DIRECTORS
George Biagi, Jr.
Rudy Mussi
Edward Zuckerman

COUNSEL
Dante John Nomellini
Dante John Nomellini, Jr.

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

Ms. Lori Rinek
Sacramento Fish and Wildlife Office
2800 Cottage Way W-2605
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

DIRECTORS
George Biagi, Jr.
Rudy Mussi
Edward Zuckerman

COUNSEL
Dante John Nomellini
Dante John Nomellini, Jr.

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

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 <u>common source</u> 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

DIRECTORS
George Biagi, Jr
Rudy Mussi
Edward Zuckerman

COUNSEL
Dante John Nomellini
Dante John Nomellini, Jr

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

March 24, 2008

Rosalie del Rosario
National Marine Fisheries Service
650 Capitol Mall, Suite 8-300
Sacramento, California 95819

Lori Rinek, Chief
Conservation Planning & Recovery Division
Sacramento Fish and Wildlife Office
2800 Cottage Way, W-2605
Sacramento, California 95825

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

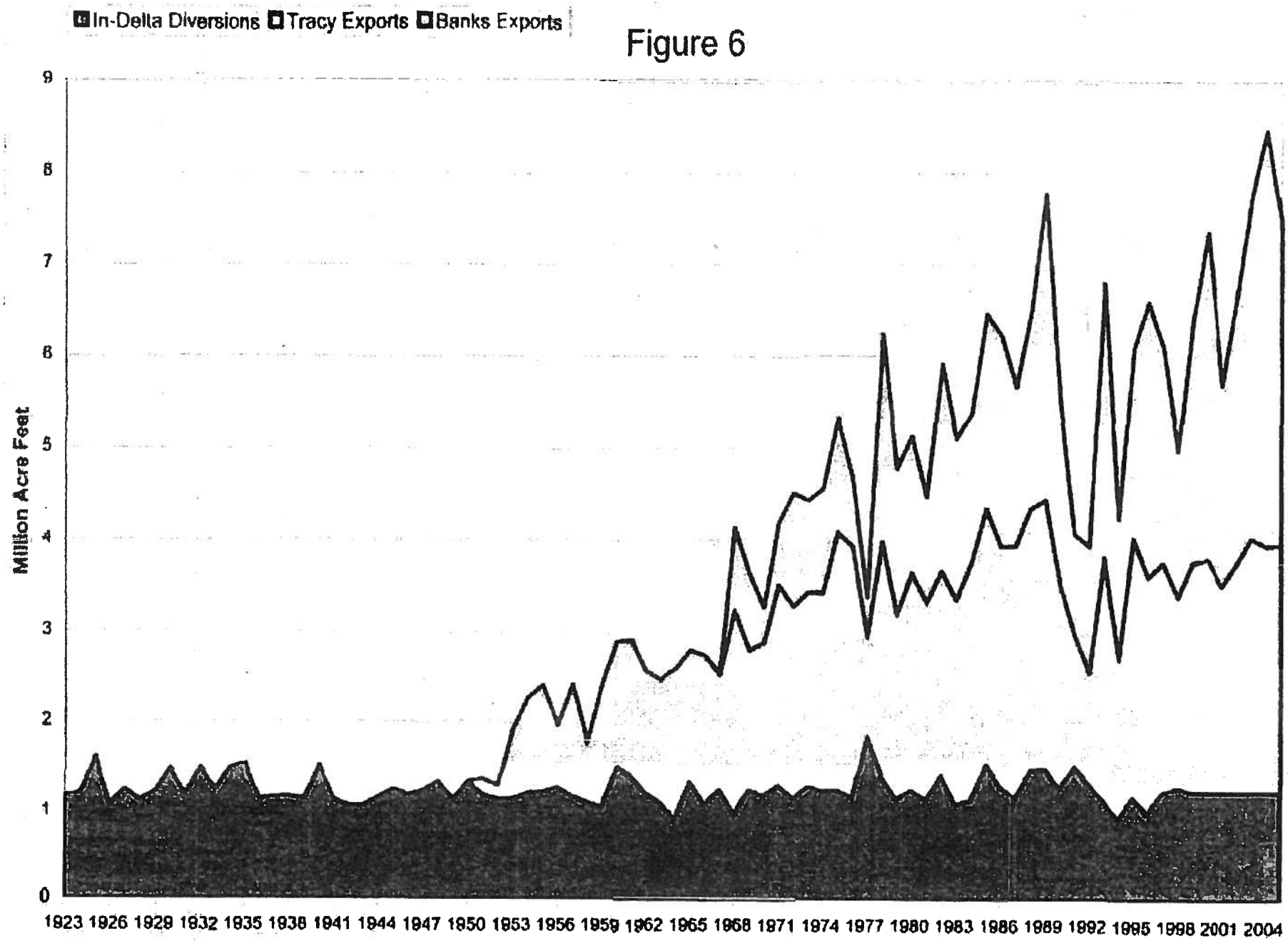
other threats including those outside the Delta. Real consideration of the reduced Delta export alternatives is critical.

