

NORTH DELTA WATER AGENCY

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December 9, 2011

Sent Via Email to: lchu@water.ca.gov

Dean F. Messer, Chief
CA Dept. of Water Resources
Division of Environmental Services
3500 Industrial Blvd.
West Sacramento, CA 95691

SUBJECT: Fish Restoration Program Agreement Comments by NDWA

Dear Mr. Messer:

The North Delta Water Agency (NDWA) appreciates the opportunity to comment on the Fish Restoration Program Agreement (FRPA) between the Department of Water Resources (DWA) and the Department of Fish and Game (DFG) regarding the habitat restoration requirements in the biological opinions (BOs) and incidental take permit (ITP) for the State Water Project (SWP) and Central Valley Project (CVP) operations.

The NDWA was formed by a special act of the State Legislature in 1973 to negotiate, enter into, administer, and enforce an agreement to assure a reliable supply of water of suitable quality and to avoid and remediate damage caused by the operation of the SWP and its conveyance facilities. The NDWA successfully negotiated and approved a contract with DWR in 1981 (Contract). The NDWA encompasses approximately 300,000 acres of the legal Delta and is the location of most of the aquatic habitat restoration acres contemplated in the FRPA.

General Comments

The implementation of the restoration requirements in the BOs and ITP have the potential to be in conflict with the NDWA's 1981 Contract with DWR if not properly designed and implemented. In addition, there are likely to be significant impacts to landowners and the economy of the North Delta pursuant to implementation of the FRPA. Unfortunately, the distribution of the November 16, 2011 letter requesting comment was limited to only a select group of entities and excluded adjacent/affected landowners. Therefore, we recommend you expand the distribution of this document to all members of the public for comment and hold public workshops regarding the specific actions and timelines committed to in the FRPA *prior* to the close of the public comment period.

On behalf of the NDWA, we request the state and federal agencies to respect the commitments and assurances already made by the State of California to the NDWA's water users (landowners) and recognize the need to use the terms and conditions of the 1981 Contract as an important baseline to be maintained and protected in any habitat project, work plan, implementation plan, and the FRPA itself developed by state and federal agencies.

We also recommend the FRPA and all habitat projects, associated work, implementation, and funding plans include adequate, reliable, and permanent financing mechanisms (i.e.: a securitized endowment or annuity), prior to construction and implementation. The securitized endowment should also include in perpetuity funding for the payment of all local government/agency in lieu taxes and assessments as well as third party impacts/harm caused by implementation of habitat projects.

Issues of Concern by Section

Section 1.3.2 Estimated Costs, Acreage Targets, and Timeline

- **ISSUE:** The estimated costs components identified on page 5 are insufficient to reflect the full costs associated with implementation of restoration actions. **RECOMMENDATION:** Add third party mitigation and local government in lieu taxes and assessments to the list of cost components listed on page 5 of the FRPA-DIS.
- **ISSUE:** The FRPA-DIS is heavily dependent on referencing commitments made in the "Memorandum of Agreement Regarding the Early Implementation of Habitat Projects for the Central Valley Project and State Water Project Coordinated Operations Criteria and Plan and Bay Delta Conservation Plan" (BDCP MOA). However, the BDCP MOA has been put out for public review and comments based on public concerns raised regarding the MOA content, and therefore the BDCP MOA may be revised. **RECOMMENDATION:** Revise the FRPA-DIS based upon subsequent changes made to the BDCP MOA pursuant to public comments.

Section 1.4 FRPA's Relationship to Other Programs

- **ISSUE:** DWR has entered into a MOA with the State and Federal Water Contractors Agency to provide ongoing coordination in planning and implementing restoration projects in the Delta, to allow SFWCA to carry out restoration projects on its own, and to allow these projects to be credited toward DWR's obligations in the BOs and the ITP. In accordance with the SFWCA MOA, DWR and SFWCA workgroup meets monthly to coordinate planning and implementation of restoration actions and is the venue for resolving many planning implementation issues. **RECOMMENDATION:** We would request these monthly workgroups to coordinate planning and implementation of restoration actions be opened to the public, particularly impacted stakeholders in the Delta.
- **ISSUE:** As mentioned in this section, there are a number of other Delta and Suisun Marsh restoration and planning efforts underway where the FRPA program will need to coordinate. As currently written the FRPA-DIS is woefully inadequate in terms of identifying all of the Agreements and Programs that need to be coordinated with. **RECOMMENDATION:** The FRPA-DIS should add the NDWA 1981 Contract and its assurances to this section. In addition, the other Habitat Management Plans in the Delta such as the Suisun Marsh Plan, the Yolo Wildlife Management Plan, the Delta Protection Commission's Land Management Plan, and many others should also be included as needing to be coordinated with by the FRPA.

