

South Delta Water Agency

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Via e-mail delores@water.ca.gov

Ms. Delores Brown, Chief
California Department of Water Resources
Office of Environmental Compliance
901 P Street
Sacramento, CA 95814

Re: Comments to the Draft Environmental Impact Report for the
Monterey Agreement, Including the Kern Water Bank Transfer:
also known as "Monterey Plus"

Dear Ms. Brown:

The following are the comments of the South Delta Water Agency ("SDWA"), joined in by the Central Delta Water Agency ("CDWA"), to the above referenced DEIR for Monterey Plus.

The DEIR is insufficient for several reasons, including most importantly, its analysis of the effects of deleting portions of Article 18 of the original State Water Contracts, its analysis of the current requirements of the State Water Project ("SWP") to maintain water quality objectives and its analysis of the potential impacts on fishery resources.

1. The DEIR does not adequately address the deletion of Article 18(b). Article 18(b) provides in the event that the State is unable to construct sufficient conservation facilities (which provide additional yield to the project), it may decrease the annual entitlements to all contractors by amending Table A (which sets forth the maximum delivery amount to each contractor). The basis for this provision is that the SWP was developed in stages, with the contractors (generally)

receiving incrementally larger deliveries as time went on until full deliveries were possible. 18(b) was a mechanism to allow a decrease in the “full” delivery allotments if all of the facilities anticipated for the SWP were for any reason not completed.

DWR’s Bulletin 76 sets forth the anticipated portions and supplies of the SWP, including those amounts needed for full development. As can be seen from the graph on page 11 of Bulletin 76 (attached hereto), as of today, approximately 5 million acre feet of supply (mainly from North Coast rivers) has not been developed as part of the SWP. Pursuant to later decisions, including the designation of “Wild Rivers” to some of the potential supply sources, these rivers will not ever be used as sources of for SWP supply. Hence we see that the project is currently 5 million acre feet “short” as of the year 2000. This is the very circumstance anticipated and provided for in Article 18(b).

Rather than include this tremendous decrease in available water supply in the DEIR analysis, the document states:

The effect of an implementation of Article 18(b) would have been to reduce the number of years when agricultural contractors would have to take shortages in years when Article 18(a) was applied to SWP deliveries. It would not, however, have altered the amount of water that the Department delivered to the contractors in the many years when more than the minimum SWP yield was available in the SWP system. Instead, such water would have been delivered to the contractors under Article 21. (DEIR at Page 2-16)

[O]nce the agriculture first shortage provision was eliminated, [article 18(b)] 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.
(DEIR at Page 4-5)

It is difficult to understand the meaning of these statements. If Article 18(b) were invoked, each contractor would have a smaller Table A amount. This means that the SWP would deliver less to each contractor *every year* because they would only be entitled to that lesser amount. In that event, each contractor would adjust its needs so that its Table A amounts were sufficient for its uses. To the contrary though, the DEIR assumes that each contractor will still seek its full/original Table A amounts even after Table A amounts have been decreased, and the SWP will continue to deliver (up to) the original Table A amounts.

The manner in which the DEIR treats this issue makes Article 18(b) meaningless and results in no real analysis of the implementation of it. It would appear that the DEIR was written in an attempt to avoid the issues found to be inadequate by the court.

2. The DEIR does not adequately analyze changes to Article 21. The Monterey Agreement alters Article 21 to remove language that insures "surplus" water is not used or relied upon as a permanent supply. The original language precluded delivery of Article 21 water if "such delivery would tend to encourage the development of an economy within the area served by such a contractor which would be dependent on the sustained delivery of water in excess of the contractor's maximum annual entitlement." As related above, the DEIR treats the SWP deliveries the same, before and after Monterey. In that case, although the Table A amounts may be less, the DEIR delivers additional surplus to the contractors so that they receive the same amount as they would have if Article 18(b) were not invoked. This clearly violates the intent of the provisions, and results in the DEIR not disclosing an accurate or true set of circumstances should Article 18(b) and 21 have been implemented as anticipated. Under the DEIR, contractors continue to be dependent on total SWP capacity even after allocations are decreased. This turns either turns the contractors into water sellers or specifically makes areas dependent on "surplus" supplies.

