

NORTH DELTA WATER AGENCY

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May 13, 2009

Via E-mail:

BDCPcomments@water.ca.gov

Ms. Delores Brown, Chief
Office of Environmental Compliance
Department of Water Resources
State of California
P.O. Box 942836
Sacramento, CA 95814

**Re: SCOPING COMMENTS OF NORTH DELTA WATER AGENCY
BAY DELTA CONSERVATION PLAN ENVIRONMENTAL IMPACT
REPORT/ENVIRONMENTAL IMPACT STATEMENT**

Dear Ms. Brown:

The North Delta Water Agency (“NDWA”) respectfully submits these scoping comments on the Bay Delta Conservation Plan Environmental Impact Report/Environmental Impact Statement (EIR/EIS).

HISTORY OF THE NORTH DELTA WATER AGENCY

NDWA was formed by a special act of the Legislature in 1973. (North Delta Water Agency Act, Chapter 283, Statutes of 1973). Its boundaries encompass approximately 277,000 acres including all of that portion of the Sacramento-San Joaquin Delta, as defined in Water Code Section 12220, that is situated within Sacramento, Yolo and Solano Counties. Also included within NDWA’s boundaries are certain lands in northeastern San Joaquin County comprising New Hope Tract, Canal Ranch and Staten Island.

Beginning approximately 160 years ago, farmers within the area now comprising NDWA began reclaiming lands from flooding, appropriating water to beneficial use and establishing vibrant agricultural communities. The Bureau of Reclamation (Bureau) began constructing the Central Valley Project (CVP) in the late 1930s, damming the major tributaries on the Sacramento River and holding back substantial quantities of the Delta water supply. As it did with landowners along the Sacramento River, the United States conducted extensive studies and negotiations to ensure a sufficient supply for water right holders in the northern Delta. Discussions with Delta landowners were protracted, however, due to the complex issues of both water quantity and

quality, and the issues only intensified with the construction of the State Water Project by the California Department of Water Resources (DWR).

Against this backdrop, NDWA was formed to represent northern Delta interests in negotiating a contract with both the Bureau and DWR in order to mitigate the water rights impacts of the Projects. From 1974 to 1979, North Delta, the Bureau and DWR determined the outflow necessary to meet water quality standards for irrigated agriculture and reviewed the paramount water rights of landowners within North Delta's boundaries. The agencies also evaluated the Delta channels' historical function as natural seasonal storage. Before the Projects began withholding much of the Sacramento River system's high winter flows, the Delta channels stored sufficient fresh water to sustain water quality in the northern Delta throughout and often beyond the irrigation season. Since the Projects commenced, however, the Delta functions more like a flowing stream and, as a result, relatively minor decreases in outflow can have a serious impact on northern Delta water quality.

In 1981, DWR and NDWA executed a Contract for the Assurance of a Dependable Water Supply of Suitable Quality (1981 Contract), a copy of which is enclosed. The crux of the 1981 Contract is a guarantee by the State of California that, on an ongoing basis, it will ensure that suitable water will be available in the northern Delta for agriculture and other beneficial uses. The 1981 Contract requires DWR to operate the State Water Project to meet specified water quality criteria while providing enough water to satisfy all reasonable and beneficial uses of water within NDWA's boundaries. (1981 Contract, Art. 2) In return, North Delta makes an annual payment to DWR. (*Id.* Art. 10). The 1981 Contract remains in full force and effect.¹

Although the two signatories are public agencies, the 1981 Contract also extends to individual landowners who, under the terms of the Contract, have executed Subcontracts guaranteeing that their lands will receive all the benefits and protections of the 1981 Contract. (*Id.* Art. 18) Many of these Subcontracts have been signed and recorded, enabling the subcontractors to enforce the terms of the 1981 Contract.

