



## CENTRAL DELTA WATER AGENCY

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

**DIRECTORS**  
George Biagi, Jr.  
Rudy Mussi  
Edward Zuckerman

**COUNSEL**  
Dante John Nomellini  
Dante John Nomellini, Jr.

January 14, 2008

**Via Email: delores@water.ca.gov**  
**and First Class Mail.**

Attn: Delores Brown, Chief  
Office of Environmental Compliance  
Division of Environmental Services  
California Department of Water Resources  
Post Office Box 942836  
Sacramento, CA 94236-0001

Re: Comments on the Draft Environmental Impact Report for the “Monterey Amendment to the State Water Project Contracts (Including Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement) (Monterey Plus)”

Dear Ms. Delores:

The Central Delta Water Agency joins in the comments on this project submitted by the South Delta Water Agency and hereby supplements those comments with the following additional comments.

### 1. **Legal Feasibility of the Proposed Project.**

It is implicit in CEQA that the “proposed project” (as well as the decision makers’ ultimate chosen course of action), must be *legally* “feasible,” i.e., “capable of being accomplished in a successful manner within a reasonable period of time, taking into account . . . *legal* . . . factors.” (Guidelines, § 15364, emphasis added.) The legal feasibility of the proposed project is particularly relevant to the decision makers’ determination of which course of action to pursue after considering the EIR’s reasonable range of alternatives to the proposed project. Since “[t]he range of potential alternatives to the proposed project shall include those that could *feasibly accomplish* most of the basic objectives of the project . . .” (Guidelines, § 15126.6, subd. (c), emphasis added), a proposed project that cannot *feasibly accomplish* such objectives would not and should not fare well in that ultimate determination. In any event, the DEIR should thoroughly discuss the feasibility, i.e., legality, of the various components of the proposed project and all of the alternatives where, as here, such legality is not obvious and called into question.

a. **Increased Exports from the Delta Watershed.**

The DEIR states at page ES-6:

“The Department estimates the water supply management practices that are a part of the proposed project would result in an annual increase of around 50,000 AF in diversion of water from the Delta by the SWP.”

Thus far, the DEIR has failed to demonstrate that such anticipated increases in diversions from the Delta pursuant to the proposed project are consistent with the Watershed Protection Act (Wat. Code, § 11460 et seq.) or Delta Protection Act (Wat. Code, § 12200 et seq.). Both of those acts seek to ensure that only “surplus” water is exported from the Delta Watershed.

If the DEIR preparers believe the additional water which the SWP is anticipated to export pursuant to the proposed project is water that is not needed for any environmental or other beneficial need within the Delta Watershed and is water that is truly surplus to such needs, then the DEIR must better explain, with facts and analysis, why it believes that to be the case. Such an explanation, should include, among other things, an examination of whether any releases from storage to facilitate such increases in exports are potentially needed to be held in storage (i.e., “carried over”) to meet the needs of the Delta Watershed in future years.

Some pertinent provisions of the Watershed Protection Act and Delta Protection Act which should be discussed include the following:

- Section 11460 of the Watershed Protection Act which prohibits the SWP from “directly or indirectly” depriving the Delta Watershed of water from that watershed which is “reasonably required to adequately supply the beneficial needs of [that] watershed . . . .” (Wat. Code, § 11460.)
- Sections 12204 and 12202 of the Delta Protection Act which provide that “no water shall be exported [from the Delta] which is necessary to” enable the SWP to perform its “function[ of] . . . provi[ding] salinity control and an adequate water supply for the users of water in the [Delta].” (Wat. Code, §§ 12204 & 12202.)
- Section 12205 of the Delta Protection Act which provides: “It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta [by the SWP] 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 [which include the SWP’s provision of salinity control and an adequate water supply for the users of water in the Delta].”

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b. **Elimination of Article 18(b).**

At page 4-5 the DEIR explains that “[t]he Monterey Amendment eliminated Article 18(b) of the SWP long-term water supply contracts.” Embedded in Article 18(b) is the recognition and protection of “area of origin” contractors’ prior and paramount rights to SWP water over non-area of origin contractors.

For starters, the DEIR must better explain why such recognition and protection was eliminated. The DEIR at page 4-5 states:

“The reason for eliminating Article 18(b) is not described in the Monterey Agreement. However, once the agriculture first shortage provision was eliminated, it would no longer be needed to protect agricultural water users from excessive shortages. With the elimination of the agricultural first shortage provisions, it no longer mattered whether a shortage was a temporary one or a permanent one, since the allocation of the available supply would be the same in either situation.”

