5. **Impacts Which Should be Analyzed.**

The NOP at page 9 states:

> "The EIR/EIS will analyze the reasonably foreseeable direct, indirect and cumulative effects (e.g. climate change, including sea level rise) of the BDCP (including habitat conservation measures and water conveyance facilities) and a reasonable range of alternatives on a wide range of resources, including but not limited to:
>
> BDCP covered species
> Other Federal and State Listed Species

Aquatic Biological Resources
Wetlands and Terrestrial Habitat
Surface Hydrology including Water Rights
Groundwater Hydrology
Geology and Soils
Water Quality
Seismic Stability
Aesthetics
Air Quality, including Greenhouse Gas Emissions
Land Use (e.g. Urban, Agricultural and Industrial Uses)
Historic and Cultural Resources
Environmental Health and Safety
Public Services and Utilities
Energy and Natural Resources
Recreation
Population/Housing
Transportation/Traffic"

In addition to what was stated above with respect to alternatives, the following effects/topics should also be throughly analyzed:

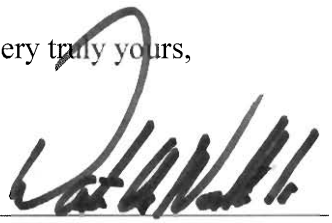
-- Impacts on *all* aquatic and terrestrial species must be examined, not just the BDCP covered species or other "listed" species.
-- Navigation impacts.
-- Impacts on the integrity of existing levees within the Delta from the construction and operation of any isolated facility or other facilities.
-- Seepage impacts on lands within the Delta from the construction and operation of any isolated facility or other facilities.
-- Evaporative water losses from any proposed creation of wetlands.
-- If any increase in exports are contemplated or reasonable foreseeable, then a thorough identification of the source of such exports and examination of the full range of potential environmental impacts from the export of such water must be conducted.
-- Growth-inducing impacts.
-- Economic impacts which have the potential to result in adverse changes to the environment, e.g., the economic impacts from a loss of farmland due to an isolated facility and/or construction of wetlands and the decreased agricultural production within the Delta resulting from any decrease in water quality resulting from the operation of an isolated canal or otherwise. The potential for such economic impacts to result in physical changes to the environment via the abandonment of farming operations or local ability to fund levee maintenance, etc. should be fully examined.

Lastly (for the time being), but certainly not least, the EIS/EIR should thoroughly embrace the ramifications to the environment from the construction and operation of any isolated facility which would eliminate or diminish the Projects and, their water contractors', currently existing direct beneficial interests in preserving the water quality in the Delta. The Delta Protection Act of 1959's mandate that exports from the Delta be taken from the "common pool" within the Delta, and not from the uppermost northern tip of the Delta, has ensured that the state and federal government, as well as the millions of people who receive Delta export water and hundreds of thousands of acres of farmland that utilize such water, have a direct stake in ensuring that the Delta water quality remains fresh. What is good for the goose is good for the gander. The potential environmental impacts from the elimination or diminishment of that direct stake should not be underestimated by any of the participants to the BDCP and the upcoming EIS/EIR should thoroughly discuss, incorporate and acknowledge that potential throughout the entire EIS/EIR and especially in the discussion and evaluation of alternatives to the proposed project (whatever that may ultimately be).

6. **Conclusion.**

Thank you for your time and consideration of these comments and concerns.

Very truly yours,



Dante John Nomellini, Jr.
Attorney for the CDWA

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March 24, 2008

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Lori Rinek, Chief
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Sacramento Fish and Wildlife Office
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Re: NOI - Bay-Delta Conservation Plan

Dear Ladies and Gentlemen:

Thank you for the opportunity to comment.

INADEQUATE REGULATORY PROCESS

The Central Delta Water Agency (CDWA) continues to be concerned with the lack of arms-length relations between the regulatory agencies and the United States Bureau of Reclamation and California Department of Water Resources who are the water export project operators.

It has for years clearly been recognized that SWP and CVP impacts including export pumping from the Delta cause substantial damage to the fisheries yet the projects until recent court intervention have been allowed to steadily increase exports. Even the physical limits on federal exports have been avoided through coordinated operations, joint points of diversion, wheeling of transferred water and other mechanisms. Although failing to provide protection, the State Water Resources Control Board in 1978 recognized the harm when in D-1485 it found: "To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps."

The BDCP process is yet another example where regulatory integrity has been compromised. The need for focus on the broad protection of the Bay-Delta Estuary and the fish and wildlife therein is being blurred by the emphasis on "covered species" and by the goal to protect water supply on an equal footing with restoring and protecting the environment.

The cornerstone for both the CVP and SWP was the promise that the needs including environmental needs within the Delta and other areas of origin would come first and that only surplus water would be exported.

The base level of protection must include:

1) full mitigation of project impacts including without limitation destruction of spawning habitat upstream and within the Delta, alteration of instream flows, alteration of water temperatures upstream and in the Delta, alteration of scour and sedimentation, creation of reverse flows, diversion and/or destruction of fish, eggs and larvae at the export pumps, reduction in water levels, reduced Delta spring and summer outflows, project-induced upstream diversions and resulting discharges including degradation of water quality particularly in the San Joaquin River where San Luis Unit water was not to be provided without an adequate valley drain;

2) salinity control to both mitigate for project impacts and enhance Delta water quality;

3) preservation of fish and wildlife at project contractor cost as per Water Code section 11900 et seq. (Stats. 1961 c.867) and

4) compliance with the Coordinated Operations Project Operation Policy (Public Law 99-546).

The plan must also adhere to other constraints for planning and operations such as the CVPIA (Public Law 102-575) which includes doubling the natural production of "anadromous fish" including stocks of salmon, steelhead, striped bass, sturgeon and American shad and the Water Supply, Reliability and Environmental Improvement Act (Public Law 108-361).

The BDCP process goals do not embrace the breadth of issues necessary for water project planning which will protect the general public interest and public trust.

FAILURE TO RECOGNIZE THAT IT MAY BE IMPOSSIBLE TO PROTECT THE ENVIRONMENT (OR EVEN JUST THE COVERED SPECIES) WITH CONTINUED SWP AND CVP EXPORTS FROM THE SACRAMENTO AND SAN JOAQUIN RIVERS WATERSHED REGARDLESS OF THE METHOD OF CONVEYANCE.

The BDCP planning goal number 3 provides "Allow for projects that restore and protect water supply, water quality, ecosystem and ecosystem health to proceed within a stable regulatory framework;".

The planning goal to restore and protect water supply is an inappropriate goal for regulatory agencies which have a duty to protect threatened and endangered species from CVP and SWP impacts. It may also be totally unrealistic.

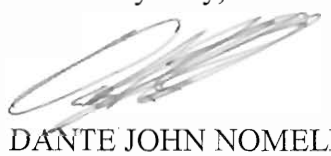
The planning for the SWP contemplated the addition of 5 million acre feet of supplemental water to the Sacramento and San Joaquin Rivers Watershed from north coast rivers by the year 2000. Development of water from such north coast rivers of course did not take place. Factors such as cost, wild and scenic river legislation and greater environmental awareness likely played a part. It is quite clear that increasing demand for water within the watershed was anticipated and the 5 million acre feet of supplemental water was intended to meet the approximately 4.25 million acre feet of SWP contract entitlement and provide about .75 million acre feet to meet the growing needs within the watershed. (See attached excerpts from DWR Bulletin 76, Preliminary Edition, December 1960.) It was never intended that exports from the Delta would be sustained with water from the Sacramento and San Joaquin Rivers Watershed past the year 2000. The absence of the 5 million acre feet of supplemental water greatly reduces the ability of the watershed to assimilate natural and man-induced contaminates and likely precludes meeting both the needs within the watershed and the desires of the exporters. Any fair environmental evaluation must evaluate the range of tolerable exports from the watershed if any at all. It would appear that water could be available for some export in wetter years but unlikely that exports could be restored or protected in other years. The environmental evaluation must look at alternatives which develop supply from outside the Sacramento and San Joaquin Rivers watershed including desalting brackish groundwater, municipal wastewater and in some cases seawater. The breadth of the evaluation should also include a determination of the range of impacts resulting from continued development of arid lands and arid lands in differing regions. The goal should be to establish the present and future needs to provide full protection within the watershed and establish the bounds of what is truly surplus water which can be exported. Curtailment of export pumping at times when fish, water quality or water levels are adversely impacted may provide more than sufficient export pumping opportunities to divert the water which is truly surplus. Attached hereto are charts showing the Estimated Seasonal Natural Runoff 1917-18 to 1946-47 for both the North Coast Area and the Central Valley. It is important to note that for the period 1928-29 to 1933-34 (the 6 year drought) the average total runoff of the Central Valley was only 17,631,000 acre feet. This can be compared to local requirements of about 25,690,000 acre feet and a safe yield of about 22,500,000 acre feet. In a reoccurrence of such a drought, the Central Valley will be severely short of water and no surplus would be available for export. Alternatives which develop self-sufficiency in areas dependent upon imported water and reduce dependence upon exports from the Delta must be considered.

The hundreds of miles of canals and pipelines together with the appurtenant pumping and power facilities leaves the present water system highly vulnerable to earthquakes, terrorism and

other threats including those outside the Delta. Real consideration of the reduced Delta export alternatives is critical.

These comments are intended to be preliminary and we further join in those submitted by the South Delta Water Agency.

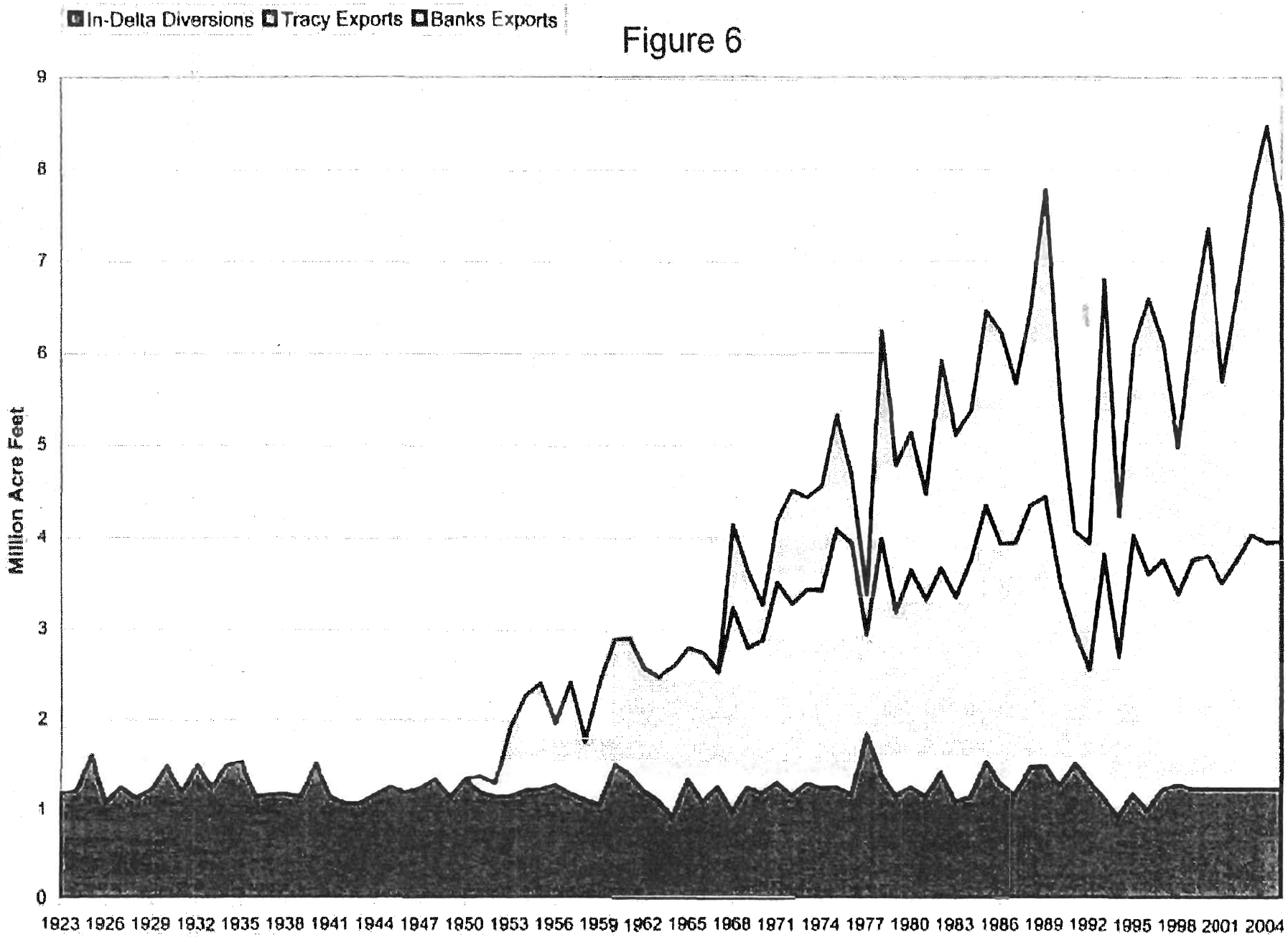
Yours very truly,



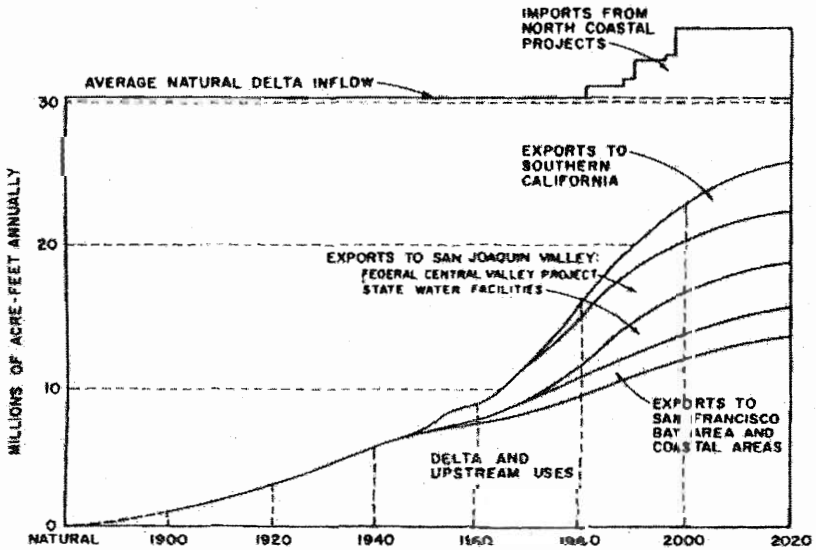
DANTE JOHN NOMELLINI
Manager and Co-Counsel

