



<i>Executive Director</i>	MELINDA TERRY
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<i>Treasurer</i>	PETE GHELFI
<i>Secretary</i>	CHRISTOPHER NEUDECK

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CA Department of Water Resources
Attn: Delta Conveyance Office
P.O. Box 942836
Sacramento, CA 94236-0001
deltaconveyancecomments@water.ca.gov

Subject: CCVFCA Comments on the Draft EIR for Delta Conveyance Project

Dear Delta Conveyance Office:

On behalf of more than 75 members, the California Central Valley Flood Control Association (CCVFCA/Association), pursuant to the CA Environmental Quality Act (CEQA) these comments are submitted on the Draft Environmental Impact Report (EIR) for the Delta Conveyance Project (DCP). This consolidated set of comments is intended to provide a more comprehensive, representative flood management perspective, rather than comments of individual member agencies.

All of the comments and recommendations contained herein are proposed as alternatives and/or mitigation measures to reduce significant environmental impacts and should therefore be treated as such for purposes of responding to these comments pursuant to CEQA (14 CCR § 15088). Accordingly, the Association expects responses to all comments and recommendations contained herein.

I. SUMMARY OF CCVFCA COMMENTS ON DCP

Under CEQA, the project description must provide the necessary detail to allow the public and decision-makers to make an informed decision about a project's impacts (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Ca1.App.4th 645, 672.) and propose and describe mitigation measures to minimize or avoid those effects. (*East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal. App. 5th 281, 303, citing Pub. Resources Code §§ 21002.1(a), 21100(b)(3); CEQA Guidelines, § 15126.4(a)(1).)

The Draft EIR, as presented, does not meet CEQA's requirements because it does not analyze the full range of the construction and operation impacts to flood control infrastructure or Delta channels and embankments that protect people, property, habitat, and the Delta agrarian economy. For some of the impacts that the Draft EIR does identify, the determinations of significance appear to be derived from speculation without studies and data to support conclusions. The modeling may also be underestimating the severity of adverse impacts because it does not reflect DWR's ability to maximize the full capacity of the proposed new diversion intake facilities.

The analysis and conclusions in the Draft EIR foster uncertainty because they make generally optimistic assumptions about the extent and duration of Project impacts, without site-specific analysis or scientific justification. Failure to ensure the implementation and effectiveness of mitigation measures could result in an increase in significant impacts that must be analyzed. The success of the Project's mitigation measures is also not certain, but the Draft EIR fails to disclose that uncertainty. Readers should be informed of the potential failure of DWR's proposed mitigation measures to minimize or offset the analyzed environmental impacts.

Simply put, the Association finds that the description of DCP construction and operation is incomplete and often internally inconsistent, preventing a full and meaningful disclosure of the scope, purpose, intensity, duration, and true effects in the EIR. This is not unexpected since the design is still at a very preliminary conceptual level. The interdependence of water conveyance, levee maintenance, and habitat restoration in the Delta warrant an environmental impact assessment that is more complete, comprehensive, and comprehensible than the current Draft EIR.

II. ASSOCIATION HISTORY AND INTEREST IN DCP

A. Association History

In existence since 1926, the Association was established to promote the common interests of its membership in maintaining effective flood control systems in California's Central Valley for the protection of life, property, and the environment. Association members include reclamation and levee districts, plus cities and counties with flood management responsibilities along the Sacramento and San Joaquin Federal Project and non-Project levee systems within the Sacramento-San Joaquin Delta.

B. Protection of Flood Management System

The Association's specific interest is assuring that the construction, mitigation, and operation activities proposed in DCP alternatives will not in any way impede, diminish, or impair the flood flow capacity or functionality of the State and Delta's levee systems. These flood control facilities are integrated and dependent on each other to operate as a system to protect people and property year-round, but particularly during highwater events, and their public safety function must not be compromised.

III. CENTRAL VALLEY FLOOD PROTECTION BACKGROUND

A. History of Reclamation in the California Central Valley

In 1850 Congress approved the Arkansas Act granting several states title to all of the Swamp and Overflowed Lands, including approximately 2 million acres in California. The State considered the reclamation of these swampy lands essential because of their extraordinary fertility when drained

(reclaimed) and also because they posed a significant public health risk due to outbreaks of malaria from mosquito breeding. The State and Federal government therefore proceeded to actively encourage the reclamation of these lands for purposes of productive farming.