That explanation does not intelligibly explain why the area of origin recognition and protection was eliminated. While the area of origin contractor’s paramount rights are recognized in Article 18, subdivision (c), that recognition is in an entirely different context than in subdivision (b). For example, subdivision (c) relates to the situation whether an area of origin contract causes a permanent shortage in SWP supplies whereas subdivision (b) refers to “any” cause which “threatens” a permanent shortage.

While, again, the reason for such elimination is unclear, such elimination would appear to be contrary to the Watershed Protection Act. The Watershed Protection Act is a direct limitation of the powers of the Department and specially states that the Department “shall not” deprive area of origin water users their prior right to SWP water. (Wat. Code, § 11460.) It further provides in Water Code section 11461 that “[i]n no other way than by purchase or otherwise as provided in this part shall water rights of a watershed . . . be impaired or curtailed by the department . . . .”

In the DEIR’s future as well as historic analysis of the proposed project, it appears the area of origin contractors water rights were *not* given a priority. Instead, their allocations of SWP water were proportionally cut back to the same extent as non-area of origin contractors. Such historical and future disregard for their priority appears to be contrary to the Watershed Protection Act. Even if the area of origin contractors were agreeable to giving up their priority, it is not clear that they have such ability nor is it clear that such priority was given up pursuant to the proper procedures (see e.g., Wat. Code, § 11461).

Among other considerations, the DEIR should thoroughly explain (1) the ramifications of the elimination of subdivision (b) so that the potential environmental impacts from such elimination can be thoroughly and meaningfully investigated and discussed; and (2) the reasons

why area of origin contractors are not always receiving 100% of their requested supplies and whether the proposed project which seeks to continue depriving such contractors 100% of their requested supplies is legal and, hence, feasible.

c. **Transfer of the Kern Fan Element.**

The DEIR states at page 4-7:

“The Monterey Amendment added Article 52 to the long-term water supply contracts. Article 52 required the Department to convey the KFE property including all fixtures to KCWA. In addition, as part of the ongoing development of groundwater banking programs during the 1980s/1990s, the Department had stored SWP water as part of the Berrenda Mesa Demonstration Program and had acquired groundwater for the SWP through the La Hacienda Water Purchase Program. Article 52 also required that one-half of such water in these two programs be relinquished to KCWA. Article 52 also provides that, subject to KCWA approval, other SWP contractors may be provided access to, and use of the property, for groundwater storage and later recovery for delivery to their service are as.”

Water Code section 11464 provides:

“No water right, reservoir, conduit, or facility for the generation, production, transmission, or distribution of electric power, acquired by the department shall ever be sold, granted, or conveyed by the department so that the department thereby is divested of the title to and ownership of it.”

Thus far, the DEIR has failed to explain how Article 52, and each of its various aspects, are consistent with Water Code section 11464. On its face, it appears that the Department has indeed “divested [itself] of the title to and ownership of” items which section 11464 expressly prohibits it from so divesting.

2. **Project Description.**

As noted above with regard to Article 18(b), the DEIR has failed to adequately explain why the various changes to the Department’s allocation of Table A Water and Article 21 Water pursuant to the proposed project were ultimately sought by the Department and the contractors. Without a full disclosure of the underlying basis and rationale for such changes neither the public nor the decision makers have been provided with the information necessary to fully understand the potential ramifications of such amendments, environmentally or otherwise (e.g., in connection with feasibility considerations), nor can the public or decision makers meaningfully determine whether the lead agency “has, in fact, analyzed and considered the [full] ecological implications of its actions.” (Guidelines, § 15003, subd. (d).)

Accordingly, the DEIR should be redrafted with such information and recirculated to afford the public a meaningful opportunity to comment on such information.

### 3. **Fishery Impacts.**

The DEIR at page 7.3-69 states:

“Based on the analysis, increased future pumping due to the proposed project under 2020 conditions could change Delta flow patterns, disrupt movement of species of fish, and increase entrainment losses of adult delta smelt, longfin smelt, splittail, striped bass, and salmonid smolts.”