3. The DEIR fails to analyze the ability of the SWP to divert water from the Delta. The SWP can only divert water from the Delta which is surplus to the needs of the Delta and the areas of origin. As stated in Bulletin 76 at page 12: *In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided.*" The Bulletin goes on to state at page 11:

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.***" (Emphasis added)

The DEIR makes no analysis of how the SWP will or can be able to divert millions of acre feet of water from the Delta when its anticipated supplies are now approximately 5 million acre feet short. Currently, insufficient water is available for in-Delta needs, including

agricultural, fishery and other public trust uses. In that event, there are times when there is no “surplus” in the Delta to provide a make up for never developed SWP supplies. The DEIR must identify those times of shortage and then determine the amounts of water available for export. Additional legal support is found in Water Code Sections 12200 et.seq. which precludes diversions for export of water needed to provide salinity control and in-Delta uses. The DEIR analysis does not address this “supply” limitation.

4. The DEIR does not adequately analyze the effects of area of origin needs. Although it is not clear whether the Monterey Agreement deletes Article 18(c), it is clear that the analysis fails to examine decreasing export supplies due to area of origin needs. As areas of origin (including the Delta) grow, or uses therein increase, those areas are able to “take over” amounts developed under the SWP (and the CVP). This anticipated decrease in the amount of water available for export is never analyzed in the DEIR. Since the SWP was unable to develop approximately 5 million acre feet of supply, there is no additional water available to make up for area of origin or in-Delta (including fishery) increases, and thus exports must slowly decrease.

It appears that the Monterey Agreement has for its purpose the increase of exports over time in order to fulfill original Table A amounts when possible. Such a project goal must be clearly identified in and EIR and not lost in the analysis. This is especially true when that increase is based on an insufficient water supply.

5. The DEIR fails to adequately analyze the operational limitations on the SWP. The DEIR list the operational constraints in Table 5-3. Under “Regulations” it mentions on the Vernalis salinity objective of D-1641. That Decision also includes three other salinity objectives, or more correctly, three other locations for the same standard to be measured for compliance. Those three other locations are permit conditions of both DWR and USBR, and are required to be met by those agencies. In order to meet those objectives, DWR and USBR have to undertake some additional measures, above those historically taken. [Though the standard is required to be maintained in all channels, the measurements last summer showed a violation at the Old River at Tracy Bridge location for most of the summer.] Those measure may include releases from San Luis Reservoir and/or changes in flow patterns in the southern Delta. Those actions could result in lesser export rates; not analyzed in the DEIR.

Further, D-1641, as clarified by the Cease and Desist order issued against the projects precludes JPOD pumping during times when the standards are being violated. In summer and fall, this affects EWA pumping. According to the SWRCB’s Executive Director, last summer the SWP/CVP JPOD of 500 cfs from July 1 - September 1 was an illegal diversion. The DEIR cannot incorporate illegal diversions as either available supply, or mitigation measures.

In addition, additional export pumping causes lowered water levels in the southern Delta to the detriment of local diverters. The DEIR makes no analysis of how a continuation of

existing exports, or the anticipated increased exports will affect water levels, and potentially be precluded unless mitigated. [The DEIR incorrectly identifies the temporary tidal barriers as used to protect water quality and to protect salmonids. The temporary barriers protect water levels, and do not generally improve quality. It is the Head of Old River barrier that is meant to protect salmonids, not the tidal barriers.]

6. The DEIR does not adequately analyze the transfers of the Kern Water Bank property. Initially, there is a question about the legality of such a transfer. Water Code Section 11464 appears to preclude the sale or transfer of any facility of the SWP owned by the Department (of Water Resources). This legal question is a threshold to any analysis of the effects.

Secondly, the DEIR does not adequately analyze how the SWP would operate and add to the SWP supplies after Article 18(b) is implemented. It is likely that when “surplus” water is available in the Delta, the Bank would be operated to slightly increase the amount of water available to southern Californian M&I users (and others). Further, the initial documents regarding the Bank indicated that its operation might have adverse effects on the Delta. These potential effects have apparently escaped analysis through assumptions in the DEIR.