Flood damage in the Sacramento Valley and Delta primarily occurs from heavy precipitation, but levee failures can also occur on a sunny day from damage caused by burrowing animals destabilizing the levee prism. In its natural condition, about one-quarter of the Central Valley extending along more than 14 counties was subject to annual or periodic overflow, so the first flood-control projects were the low levees the farmers built to protect their lands from inundation. Currently, most snow-melt run-off is stored or diverted for beneficial uses or passes harmlessly to the ocean, but prolonged high-water stages can cause seepage through levees if they are not vigilantly maintained and improved to withstand the occasional flood event with excessive run-off draining through the Central Valley and Delta.

B. SRFCP Purpose and History

Authorized by Congress in 1917, the Sacramento River Flood Control Project (SRFCP) and San Joaquin River Flood Control Project (SJRFCP) is a system of “Project levees” and flood bypasses designed and built by the U.S. Army Corps of Engineers (USACE/Corps) for three purposes:

- 1) Flood control;
- 2) Reclamation of marshy lands for farming and other productive uses;
- 3) Improvement of navigation.

Today, there are more than 1,600 miles of State-federal Project levees in the Central Valley, 385 miles of which are located in the Delta. More than 700 miles of additional Delta levees are classified as “non-project.” The key component of the SRFCP system, the Yolo Bypass, carries 80 percent of the water at the latitude of Sacramento during extreme floods.

This comprehensive system of SPFC flood control facilities is the largest flood management system in California. Collectively, the facilities, lands, programs, conditions, and mode of O&M for the State-federal flood protection system in the Central Valley are referred to as the State Plan of Flood Control (SPFC).

In 1953, the SPFC works were transferred to California with a memorandum of understanding (MOU) confirming the State’s obligation to operate and maintain all completed works/facilities and to hold the federal government harmless.

Jurisdiction and authority throughout the drainage basin and for the 1.7 million acres within the state’s Sacramento and San Joaquin Drainage District (SSJDD) is the responsibility of the Central Valley Flood Protection Board (CVFPB/Board). Created by State legislation in 1913, the SSJDD holds the property rights on about 18,000 parcels of SPFC lands, some going back to 1900. Annual inspections of the SPFC levee system are conducted twice annually by DWR.

C. Modification of SPFC

This comprehensive interconnected system of SPFC and non-project levees is absolutely critical to public health and safety, including the protection of the region’s transportation, energy, agriculture, business, homes, and even water conveyance. Levees in the Delta provide this protection at all times, during two daily high tides and seasonal high-flow events.

Under California law, no modification to the SPFC system may be constructed on or near the Sacramento and San Joaquin Rivers or their tributaries until plans have been reviewed and the projects have been approved or a permit issued by the CVFPB. The Board authorizes use of the SPFC facilities by issuing encroachment permits only *if the project is compatible with the flood system and will not hamper the State's O&M responsibilities.*

The DCP alternatives and EIR must embrace – as a fundamental permit condition – the requirement that the existing level of flood protection be maintained to protect people, property, infrastructure, habitat, and conveyance of floodwater. As most public agencies within the Delta are constantly upgrading their level of flood protection, it is also essential that DCP does not create a new barrier to future ability to increase local level of flood protection.

IV. CEQA COMMENTS

A. Inadequate Project Description

A proper environmental impact report must provide sufficient information as to the size and scope of all major project components and existing baseline conditions, presented in an accurate and understandable project description. The Association finds the release of the Draft EIR to be premature because the DCP is still at a conceptual level of design, resulting in several critical Project description inadequacies that prevent the public and local government agencies from being fully informed of the scope, duration, severity, and level of significance of the environmental impacts if implemented.

For instance, Alternative 5 envisions a Project operated entirely within the State Water Project (SWP), but the Draft EIR leaves open the possibility of involving additional exports for Reclamation's Central Valley Project. (Draft EIR, § ES.1 ["Here, as the CEQA lead agency, DWR's underlying, or fundamental, purpose in proposing the project is ... to restore and protect the reliability of State Water Project (SWP) water deliveries and, potentially, Central Valley Project (CVP) water deliveries south of the Delta..."].) Similarly, the references to operational criteria as described in Section 3.16 of the Draft EIR do not provide a clear operations plan with stable and defined parameters for how DWR will operate the north Delta intakes. The project description states use of the northern Delta intakes will depend on whether there is an "operational advantage" in DWR's discretion, but the Draft EIR does not detail that decision-making process. Because the operational details are limited, the restrictions applied to the hydrologic modeling presents a scenario that DWR may not ultimately follow under the real Project. Without a clear description of how the DCP will be operated, the public cannot meaningfully comment on its potential impacts such as levee erosion from increased hydrologic velocities or overtopping from elevated surface water levels.