A few pages later, at page 7.3-71, the DEIR states:

“As compared to baseline conditions, potential exists for the proposed project to have an adverse impact on Delta fish species by increasing salvage at the Skinner facility as a result of higher pumping at Banks during certain periods when San Luis Reservoir would otherwise be full. This impact is *potentially significant*.”

The DEIR should clarify precisely what species it believes may be subject to potentially significant impacts. The DEIR should also clarify precisely what are the sources of such potentially significant impacts, i.e., is the source solely “increased salvage” or do the proposed project’s “change[s in] Delta flow patterns” and “disrupt[ions of] movement of species of fish” also constitute potentially significant impacts?

Moreover, with regard to the DEIR’s conclusions of the proposed project’s impacts on fishery species, the DEIR should discuss the SWRCB’s finding in its 1978 Water Right Decision, Decision 1485, at page 13, wherein it stated:

"To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps."

In particular, the DEIR should discuss what has changed since the SWRCB's 1978 Decision 1485 which would lead them to fairly conclude that, at the present time and into the future, not only are the SWP’s existing levels of export pumping not detrimental to any fishery species, but neither are the proposed increases in such pumping pursuant to the proposed project.

#### a. **Mitigation of Fishery Impacts.**

The DEIR at page 7.3-71 states:

“Implementation of the following mitigation measures in combination with environmental programs already in place or forthcoming that are relevant to the

SWP would reduce this impact to a *less than significant level.*”

(Underscoring added.)

First, as noted above, the DEIR must clearly specify precisely what species this mitigation measure is intended to apply to and precisely what impacts it is intended to reduce to a less than significant level.

Second, CEQA requires that mitigation measures “must be fully enforceable through permit conditions, agreements, or other legally-binding instruments.” (CEQA Guidelines, § 15126.4(a)(2).) The DEIR references and describes eleven (11) “environmental programs either already in place or forthcoming that are relevant to the SWP” which it contends will purportedly help reduce the identified impacts to a less than significant level. To the extent the DEIR is relying on the implementation of all of those program to mitigate the project’s impacts on fishery resources, which it apparently is, the DEIR must explain how each of those programs meet the “fully enforceable” criteria.

To be “fully enforceable” mitigation measures must provide something that can be meaningfully enforced. If increased exports pursuant to the proposed project are contingent on the implementation of each of those programs, then the DEIR must specifically describe what such implementation consists of so that such implementation can be fully enforced.

Moreover, the DEIR’s reliance on programs that are “forthcoming” constitutes an improper deferral of mitigation measures. Without knowing the specific actions that result from such programs and without the ability to assess the effectiveness of such actions, such future programs cannot be relied upon to mitigate the impacts at issue. If mitigation of such impacts depends on those programs, then the proposed project is not ripe for approval and must await the development and implementation of such programs and the evaluation of their effectiveness at mitigating those impacts.

With regard to the DEIR’s mitigation measure which it adds to the above-referenced programs, the DEIR describes that measure as follows on page 7.3-72:

“The Department shall implement operational assets that could be deployed through a continuation of the EWA, through an equivalent type of program, or through another program that would replace the EWA and provide the fish protection required by the court and the Biological Opinions on delta smelt and Chinook salmon that would limit any adverse impact resulting from the proposed project on special status Delta fish species as a result of higher pumping at Banks during periods when San Luis Reservoir, absent of the proposed project, would be full.”

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This mitigation measure suffers from the same problems as the above-referenced programs. For starters the EWA has not yet been approved for 2008 and beyond, hence, reliance on the EWA is unwarranted. Reliance on a program that is equivalent to the EWA or “through another program” is inadequate, among other reasons, because such a program does not yet exist, is not yet defined and, needless to say, its ability to mitigate (or contribution to the mitigation of) the impacts to a less than significant level has not been demonstrated. To the extent the DEIR is relying on this mitigation measure, the proposed project is clearly not ripe for approval. Neither the decision makers, nor the public, can fairly conclude or be assured that the proposed project’s impacts on fishery resources will be effectively mitigated to a less than significant level.

This mitigation measure, as well as the other above-referenced programs, also lack any meaningful performance standards. It is not clear precisely what the DEIR preparers believe will constitute effective mitigation. For example, precisely how much impairment to the fishery resources does the DEIR believe is acceptable and would constitute a “less than significant level” of impairment? Without providing any answer to that question, the effectiveness of the proposed, or any other, mitigation measures cannot be meaningfully evaluated nor can they be meaningfully enforced.