DJN:ju
Enclosures

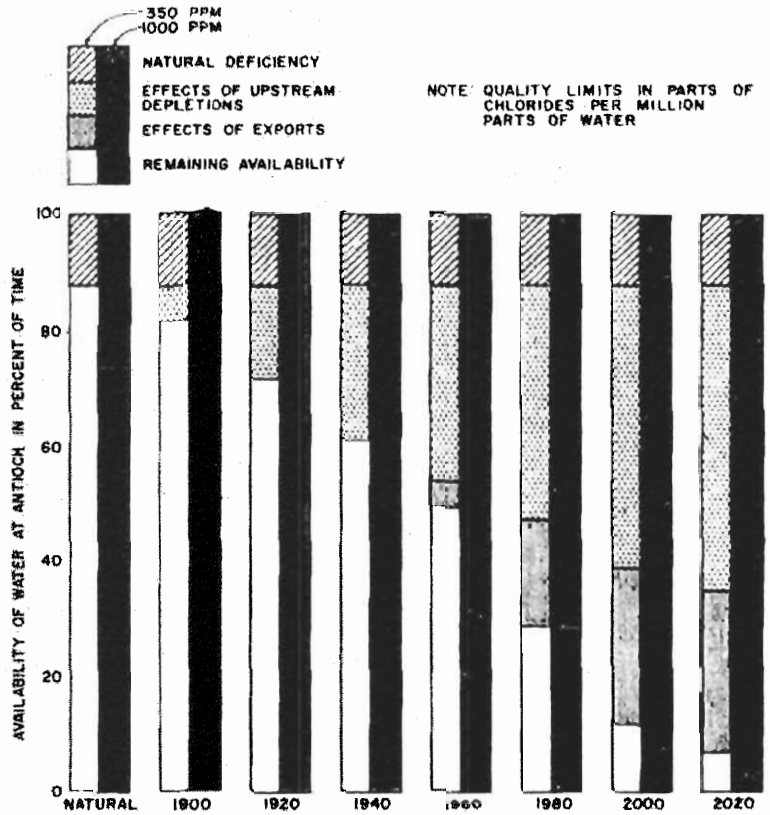
Figure 6


In-Delta Diversions
Tracy Exports
Banks Exports
Million Acre Feet
0
1
2
3
4
5
6
7
8
9
1923 1926 1929 1932 1935 1938 1941 1944 1947 1950 1953 1956 1959 1962 1965 1968 1971 1974 1977 1980 1983 1986 1989 1992 1995 1998 2001 2004

The natural availability of good quality water in the Delta is directly related to the amount of surplus water which flows to the ocean. The graph to the right indicates the historic and projected availability of water in the San Joaquin River at Antioch containing less than 350 and 1,000 parts chlorides per million parts water, under long-term average runoff and *without* specific releases for salinity control. It may be noted that even under natural conditions, before any significant upstream water developments, there was a deficiency of water supplies within the specified quality limits. It is anticipated that, without salinity control releases, upstream depletions by the year 2020 will have reduced the availability of water containing less than 1,000 ppm chlorides by about 60 percent, and that exports will have caused an additional 30 percent reduction.

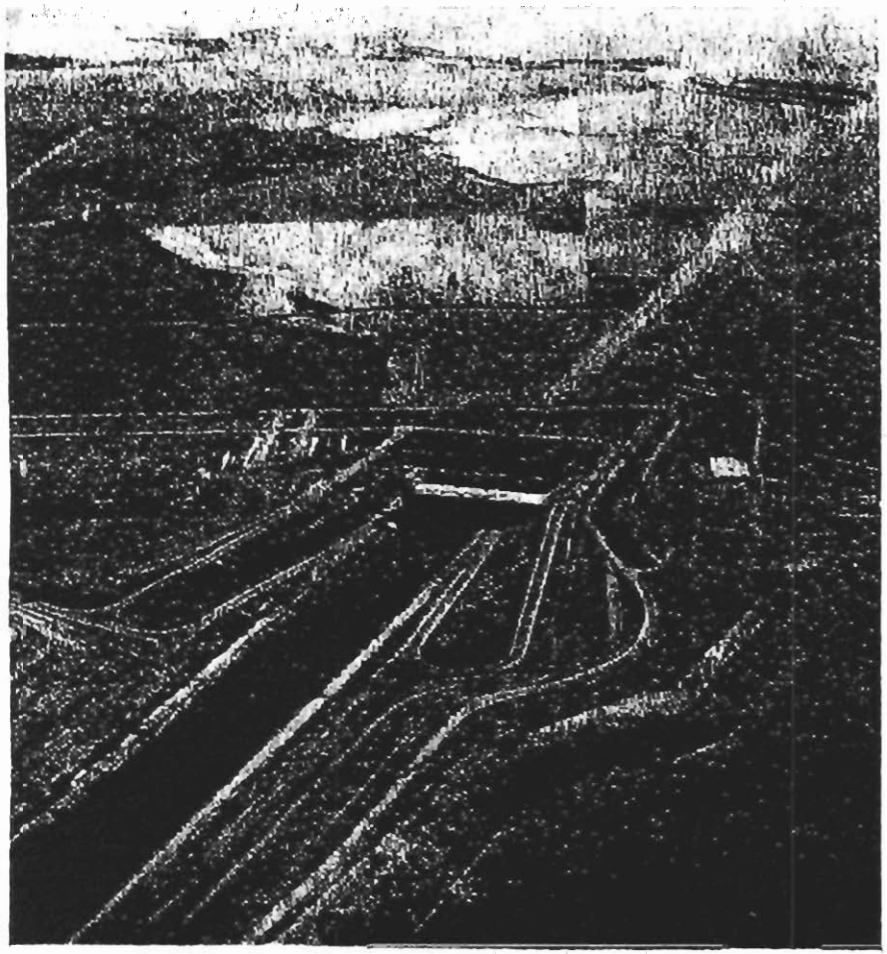


USE OF DELTA WATER SUPPLIES



DELTA WATER QUALITY WITHOUT SALINITY CONTROL

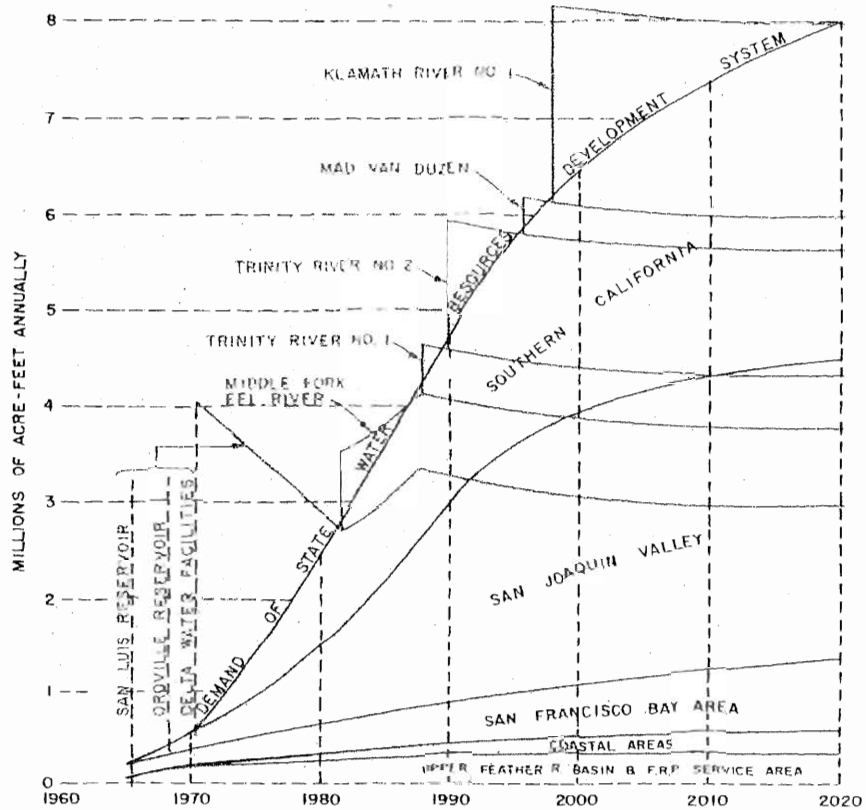
The magnitude of the past and anticipated future uses of water in areas tributary to the Delta, except the Tulare Lake Basin, is indicated in the diagram to the left. It may be noted that, while the present upstream use accounts for reduction of natural inflow to the Delta by almost 25 percent, upstream development during the next 60 years will deplete the inflow by an additional 20 percent. By that date about 22 percent of the natural water supply reaching the Delta will be exported to areas of deficiency by local, state, and federal projects. In addition, economical development of water supplies will necessitate importation of about 5,000,000 acre-feet of water seasonally to the Delta from north coastal streams for transfer to areas of deficiency.