Section 2.2.1 Financing

- **ISSUE:** Relieving the habitat restoration projects from the requirement of establishing a securitized endowment fund for the operation, monitoring, and maintenance of mitigation actions is inappropriate and puts the long-term ability to pay for the long-term maintenance in perpetuity of all completed habitat restoration project at risk. We believe the FRPA and BDCP should both have to provide securitized endowment funding rather than be vulnerable to annual budget decisions made by the SFWCA and funding dry-up in later years due to annual budget decisions by the state and federal water contractors or DWR. As stated on page 24 of the FRPA, “Financial Constraints” include securing SWP funds in the appropriate amount and at the appropriate time to implement program, and the ability to move these funds in a timely manner is problematic. **RECOMMENDATION:** Delete language allowing DWR to directly fund the long-term FRPA projects and implementation costs based on DWR’s SWP water supply contracts. The FRPA should instead require securitized endowments as other habitat project proponents in the area are currently required to provide for each project. The vagaries of annual budgeting are NOT reliable.

Section 2.2.2 Restoration Action Identification and Land Acquisition

- **ISSUE:** Identifying parcels to be acquired prior to planning and implementation of restoration actions is backwards. The public and affected stakeholders should have the opportunity to be part of the habitat project planning to determine if it’s feasible, affordable, and compatible with neighboring land uses *before* the parcels are acquired or the project is implemented. **RECOMMENDATION:** Change Section 2.2.2. to describe and provide a preliminary public process regarding specific locations for specific habitat projects to discuss feasibility and compatibility with other local land uses, Agreements such as 1981 Contracts, and other Land/Habitat Management Plans prior to parcel acquisition.
- **ISSUE:** Proposes acquisition utilize State or public lands and work with willing landowners. **COMMENT:** We support the FRPA analyzing opportunities on public lands first and committing to willing sellers for additional easements and acquisitions.

Section 2.2.3 Legal and Land Management Issues

- **ISSUE:** Changes to existing easements and assurances are concerning, particularly those found in the NDWA 1981 Contract and the flood easements existing in the Yolo Bypass. **RECOMMENDATION:** Language should be added in the FRPA to clarify the intent for all restoration actions to abide with the assurances and criteria in the NDWA 1981 Contract to protect water supply and quality in the North Delta, to NOT cause a decrease or increase in the natural flow, or reversal of the natural flow direction or to cause the water surface elevation in Delta channels to be altered to the detriment of North Delta channels or North Delta water users, and to avoid or repair any seepage or erosion damage caused to lands, levees, embankments, or revetments adjacent to channels in the North Delta pursuant to Article 6 of the Contract. In addition, language should be included in the FRPA to maintain, respect, and protect the flood easements in the Yolo Bypass for the public safety of all residents and businesses in the greater Sacramento region.

Section 2.2.4 Stakeholder Involvement and Public Outreach

- **ISSUE:** Public participation in the development and implementation of habitat restoration projects is inadequate in terms of the significant negative impacts the Delta communities may experience as a result of these proposed projects. The “currently operating forums and technical teams” mentioned are not all open, transparent, or inclusive of all interested

stakeholders and public. For instance the Fishery Agency Strategy Team, the Restoration Technical Team, the External Science Review, the FRPA Coordination Team, the Cache Slough Complex Interagency Technical Team mentioned in Section 2.2.5 on page 13, and many others are not noticed as open to the public. **QUESTION:** What are the “currently operating forums and technical teams” referred to in this section? Please name the specific forums and teams where the public can participate. **RECOMMENDATION:** Expand the public participation opportunities within the various technical teams associated with implementing FRPA.