For similar reasons, reliance on the yet-to-be-developed Biological Opinions, potential purchases of water from Yuba County Water Agency and any other mitigation measure that may or may not be brought into fruition and may or may not effectively mitigate the project’s impacts, cannot be fairly relied upon to mitigate the project’s impacts on fishery resources. If the decision makers ultimately desire to increase exports from the Delta, it is clear that any such increase would be highly premature at this time and should await the development, implementation and evaluation of the effectiveness of all of those future events which this DEIR is relying on to address the impacts from such increases.

#### 4. **Alternative Analysis.**

CEQA 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 would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.”

While “there is no ironclad rule governing the nature or scope of the alternatives to be discussed in an EIR, other than the rule of reason” (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 576), the mandatory “range” is not just any range, it must be an objectively “reasonable” range. (Id., p. 566.)

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The instant “range” of alternatives in the DEIR is not objectively reasonable. While the instant range purports to consist of a single alternative, i.e., “Alternative 5,” by the DEIR’s own admission that alternative does not meet both criteria in Guidelines section 15126.6, subdivision (a). As the DEIR explains at page 11-3: “None of the alternatives suggested met all the screening criteria but one alternative [“Alternative 5”] was [nevertheless] selected for detailed analysis.”

If the DEIR is relying on the various “no project” alternatives to supply the mandatory range of alternatives to the proposed project, such reliance is misplaced. “No project” alternatives are *in addition* to the alternatives in the reasonable range and, by definition, do not meet most of the basic objectives of the project. (See Guidelines, § 15126.6, subd. (e).)

The purpose of the mandatory range of alternatives is to present the decision makers as well as the public with a genuine “choice” among alternative courses of action which the decision makers could ultimately choose. To make that choice meaningful, such alternatives must be capable of meeting most of the projects’ basic objectives, otherwise such alternatives would be dead on arrival and have no chance of actually being adopted.

There is a fundamental problem with CEQA when the DEIR preparers conclude that neither they nor the public have come up with any alternatives to the proposed project that have to the potential to feasibly meet most of the projects’ basic objectives. In such a case, it is clear that the projects’ basic objectives are either far too narrowly defined or are being far too narrowly interpreted. In either case, CEQA’s mandatory alternative analysis is substantially thwarted.

The DEIR states at page 11-34:

“There are doubts about the institutional feasibility of Alternative 5 because the Monterey Amendment was approved as an integrated package of amendments to the long-term water supply contracts that balanced the interests of the signatories in an acceptable manner. If some elements of the package were removed it is unlikely that it would acceptable to all signatories.”

The forgoing statement is unacceptable under CEQA. The forgoing statement evidences a take-it-or-leave it approach and completely undermines CEQA’s alternative analysis, as well as CEQA as a whole.

It is contrary to CEQA to structure a proposed project such that anything other than the proposed project would “unlikely” be deemed feasible. To avoid such a structuring, CEQA requires that all projects have one or more “basic” objectives. And, as noted above, those objectives cannot be defined so narrowly that only one course of action can be said to fairly meet that objective or most of those objectives.

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To the DEIR preparers' credit, the DEIR does provide some basic objectives of the project and defines them in a manner that gives rise to a broad variety of alternative courses of action which could meet most of those objectives. (See DEIR, pp. 4.1 & 4.2.) Where the DEIR preparers fall fundamentally astray is when they fail to use those basic objectives to screen proposed alternatives for inclusion in the EIR's mandatory range and, instead, seemingly use *the proposed project itself* as a basis for screening such alternatives with the absurd result that anything other than the proposed project is "unlikely" to meet most of those basic objectives.

Moreover, the DEIR's statement that the Monterey Amendment and the Settlement Agreement were "package deal[s] of negotiated concessions that required achieving *all* of the [project's basic] objectives" (DEIR, p. 4-1 & 4-2), does not, and cannot under CEQA, mean that to be eligible for inclusion in the EIR's mandatory range of alternatives, every other proposed course of action must likewise meet "all" of the those objectives. To the contrary, CEQA makes it clear that such alternatives need only meet "most" of those objectives. (See e.g., Guidelines, § 15126.6, subd. (a).)