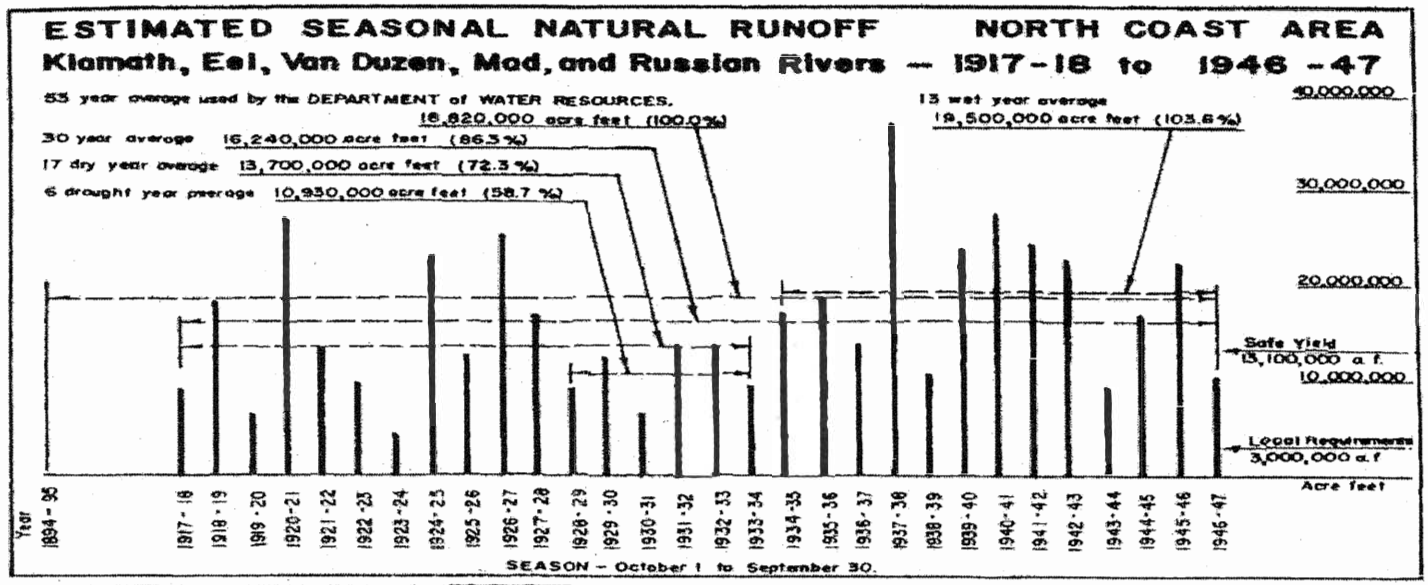
Tracy Pumping Plant

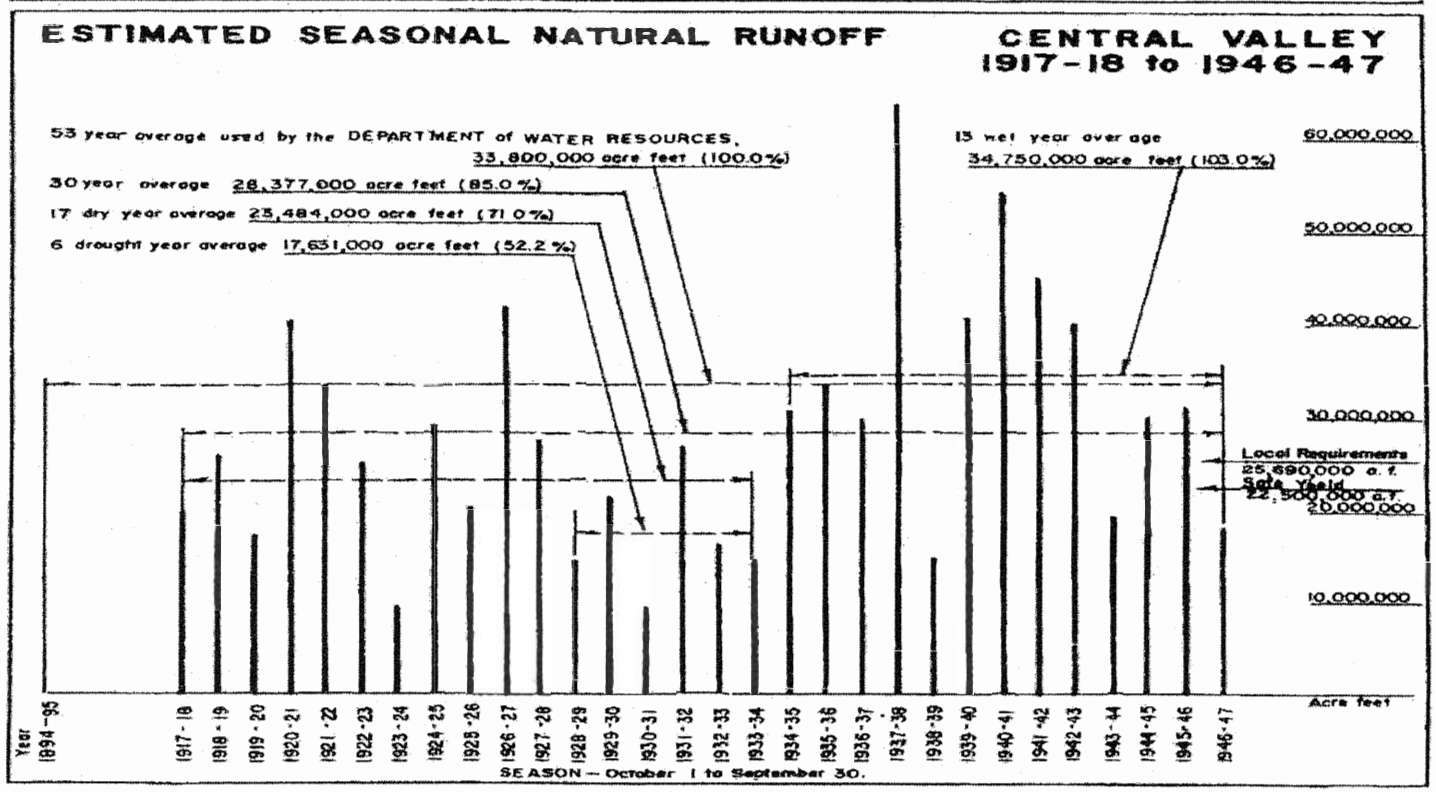
Full demands on the State Water Resources Development system can be met until about 1981 from surplus water in and tributary to the Delta with regulation by the proposed Oroville and San Luis Reservoirs. However, upstream depletions will reduce the available surplus supplies and water will have to be imported from north coastal sources after that year. It is anticipated that coordinated operation of the State Water Resources Development System and the Federal Central Valley Project will afford a limited increase in usable surplus Delta supplies beginning in 1981. As indicated in the chart, upstream depletions will continue to decrease the available surplus supplies.

The coordinated use of surplus water in and tributary to the Delta and of regulated or imported supplements to this supply, as required, is referred to as the Delta Pooling Concept. Under this concept of operation the State will ensure a continued supply of water adequate in quantity and quality to meet the needs of export water users. Advantage will be taken of surplus water available in the Delta, and as the demand for water increases and the available surplus supply is reduced by further upstream uses, the State will assume the responsibility of guaranteeing a firm supply of water, which will be accomplished by construction of additional storage facilities and import works. At the same time, the water needs of the Delta will be fully met.



WATER SOURCES AND USES


ESTIMATED SEASONAL NATURAL RUNOFF
NORTH COAST AREA
Klamath, Eel, Van Duzen, Mad, and Russian Rivers — 1917-18 to 1946-47
53 year average used by the DEPARTMENT of WATER RESOURCES.
16,820,000 acre feet (100.0%)
30 year average 16,240,000 acre feet (86.3%)
17 dry year average 13,700,000 acre feet (72.3%)
6 drought year average 10,930,000 acre feet (58.7%)
15 wet year average
19,500,000 acre feet (103.6%)
40,000,000
30,000,000
20,000,000
Safe Yield
13,100,000 a.f.
10,000,000
Local Requirements
3,000,000 a.f.
Acre feet
Year
1894-95
1917-18
1918-19
1919-20
1920-21
1921-22
1922-23
1923-24
1924-25
1925-26
1926-27
1927-28
1928-29
1929-30
1930-31
1931-32
1932-33
1933-34
1934-35
1935-36
1936-37
1937-38
1938-39
1939-40
1940-41
1941-42
1942-43
1943-44
1944-45
1945-46
1946-47
SEASON — October 1 to September 30.


ESTIMATED SEASONAL NATURAL RUNOFF
CENTRAL VALLEY
1917-18 to 1946-47
53 year average used by the DEPARTMENT of WATER RESOURCES.
33,800,000 acre feet (100.0%)
30 year average 28,377,000 acre feet (85.0%)
17 dry year average 25,484,000 acre feet (71.0%)
6 drought year average 17,651,000 acre feet (52.2%)
15 wet year average
34,750,000 acre feet (103.0%)
60,000,000
50,000,000
40,000,000
30,000,000
Local Requirements
25,690,000 a.f.
Safe Yield
22,500,000 a.f.
20,000,000
10,000,000
Acre feet
Year
1894-95
1917-18
1918-19
1919-20
1920-21
1921-22
1922-23
1923-24
1924-25
1925-26
1926-27
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1931-32
1932-33
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1934-35
1935-36
1936-37
1937-38
1938-39
1939-40
1940-41
1941-42
1942-43
1943-44
1944-45
1945-46
1946-47
SEASON — October 1 to September 30.

SOUTH DELTA WATER AGENCY

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Alex Hildebrand
Counsel & Manager:
John Herrick

March 24, 2008

Via E-Mail
BDCP-NEPA.SWR@noaa.gov

Re: Notice of Intent to Conduct Public Scoping and Prepare an EIR/EIS Regarding the Bay Delta Conservation Plan (BDCP) for the Sacramento-San Joaquin Delta

Gentlemen:

The South Delta Water Agency submits the following comments regarding the NOI to prepare environmental documents reviewing the Bay Delta Conservation Plan ("BDCP").

1. The BDCP proposes to provide for the conservation of endangered species and their habitats in the Delta in a way "that also will provide sufficient and reliable water supplies" for parties reliant on exports from the Delta. Thus, the underlying premise limits the various options available to DFG, FWS and NMFS for recovery and enhancement of not only endangered (and threatened species) but for most Delta species in general.

One of the options available to the fishery agencies is to limit exports and require increased outflow to the point where the impacted fisheries are improved. By assuming ahead of time that some certain level of exports will be allowed (or amounts of outflow will be limited), the agencies are precluded from examining possible scenarios which might be better for the fisheries than the alternatives proposed by the BDCP. This approach also ignores various underlying legal requirements that DWR and USBR fully mitigate the impacts of the SWP and CVP.

2. The environmental review must fully analyze the alternative's impacts to water quality, especially in the South Delta. Currently, Sacramento River water is drawn across the Delta to the export pumps. This "fresher" water is mixed with the "poorer" San Joaquin River water and provides water quality benefits to both the Central and Southern Delta channels. An isolated facility decreases the amount of Sacramento water moving across the Delta, and thus result in a worsening of water quality in the Central and South Delta.

Studies so far have improperly examined this effect. DWR's modeling suggests that the operation of an isolated facility would have no significant effect on water quality. However, that modeling was an averaging of all year types, which resulted in a masking of the effects of the project. The environmental review must look at the various year types separately, showing how differing levels of flows through an isolated facility would result in differing flows across the Delta and less dilution of salts in the Central and South Delta.

For example, this past month, exports have been curtailed due to a court ruling. With the diminished through-Delta flow, the water quality objective was violated as measured at the Old River Tracy Blvd. compliance location. With an isolated facility, there might be less or no cross Delta flow, resulting in even worse quality and a more extreme violation of that and other standards/objectives.

As part of the analysis, the environmental documents must examine how the various options will affect compliance with the Southern Delta salinity standards as those standards are terms of the DWR and USBR permits. [Note, the standards are required to be met throughout the channels, not just at the compliance locations per the 2006 Bay-Delta Water Quality Control Plan.] The project purpose must include compliance with all permit terms and conditions, as well as other legal limitations and requirements on the projects. SDWA's analysis indicates that moving Sacramento River water through an isolated facility will in most years and in most months result in violations of the salinity standards, and thus any option with such a facility could not be adopted or implemented.

3. Operation of an isolated facility would decrease the inflow to the Delta, and thus affect outflow. Either outflow will decrease, or additional inflow will be necessary to meet outflow requirements. The environmental documents must fully examine the various operational scenarios and the consequent effects on fisheries and other beneficial uses. Less inflow will mean that the flow of water through the Delta will be slower. There are resulting impacts to fisheries as well as water quality from this change. Previous studies indicate that decreased rates of flow result in increased predation on various species, especially endangered ones. It would also result in warmer water, decreased DO, and increased hyacinth and other plants clogging the channels. As stated above, an alternative not presented by BDCP is an increased outflow scenario which should improve fisheries. Such an option must be considered in the review.

4. An isolated facility, by changing the water quality in Delta channels could result in changes in the location of various fish species who use water quality as cues for migration, spawning and other life stages. Hence, the intake to an isolated facility might become a place of greater risk for some species. Further, decreasing Delta cross flow might decrease the areas of good habitat for species seeking better water quality, thus increasing the stressors to the species.

5. The environmental documents must examine how an isolated facility would be operated to insure no adverse impacts to other and superior water right holders. During low flow

times, the "natural" flow may be necessary for in-Delta users and thus cannot be removed from the system through an isolated facility. Similarly, upstream return flows may be necessary for numerous water right holders and not available for the junior export permits. Further, stored flow may be necessary to comply with existing permit terms and conditions to meet outflow and water quality parameters and again not be available for transport though an isolated facility.

It is important to note that all (legal) Delta channels are subject to the tides, and in combination with their channel bottom elevations, result in water always being in those channels. This raises important issues that must be covered in the environmental documents. Water is always available for in-Delta users. If some or all tributary flow ceased, water would still be in Delta channels. Case law, statues, and permit terms and conditions require the projects to keep the Delta water at certain qualities for those in-Delta uses. Hence, the operation of any isolated facility must include the protection of the water quality on which those uses depend. Any honest analysis will indicate those obligations cannot be met when an isolated facility is moving water around the Delta instead of through it.

6. As a follow on to the above point, the Delta Protection Act (Water Code Sections 12200 et. seq.) places certain burdens on the export projects. Those statues require that the Delta be kept as a "common" pool for in-Delta and export supplies. The statues go on to require that an "adequate supply" be provided to in-Delta water users (no supply amount is guaranteed to export users), that no water needed for this supply or for salinity control may be exported, and that exports cannot include water to which in-Delta users are entitled. Finally, the statues require that releases from storage in the Sacramento-San Joaquin system shall be integrated as much as possible to meet the requirements of the Act.

Taken together, these statues place severe operational limitations of not only the export pumps, but also any isolated facility. Hence, the environmental documents must include a review of the BDCP alternatives with these statutory/operational limitations. The result will indicate that the opportunities for its operation will be nil.

7. The review must include other alternatives, not currently in the BDCP proposal. SDWA and CDWA proposed to the Delta Vision process a comprehensive program which included the "Delta Corridors" plan. This plan seeks to reconnect the San Joaquin River with the Bay, a situation that no longer exists during most years. This is because the export projects typically take more water than is entering the Delta from the San Joaquin, and thus no San Joaquin water reaches the Bay. In addition, upstream use has decrease in-Delta flow to the point where in many months in most years, the inflow of the San Joaquin is less than the local, in-Delta diversions. Again, this results in none of the river's flow reaching the Bay. The Delta Corridors plan seeks to correct this and thus should show increased benefits to fisheries over proposals which will decrease water quality in the Delta (isolated facility).

8. The review should include an improved through Delta conveyance as well as one that curtails exports in order to meet superior water right and environmental needs. As currently constructed, the BDCP proposals for through Delta are constrained by inaccurate assumptions regarding improved Delta channels and the need to maintain some "acceptable level" of exports.

9. It is unrealistic to assume that a Conservation Plan can be developed at this point. Ongoing investigations, speculation and analysis in the POD process indicates that the solution or solutions to the radical decline in ceratin fisheries are not yet known. Until such time as the specifics of why the decline is occurring at this time it is impractical and improper to adopt a Plan which gives exports a multi-year approval or guarantee of operations. We do not know yet if any particular level of exports is consistent with the protection of endangered species. Until we do, no plan should be contemplated or adopted which protects exports which are the likely cause the fishery problems.

SDWA can provide information and documentation to support the points set forth above and looks forward to participating in the environmental review of the BDCP proposals.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd

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Phone 209/465-5883 • Fax 209/465-3956

May 14, 2009

Via email lori_rinek@fws.gov
and Regular U.S. Mail

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Sacramento Fish and Wildlife Office
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Sacramento, CA 95825

Via email BDCPcomments@water.ca.gov
and Regular U.S. Mail

Ms. Delores Brown
Chief, Office of Environmental Compliance
Department of Water Resources
P. O. Box 942836
Sacramento, CA 94236

Re: Scoping BDCP NOI 74FR7257 (Feb. 13, 2009) and NOP State Clearinghouse No. 2008032062 (Feb. 13, 2009)

Dear Ms. Rinek and Brown:

The following comments are intended to supplement previous comments which are attached hereto and incorporated by this reference thereto.

Assumption that Adverse Impacts to Certain Listed Species and Ecosystem Will be Improved by Relocation of SWP and CVP Export Pumping Intakes of the SWP and CVP is Unsupported and Requires Thorough Analysis.