Section 2.2.5 Planning and Design

- **ISSUE:** There is no definition of “other agencies and interested stakeholders” to be allowed to collaborate on planning and design of project alternatives. Does this include the NDWA? Does it include the state and federal water contractors? Does it include environmental organizations? **RECOMMENDATION:** The FRPA needs to identify the actual agencies and stakeholders that will be part of the collaboration as well as the how and when they are included in this collaboration process.

Section 2.2.6 Environmental Compliance and Permits

- **ISSUE:** This sections states that DWR will follow the steps described in Section 3 before committing to a definite course of action for a specific habitat restoration site when they are the lead agency for environmental permitting. However, this section also states that “DFG or other project proponents” may also be the project lead agency for FRPA restoration actions, but it fails to identify either who these “other” project proponents are or what process they are required to follow. **RECOMMENDATION:** This section of the FRPA needs to identify who exactly the “other” eligible project proponents are and what process they will be required to follow.
- **ISSUE:** It's unclear what type of significant effects DWR plans to thoroughly assess on page 13. Do they plan to mitigate or avoid significant effects on fish, people, properties, or all of the above? What about Contracts, Agreements, and other Management Plans? **RECOMMENDATION:** This section needs to clarify exactly whose impacts they will be avoiding and mitigating. In addition, this section should include specific reference to compliance with the assurances and criteria in the NDWA 1981 Contract.

Section 2.2.9 Post-Project Management

- **ISSUE:** Dependability of the long-term management of restoration projects needs to be in place and committed to prior to construction. **RECOMMENDATION:** Amend this section to require the adoption and approval of a management plan *prior* to start of construction instead of upon construction completion.

Section 2.3 Near Term Actions

- **ISSUE:** We object to this section stating that all of these “Near-Term Actions” *will be* implemented. Many of these actions are still in preliminary planning and warrant additional discussion with local landowners and agencies in order to determine if they are feasible, affordable, and compatible with local land uses in the project area or even beneficial to *all* listed species. **RECOMMENDATION:** Change “will be implemented” on page 15 to “will be investigated and discussed in coordination with local landowners and agencies . . .”
- **ISSUE:** The listed expected outcomes is limited to expected benefits to fish. What about other expected outcomes? It seems appropriate to also list the potential expected outcomes

that may be detrimental to the local communities such as loss of agriculture production, reduced county and local government revenues, seepage damage, etc.

RECOMMENDATION: Add list of expected outcomes to local Delta communities that may be expected pursuant to implementation of habitat projects.

Section 2.4 Potential Future Actions

- **ISSUE:** We have found elevation maps of the Delta to be inaccurate. It is important to start with the correct data before selecting locations for habitat, otherwise the beneficial outcomes for species may not be achieved and productive agricultural may be eliminated unnecessarily. **RECOMMENDATION:** The FRPA should distribute for public comment the elevation map and initiate discussion and agreement on the correct elevations before using the map identified as Figure 5, page 21, for selecting habitat locations.
- **ISSUE:** Habitat locations and projects need to be based on good science. **RECOMMENDATION:** This section should reference the science that supports the statement on page 20 that the elevations are conducive to tidal restoration in Western Cache Slough, Hasting's Tract, and Eastern Egbert Tract. Need to ground truth the elevations used in Figure 5 with local agencies including Reclamation Districts.
- **ISSUE:** Protection of vegetation in sloughs may conflict with USACE policies for vegetation on levees and put project levees at risk of losing PL 84-99 eligibility. **RECOMMENDATION:** Explain what is meant by "Protect vegetation and habitat in the freshwater sloughs in Lindsey, Barker, and Cache Sloughs and how it relates to the USACE's policy on removing vegetation from Project Levees and how it will affect PL 84-99 eligibility.
- **ISSUE:** This section is vague on what water diversion management means. **RECOMMENDATION:** Expand on and explain what is meant by Lower Yolo Bypass/Cache Slough Complex Water Diversion Management. What would these projects be?