The proposed project involves the cardinal sin of CEQA, i.e., it involves the locking-in-place of a proposed course of action *prior to* the environmental review of that action. CEQA is premised on the fact that a proposed course of action may very well be altered when it is feasible to do so for the sake of the environment. If it is determined at the outset, as it seemingly was in this case, that any deviation from the proposed project will be deemed infeasible, then the entirety of the CEQA process has been fundamentally undermined.

This error cannot be easily cured since it suggests in reality that the project proponents are indeed committed to the notion that there is no meaningful flexibility in what they have proposed regardless of the environmental impacts of the proposal. They are essentially stating that no matter what those impacts are, we have already negotiated the details of the proposed project and anything other than the implementation of each and everyone of those details will be deemed infeasible. Such is a fatal flaw under CEQA which infects the entirety of the DEIR and public EIR process as a whole.

While it is seemingly clear, based on the forgoing, that the decision makers will reject any alternative other than the proposed project, assuming that such reality can be ignored, the DEIR must include a reasonable "range" of alternatives that meet the two criteria in Guidelines section 15126.6, subdivision (a). As noted above, so far, the DEIR has zero alternatives in that range.

Since none of the project's basic objectives is to "increase" total annual SWP exports from the Delta (and, even if there was such an objective, alternatives need only meet "most" of the objectives and not "all" of them), there should be at least one alternative which is designed to not increase and/or designed to reduce such total annual exports. While Alternative 5 may have that effect as a result of eliminating the various "water supply management practices" (DEIR, p. 11-3), the DEIR has essentially stated that such elimination would be infeasible. (See e.g., DEIR, p. 11-34.)

If the entire elimination of those management practices will render the alternative infeasible, then the DEIR preparers should in good faith develop a “reduced or non-increased” export alternative that *can* feasibly meet at least most of the project’s basic objectives. For example, any additional exports pursuant to such management practices could be offset by reductions at other times so as to ensure there is no net increase in annual exports from the Delta. If the DEIR preparers so choose, such an alternative could be designed such that any such offsets are themselves offset by increases in non-Delta water supplies to the areas experiencing a reduction in export supplies pursuant to such an alternative.

In light of the well-recognized problems associated with exports, and, in particular, in light of the DEIR’s finding that increased exports will have a potentially significant impact on fishery resources, it is unacceptable and “unreasonable” for the EIR’s range of alternatives to not include such a potentially feasible “reduced or non-increased” export alternative. It is not only an obvious alternative but one that could actually help, rather than exacerbate, the problems within the Delta and the Delta Watershed while also helping to meet the water needs of project proponents. It is also likely to be the only alternative that is *legally* feasible in light of the Watershed Protection Act and Delta Protection Act discussed above.

In the end, given the relatively broad objectives of the proposed project, the EIR’s range should be comprised of at least a handful of good faith and meaningful alternatives to the proposed project. That range should provide a sufficient variety of courses of action to allow for a “reasoned choice” among them and “to foster meaningful public participation and informed decision making.” (Guidelines, § 15126.6, subd. (f).)

Finally, for each of the suggested alternatives which were rejected for inclusion in the EIR’s mandatory range, the DEIR should explain in more detail why such alternatives do not have at least the “potential” to feasibly attain “most” of the project’s basic objectives listed on pages 4.1 and 4.2. (Guidelines, § 15126.6, subd. (a).) Each of those particular objectives should be discussed for each of those alternatives. The DEIR should further explain what it deems to constitute “most” of those objectives. For any alternative that the DEIR preparers believe cannot feasibly meet most of those objectives, the DEIR should explain why such alternatives could not be restructured or combined with other features, etc. such that they do have the potential to feasibly meet most of those objectives.

5. **Impact Analysis:**

a. **Surface Water Hydrology, Water Quality and Water Supply.**

The DEIR should more clearly discuss whether the various analyses of the proposed projects’ impacts assumed full compliance with the southern delta “interior” agricultural salinity standards. (See DEIR, p. 7.1-25.) One or more of such standards were violated in 2007. (See attached letter from the SWRCB to DWR dated November 28, 2007.) If full compliance is not anticipated, then, the DEIR should discuss methods by which the SWP could facilitate the release

of previously exported water to the San Joaquin River from San Luis Reservoir or otherwise to help meet those standards since the SWP's right to export water from the Delta is contingent on compliance with such standards pursuant to its water right permits (as well as other laws).

**b. Water Levels in the South Delta.**

It does not appear that the DEIR considered the proposed project's impacts on water *levels* in the southern Delta. Since water levels have been a historic and ongoing problem, the proposed project's potential to exacerbate such levels should be thoroughly discussed.