Most of the fish, most of the water and the better water quality in the Delta watershed are in the Sacramento River. It would appear that relocation to the Sacramento River will result in the diversion and export of a greater percentage of Sacramento River water at any given rate of exports and therefore the adverse impact on fish dependent upon Sacramento river water will be increased. Removal of more Sacramento River water from the Delta pool and Delta outflow including the Sacramento River downstream of the intakes will result in degradation of the water quality and temperature thereby adversely impacting in-Delta and adjoining area water users, as well as fish and wildlife including waterfowl which are dependent upon such water.

Direct damage to fish, eggs and larvae from fish screens including related predation would appear to be greater with intakes on the Sacramento River due to the proximity to greater numbers of fish, eggs and larvae and the greater percentage of channel flow diverted at the screen locations. With degradation of quality in other portions of the Delta, it is likely that fish will move to the good water quality locations and thereby aggravate the problem.

The Stated Purpose and Objective to Restore and Protect the Ability of the SWP and CVP to Deliver Up to Full Contract Amounts Consistent With Law and Contract Terms Is Inappropriate as Related to the Conservation Plan and Natural Community Conservation Plan.

The mix of objectives to foster exports and conserve species results in an inappropriate conflict for those trust agencies with the responsibility to protect the identified species. The conservation planning process should be solely directed at conservation of the species impacted by the activity or project sought to be considered.

Fostering SWP and CVP deliveries is appropriately relevant only to define the scope of the planning effort. Conceptually it may be impossible to conserve species of concern while permitting any SWP or CVP deliveries or any particular level of deliveries.

Restoring and Protecting the Ability of the SWP to Deliver Water assumes that the SWP has water to deliver. The planning for the SWP recognized that by the year 2000, 5 million acre feet of supplemental water from North Coast watersheds would be required to supplement inflow to the Delta to meet in-basin requirements and export deliveries. Since the SWP contract entitlements are about 4.25 million acre feet and the 5 million acre feet has not been provided, there is no SWP water for delivery. Restoring and Protecting the Ability of the SWP to Deliver Water is to restore and protect zero deliveries.

Excepting to some extent water right settlement contracts, the contracts of both the SWP and CVP are contracts only to deliver water which is surplus to the present and future water needs including environmental needs within the Delta and other areas of origin, the water needs to protect other senior water rights and the water needs to meet other requirements such as salinity control, CVPIA requirements for restoration of anadromous fish populations and water quality standards. Until it is determined that there is surplus water available for SWP and CVP delivery, there is no delivery to be restored. As discussed below, historical hydrology and projected climate change may result in no water for SWP and CVP delivery regardless of other constraints.

Essential to the Consideration of a Conservation Plan Including a Natural Community Conservation Plan As Proposed Is a Determination of What If Any Quantity of Water Is Available For SWP and CVP Delivery and When Is It Available.

The Sacramento and San Joaquin Rivers Watershed was never intended to provide the water currently desired to be exported from the Delta. The State Water Project in particular was to provide an additional 5 million acre feet of supplemental water to the Delta from North Coast watersheds by the year 2000. The availability of water for export from federal Central Valley Project facilities which formerly was focused on firm yield at the end of a six year dry cycle such as 1929-1934 is now over-subscribed. This over-subscription is due in major part to the desire to firm the delivery of non-firm supply. Permanent crops have been planted in federal service areas based on non-firm supply. Environmental needs which are greater than previously estimated and reduced natural flow due to possible climate change further constrain the availability of water for export. The determination of the real export water yield from the Delta requires an estimate of the present and future consumptive water needs for full development within the Sacramento and San Joaquin Rivers Watershed including the Delta. The Watershed Protection Act/Area of Origin Law, W.C. 11460 et seq., provides for priority and right of recapture as to exports by both the SWP and CVP. Additionally, the instream flow needs for fish and other environmental features, recreation, navigation, maintenance of water levels and salinity control must be determined. The needs for fish must include the water necessary to provide full mitigation of SWP and CVP impacts including restoration of the natural production of anadromous fish to sustainable levels not less than twice the average levels during the period of 1967-1991 as required by the CVPIA (Public Law 102-575) and to meet the narrative salmon objective in the 1995 Water Quality Control Plan. Public Trust needs and water needed to meet water right permit terms and conditions and other regulatory requirements must be considered. The instream flows and Delta outflow must be sufficient to restore and support the interconnected ecosystem of the Bays, the Delta and the tributaries. The future availability of water for export if any will vary from year to year and it is probable that no water will be available during dry cycle hydrology such as occurred in 1929 through 1934 and 1987 through 1992. Climate change could produce dry cycles which are far more extended than those experienced in the last 100 years.

The Impacts Associated With So-called Restoration and Protection of Ability of the SWP and CVP Extend Well Beyond the Delta and Must Be Fully Considered.

There are numerous impacts associated with SWP and CVP water deliveries throughout the State some of which impact species of concern within the Delta. By way of example, deliveries to agricultural and refuge areas in the San Joaquin Valley increase salt concentrations in the San Joaquin River and add constituents such as selenium and boron. Such deliveries are being made without a suitable drainage solution and are causing waterlogging of lands in the trough of the valley and increasing the accumulation of salt in the soils and groundwater which will ultimately result in the loss of productivity of the land.

Evaporative losses of water and electrical power consumption associated with transportation of the water are significant.

There are obvious growth-inducing impacts. As development extends, there are the obvious impacts associated with changes in land use. Development including lakes and swimming pools in the desert consume more water per capita than development in cooler climates. Differences in losses of water to unusable surface water bodies and groundwater basins may also be significant.

Impacts associated with extraction of water from the Trinity River which is outside the Delta Watershed must be considered. Impacts associated with export of water from the Delta tributaries including impacts of water transfers must be considered. Groundwater basins in both the Sacramento River and San Joaquin River basins is currently overdrafted. SWP and CVP deliveries of water in areas upstream of the Delta have induced greater upstream use of natural flow thereby impacting the Delta and Bay.

The Vulnerability of SWP and CVP Existing and Proposed Facilities to Hazards Such As From Floods, Earthquakes, Sea Level Rise, Climate Change, Fire and Terrorist Attack Must Be Considered.

Delta levees are only part of the concern. The peripheral canal will of course build two new Delta levees which cross identified faults and connect to existing SWP and CVP export facilities which are located near active earthquake faults. The SWP and CVP export aqueducts and related facilities appear to parallel in close proximity to high hazard active faults. The Delta Risk Management Strategy effort appears to be seriously flawed and should not be used as a basis for planning without truly independent review.

The Goals of the Conservation Planning Effort Must Be To Comply With All Laws.

While the focus of the effort is to develop conservation-related plans, administrative agencies of both the State and United States must seek to comply with existing law.

Among the laws which must be met are the Delta Protection Act (California Water Code section 12200 et seq.); the Watershed Protection Act (California Water Code section 11460 et seq.); the San Joaquin River Act (California Water Code section 12230 et seq.); the Davis Dolwig Act (California Water Code section 11900 et seq.); the Central Valley Project Improvement Act (Public Law 102-575); the Water Supply, Reliability and Environmental Improvement Act (Public Law 108-361) and the so-called Coordinated Operations Agreement Act (Public Law 99-546).

Conservation Plans Must Address both Aquatic and Terrestrial Species and Must Not Transfer Adverse Impacts to Other Species.

The focus on listed aquatic species such as fish should not detract from the need to protect terrestrial species and otherwise address all environmental concerns. The improper joinder of water deliveries/conveyance as goals in the conservation planning effort appears to have the real purpose of simply circumventing court-ordered restrictions involving Delta smelt. The conservation planning effort must not result in significant adverse impacts to other species such as terrestrial species including without limitation migratory waterfowl.

Incorporation of Power Transmission Lines in the Project Requires Analysis of the Impacts Throughout the Interconnected System.

The scope of area of impact must include all areas served or impacted by the interconnected power transmission facilities. More locally, the transmission lines in the Delta greatly interfere with bird life and in particular waterfowl. The foundations for towers have created paths for critical underseepage. Because development within the primary zone of the Delta has been restricted, it has obviously become a lower cost target for construction of facilities to serve other areas. Such a result is contrary to the intent to preserve the area for agriculture and related compatible wildlife friendly agricultural practices.

Yours very truly,

DANTE JOHN NOMELLINI
Manager and Co-Counsel

DJN:ju

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May 30, 2008

Via Email at delores@water.ca.gov

Ms. Delores Brown, Chief
Office of Environmental Compliance
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236

Re: Comments on the Notice of Preparation for the EIS/EIR for the Bay Delta Conservation Plan

Dear Ms. Brown:

The Central Delta Water Agency and South Delta Water Agency previously submitted comments on the *federal* "Notice of Intent" to prepare an EIS/EIR for the BDCP on March 24, 2008. Since such comments relate to the same topic at issue herein, those comments are hereby incorporated by reference and enclosed herewith. We hereby take the opportunity to supplement those comments with the following.

1. **The Feasibility of "the Project" Has Not Yet Been Demonstrated and Must be Demonstrated *Prior to* the Initiation of the CEQA Process.**

CEQA at least implicitly, if not explicitly, assumes that the "project" which is subjected to environmental analysis under CEQA is a project that is feasible. Guidelines section 15364 defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."

CEQA is not meant to be the process to determine whether the proposed project is feasible. (CEQA *is*, however, an appropriate process to evaluate whether *alternatives* to the project are feasible.) Thus, before the CEQA process ever begins the project must be fairly determined to be feasible. This is especially important since EIS/EIRs are inevitably biased towards justifying why the project should be carried out and why all the alternatives to the project are not feasible and should be rejected. Moreover, it would involve a colossal waste of the resources of all of the public responsible and trustee agencies as well as the general public

and stakeholders to embark on the CEQA process with a project that, from the get-go, has not been proven to be fesible, i.e., "capable of being accomplished in a successful manner within a reasonable period of time . . . ." (Guidelines, § 15364.)

While as discussed below the project at issue has not yet been defined, and, as a result, this entire Notice of Preparation and Scoping Process is legally inadequate and premature, it is clear that at the present time it would be unwarranted and unlawful for the ultimate project to include any form of an isolated conveyance facility. In its "Vision for the California Delta," the Delta Vision's Blue Ribbon Task Force, which was specifically directed by the Governor to "develop a durable vision for sustainable management of the Delta" (Governor's Exec. Order No. S-17-06 (Sept. 28, 2006)), readily recognizes and concedes that the feasibility of any isolated conveyance to accomplish the purposes for which it is sought has not yet been demonstrated. For example, the Task Force explains:

> "One way to manage water exports is to create isolated facilities that take water around the Delta. *Perhaps* this would enhance the reliability of exports, create fewer problems for selected species, be less exposed to seismic risk, and result in higher water quality. *But at this point, there is not sufficient specific information to guarantee these outcomes.*
>
> Similarly, the concept of a "dual" conveyance, joining an isolated facility to improved conveyance through the Delta, *might* increase reliability and capture more high-water flows, but again, *not enough information is available at this point to ensure this*." (Delta Vision, Blue Ribbon Task Force's "Our Vision for the California Delta," p. 13.)

Once the lead agencies for the BDCP EIS/EIR figure out and articulate what basic objectives they are trying to accomplish, then *before* the lead agencies develop the project which they believe is the preferred course of action (i.e., alternative) to accomplish those objectives, the lead agencies must ensure under CEQA, as well as the rule of good faith and fair dealing and other laws and principles, that whatever project they develop and bias the entire EIS/EIR process in favor of is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364.)

a. **An Isolated Conveyance Facility Is Not "Legally" Feasible.**

With regard to "legal" feasibility, two paramount questions regarding any form of an isolated facility include whether such a facility can be legally constructed and, if so, whether such a facility can be legally operated in a manner which successfully accomplishes the purposes for which it is constructed. Unless existing law is substantially overhauled the answer is "no" on both counts.

i. **Delta Protection Act of 1992.**

"The Legislature finds and declares that the Sacramento-San Joaquin Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state *to recognize, preserve, and protect those resources* of the delta for the use and enjoyment of current and future generations." (Pub. Resources Code, § 29701, emphasis added.)

"The Legislature further finds and declares that the basic goals of the state for the delta are the following:

(a) *Protect, maintain, and, where possible, enhance and restore* the overall quality of the delta environment, including, but not limited to, *agriculture, wildlife habitat, and recreational activities.*

. . .

(c) Improve flood protection by structural and nonstructural means to ensure an increased level of public health and safety." (Pub. Resources Code, § 29702, emphasis added.)

"The Legislature further finds and declares as follows:

(a) The delta is an agricultural region of great value to the state and nation and *the retention and continued cultivation and production of fertile peatlands and prime soils are of significant value.*

(b) The agricultural land of the delta, while adding greatly to the economy of the state, also provides a significant value as open space and habitat for water fowl using the Pacific Flyway, as well as other wildlife, and the *continued dedication and retention of that delta land in agricultural production contributes to the preservation and enhancement of open space and habitat values.*

(c) *Agricultural lands located within the primary zone should be protected from the intrusion of nonagricultural uses.*" (Pub. Resources Code, § 29703, emphasis added.)

The construction of a huge isolated facility through the Delta will constitute a massive "intrusion of nonagricultural uses" by taking considerable acreage of agricultural land out of production, and, hence, result in the destruction of the associated economic, open space and habitat values associated therewith, which is squarely contrary to State's goal and policy to "recognize, preserve, and protect" such agricultural lands and values. (Pub. Resources Code, §§ 29703 & 29701, respectively.)

Similarly, with regard to the "operation" of an isolated facility, how is the diversion of substantial amounts of fresh water flows into such a facility consistent with the basic goal of the state to "*[p]rotect, maintain, and, where possible, enhance and restore the overall quality of the delta environment*, including, but not limited to, agriculture, wildlife habitat, and recreational activities"? (Pub. Resources Code, § 29702.) Clearly, it is not.

ii. **Water Code sections 12980 et seq.**

> "The Legislature finds and declares that the delta is endowed with many invaluable and unique resources and that *these resources are of major statewide significance.*" (Wat. Code, § 12981, subd. (a), emphasis added.)
>
> "The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, *the physical characteristics of the delta should be preserved essentially in their present form;* . . ." (Wat. Code, § 12981, subd. (b), emphasis added.)