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

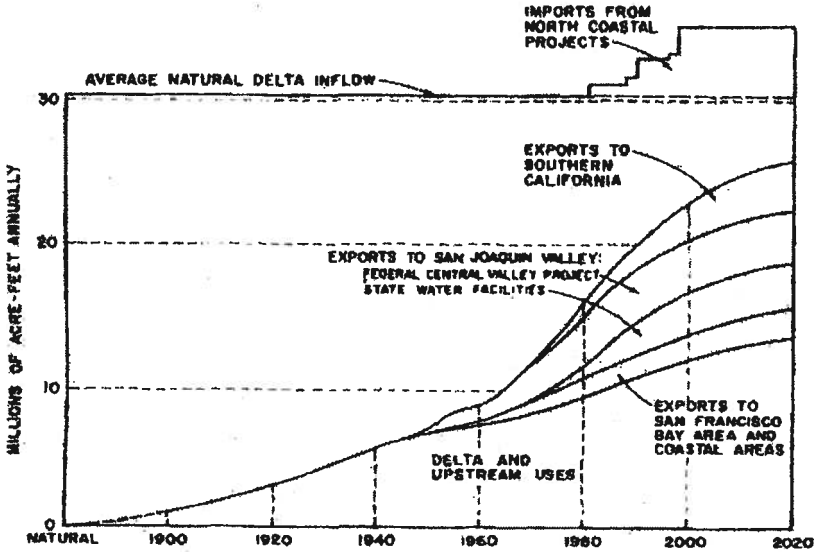
Yours very truly,

DANTE JOHN NOMELLINI
Manager and Co-Counsel

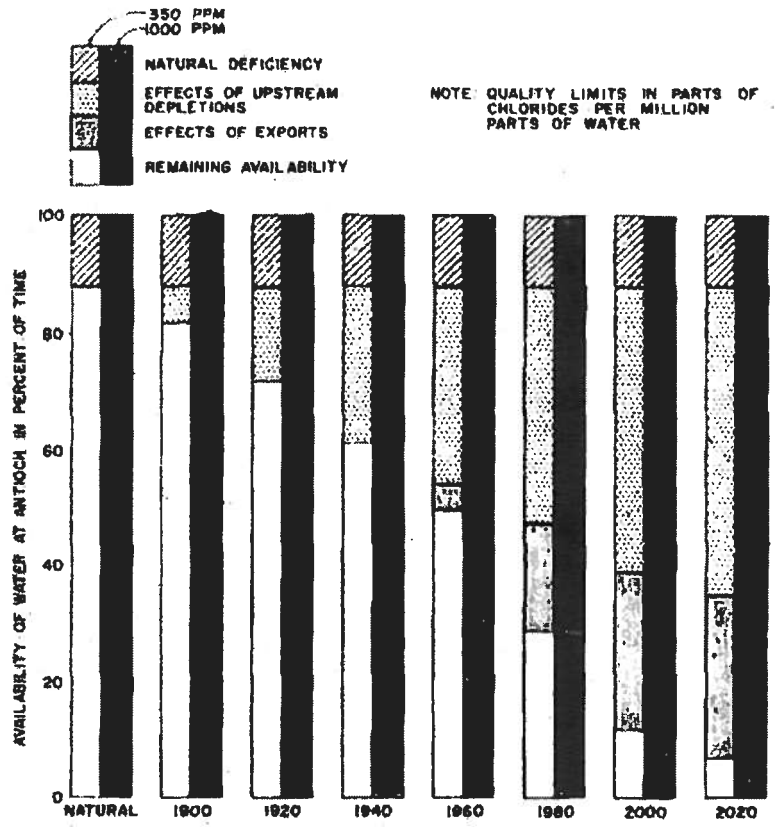
DJN:ju
Enclosures


In-Delta Diversions
Tracy Exports
Banks Exports
Figure 6
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.