**c. Growth-Inducing Impacts:**

At page 8-6, the DEIR states:

“The Monterey Amendment and Settlement Agreement would not be expected to have any effect on natural increase or net migration to the State and thus would have no effect on statewide population.”

The DEIR should provide facts and analysis to support that conclusion, especially with regard to net migration to the State.

The DEIR concludes that the proposed project “could support additional [population] growth” and that “[i]ncreases in population can result in new development that causes adverse impacts to the environment.” (DEIR, pp. 8-14 & 8-15.) The DEIR then states, “This study concludes that some of the impacts are potentially significant and cannot be avoided.” The DEIR has failed to adequately explain why such impacts “cannot be avoided.” For example, why are there no potentially feasible mitigation measures or alternatives that could avoid such impacts or lessen them to a less than significant level?

Since alternatives need only meet “most” of the project's basic objectives, even if supporting population growth was one of the objectives, which it plainly is not, the DEIR must thoroughly explain why such population could not be lessened or avoided by an alternative that lessens or avoids such impacts while still meeting at least “most” of the project's basic objectives.

Moreover, at page ES-7, the DEIR states:

“Neither the Department nor the contractors make local decisions regarding growth or where it will occur. Cities and counties in the contractors' service areas affected by the increased population are responsible for considering the environmental effects of their growth and land use decisions. Therefore, mitigation measures of these impacts are subject to local agencies decision making.”

To the extent the DEIR is suggesting that the consideration of mitigation measures and alternatives to mitigate the proposed projects' growth-inducing impacts is the responsibility of local agencies and not the lead agencies for the proposed project, the DEIR is mistaken. Whether and to what extent such impacts will occur directly depend on what course of action is chosen by the decision makers to meet most of the basic objectives of the project, and, accordingly, the mitigation of such impacts is the direct responsibility of the lead agencies preparing this DEIR. Furthermore, the Department and the contractors obviously *do* have substantial control over "where [growth] will occur." They can amend the contracts in any number of ways to avoid or minimize such project-induced growth or even direct the locations, generally or otherwise, to which such growth can occur.

d. **Reliability of Water Supplies and Growth.**

At page 9-11, the DEIR states:

"Table A amounts now serve primarily as a way of allocating certain SWP costs and water shortages and surplus among the contractors. Reducing the Table A amount through invocation of Article 18(b) is not relevant given current day operations and planning based on water delivery reliability curves."

There is obviously a reason why the project proponents do not want to reduce the Table A amounts through invocation of Article 18(b), however, the DEIR has failed to adequately disclose that reason. Among other things, DEIR should explain why the "allocati[on] of certain SWP costs and water shortages and surplus among the contractors" cannot be effectively accomplished with a reduction in the Table A amounts through invocation of 18(b).

Without a thorough disclosure and understanding of why each of the amendments to the contracts are sought, neither the public nor the decision makers have been provided with the information necessary to fully understand the potential ramifications of such amendments, environmentally or otherwise (e.g., in connection with feasibility considerations) and to be assured that the lead agency "has, in fact, analyzed and considered the ecological implications of its actions." (Guidelines, § 15003, subd. (d).)

e. **Cumulative Environmental Impacts:**

At page 10.1-21, the DEIR states:

"No significance determination was made with respect to cumulative flow changes in the Sacramento and Feather rivers or for the flow changes produced by the proposed project. However, the proposed project's contribution to flow changes would not be considerable."

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“No significance determination was made with respect to cumulative flow changes in the Delta or for the flow changes in the Delta produced by the proposed project. However, the proposed project’s contribution to flow in the Delta would not be cumulatively considerable.”

The DEIR fails to explain why no such significance determinations were made. Making such determinations is the very purpose of CEQA’s mandatory cumulative analysis. (Moreover the conclusion with regard to the flow changes in the Sacramento and Feather rivers is not the correct conclusion. It should be “would not be *cumulatively* considerable” if that is what the DEIR so concludes.)

i. **Growth-Inducement:**

At page 10.1-52, the DEIR states:

“The additional water supply that would be made available by cumulative water development projects, including the proposed project, would support projected state-wide population growth. . . . [¶] Increases in population can result in new development that causes adverse impacts to the environment. This discussion concludes that some of the impacts are potentially significant and cannot be avoided.”