Neither the construction of a huge isolated facility through the Delta, nor the diversion of fresh water inflows into such a facility, come anywhere near "preserv[ing]" "the physical characteristics of the delta . . . in their present form; . . . ." (*Ibid.*) Such construction and operation constitute an obvious and drastic alteration of the present physical characteristics of the Delta in direct contravention of the Legislature's finding and declaration in section 12981.

iii. **Delta Protection Act of 1959.**

> "The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220, Chapter 2, of this part, *and to provide a common source of fresh water for export to areas of water deficiency* is necessary to the peace, health, safety and welfare of the people of the State . . . ." (Wat. Code, § 12201, emphasis added.)

If water is exported at the northernmost tip of the Delta via an isolated facility, then such water is plainly *not* providing a "*common* source of fresh water for export," instead, it is providing an *isolated* source of fresh water for export which is entirely devoid of common benefits to essentially the entirety of the Delta and, hence, which is squarely contrary to section 12201 and "to the peace, health, safety and welfare of the people of the State."

Moreover, Water Code section 12205 provides:

"It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates *shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part.*" (Emphasis added.)

Since, as just noted, one of the "objectives of this part" is to "provide a *common* source of fresh water for export" (Wat. Code, § 12201), the Projects have a duty to integrate their releases from storage into the Delta "to the maximum extent" possible to provide that "common" source. Diverting any amount of such releases in an isolated canal, which by definition is entirely devoid of the required commonality of benefits, is obviously not providing the "common" source of fresh water to the maximum extent possible. Rather, it would be blatantly disregarding that mandate.

Water Code sections 12203 and 12204, respectively, provide:

"It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled."

"In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter."

Even assuming that the "common pool" mandate can somehow be disregarded, before one drop of water is placed in an isolated facility, there needs to be a comprehensive analysis regarding how many drops of water, and at what times of year, and during what hydrological and ecological situations, etc., can such drops of water be legally deemed to be surplus to what "users within [the] Delta are entitled" (Wat. Code, § 12203) and surplus to what is "necessary to meet the requirements of Sections 12202 and 12203 of this chapter." (Wat. Code, § 12204.) Once that amount of water is determined, then, and only then, can the economic and other feasibility considerations be fairly and meaningfully evaluated.

iv. **Watershed Protection Act.**

Water Code section 11460 provides:

"In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, *shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the*

beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Similar to the discussion immediately above, in order to fairly and meaningfully evaluate the feasibility of an isolated facility, there needs to be a comprehensive determination of what amount of water, at what times of year, and under what hydrological and ecological situations, etc., is "reasonably required to adequately supply the [human and environmental and public trust, etc.] beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." Assuming the result of that determination reveals that there is indeed some amount of water that is surplus to such needs, does it make sense, economically or otherwise, to construct such a massive and expensive, and economically and environmentally disruptive, facility for the purpose of exporting that amount of water?

As noted above, whereas prior to the use of such an isolated facility water diverted into the Delta for export from the southern Delta provides some measure of "common" benefits, with an isolated facility any and all such common benefits are eliminated thereby making the deprivation of area of origin needs reasonably foreseeable, if not, clearly inevitable.

v. State and Federal Anti-degradation Laws.

The Federal Environmental Protection Agency ("EPA") requires all states to adopt an "antidegradation policy" similar to the State Water Resources Control Board's ("SWRCB") Resolution 68-16. (40 C.F.R. 131.12.) Resolution 68-16 is further intended to, and does, implement Water Code section 13000 which requires the SWRCB to regulate all "activities and factors which may affect the quality of the waters of the state" such that they "attain the highest water quality which is reasonable."

The State Water Resources Control Board's ("SWRCB") "Resolution 68-16 [commonly referred to as the SWRCB's "Anti-Degradation Policy"] provides in pertinent part:

> "Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies."

This Anti-Degradation Policy is yet another example of a policy which must be duly assessed before the feasibility of any proposed project which proposes to substantially disrupt the current distribution of water throughout the Delta, such as what an isolated facility would do, can be meaningfully determined. It does not take a degree in hydrodynamics to recognize the clear

potential, if not inevitability, of a substantial reduction in water quality in the Delta as the result of a substantial diversion of fresh water inflow into an isolated canal that would otherwise flow into the Delta.

This policy along with all other applicable policies and laws must be duly assessed before any project is deemed feasible and worthy of subjection to the CEQA process as "the project" and, hence, as the "preferred project alternative" course of action which the EIS/EIR process will inevitably be biased towards implementing.

b. **The EIS/EIR's Range of Alternatives Must Also be Comprised of Feasible Alternatives.**

In a similar vein, since Guidelines section 15126.6, subdivision (a), provides that "[a]n EIR *shall* describe a range of reasonable alternatives to the project, or to the location of the project, *which would feasibly attain* most of the basic objectives of the project" (emphasis added), not only does the feasibility of the project itself need to be assessed but so does the feasibility of all of the alternatives in that range. Potential alternatives which include an isolated facility or other unlawful component and, thus, which cannot pass the *legal* feasibility test, cannot not be properly credited for CEQA purposes as being included within the EIS/EIRs mandatory "range" of *feasible* alternatives.

2. **The Instant Notice of Preparation and Scoping Process Are Premature and Legally Inadequate.**

Guidelines section 15082, subdivision (a)(1) provides:

> The notice of preparation shall provide . . . sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response. At a minimum, the information shall include: (A) Description of the project, (B) Location of the project . . . , and (C) Probable environmental effects of the project.

The NOP is inadequate since it does not provide "sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response." Instead, the NOP makes it clear that the project has not even been developed at this stage. For example, the NOP states:

> [DWR] is initiating preparation of a joint [EIS/EIR] for the [BDCP], that will include analysis of improved water conveyance infrastructure and other habitat conservation measures *that will be developed* to advance the goals and objectives of the BDCP.

[¶] The planning effort for the BDCP *is in the preliminary stages of development*, ...

(NOP, p. 1, emphasis added.)

Because the project has not yet been developed the NOP cannot, and does not, sufficiently describe the actual project, the location of the project nor the probable environmental effects of the project as required by Guidelines section 15082.

The NOP states:

> The purpose of the scoping process is to solicit early input from the public and responsible, cooperating and trustee agencies regarding the development of reasonable alternatives and potential environmental impacts to be addressed in the EIR/EIS for the BDCP.

(NOP, p. 1.)

Because neither the project itself, nor its location, are adequately described, meaningful comment on the potential environmental impacts of the project is thwarted. With regard to the development of reasonable alternatives to the project, Guidelines section 15126.6, subdivision (a), provides:

> An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which [1] would feasibly attain most of the basic objectives of the project but [2] would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

Meaningful comment on proposed alternatives to the project is also substantially thwarted since neither the project's "basic objectives" nor the potentially significant effects of the project have been articulated.

With regard to the project's basic objectives, the NOP states:

> Although the BDCP planning efforts are in the preliminary stages, the collective goals of the [Potentially Regulated Entities] *will provide the basis for* the project objectives under CEQA and the purpose and need statement under NEPA.

(NOP, p. 4, emphasis added.) "[W]ill provide the basis for" suggests that those goals will provide the basis *for the establishment of* the project's basic objectives or, in other words, the project's basic objectives will be derived from those goals. Whatever the case, the NOP does not adequately describe the project's basic objectives which the lead agency will ultimately use to

accept and/or reject proposed alternatives to the project. As a result, meaningful comment on proposed alternatives is thwarted and the lead agency's rejection of any suggested alternatives during this scoping process on the grounds that such alternatives do not have the potential to feasibly attain most of the project's basic objectives would be fundamentally unfair and entirely misplaced. (See Guidelines, § 15126.6, subd. (c) ["The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency's determination"].)

For similar reasons, the mandatory "scoping meeting" required by CEQA, as well as the "Notice of Intent" and "scoping process" requirements of NEPA, are likewise unduly premature and legally inadequate. (See Guidelines, § 15082, subd. (c)(1) and 40 C.F.R. § 1508.22 & 1501.7, respectively.)

3. **Inadequate Identification and Description of the Project's Basic Objectives.**

Since the project's basic objectives play such a critical role in the lead agency's decision of which alternatives should be included in the EIR's detailed analysis of a "reasonable range" of alternatives to the project, as well as the lead agency's ultimate decision of which alternative it should ultimately select to carry out, the lead agency must very clearly identify and describe the precise "basic objectives" of the project. As discussed above, thus far, the lead agency has not done so.

The NOP states on page 4:

> The BDCP is being developed to set out near-term and long-term approaches to meet the objectives of providing for the conservation of covered species and their habitats, addressing the requirements of the federal and State endangered species laws, and improving water supply reliability.

If those three objectives are meant to the be the project's basic objectives, then, once again, the NOP and upcoming EIS/EIR must make it crystal clear that those are the project's basic objectives. While the project's basic objectives must be sufficiently broad to enable a broad range of alternative courses of action to be formulated to meet most of those objectives, the objective of "improving water supply reliability" needs some more specificity to avoid confusion and disputes as to what that objective really means.

For example, improving water supply reliability *for whom*? For water users within the Central Delta Water Agency? For *all* water users using water from the Delta watershed? For just those water users that use that watershed water in areas located *outside* that watershed? For just the so-called "Potentially Regulated Entities" or PREs?

What constitutes an "improvement" of water supply "reliability" in the eyes of the lead

agencies? This objective must ultimately be broad enough to allow for consideration of alternatives that seek to make the water supplies of the Project's export contractors more reliable by providing *non*-Delta watershed water supplies to those contractors in lieu of the inherently unreliable and variable Delta water supplies.

As you are aware, the legal sufficiency of the CALFED Bay-Delta Programmatic EIS/EIR under CEQA is currently under review by the California Supreme Court. One of the central disputes in that case is in fact, "what are the project's basic objectives"? While none of the project's "basic" (or even "secondary") objectives stated that total annual Project exports from the Delta must increase, the lead agency, and other export interests, unfairly argued that any alternative that did not increase such exports was somehow contrary to the project's basic objectives. Such monkey business, for a lack of a better word, with regard to the project's basic objectives should be avoid at all costs in the instant EIS/EIR.

Accordingly, great care should be given to the articulation of the project's basic objectives and the EIS/EIR should clearly articulate what those objectives are and it should use the terminology of "basic objectives" so that it tracks CEQA's language and there is no confusion as to what constitutes the basic objectives of the project.

4. **Proposed Alternatives.**

While as noted above, the suggestion of potential alternatives is substantially thwarted at this stage by the lack of articulation of the project's basic objectives as well as the lack of identification of the potentially significant impacts from the project, not to mention the lack of a meaningful description of the "project" itself, some alternatives concepts which should be consider either as stand alone alternatives or components of various alternatives include the following:

Alternatives which comply with the statutory "common pool" mandate and, thus, do not have any form of an isolated facility, dual or otherwise.

An alternative of "regional self-sufficiency" where Peter (human and environmental water users within the Delta watershed) are not robbed to pay Paul (i.e., export contractors). Instead, every feasible effort is made to the maximum extent possible to develop new <u>non</u>-Delta watershed water and/or make better use of existing <u>non</u>-Delta watershed water to meet the needs of export contractors. The intended result being, that such export contractors can ultimately wean themselves off Delta watershed water, substantially or entirely, such that the Delta watershed water can be used to meet the needs within that watershed.

Ultimately there should be several alternatives which contemplate a *reduction* in exports from the Delta over historical levels.

With regard to the feared apocalyptic collapse of numerous Delta levees from an earthquake. Numerous alternatives should be considered to address such a collapse. To the extent the desire is to avoid the disruption of export deliveries the EIS/EIR should first thoroughly explain as precisely as possible what the water quality will likely be under existing conditions should the Projects desire to continue exporting water during such a apocalyptic failure. Then the EIS/EIR should clearly explain how long that water quality will likely remain in that state assuming the recently adopted emergency preparedness plans are in place, etc. to close those levee breaches. The EIS/EIR should then thoroughly explain whether the Projects can still divert and utilize water of that level of quality for agricultural beneficial uses, urban, etc. in either blended form with water stored in San Luis or blended with other water supplies. Assuming the water cannot be used in its current "degraded" state, the EIS/EIR should explain what facilities could be constructed to desalinize that water, or better allow for the blending of that water will other higher quality supplies, etc., and the costs of the construction and operation of such facilities.

In the event, the Projects simply cannot feasibly use the water in the Delta after an apocalyptic levee failure and/or cannot get by with other supplies while the levees breaks are being repaired, then the fortification of various master levee scenarios should be considered to minimize the intrusion of bay waters in the event of such failures much like what is already being implemented at the present time. So called "polders" should also be considered whereby areas are protected by master levees such that not all levees need to be substantially upgraded. Rather, only "master" levees need to be so upgraded which would serve to protect the polders or various sections of land within the Delta.

Tidal gate structures should also be evaluated to help repel bay salinity in the event of such a massive failure.

The forgoing measures to protect against an apocalyptic levee failure could also serve the additional benefit of protecting the Delta from reasonably anticipated sea level rise.

In addition, with regard to the apocalyptic earthquake, the EIS/EIR's analysis should thoroughly examine the likelihood of such a magnitude earthquake near all of the Project's major export facilities, not the least of which is the export pumping facilities themselves as well as the California Aqueduct and Delta-Mendota canals which essentially track major fault lines. Alternatives to protect against damage and disruption of export supplies resulting from such earthquakes should be thoroughly evaluated.