B. Limited Range of Alternatives

Under CEQA, an EIR must consider a reasonable range of feasible project alternatives that would substantially lessen the project's significant environment effects. (Pub. Resources Code, § 21061; CEQA Guidelines, § 15126.6, subds. (d), (f).) Section 3.2 of the Draft EIR describes DWR's process of screening and eliminating alternatives, which culminated in three potential conveyance alignments, and diversion facilities with incremental variations in water capacity. The range of alternatives selected for the Project is artificially narrow, which eliminates meaningful options for accomplishing the Project purpose. Section 2.3 of the Draft EIR identifies the main purpose for the Delta Conveyance Project is to reduce risks to the State Water Project supply infrastructure posed by climate change-induced sea level rise, and seismic events. In both scenarios, the risk to infrastructure is caused by potential levee failures that would threaten SWP deliveries.

An alternative approach to address these threats, such as extensive remediation of existing conveyance infrastructure to improve levee stability in the Delta, was not evaluated as a feasible alternative in the Draft EIR. With adequate levee improvements in place, a through-Delta alternative would also reduce flood risks to Delta communities and enhance other beneficial aspects relevant to maintaining “Delta as Place,” but DWR eliminated the non-tunnel alternatives in the first filter screening process by concluding that through-Delta conveyance is unavoidably infeasible due to sea level rise and seismic risks. (Draft EIR, App’x 3A, at p. 3A-35.) The Final EIR should include a through-Delta levee upgrade to improve the conveyance reliability of SWP water deliveries.

C. Insufficient Analysis of Flood Risk

Under CEQA the lead agency’s factual conclusions must be supported by substantial evidence – facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts (CEQA Guidelines §15384(b)). Speculation does not constitute substantial evidence, and unsubstantiated narrative or expert opinion asserting nothing more than “it is reasonable to assume” that something “potentially may occur” is not analysis supported by factual evidence.

The alternatives for the Project will alter water elevations in the Delta, including reduced surface flows in late summer and early fall months. (Draft EIR, § 5.3.) However, the Draft EIR states that changes to surface water resources and water supplies, “by themselves” are not considered impacts under CEQA, and therefore only describes the potential changes as a basis for understanding potential effects on other surface water-related resources. (Draft EIR, § 5.0 at p. 5-2.) DWR’s failure to consider surface water impacts as environmental impacts requiring analysis is incompatible with the clear requirement of CEQA to analyze environmental impacts. (See Pub. Resources Code, § 21002 [requiring public agencies to avoid or lessen significant environmental impacts of projects]; § 20160.5 [defining “environment” as the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water”].)

By only analyzing surface water and water supply impacts indirectly through the effects on other surface-water related resources, the Draft EIR fails to analyze the full environmental impacts attributable to the Project such as increased flood risk to Delta communities and agrarian economy. The programs, projects, and policies considered for cumulative impact analysis are identified in Table 3C-2 of the Draft EIR, but the Draft EIR excludes any analysis of cumulative impacts on surface water (Chapter 5) or water supplies (Chapter 6), contrary to CEQA guidelines. (CEQA Guidelines, §§ 15130(a)(1), (b).)

DCP alternatives would involve extensive excavation, grading, stockpiling, soil compaction, and dewatering, resulting in temporary and long-term alteration and disruption of drainage patterns, paths, and facilities. The existing drainage facilities in the Plan Area are intricate networks of canals, ditches, pipes, and pumps which means they have been carefully designed to function as a system and located to work with gravity and the natural land contours and drainage patterns that exist on the Delta islands. Therefore, any disconnection potentially renders the whole system inoperable and prevents drainage to allow farming. Farming must also be protected from seepage, runoff, and dewatering discharges. The DCP alternatives assume being able to discharge the dewatering volumes into local irrigation/drainage ditches, but there is NO EXTRA CAPACITY in these local facilities and therefore CANNOT be used by the DCP during construction.

Increases in surface water above historical levels during the growing season will also result in unwanted and involuntary sub-irrigation due to increased hydro-static pressure caused by the increase in seepage.

Many crops grown in the Project Area, including grapes, alfalfa, kiwis, apples, pears and cherries, are extremely sensitive to increased water within plant root zones. During the growing season, reduced oxygen to the root zone would reduce crop yield and, potentially, result in the loss of trees and vines. This will be damaging to crops and to Delta agriculture in general.

With dewatering pumps placed around the facilities under construction, with continuous groundwater pumping at rates ranging from 100 gallons per minute to 2,000 gpm. We could find no studies or references to any evidence to support how the lowered groundwater depth or the radius of influence were determined, so they appear to be nothing more than professional guesstimates without any factual surveys or technical analysis to verify these claims.