Section 2.5 Restoration Challenges

- **ISSUE:** There are many more challenges and constraints that need to be recognized. **RECOMMENDATION:** Add the following to the list of challenges or constraints on page 22: Public safety, existing land use and habitat management plans, and existing assurances and contracts such as the NDWA 1981 Contract.
- **ISSUE:** Levee Failures: There has been a reduction in levee failures in the Delta since the funding and implementation of the Delta Levees Subvention Program. **RECOMMENDATION:** The "Levee Failures" bullet on page 23 should mention the funding of the Delta Levees Subvention Program as one of the actions that could help moderate or prevent the ecological effects of potential multiple levee failures on existing projects.
- **ISSUE:** This section does NOT include a complete list of restoration challenges. **RECOMMENDATION:** Add two more bullets on page 23: 1) Existing Contract Assurances and Management Plans should specify the NDWA Contract and other assurances and plans; 2) Public Safety is a critical issue that must be maintained in light of the fact that most of the habitat restoration projects propose to modify components of the State Plan of Flood Control (project levees and Yolo Bypass).
- **ISSUE:** Top of Page 24 references "Financial Constraints" and says DWR will work to the best of its abilities to ensure sufficient funding. "Best of its abilities" is NOT sufficient guarantees in light of the long-term nature of the construction and implementation of these

habitat projects. **RECOMMENDATION:** Financing of habitat project long-term maintenance and monitoring **MUST** be through securitized endowments, not with the vagaries associated with annual budget decisions of state and federal water contractors over time.

Section 3 Action Selection Framework

- **ISSUE:** Fish restoration actions should not be agreed upon by state and federal agencies without the benefit of public input first. **RECOMMENDATION:** The actions described in FRPA Attachment 4 as referenced on page 24 should be mutually agreed upon with public input through a public process.

Section 3.1 Action Identification Process

- **ISSUE:** The first bullet is vague in terms of who is involved in identifying potential restoration actions. Who is the “and others” mentioned in the first bullet?
RECOMMENDATION: Either delete “and others” in the first bullet on who identifies restoration actions or specifically identify the exact “others” to be involved in the decision.
- **ISSUE:** Seek more public involvement in the evaluation and development of restoration actions. **RECOMMENDATION:** Include public process and comment in the second bullet on page 24 regarding the evaluation and development of potential restoration actions.

Section 3.2 Action Selection Criteria

- **ISSUE:** Page 26, Figure 6, is vague in terms of participants, and should be expanded to include public input. The top of the graphic shows DWR, DFG, and “Other” providing initial input of “Proposed Actions,” but “Other” is too vague and should be defined. Can anyone or any entity submit habitat restoration actions? Also, need to indicate the locations in the graphic where public input regarding development of the restoration action is allowed *before* the project is implemented. **RECOMMENDATION:** Provide definition of “Other” *and* indicate the places in the “Framework for analyzing and selecting proposed actions for implementation” that public comment and input is allowed *prior* to implementation of a project.

Section 4.2 Monitoring Plan Implementation

- **ISSUE:** What is the baseline of the regional and site-specific habitat characteristics used in the Implementation Strategy for the five categories of metrics listed on page 29? This is especially important since the bottom of page 29 states that one of the habitat regions, the Cache Slough region, “is largely excluded from current monitoring efforts” and that there are “No permanent long-term monitoring stations located in the Cache Slough Complex.”
RECOMMENDATION: Need to install additional monitoring stations in the Cache Slough area to monitor the salinity levels for the NDWA 1981 Contract as well as the Implementation Strategy’s five categories of metrics. In order to measure progress of habitat project properly, the Implementation Strategy needs to identify the baseline of each category in the region and site-specific area.
- **ISSUE:** The Implementation Strategy mentions having pre-project baseline monitoring prior to project implementation, but fails to state how long of a period this baseline monitoring should occur before implementation. **RECOMMENDATION:** Establish a standard length of time for pre-project baseline monitoring to occur prior to project implementation.

Section 4.3 Reporting Requirements

- **ISSUE:** Habitat projects can have unintended consequences for the surrounding landowners, community and economy that should also be tracked annually so they can be properly mitigated pursuant to the EIR/EIS for each project. **RECOMMENDATION:** The annual report on programs and projects being implemented under FRPA should also include impacts to third-parties (landowners, county, etc) and problems where the habitat project is in non-compliance or conflict with existing Contracts such as NDWA's or local land-use and habitat management plans.