With regard to protecting fishery resources within the Delta, actual, state of the art, fish screens on all Project export facilities should be evaluated to enable water that is truly surplus from the needs of the Delta, assuming there is any such water, to be exported with minimal impacts to fish. If an actual, state of the art fish screen is included for an isolated facility in any alternative which includes such an isolated facility, then such a screen must naturally also be included in all the alternatives that do not involve an isolated facility and should be installed on

all exiting Project export facilities.

An alternative should be considered that includes substantially increased Delta outflows. Such an alternative could draw sensitive fishery species away from the existing export facilities, thereby increasing the "reliability" of such exports, and also enable the restoration of the Suisun Marsh which could provide tremendous benefits to numerous fishery species.

The EIS/EIR should include an extensive discussion of desalinization options in order to promote regional self-sufficiency. Such a discussion would be in furtherance of Water Code section 12946 which provides:

> It is hereby declared that the people of the state have a primary interest in the development of economical saline water conversion processes which could eliminate the necessity for additional facilities to transport water over long distances, or supplement the services to be provided by such facilities, and provide a direct and easily managed water supply to assist in meeting the future water requirements of the state.

Opportunities for environmentally friendly desalinization of ocean waters as well as brackish ground waters (as well as the saltier Delta waters which presumably will result from a massive levee failure) should be thoroughly examined.

To the extent the objectives of the BDCP are ultimately to "provid[e] for the conservation of covered species and their habitats, address[] the requirements of the federal and State endangered species laws, and improv[e] water supply reliability" (NOP, p. 4), it is easy to see that weaning the export contractors off the Delta watershed such that exports from the Delta could be ultimately substantially reduced would seemingly satisfy those objectives better than any other alternative. Accordingly, as stated above. multiple alternative scenarios which seek to accomplish such weaning should be thoroughly considered.

5. Impacts Which Should be Analyzed.

The NOP at page 9 states:

> "The EIR/EIS will analyze the reasonably foreseeable direct, indirect and cumulative effects (e.g. climate change, including sea level rise) of the BDCP (including habitat conservation measures and water conveyance facilities) and a reasonable range of alternatives on a wide range of resources, including but not limited to:
>
> BDCP covered species
> Other Federal and State Listed Species

Aquatic Biological Resources
Wetlands and Terrestrial Habitat
Surface Hydrology including Water Rights
Groundwater Hydrology
Geology and Soils
Water Quality
Seismic Stability
Aesthetics
Air Quality, including Greenhouse Gas Emissions
Land Use (e.g. Urban, Agricultural and Industrial Uses)
Historic and Cultural Resources
Environmental Health and Safety
Public Services and Utilities
Energy and Natural Resources
Recreation
Population/Housing
Transportation/Traffic"

In addition to what was stated above with respect to alternatives, the following effects/topics should also be throughly analyzed:

-- Impacts on *all* aquatic and terrestrial species must be examined, not just the BDCP covered species or other "listed" species.
-- Navigation impacts.
-- Impacts on the integrity of existing levees within the Delta from the construction and operation of any isolated facility or other facilities.
-- Seepage impacts on lands within the Delta from the construction and operation of any isolated facility or other facilities.
-- Evaporative water losses from any proposed creation of wetlands.
-- If any increase in exports are contemplated or reasonable foreseeable, then a thorough identification of the source of such exports and examination of the full range of potential environmental impacts from the export of such water must be conducted.
-- Growth-inducing impacts.
-- Economic impacts which have the potential to result in adverse changes to the environment, e.g., the economic impacts from a loss of farmland due to an isolated facility and/or construction of wetlands and the decreased agricultural production within the Delta resulting from any decrease in water quality resulting from the operation of an isolated canal or otherwise. The potential for such economic impacts to result in physical changes to the environment via the abandonment of farming operations or local ability to fund levee maintenance, etc. should be fully examined.

Lastly (for the time being), but certainly not least, the EIS/EIR should thoroughly embrace the ramifications to the environment from the construction and operation of any isolated facility which would eliminate or diminish the Projects and, their water contractors', currently existing direct beneficial interests in preserving the water quality in the Delta. The Delta Protection Act of 1959's mandate that exports from the Delta be taken from the "common pool" within the Delta, and not from the uppermost northern tip of the Delta, has ensured that the state and federal government, as well as the millions of people who receive Delta export water and hundreds of thousands of acres of farmland that utilize such water, have a direct stake in ensuring that the Delta water quality remains fresh. What is good for the goose is good for the gander. The potential environmental impacts from the elimination or diminishment of that direct stake should not be underestimated by any of the participants to the BDCP and the upcoming EIS/EIR should thoroughly discuss, incorporate and acknowledge that potential throughout the entire EIS/EIR and especially in the discussion and evaluation of alternatives to the proposed project (whatever that may ultimately be).

6. **Conclusion.**

Thank you for your time and consideration of these comments and concerns.

Very truly yours,

Dante John Nomellini, Jr.
Attorney for the CDWA

DJR/djr
Enclosures

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March 24, 2008

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Sacramento Fish and Wildlife Office
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BDCP-NEPA.SWR@noaa.gov.

Re: NOI - Bay-Delta Conservation Plan

Dear Ladies and Gentlemen:

Thank you for the opportunity to comment.

INADEQUATE REGULATORY PROCESS

The Central Delta Water Agency (CDWA) continues to be concerned with the lack of arms-length relations between the regulatory agencies and the United States Bureau of Reclamation and California Department of Water Resources who are the water export project operators.

It has for years clearly been recognized that SWP and CVP impacts including export pumping from the Delta cause substantial damage to the fisheries yet the projects until recent court intervention have been allowed to steadily increase exports. Even the physical limits on federal exports have been avoided through coordinated operations, joint points of diversion, wheeling of transferred water and other mechanisms. Although failing to provide protection, the State Water Resources Control Board in 1978 recognized the harm when in D-1485 it found: "To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps."

The BDCP process is yet another example where regulatory integrity has been compromised. The need for focus on the broad protection of the Bay-Delta Estuary and the fish and wildlife therein is being blurred by the emphasis on "covered species" and by the goal to protect water supply on an equal footing with restoring and protecting the environment.

The cornerstone for both the CVP and SWP was the promise that the needs including environmental needs within the Delta and other areas of origin would come first and that only surplus water would be exported.

The base level of protection must include:

1) full mitigation of project impacts including without limitation destruction of spawning habitat upstream and within the Delta, alteration of instream flows, alteration of water temperatures upstream and in the Delta, alteration of scour and sedimentation, creation of reverse flows, diversion and/or destruction of fish, eggs and larvae at the export pumps, reduction in water levels, reduced Delta spring and summer outflows, project-induced upstream diversions and resulting discharges including degradation of water quality particularly in the San Joaquin River where San Luis Unit water was not to be provided without an adequate valley drain;

2) salinity control to both mitigate for project impacts and enhance Delta water quality;

3) preservation of fish and wildlife at project contractor cost as per Water Code section 11900 et seq. (Stats. 1961 c.867) and

4) compliance with the Coordinated Operations Project Operation Policy (Public Law 99-546).

The plan must also adhere to other constraints for planning and operations such as the CVPIA (Public Law 102-575) which includes doubling the natural production of "anadromous fish" including stocks of salmon, steelhead, striped bass, sturgeon and American shad and the Water Supply, Reliability and Environmental Improvement Act (Public Law 108-361).

The BDCP process goals do not embrace the breadth of issues necessary for water project planning which will protect the general public interest and public trust.

FAILURE TO RECOGNIZE THAT IT MAY BE IMPOSSIBLE TO PROTECT THE ENVIRONMENT (OR EVEN JUST THE COVERED SPECIES) WITH CONTINUED SWP AND CVP EXPORTS FROM THE SACRAMENTO AND SAN JOAQUIN RIVERS WATERSHED REGARDLESS OF THE METHOD OF CONVEYANCE.

The BDCP planning goal number 3 provides "Allow for projects that restore and protect water supply, water quality, ecosystem and ecosystem health to proceed within a stable regulatory framework;".

The planning goal to restore and protect water supply is an inappropriate goal for regulatory agencies which have a duty to protect threatened and endangered species from CVP and SWP impacts. It may also be totally unrealistic.

The planning for the SWP contemplated the addition of 5 million acre feet of supplemental water to the Sacramento and San Joaquin Rivers Watershed from north coast rivers by the year 2000. Development of water from such north coast rivers of course did not take place. Factors such as cost, wild and scenic river legislation and greater environmental awareness likely played a part. It is quite clear that increasing demand for water within the watershed was anticipated and the 5 million acre feet of supplemental water was intended to meet the approximately 4.25 million acre feet of SWP contract entitlement and provide about .75 million acre feet to meet the growing needs within the watershed. (See attached excerpts from DWR Bulletin 76, Preliminary Edition, December 1960.) It was never intended that exports from the Delta would be sustained with water from the Sacramento and San Joaquin Rivers Watershed past the year 2000. The absence of the 5 million acre feet of supplemental water greatly reduces the ability of the watershed to assimilate natural and man-induced contaminates and likely precludes meeting both the needs within the watershed and the desires of the exporters. Any fair environmental evaluation must evaluate the range of tolerable exports from the watershed if any at all. It would appear that water could be available for some export in wetter years but unlikely that exports could be restored or protected in other years. The environmental evaluation must look at alternatives which develop supply from outside the Sacramento and San Joaquin Rivers watershed including desalting brackish groundwater, municipal wastewater and in some cases seawater. The breadth of the evaluation should also include a determination of the range of impacts resulting from continued development of arid lands and arid lands in differing regions. The goal should be to establish the present and future needs to provide full protection within the watershed and establish the bounds of what is truly surplus water which can be exported. Curtailment of export pumping at times when fish, water quality or water levels are adversely impacted may provide more than sufficient export pumping opportunities to divert the water which is truly surplus. Attached hereto are charts showing the Estimated Seasonal Natural Runoff 1917-18 to 1946-47 for both the North Coast Area and the Central Valley. It is important to note that for the period 1928-29 to 1933-34 (the 6 year drought) the average total runoff of the Central Valley was only 17,631,000 acre feet. This can be compared to local requirements of about 25,690,000 acre feet and a safe yield of about 22,500,000 acre feet. In a reoccurrence of such a drought, the Central Valley will be severely short of water and no surplus would be available for export. Alternatives which develop self-sufficiency in areas dependent upon imported water and reduce dependence upon exports from the Delta must be considered.

The hundreds of miles of canals and pipelines together with the appurtenant pumping and power facilities leaves the present water system highly vulnerable to earthquakes, terrorism and

other threats including those outside the Delta. Real consideration of the reduced Delta export alternatives is critical.

These comments are intended to be preliminary and we further join in those submitted by the South Delta Water Agency.