As with the *individual* growth inducing impacts discussed above, the DEIR has likewise failed to adequately explain why such *cumulative* impacts “cannot be avoided.” (See above discussion of individual growth inducing impacts.)

f. **Significant and Unavoidable Impacts:**

At page 10.2-1, the DEIR states:

“These impacts are unavoidable because it has been determined that either no mitigation, or only partial mitigation, is feasible.”

While the DEIR has not adequately explained why these impacts cannot be fully avoided or lessened via the implementation of mitigation measures, the DEIR appears to have overlooked the potential to avoid or substantially lessen such impacts via *alternative courses of action* to the proposed project as opposed to the implementation of such measures. As noted above, alternatives need not meet all of the projects basic objectives, only “most” of them. Accordingly, the DEIR must thoroughly explain with facts and analysis why each one of those “unavoidable” impacts cannot be at least lessened to a level of insignificance by any alternative design of the proposed project that still meeting most of the project’s basic objectives.

Moreover, the DEIR has failed to explain and demonstrate that such impacts have been

lessened to the maximum extent feasible via mitigation measures and/or alternatives even if such lessening does not lessen them to a level of insignificance.

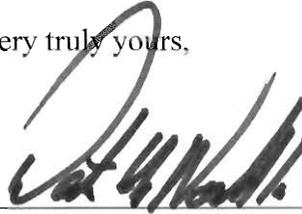
**6. Project Verus Program Analysis.**

The DEIR at page 1-1 states that “[t]his EIR serves as both a Project EIR and a Program EIR under CEQA.” To avoid any confusion as to what actions the lead agencies, and ultimately the decision makers, believe are 100% covered by this EIR and require no further CEQA review, the DEIR should describe all of those actions in detail. Elsewhere, the DEIR readily acknowledges that various transfers of “Table A amounts” and other actions will result in various local impacts, from growth inducement or otherwise. Accordingly, it is not yet clear which, if any, of the various actions set forth in Chapter 4 or elsewhere, are deemed to be 100% covered by this EIR.

**7. Conclusion.**

Thank you for your consideration of these comments.

Very truly yours,



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Dante John Nomellini, Jr.  
Attorney for the Central Delta Water Agency

DJR/djr  
Enclosure



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

## Executive Office

Tam M. Doduc, Board Chair  
1001 I Street • Sacramento, California • 95814 • 916.341.5615  
P.O. Box 100 • Sacramento, California • 95812-0100  
Fax 916.341.5621 • www.waterboards.ca.gov



Arnold Schwarzenegger  
Governor

## MEMORANDUM

**TO:** Gerald E. Johns, Deputy Director  
**DEPARTMENT OF WATER RESOURCES**  
P.O. Box 942836  
Sacramento, CA 942836

**FROM:**   
Dorothy Rice  
Executive Director  
**EXECUTIVE OFFICE**

**DATE:** NOV 28 2007

**SUBJECT:** SOUTHERN DELTA WATER QUALITY OBJECTIVES FOR AGRICULTURAL  
USES AND JOINT POINTS OF DIVERSION

This memorandum responds to your memorandum to Victoria A. Whitney, Chief of the State Water Resources Control Board's (State Water Board) Division of Water Rights, dated September 11, 2007, regarding use of Joint Points of Diversion (JPOD) while exceedances of the interior southern Delta salinity objectives were occurring this past irrigation season.

Regarding the exceedances of the salinity objectives, I have reviewed the information that the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) have submitted regarding actions that were taken to attempt to meet the objectives this year, including modified operations of the temporary southern Delta agricultural barriers and recirculation activities. Based on this information and the dry conditions in the San Joaquin River basin this year, I will not recommend that the State Water Board take enforcement action at this time. This in no way implies that I will not recommend, or that the State Water Board will not consider, enforcement action in future years. Accordingly, DWR should take all reasonable actions to attempt to meet the interior southern Delta salinity objectives in the future. The State Water Board will continue to review the southern Delta salinity objectives and their implementation to determine what if any changes should be made to either. The State Water Board appreciates DWR's support with this effort and will continue to coordinate regarding needed assistance.