The 1981 Contract contains provisions that expressly protect NDWA and its landowners from harm caused by changes in State Water Project (SWP) water conveyance infrastructure. For

¹ In connection with the hearings that preceded the State Water Resources Control Board's adoption of Water Right Decision 1641, DWR and NDWA entered into a memorandum of understanding dated May 26, 1998 (MOU), which provides that DWR is responsible for any obligation imposed on NDWA to provide water to meet Bay-Delta flow objectives, so long as the 1981 Contract remains in effect. In Decision 1641, the State Water Board made the following findings and determinations: "Based on the agreement, the SWRCB finds that the DWR will provide the backstop for any water assigned to the parties within the NDWA as specified in the MOU. This decision assigns responsibility for any obligations of the NDWA to the DWR consistent with the MOU." (Decision 1641 at 66). The latter findings and determinations were upheld by the trial and appellate courts that subsequently reviewed Decision 1641.

example, Article 6 of the 1981 Contract provides:

“The State shall not convey SWP water so as to 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 Delta channels or water users within the Agency. If lands, levees, embankments, or revetments adjacent to Delta channels within the Agency incur seepage or erosion damage or if diversion facilities must be modified as a result of altered water surface elevations as a result of the conveyance of water from the SWP to lands outside the Agency after the date of this contract, the State shall repair or alleviate the damage, shall improve the channels as necessary, and shall be responsible for all diversion facility modifications required.” (emphasis added)

NDWA will take all steps necessary to ensure that the protections embodied in Article 6 and the other provisions of the 1981 Contract are adhered to in connection with the BDCP process and any subsequent processes, proceedings or activities undertaken by the State of California.

SCOPING COMMENTS OF NORTH DELTA WATER AGENCY

1. Any Delta solution must include guarantees that lands within NDWA will continue to receive both the quantity and quality of water guaranteed under the 1981 Contract and under other applicable law, including but not limited to the Delta Protection Act, Cal. Water Code §§ 12201-12204 and the area of origin laws, Cal. Water Code §§ 11460-11465. Accordingly, the EIR/EIS must: (A) include a comprehensive description of the 1981 Contract including but not limited to its water quality requirements and the Article 6 protections quoted above; (B) identify the 1981 Contract as a significant legal constraint on the discretion of the State to implement any project involving the modification of SWP water conveyance infrastructure within the northern Delta; and (C) identify in the EIR/EIS how all BDCP projects and actions will assure water supply reliability, availability, and quality for all North Delta water users.

2. Consistent with Comment 1 above, all hydrologic and hydraulic modeling undertaken as part of the BDCP process must assume, as the “baseline” condition, that the terms and conditions of the 1981 Contract, including but not limited to its water quality requirements, will remain in full force and effect. NDWA is informed and believes that the modeling work undertaken to date in support of the BDCP process does not utilize the water quality and water supply provisions of the 1981 Contract as the baseline for analysis of environmental impacts; instead the modeling work utilizes the water quality objectives contained in the current Water Quality Control Plan for the Delta as the baseline condition. The latter objectives differ in certain key respects from the water quality requirements of the 1981 Contract particularly the period from mid-August through March where the 1981 Contract requirements are more stringent from a

water quality standpoint. Use of the wrong environmental baseline would skew the analysis of environmental impacts associated with the proposed project(s) and render the EIR/EIS vulnerable to attack. In addition, the hydrologic and hydraulic modeling undertaken as part of the BDCP process should fully analyze all water quality impacts relating to the proposed creation of fishery habitat areas within the Yolo Bypass and Cache Slough areas. In order to provide the baseline data referenced above and to analyze the impacts from all projects and operational actions identified in a final EIR/EIS, the proposed project EIR/EIS must include the installation of salinity and hydrodynamic monitoring stations in the Yolo Bypass and Cache Slough as well as other sloughs and canals throughout the North Delta to guide future adaptive management of BDCP actions that may result in violating the provisions of the 1981 Contract.

3. Consistent with Comments 1 and 2 above, changes in the water surface elevations, natural flows and flow directions within the NDWA would potentially result in violation of Article 6 of the 1981 Contract. All hydrologic and hydraulic modeling should include an analysis of the changes identified in the preceding sentence as well as the potential for seepage and erosion within the NDWA related to any isolated water conveyance facility and associated diversion facilities, proposed changes in water operations and new habitat measures. The EIR/EIS should address not only the potential impacts to water surface elevations, flows and flow direction, increased seepage and erosion resulting from various alternatives, but also the costs associated with these changes including but not limited to repairs, modifications, or replacement of existing diversion facilities and levees and added operating costs, as required under Article 6 of the 1981 Contract.

4. Also consistent with Comment 1 above, the discussion of alternatives in the EIR/EIS must focus on alternatives that are potentially feasible in light of the requirements of the 1981 Contract. Inclusion of an alternative in the EIR/EIS that would result in a violation of the 1981 Contract's water quality, Article 6 or other obligations would violate the requirements of the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). "[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives or would be more costly." (CEQA Guidelines § 15126.6(b)). In the present context these requirements clearly indicate that the EIR/EIS must consider, as one alternative, a project that involves the improvement of through-Delta water conveyance capacity coupled with continued adherence to the water quality and other requirements of the 1981 Contract, with no so-called "isolated facility."