Yours very truly,

DANTE JOHN NOMELLINI
Manager and Co-Counsel

DJN:ju
Enclosures

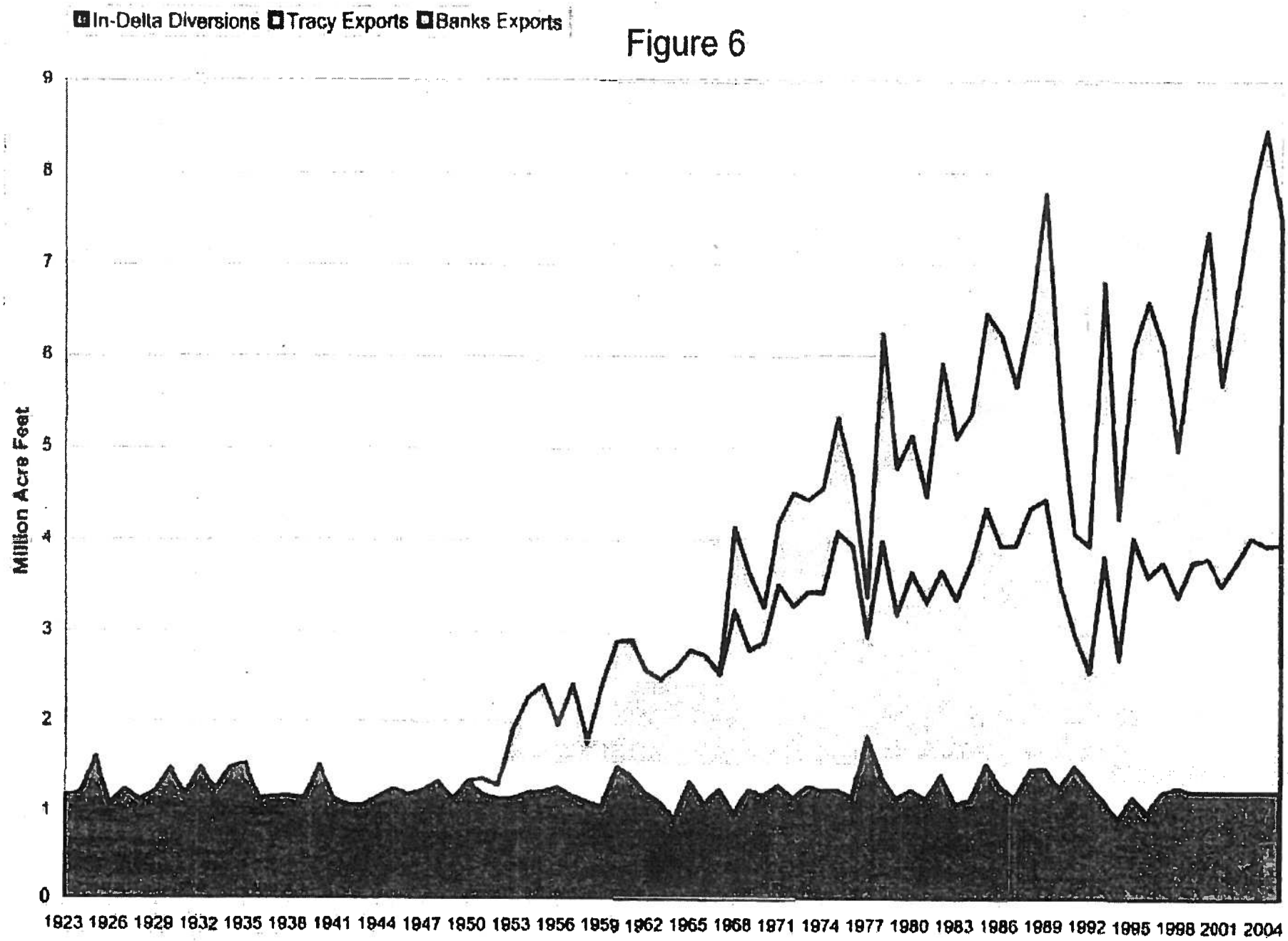
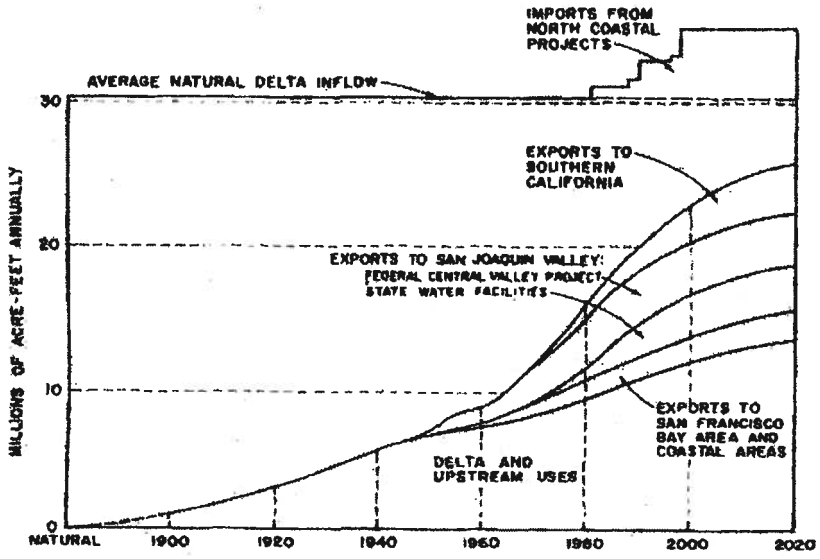
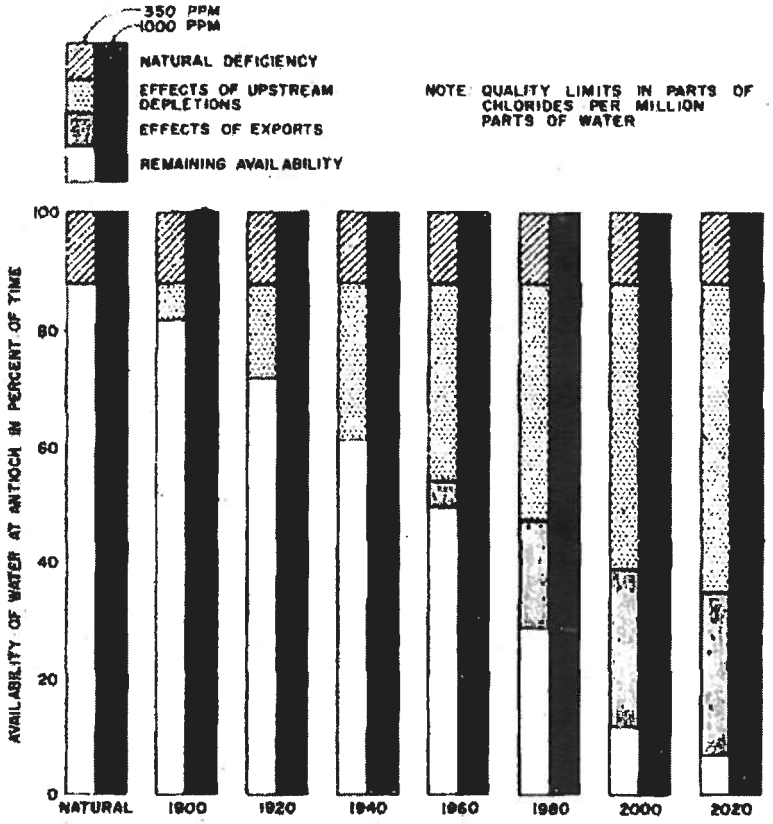

In-Delta Diversions
Tracy Exports
Banks Exports
Million Acre Feet
0
1
2
3
4
5
6
7
8
9
1923 1926 1929 1932 1935 1938 1941 1944 1947 1950 1953 1956 1959 1962 1965 1968 1971 1974 1977 1980 1983 1986 1989 1992 1995 1998 2001 2004

Figure 6

The natural availability of good quality water in the Delta is directly related to the amount of surplus water which flows to the ocean. The graph to the right indicates the historic and projected availability of water in the San Joaquin River at Antioch containing less than 350 and 1,000 parts chlorides per million parts water, under long-term average runoff and *without* specific releases for salinity control. It may be noted that even under natural conditions, before any significant upstream water developments, there was a deficiency of water supplies within the specified quality limits. It is anticipated that, without salinity control releases, upstream depletions by the year 2020 will have reduced the availability of water containing less than 1,000 ppm chlorides by about 60 percent, and that exports will have caused an additional 30 percent reduction.

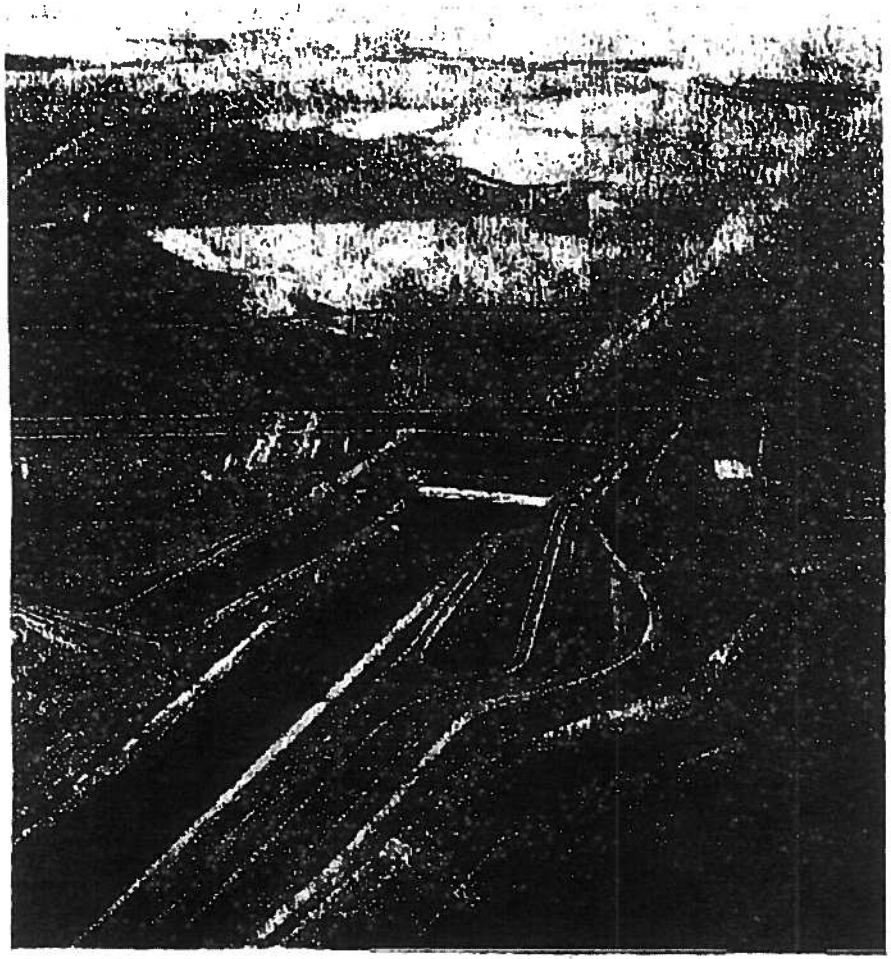


USE OF DELTA WATER SUPPLIES



DELTA WATER QUALITY WITHOUT SALINITY CONTROL

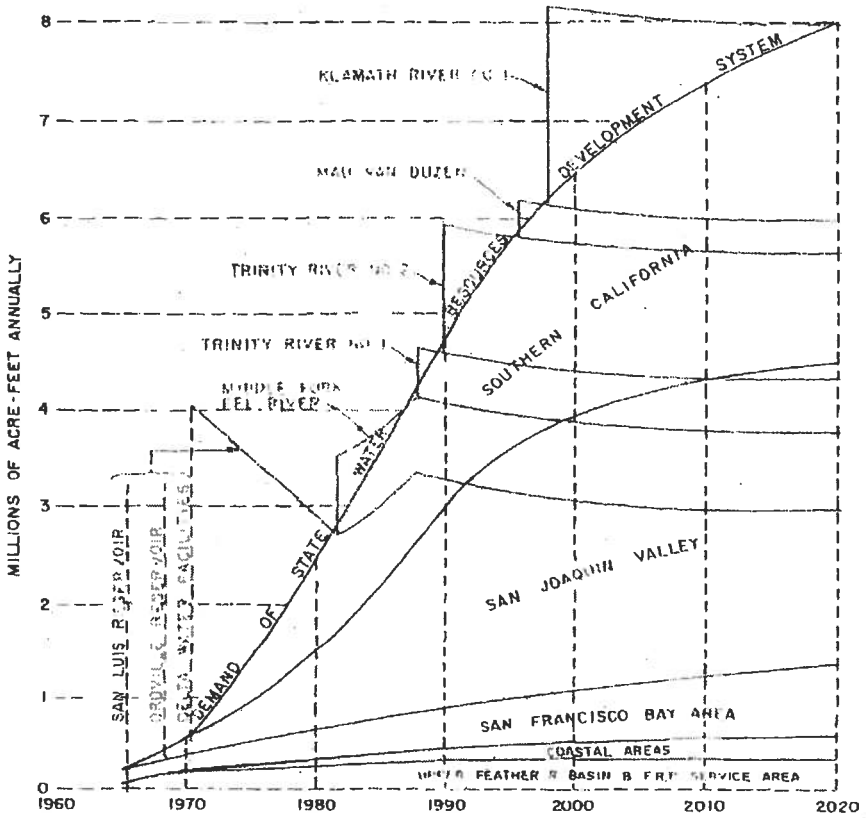
The magnitude of the past and anticipated future uses of water in areas tributary to the Delta, except the Tulare Lake Basin, is indicated in the diagram to the left. It may be noted that, while the present upstream use accounts for reduction of natural inflow to the Delta by almost 25 percent, upstream development during the next 60 years will deplete the inflow by an additional 20 percent. By that date about 22 percent of the natural water supply reaching the Delta will be exported to areas of deficiency by local, state, and federal projects. In addition, economical development of water supplies will necessitate importation of about 5,000,000 acre-feet of water seasonally to the Delta from north coastal streams for transfer to areas of deficiency.



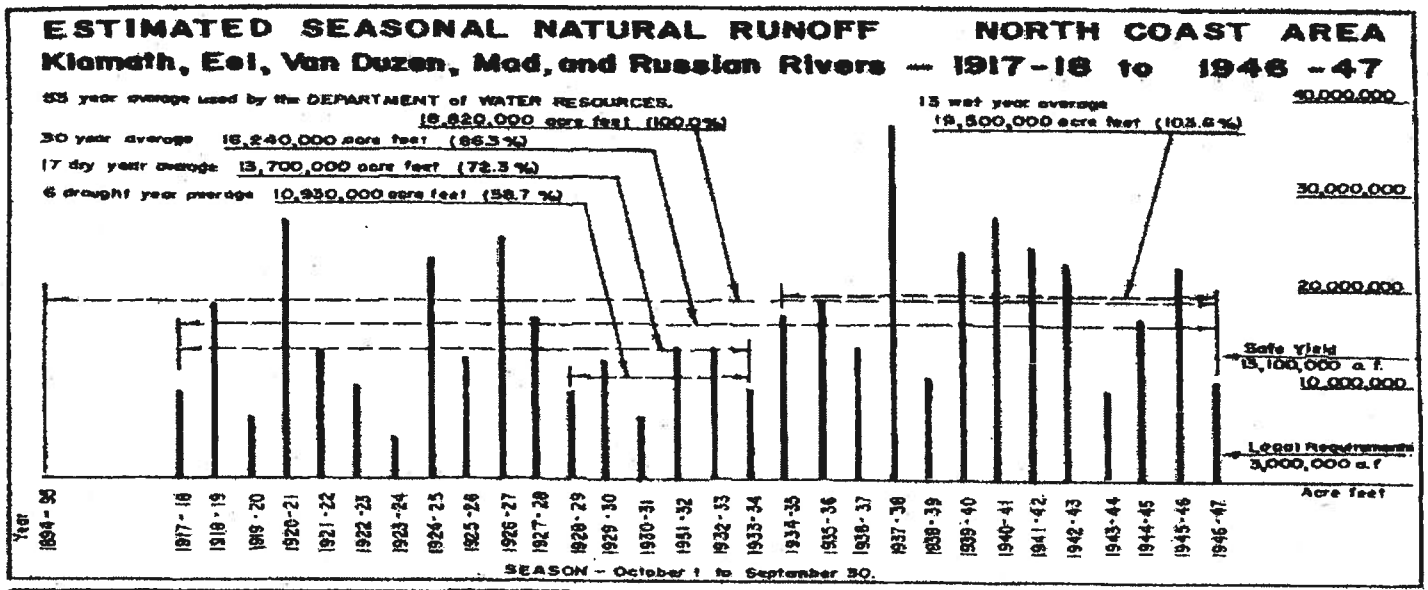
Tracy Pumping Plant

Full demands on the State Water Resources Development system can be met until about 1981 from surplus water in and tributary to the Delta with regulation by the proposed Oroville and San Luis Reservoirs. However, upstream depletions will reduce the available surplus supplies and water will have to be imported from north coastal sources after that year. It is anticipated that coordinated operation of the State Water Resources Development System and the Federal Central Valley Project will afford a limited increase in usable surplus Delta supplies beginning in 1981. As indicated in the chart, upstream depletions will continue to decrease the available surplus supplies.