Regarding use of JPOD, you indicate that you believe that State Water Board Decision 1641 (D-1641) authorizes DWR and USBR to utilize JPOD when the interior southern Delta salinity objectives are being exceeded if the exceedances are beyond the reasonable control of DWR or USBR. You cite State Water Board Executive Director Celeste Cantu's letter of October 13, 2006, to support your conclusions. However, as stated in Ms. Whitney's August 21, 2007

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Gerald E. Johns, Deputy Director  
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letter, D-1641 and Order WR 2006-0006 only allow USBR and DWR to conduct JPOD diversions if they are, at the time of diversion, in compliance with all of the conditions of their water right permits and license, including meeting the salinity objectives at the interior southern Delta stations. Ms. Cantu's letter in no way changes those requirements.

Of course, DWR and USBR may petition the State Water Board to change the permit and license requirements applicable to their use of JPOD. If DWR or USBR are considering submitting such a change petition, I suggest that they submit it as soon as possible to assure that the matter can be considered prior to any need for JPOD diversions next year. The State Water Board will then consider the petition and determine whether to modify DWR's and USBR's permit/license conditions.

If you have any questions or would like to discuss this matter further, please contact Diane Riddle; the Environmental Scientist assigned to this issue, at (916) 341-5297 or Erin Mahaney, Senior Staff Counsel, at (916) 341-5187.

cc: Ronald Milligan  
Manager, Central Valley Operations  
Bureau of Reclamation  
3310 El Camino Avenue, Suite 300  
Sacramento, CA 95821

David H. Roose  
Chief, State Water Project  
Operations Control Office  
Department of Water Resources  
3310 El Camino Avenue, Suite 300  
Sacramento, CA 95821

Cathy Crothers  
Assistant Chief Counsel  
Department of Water Resources  
1416 Ninth Street, Room 1118  
Sacramento, CA 95814

Amy L. Aufdemberge  
Assistant Regional Solicitor  
2800 Cottage Way, Room E-1712  
Sacramento, CA 95825

Dante John Nomellini, Esq.  
Nomellini, Grilli & McDaniel  
P.O. Box 1461  
235 East Weber Avenue  
Stockton, CA 95201

Carl P. A. Nelson  
Bold, Polisner, Maddow, Nelson &  
Judson  
500 Ygnacio Valley Road, Suite 325  
Walnut Creek, CA 94596-3840

Tim O'Laughlin  
O'Laughlin & Paris LLP  
2580 Sierra Sunrise Terrace  
Suite 210  
Chico, CA 95928

Thomas J. Shephard, Sr.  
P.O. Box 20  
Stockton, CA 95201

Jon D. Rubin  
Diepenbrock Harrison  
400 Capitol Mall, Suite 1800  
Sacramento, CA 95814

John Herrick, Esq.  
South Delta Water Agency  
4255 Pacific Avenue, Suite 2  
Stockton, CA 95207

Gerald E. Johns, Deputy Director  
Department of Water Resources

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November 28, 2007

Michael Jackson  
P.O. Box 207  
429 W. Main Street  
Quincy, CA 95971

Clifford W. Schulz  
Kronick, Moskovitz, Tiedemann  
& Girard  
400 Capitol Mall, Suite 2700  
Sacramento, CA 95814

Gary Bobker, Program Director  
The Bay Institute  
500 Palm Drive, Suite 200  
Novato, CA 94949

Paul R. Minasian  
P.O. Box 1679  
Oroville, CA 95965

Karna E. Harrigfeld  
Herum Crabtree Brown  
2291 W. March Lane, Suite B100  
Stockton, CA 95207

David J. Guy, Executive Director  
Northern California Water Assn.  
455 Capitol Mall, Suite 335  
Sacramento, CA 95814

Arthur F. Godwin  
700 Loughborough Drive, Suite D  
Merced, CA 95348

Tina R. Cannon  
CA Department of Fish and Game  
1416 9<sup>th</sup> Street, Suite 1341  
Sacramento, CA 95814

Alex Peltzer  
Dooley Herr & Peltzer  
100 Willow Plaza, Suite 300  
Visalia, CA 93291

Ernest A. Conant  
Young Wooldridge, LLP  
1800 30<sup>th</sup> Street, 4<sup>th</sup> Floor  
Bakersfield, CA 93301

Bob Baiocchi, Consultant  
P.O. Box 1790  
Graeagle, CA 96103

John Davis, Acting Regional Director  
Mid-Pacific Regional Office  
Bureau of Reclamation  
2800 Cottage Way  
Sacramento, CA 95825-1898