5. To the extent that any of the project alternatives analyzed in the EIR/EIS would cause productive agricultural land within NDWA to be taken out of production, or would cause environmental problems to be re-directed into the NDWA, CEQA and NEPA impose an obligation to analyze the effects (direct and indirect) associated with such changes, and to mitigate for significant effects. The following comments examine the nature and extent of this obligation in further detail.

(a) It is well-established that NEPA is focused not just on physical impacts but on “human” impacts as well. For example, the definition of “effects” contained in NEPA refers to “economic, social or health” effects. 40 C.F.R. § 1508.8. NEPA’s focus on the human consequences of environmental effects derives from the statutory reference to the “*human* environment.” 42 U.S.C. § 4332(C)(emphasis added). Accordingly, the EIR/EIS must include an analysis of the direct and indirect economic, social, public safety and health effects of the proposed action(s) on the Delta residents and economy and such effects in the Delta must be mitigated in accordance with applicable law.

(b) In the present context, NDWA is concerned that the massive new water conveyance infrastructure being considered by BDCP for the northern Delta will not only have the obvious effect of taking large tracts of agricultural land out of production; it will also have the more insidious, long-term effect of eroding the economic viability of the agricultural economy of the north Delta region and the social and economic viability of north Delta communities. In a similar vein, current BDCP proposals would, in effect, dissect certain of the reclamation districts within the northern Delta that provide flood protection to Delta lands and communities, potentially eliminating vital flood protection. All of these in-Delta “human” impacts must be thoroughly analyzed in the EIR/EIS. Moreover, to the extent that implementation of a Delta project causes harm within NDWA in the form of a diminution in the value of land or business assets, the State of California will be subject to liability under state and federal law for inverse condemnation damages. It is essential that BDCP, in determining the full cost of any Delta project(s), take these additional costs and liabilities into account. The core principle which BDCP should apply and follow throughout its process is that landowners and residents within NDWA must be made whole for all harm (direct and indirect) associated with the implementation of any particular Delta infrastructure project.

(c) Landowners and water users within NDWA should be protected from short-term and long-term “collateral damage” arising from BDCP habitat restoration efforts. This includes, but is not limited to, regulatory actions that may affect the right to divert (i.e. fish screen requirements) and the timing of diversions. Any Delta solution must include robust and secure “take” authorization for existing, in-Delta covered activities. Assurances must be flexible and open-ended, and must not shift the risk for changed conditions away from the State of California.

(d) In order to comply with CEQA and NEPA, any project must include adequate, reliable, and permanent financing mechanisms (i.e. an endowment, annuity, or dedicated stream of revenue), especially for maintaining project-related properties and habitat so that they do not impact neighboring land uses and land values. In a similar vein, existing local taxes and assessments must be maintained so that northern Delta cities, counties and special districts (including reclamation districts, fire protection districts and NDWA) will remain economically viable. Removing even a small part of the local funding for these agencies would compromise their ability to execute critical roles in community governance. NDWA is concerned that BDCP’s proposals to convert massive tracts of land within NDWA from private ownership to public ownership for water conveyance and habitat purposes may seriously erode NDWA’s

assessment base. Even assuming, for the sake of discussion, that arrangements could be made to reduce NDWA payments to DWR under the 1981 Contract for lands taken out of private ownership, the remaining private landowners within NDWA would be left with a proportionately higher share of NDWA fixed and administrative costs. Over time, this cost burden would undermine the viability of the agricultural economy within NDWA, so must be avoided.

(e) The EIR/EIS must consider public health and safety effects associated with the proposed project including (i) mosquito-borne diseases such as malaria or West Nile virus associated with new water impoundments, and (ii) flood risks.

6. The EIR/EIS must avoid the tendency, evident in other BDCP planning documents, to overstate the presumed benefits to migratory and pelagic fish species arising from the implementation of specific projects or project elements (including conservation measures) and to underestimate potential detrimental effects. Presumed benefits of conservation measures are impossible to evaluate in the absence of specific performance targets. The EIR/EIS may not, consistent with applicable law, presume benefits to migratory or pelagic fish species based on assumptions regarding underlying biological mechanisms that are untested or poorly supported.