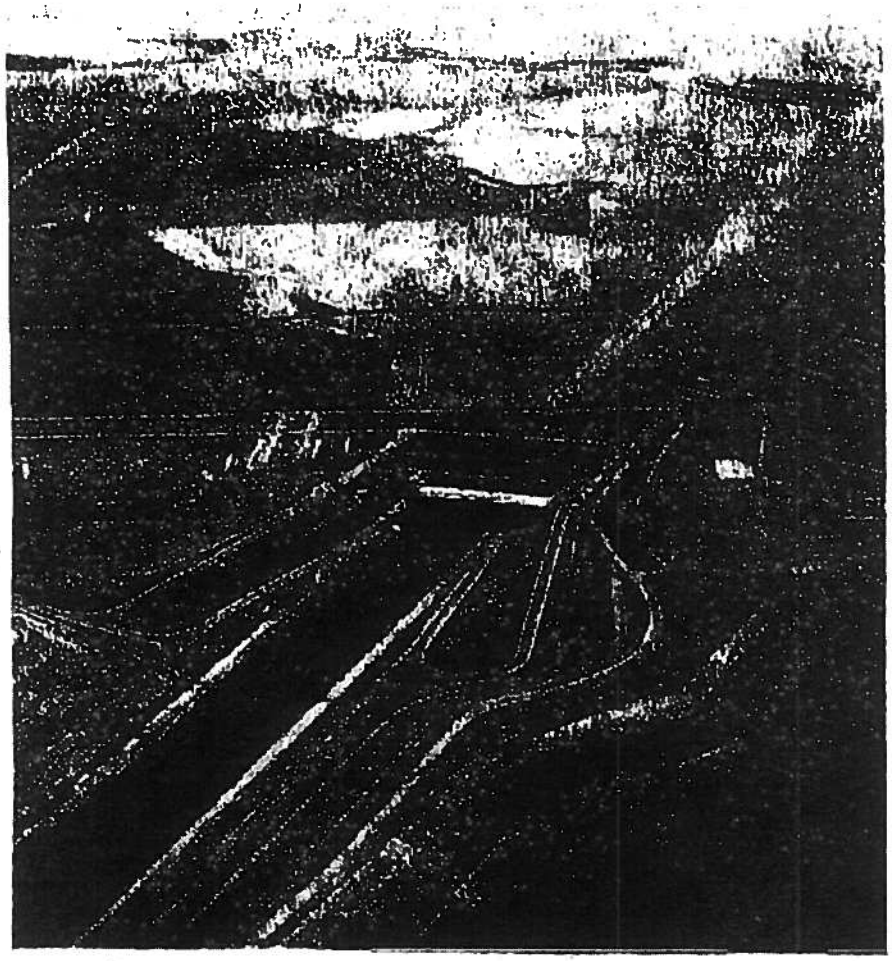


USE OF DELTA WATER SUPPLIES



DELTA WATER QUALITY WITHOUT SALINITY CONTROL

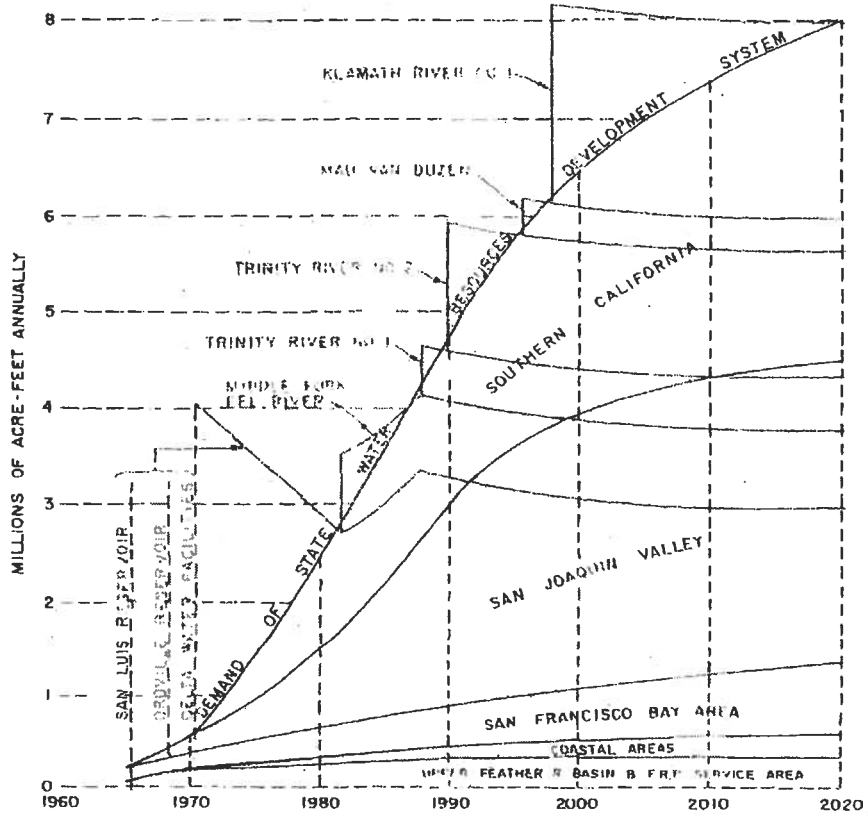
The magnitude of the past and anticipated future uses of water in areas tributary to the Delta, except the Tulare Lake Basin, is indicated in the diagram to the left. It may be noted that, while the present upstream use accounts for reduction of natural inflow to the Delta by almost 25 percent, upstream 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.