Section 5.1 Property Transfer and Management Costs

- **ISSUE:** Assurances for sufficient funding in perpetuity cannot be achieved by relying on the vagaries of decisions made annually in DWR's SWP operations and maintenance budget, as future decision-makers could reduce the amount given to each project annually, starving the project of adequate money. As stated on page 24 of the FRPA, "Financial Constraints" include securing SWP funds in the appropriate amount and at the appropriate time to implement program, and the ability to move these funds in a timely manner is problematic." Therefore, all habitat restoration projects should be required to establish a securitized endowment fund for the operation, monitoring, and maintenance of mitigation actions as part of their management plan *prior* to implementation. **RECOMMENDATION:** Delete language allowing DWR to directly fund the long-term costs based on DWR's long-term SWP water supply contracts for FRPA implementation or individual action. Replace with requirement for securitized endowment funding as part of the management plans.
- **ISSUE:** Long-term management of habitat projects also need to be able to fund the payment of local in lieu taxes and assessments as well as pay for mitigation costs for detrimental impacts to neighboring/affected landowners. **RECOMMENDATION:** The management plans mentioned in section 5.1 on page 35 should also specify the need for these plans to require payment of local in lieu taxes and assessments as well as costs for mitigating detrimental impacts to local landowners.

Section 5.2 Funding

- **ISSUE:** Additional costs associated with the long-term management of habitat projects includes the payment of local in lieu taxes and assessments as well as mitigation costs for detrimental impacts to neighboring/affected landowners. **RECOMMENDATION:** The list of items that require sufficient funding for full implementation should be expanded to include the need for the payment of local in lieu taxes and assessments as well as costs for mitigating detrimental impacts to local landowners.

Appendix A: Fish Restoration Program Agreement

- **ISSUE:** Item B Implementation Schedule mentioned on page 5 of the Agreement states that no later than twelve months from the effective date of this Agreement and Implementation Schedule of the restoration actions, estimated costs, targeted acreage, and a timeline for implementation will be developed. The Agreement was signed by parties in October 2010, so twelve months have expired. **RECOMMENDATION:** Please make this Implementation Schedule document available to the public immediately.
- **ISSUE:** Item G Acreage Credit on page 7 of the Agreement states that DWR will be able to receive credit "in advance of taking any restoration actions." **RECOMMENDATION:** Agreement should be amended to make it clear that habitat credit can only be received after

habitat project is completed and implemented (preferably for one year) and delete any reference to credit being given prior to restoration actions.

- **ISSUE:** Item I Reporting requires an annual report on the programs and projects being implemented including the current status, barriers, and relative accrued benefits of those projects. **RECOMMENDATION:** This report should be made readily available to the public at the same time it is provided to USFWS and NMFS.

Attachment 2: Excerpt from the Delta Smelt BiOp

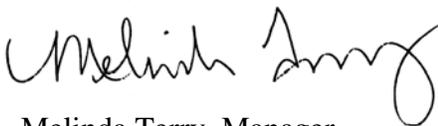
- **ISSUE:** Habitat projects should rely on willing sellers in order for the FRPA to be successful. Page 18 of Attachment 2, which is page 608 of the BiOp, specifically mentions purchasing land, easements, and/or water rights from willing sellers and excludes condemnation authority. **COMMENT:** The NDWA supports the BiOp's requirement to rely on willing sellers.
- **ISSUE:** Page 20 of Attachment 2, page 610 of the Smelt BiOp, indicates under "Rationale for Actions I6.2 and I.6.4" that these actions have been "fully vetted by CDFG and found to be necessary initial steps." The NDWA disagrees that these action have been "fully vetted" and in fact these actions continue to be part of the ongoing discussions of the Yolo Bypass work group of the BDCP in order to evaluate the design and implementation of such projects. These measures also continue to be described as having a high level of scientific uncertainty, so we question whether they are "necessary" first steps without additional scientific study. **RECOMMENDATION:** As the FRPA is implemented it is important to include local landowners and government agencies in the discussions regarding the design and implementation of these projects, not just rely on the opinion of CDFG or limited, non-peer reviewed science. The local landowners can be very helpful in designing appropriate habitat projects.

Appendix E: Permits Likely to be Required for Near Term Actions

- **ISSUE:** The list in Appendix E states it may not be all inclusive. The local government agencies are noticeably missing from the list. **RECOMMENDATION:** The list should mention local Reclamation Districts and County permits.

If you have any questions regarding these comments, please contact me at (916) 446-0197.

Sincerely,



Melinda Terry, Manager