7. The EIR/EIS must avoid the tendency, evident in other BDCP planning documents, to assume that the populations of covered species are limited principally by food resources available in the Delta. There is no support for this assumption.

8. The EIR/EIS must be based on the best available science. Given the accelerated BDCP schedule, it is perhaps not surprising that the best available science has not always been adequately considered during the course of the BDCP process. However, NEPA and CEQA require that the best available science be considered and incorporated into the analysis contained in the EIR/EIS.

9. The EIR/EIS must contain a comprehensive discussion of the various options regarding size and configuration of Delta conveyance facilities and the impacts associated with each option. Size of facilities cannot be properly evaluated without some range of operating parameters.

10. The EIR/EIS must avoid the tendency, evident in other BDCP planning documents, to assume that the historic reclamation of much of the Delta for agriculture and ongoing agricultural operations within the Delta amount to a “stressor” on covered species. This is not the case and there is no scientific evidence supporting this assumption. The operation of the export facilities cause or exacerbate nearly every problem impacting the covered species in the Delta and the EIS/EIR should so state.

It is unclear from a scientific standpoint whether diverting water from locations north of the Delta will improve overall ecosystem functioning. The new North Delta diversion facilities may in fact result in harm to pelagic and anadromous fish species due to entrainment or predation.

The EIR/EIS should so state. Based on the limited scientific support validating species benefits from new North Delta diversions, all assumptions regarding the ecosystem benefits of north of Delta diversions should be removed from BDCP draft documents and not included in the EIR/EIS if they cannot be clearly identified and supported by published scientific data or peer-reviewed scientific research and reports.

12. The adaptive management process proposed in BDCP draft documents fails to describe how monitoring will be designed to establish cause and effect relationships between implementation of specific conservation measures or operation of new conveyance facilities and the type and magnitude of human impacts from those measures such as economic and public safety. Draft documents gives examples of a tidal marsh restoration project being reduced or discontinued or water operation being modified if its providing little benefit to covered species, however it does not explain what will happen if a habitat project or water operation results in causing economic or physical harm to humans in the Delta. In addition, actions proposed in BDCP draft documents could also result in violating assurances and provisions included in the NDWA 1981 Contract. Due to the significant scientific uncertainties regarding the impacts from the construction and operation of new conveyance facilities and the implementation of habitat conservation measures in the Delta, the EIR/EIS must include an adaptive management process that includes modification of any conveyance or habitat project that result in violating the provisions of the 1981 Contract and the human consequences mentioned in number 5 above. Just as there is an adaptive management process for responses by covered species to the Plan's implementation, there also needs to be an adaptive management process to respond to negative human impacts caused by the Plan's implementation. Otherwise, this is not a complete adaptive management plan.

13. NDWA agrees with previous commenters that water quality considerations in relation to Delta Cross Channel operations and a potential Three-Mile Slough gate are important in evaluating the benefits and impacts of water export operations in the Delta. The EIR/EIS must include a comprehensive discussion of water quality, hydrodynamics and the water quality impacts associated with the various project alternatives. As noted above, the EIR/EIS should evaluate such impacts in light of, among other things, the water quality requirements of the 1981 NDWA-DWR Contract.

Finally, it is impossible to provide comprehensive or complete comments on the Bay Delta Conservation Plan Environmental Impact Report/Environmental Impact State or evaluate the cumulative impact of various projects to be in a final EIR/EIS due to the lack of a project description or specific performance targets such as, but not limited to, bypass flows and outflows, greenhouse gas impacts, or seismic stability. The purpose of an EIR is to provide State and local agencies and the general public with detailed information on the potentially significant environmental effects which a proposed project is likely to have and to list ways which the significant environmental effects may be minimized and indicate alternatives to the project. The lack of specificity or details on the proposed project prevents the Association from being able to

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identify the significant environmental effects of the project action or how to avoid any significant environmental effects, or how to mitigate those significant environmental effect, where feasible, pursuant to the basic purpose and goals of CEQA. We therefore expect to be provided the opportunity in the future to see and comment on a detailed project description, alternatives, and proposed mitigations before a final EIR/EIS is approved.

Thank you for the opportunity to submit these scoping comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Melinda Terry". The signature is written in a cursive style with a large, looping "T" at the end.

Melinda Terry
General Manager