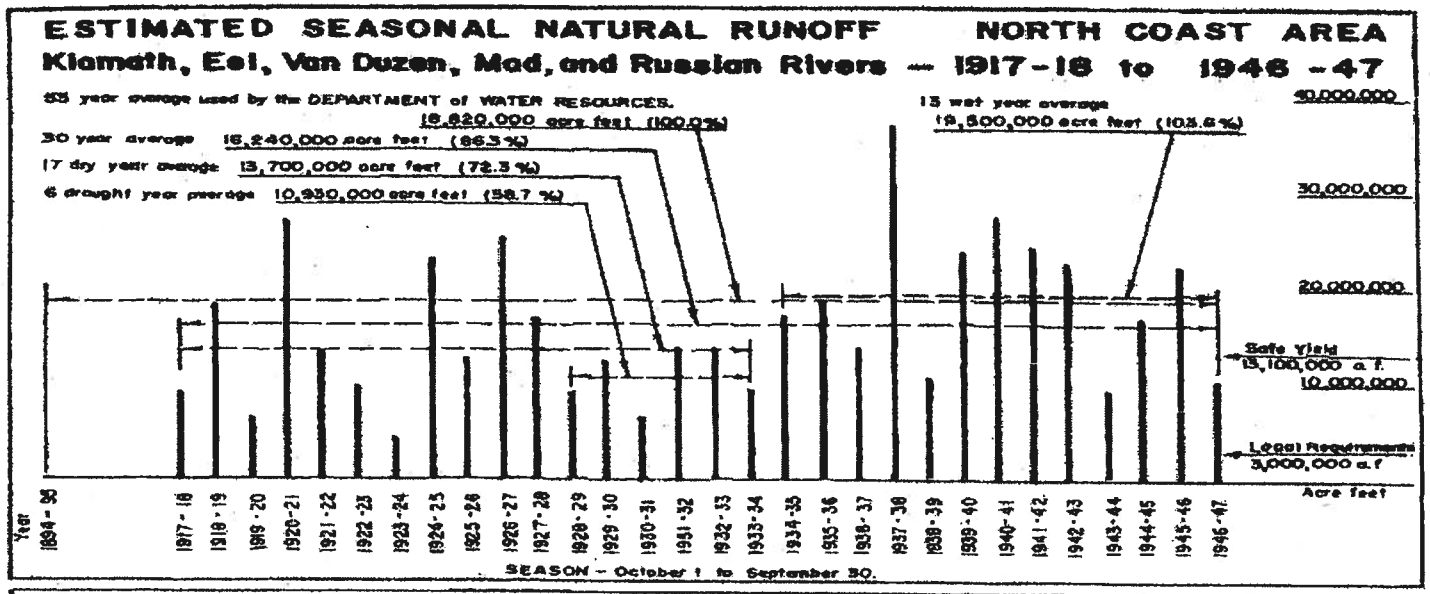
Tracy Pumping Plant

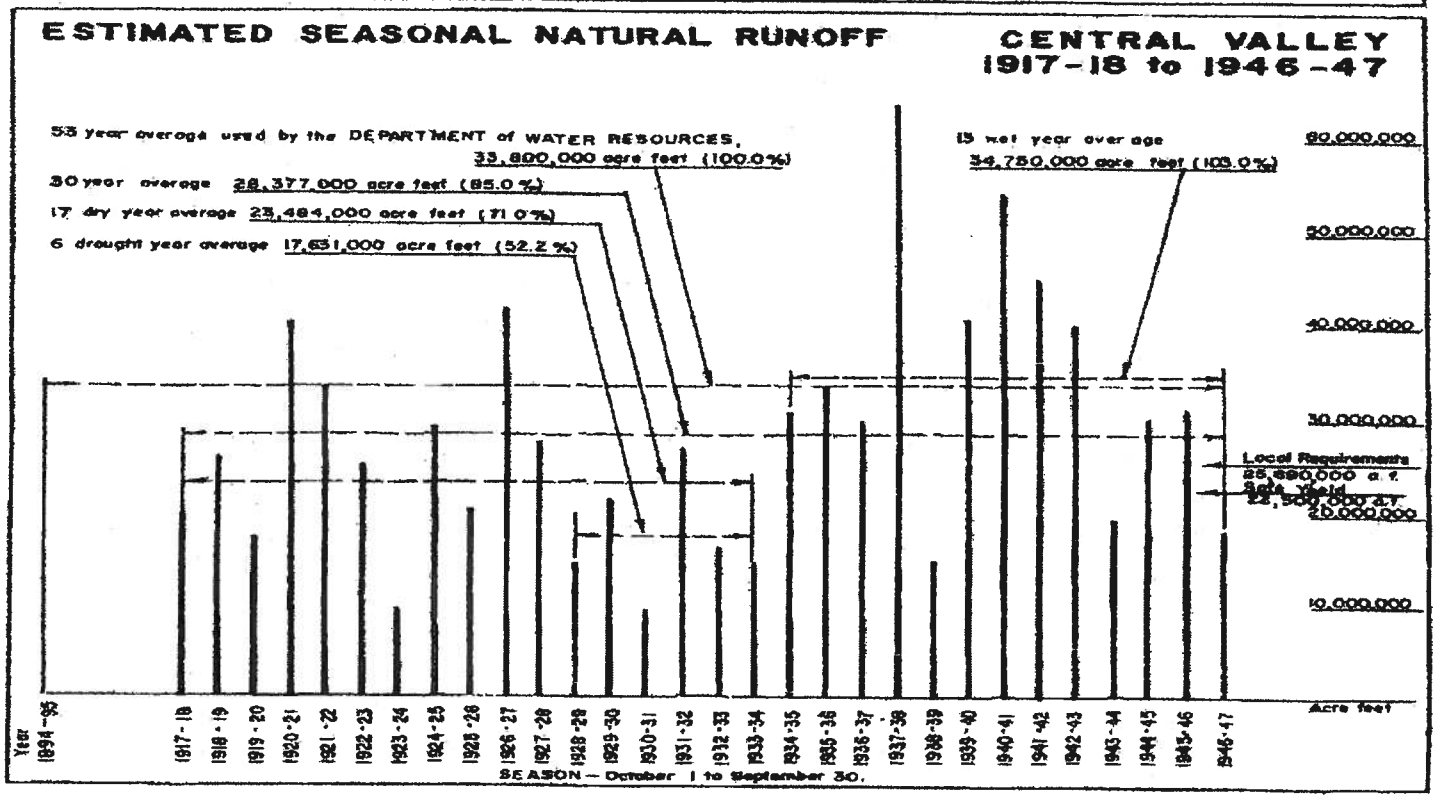
Full demands on the State Water Resources Development system can be met until about 1981 from surplus water in and tributary to the Delta with regulation by the proposed Oroville and San Luis Reservoirs. However, upstream depletions will reduce the available surplus supplies and water will have to be 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.
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 (72.3%)
6 drought year average 10,950,000 acre feet (58.7%)
13 wet year average
19,500,000 acre feet (103.6%)
50,000,000
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 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
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.

SOUTH DELTA WATER AGENCY

4255 PACIFIC AVENUE, SUITE 2
STOCKTON, CALIFORNIA 95207
TELEPHONE (209) 956-0150
FAX (209) 956-0154
E-MAIL Jherrlaw@aol.com

Directors:
Jerry Robinson, Chairman
Robert K. Ferguson, Vice-Chairman
Natalino Bacchetti
Jack Alvarez

Engineer:
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