The coordinated use of surplus water in and tributary to the Delta and of regulated or imported supplements to this supply, as required, is referred to as the Delta Pooling Concept. Under this concept of operation the State will ensure a continued supply of water adequate in quantity and quality to meet the needs of export water users. Advantage will be taken of surplus water available in the Delta, and as the demand for water increases and the available surplus supply is reduced by further upstream uses, the State will assume the responsibility of guaranteeing a firm supply of water, which will be accomplished by construction of additional storage facilities and import works. At the same time, the water needs of the Delta will be fully met.



WATER SOURCES AND USES


ESTIMATED SEASONAL NATURAL RUNOFF
NORTH COAST AREA
Klamath, Eel, Van Duzen, Mad, and Russian Rivers — 1917-18 to 1946-47
55 year average used by the DEPARTMENT of WATER RESOURCES.
18,820,000 acre feet (100.0%)
30 year average 16,240,000 acre feet (86.3%)
17 dry year average 13,700,000 acre feet (72.8%)
6 drought year average 10,950,000 acre feet (58.7%)
15 wet year average
19,500,000 acre feet (103.6%)
50,000,000
30,000,000
20,000,000
Safe Yield
15,100,000 a.f.
10,000,000
Legal Requirements
3,000,000 a.f.
Acre feet
Year
1894-95
1917-18
1918-19
1919-20
1920-21
1921-22
1922-23
1923-24
1924-25
1925-26
1926-27
1927-28
1928-29
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1935-36
1936-37
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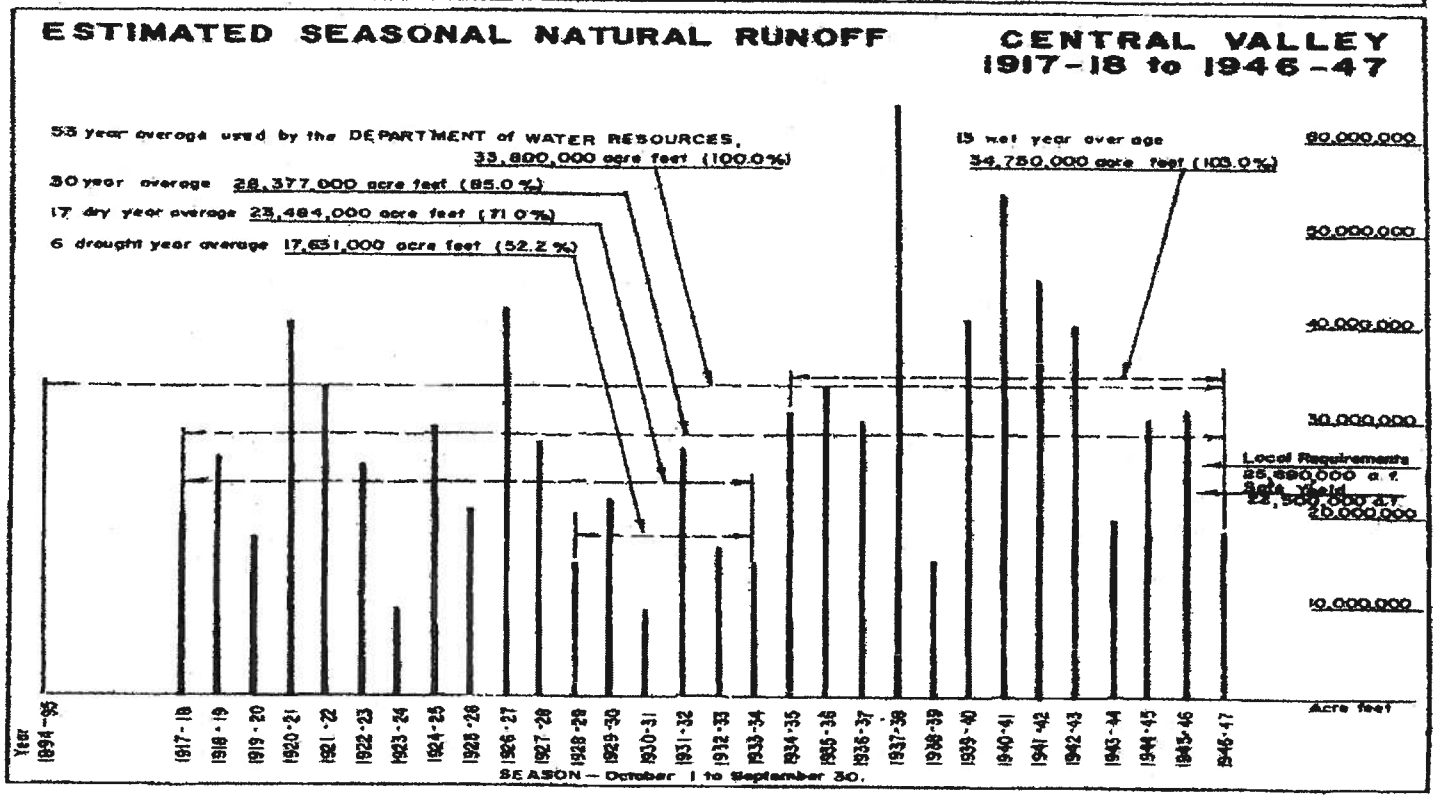
1942-43
1943-44
1944-45
1945-46
1946-47
SEASON — October 1 to September 30.


ESTIMATED SEASONAL NATURAL RUNOFF
CENTRAL VALLEY
1917-18 to 1946-47
55 year average used by the DEPARTMENT of WATER RESOURCES.
33,800,000 acre feet (100.0%)
30 year average 28,377,000 acre feet (85.0%)
17 dry year average 23,484,000 acre feet (71.0%)
6 drought year average 17,651,000 acre feet (52.2%)
15 wet year average
34,750,000 acre feet (103.0%)
60,000,000
50,000,000
40,000,000
30,000,000
Local Requirements
25,690,000 a.f.
Safe Yield
22,500,000 a.f.
20,000,000
10,000,000
Acre feet
Year
1894-95
1917-18
1918-19
1919-20
1920-21
1921-22
1922-23
1923-24
1924-25
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1941-42
1942-43
1943-44
1944-45
1945-46
1946-47
SEASON — October 1 to September 30.

SOUTH DELTA WATER AGENCY

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March 24, 2008

Via E-Mail
BDCP-NEPA.SWR@noaa.gov

Re: Notice of Intent to Conduct Public Scoping and Prepare an EIR/EIS Regarding the Bay Delta Conservation Plan (BDCP) for the Sacramento-San Joaquin Delta

Gentlemen:

The South Delta Water Agency submits the following comments regarding the NOI to prepare environmental documents reviewing the Bay Delta Conservation Plan ("BDCP").

1. The BDCP proposes to provide for the conservation of endangered species and their habitats in the Delta in a way "that also will provide sufficient and reliable water supplies" for parties reliant on exports from the Delta. Thus, the underlying premise limits the various options available to DFG, FWS and NMFS for recovery and enhancement of not only endangered (and threatened species) but for most Delta species in general.

One of the options available to the fishery agencies is to limit exports and require increased outflow to the point where the impacted fisheries are improved. By assuming ahead of time that some certain level of exports will be allowed (or amounts of outflow will be limited), the agencies are precluded from examining possible scenarios which might be better for the fisheries than the alternatives proposed by the BDCP. This approach also ignores various underlying legal requirements that DWR and USBR fully mitigate the impacts of the SWP and CVP.

2. The environmental review must fully analyze the alternative's impacts to water quality, especially in the South Delta. Currently, Sacramento River water is drawn across the Delta to the export pumps. This "fresher" water is mixed with the "poorer" San Joaquin River water and provides water quality benefits to both the Central and Southern Delta channels. An isolated facility decreases the amount of Sacramento water moving across the Delta, and thus result in a worsening of water quality in the Central and South Delta.

Studies so far have improperly examined this effect. DWR's modeling suggests that the operation of an isolated facility would have no significant effect on water quality. However, that modeling was an averaging of all year types, which resulted in a masking of the effects of the project. The environmental review must look at the various year types separately, showing how differing levels of flows through an isolated facility would result in differing flows across the Delta and less dilution of salts in the Central and South Delta.

For example, this past month, exports have been curtailed due to a court ruling. With the diminished through-Delta flow, the water quality objective was violated as measured at the Old River Tracy Blvd. compliance location. With an isolated facility, there might be less or no cross Delta flow, resulting in even worse quality and a more extreme violation of that and other standards/objectives.

As part of the analysis, the environmental documents must examine how the various options will affect compliance with the Southern Delta salinity standards as those standards are terms of the DWR and USBR permits. [Note, the standards are required to be met throughout the channels, not just at the compliance locations per the 2006 Bay-Delta Water Quality Control Plan.] The project purpose must include compliance with all permit terms and conditions, as well as other legal limitations and requirements on the projects. SDWA's analysis indicates that moving Sacramento River water through an isolated facility will in most years and in most months result in violations of the salinity standards, and thus any option with such a facility could not be adopted or implemented.

3. Operation of an isolated facility would decrease the inflow to the Delta, and thus affect outflow. Either outflow will decrease, or additional inflow will be necessary to meet outflow requirements. The environmental documents must fully examine the various operational scenarios and the consequent effects on fisheries and other beneficial uses. Less inflow will mean that the flow of water through the Delta will be slower. There are resulting impacts to fisheries as well as water quality from this change. Previous studies indicate that decreased rates of flow result in increased predation on various species, especially endangered ones. It would also result in warmer water, decreased DO, and increased hyacinth and other plants clogging the channels. As stated above, an alternative not presented by BDCP is an increased outflow scenario which should improve fisheries. Such an option must be considered in the review.

4. An isolated facility, by changing the water quality in Delta channels could result in changes in the location of various fish species who use water quality as cues for migration, spawning and other life stages. Hence, the intake to an isolated facility might become a place of greater risk for some species. Further, decreasing Delta cross flow might decrease the areas of good habitat for species seeking better water quality, thus increasing the stressors to the species.

5. The environmental documents must examine how an isolated facility would be operated to insure no adverse impacts to other and superior water right holders. During low flow

times, the "natural" flow may be necessary for in-Delta users and thus cannot be removed from the system through an isolated facility. Similarly, upstream return flows may be necessary for numerous water right holders and not available for the junior export permits. Further, stored flow may be necessary to comply with existing permit terms and conditions to meet outflow and water quality parameters and again not be available for transport though an isolated facility.

It is important to note that all (legal) Delta channels are subject to the tides, and in combination with their channel bottom elevations, result in water always being in those channels. This raises important issues that must be covered in the environmental documents. Water is always available for in-Delta users. If some or all tributary flow ceased, water would still be in Delta channels. Case law, statues, and permit terms and conditions require the projects to keep the Delta water at certain qualities for those in-Delta uses. Hence, the operation of any isolated facility must include the protection of the water quality on which those uses depend. Any honest analysis will indicate those obligations cannot be met when an isolated facility is moving water around the Delta instead of through it.

6. As a follow on to the above point, the Delta Protection Act (Water Code Sections 12200 et. seq.) places certain burdens on the export projects. Those statues require that the Delta be kept as a "common" pool for in-Delta and export supplies. The statues go on to require that an "adequate supply" be provided to in-Delta water users (no supply amount is guaranteed to export users), that no water needed for this supply or for salinity control may be exported, and that exports cannot include water to which in-Delta users are entitled. Finally, the statues require that releases from storage in the Sacramento-San Joaquin system shall be integrated as much as possible to meet the requirements of the Act.

Taken together, these statues place severe operational limitations of not only the export pumps, but also any isolated facility. Hence, the environmental documents must include a review of the BDCP alternatives with these statutory/operational limitations. The result will indicate that the opportunities for its operation will be nil.

7. The review must include other alternatives, not currently in the BDCP proposal. SDWA and CDWA proposed to the Delta Vision process a comprehensive program which included the "Delta Corridors" plan. This plan seeks to reconnect the San Joaquin River with the Bay, a situation that no longer exists during most years. This is because the export projects typically take more water than is entering the Delta from the San Joaquin, and thus no San Joaquin water reaches the Bay. In addition, upstream use has decrease in-Delta flow to the point where in many months in most years, the inflow of the San Joaquin is less than the local, in-Delta diversions. Again, this results in none of the river's flow reaching the Bay. The Delta Corridors plan seeks to correct this and thus should show increased benefits to fisheries over proposals which will decrease water quality in the Delta (isolated facility).

8. The review should include an improved through Delta conveyance as well as one that curtails exports in order to meet superior water right and environmental needs. As currently constructed, the BDCP proposals for through Delta are constrained by inaccurate assumptions regarding improved Delta channels and the need to maintain some "acceptable level" of exports.

9. It is unrealistic to assume that a Conservation Plan can be developed at this point. Ongoing investigations, speculation and analysis in the POD process indicates that the solution or solutions to the radical decline in ceratin fisheries are not yet known. Until such time as the specifics of why the decline is occurring at this time it is impractical and improper to adopt a Plan which gives exports a multi-year approval or guarantee of operations. We do not know yet if any particular level of exports is consistent with the protection of endangered species. Until we do, no plan should be contemplated or adopted which protects exports which are the likely cause the fishery problems.

SDWA can provide information and documentation to support the points set forth above and looks forward to participating in the environmental review of the BDCP proposals.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK

JH/dd