7. The DEIR does not adequately analyze alternatives. Initially, the alternatives selected do not include any reduction in supplies to the contractors. As stated above, the DEIR simply assumes that the SWP will deliver the same (or increased amounts) of water under both the project and no-project scenarios, ignoring the provisions of Article 18 and 21. In light of these Articles, the DEIR must include some sort of decreased exports alternative, similar to that required by the court in the CalFed ROD cases.

Secondly, the DEIR seems to confuse the baseline conditions with those of the no-project condition, rather than comparing a set of alternatives against both the baseline and the no-project conditions. In this case (as stated above), the DEIR ends up comparing a number of scenarios which all assume virtually the same amount of exports and deliveries. This gives no real comparison for the public or the decision makers to review.

8. The DEIR inadequately examines the project’s effects on the Pelagic organisms decline (“POD”). It is clear that SWP and CVP operations have been a major, if not primary cause of the POD (see Smelt Work Plan, March 2007). Entrainment of numerous species, including those pelagic, endangered and threatened species has resulted in record lows, with some species apparently approaching extinction. All of this occurred during times when significant changes in times and amounts of exports occurred under CalFed and other agreements. For example, exports in certain winter months sometimes tripled over recent and historic rates as presented by The Bay Institute at the SWRCB POD workshop in 2007.

We see that efforts such as EWA, “no-net loss” (under D-1641 export “limitations”) and altered export operations have caused the drastic and catastrophic decline of the species. At the same time, the DWR was operating its Delta export facilities without any “take” permit or other authorization under CESA (see *Watershed Enforcers (CalSPA) v. DWR*) and the CVP was operating under (later) voided Biological Opinions (see *NRDC v. USBR*). This leads to two separate requirements of the DEIR. The first is that the no-project scenario (at the very least) must assume that SWP exports must be very limited unless and until DWR applies for and receives a take permit under CESA. Until this, or some legally equivalent action occurs, there is not authorization to take smelt (and other species) and therefore export pumping cannot occur when take is likely or in fact occurs.

The second requirement is that the DEIR cannot assume EWA or any actions are sufficient to mitigate the adverse impacts to the fisheries since EWA (and numerous other actions listed in the DEIR) were ongoing during the time the species crashed. [This was the gist of the courts ruling in the *NRDC* case.] The net result is that the DEIR fails to examine a scenario where exports are radically decreased due to existing environmental regulations and endangered species laws.

In addition, the other potential factors relating to the POD are related to the export facilities. Things such as changes in habitat and food can and are directly related to the export facilities changes to interior Delta flows. Similarly, effects of contaminants and toxics are also affected by those same changes in Delta flows. Contra Costa Water District has found a correlation between fall salinity levels and subsequent year smelt populations. That salinity is a function of exports affecting sea water intrusion (or X2 location) and/or San Joaquin River salinities (a direct result of CVP and SWP deliveries to the San Joaquin valley). Hence export constraints other than entrainment may be necessary to protect the species and those operational changes are ignored by the DEIR.

With regard to entrainment, the DEIR incorrectly lists only numbers of fish found to have been entrained. The normal practice of DFG and FWS is to multiply that amount to estimate actual numbers of fish affected due to the inefficiency of the screens and the large numbers not “caught” by them. In addition, the smaller forms of the fish (larvae and juveniles) are not screened, but significant numbers are killed.

In addition to these comments, SDWA and CDWA incorporate by reference the comments submitted by the California Water Impact Network and CalSPA.

As set forth above, the DEIR seemingly avoids the “new” environmental analysis required by the litigation which overturned the first. Implementing Article 18(d) would result in a drastic change in exports levels resulting in much lower export deliveries. This alternative is apparently not even contemplated in the review, yet would certainly show a significant

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difference between the project and no-project alternatives. Under such a scenario, not only would exports to many agricultural uses be greatly diminished, but M&I users like MWDSC would receive larger allotments during those times when ag allotments would be first cut back. Finally, the failure to analyze the eventual impacts of area of origin demands, Delta needs and fishery requirements results in a DEIR which ignores specific laws, regulations, and the underlying promises supporting the authorization of the SWP.

Please feel free to contact me if you have any questions.

Very truly yours

JOHN HERRICK