From a public safety standpoint, it is critical for DCP consultants to immediately consult with local RDs, the CVFPB, DWR's levee inspection branch, and the USACE to discuss drafting a specific mitigation measure to deal with the effects that staging of construction equipment, construction traffic, and/or road re-routing will have on levee inspections and routine levee maintenance to be performed during the 14-year construction period, such as:

- The number of construction vehicles/equipment expected to drive on roadways in the Plan Area;
- The approximate weight of vehicles expected to frequently drive on roadways in the Plan Area;
- The approximate start and end date for heavy construction traffic usage;
- Whether construction traffic will be 24/7 or be limited to certain days and hours on all roadways identified for use in the Plan Area;
- Provide results from studies and analyses conducted that have tested the weight and multiple load tolerance levels of existing levees underneath roadways to be heavily used in construction.

Concerns over levee stability and their performance during a seismic event are some of the primary reasons Project Proponents state for building the new facilities. Intensive and sustained ground-shaking from construction trucks on levee roads 24/7 and daily, repetitive pile-driver strikes at multiple locations will adversely affect the stability of the nearby levees. The sustained intensive localized vibration for such a long duration as contemplated in the 14-year construction description could cause stress fractures and possibly levee failures, but is not acknowledged as an adverse impact or mitigated in the Draft EIR.

The impacts analysis and disclosures in the EIR need to provide details on specific locations, durations, timing, size, and intensity of changes to surface water elevations and discharges from dewatering in order to provide the public with a useful environmental document. Following are flood risk impacts related to DCP activities that specifically require more analysis, disclosure, and mitigation than what is provided in the current Draft EIR:

- Damage to levee stability from increased subsidence and sink holes from dewatering activities;
- Damage to levee stability from pile driving, tunnel muck haulage, and other construction activities;
- Damage to levee stability from seepage and erosion scour caused by changes in hydrology that change localized water velocities;
- Damage to levee stability from daily sustained intensive and repetitive pile driving;
- Deflection and obstruction of flood flows in Delta channels due to cofferdam construction for two or three intakes, levee reconfigurations, sediment loading, and other construction

activities that may redirect flows and alter flood risks throughout the 14-year construction timeframe;

- Impairment of ditches, pumps and other interior drainage facilities from subsidence and sinkholes caused by dewatering activities, disconnecting interconnected drainage systems, and seepage waters exceeding existing local capacity;
- Obstruction of levee maintenance, flood fighting and emergency response activities through the clogging of Delta levee roadways and channels with construction traffic and equipment, and through the monopolization of barges and repair materials;
- Financial impacts to RDs in the Plan Area (e.g., reduced assessment revenues during the 14-year construction, increased maintenance costs to deal with seepage/erosion damage, increased drainage pumping costs).

CCVFCA recommends the EIR:

- Determine how levee stability will be impacted by the creation of subsidence and sinkholes from dewatering;
- Examine existing conditions in terms of interconnected drainage systems and identify specific locations where construction will disconnect or disrupt the existing drainage facilities' ability to function/drain effectively;
- Identify specific discharge locations, how many locations, the capacity of the discharge location or what its capacity availability is based on local usage/needs (winter drainage or summer irrigation)
- Quantify the daily discharge rates and volumes from dewatering;
- Identify how long dewatering and subsequent discharges will occur at each location;
- Identify and analyze the additional drainage maintenance works and costs DCP will need to assume in order to keep the drainage facilities functioning and able to accommodate the increased dewatering discharges.

D. Deferral of Analysis and Mitigation

In order to approve a project, the lead agencies must identify feasible mitigation measures or alternatives that would avoid or substantially lessen any significant adverse environmental effects of the project. (Cal. Pub. Res. Code § 21002) The mitigation measures must also be specific and mandatory, such that they are fully enforceable.

The EIR cannot defer the determination of the scope and nature of significant impacts until future studies and reports are prepared without including specific performance standards, timeframes for completion, and a commitment to mitigate. However, many of the proposed Mitigation Measures fail to set specific performance standards or criteria for surveying, relocating, repairing, replacing, compensating, or restoring the impacted resource.

Every chapter indicates additional surveys and investigations are necessary to determine the level of impacts anticipated during the construction and operation of the DCP. For example, Section 11.3.2 says the implementation level design would not be completed until after CEQA process is complete and the lead agency determines whether to approve a project alternative. It also states that additional geotechnical studies would be prepared at the time of final design to refine DWR's understanding of site-specific conditions. Without these investigations, the EIR acknowledges DWR will not be able to determine the soil load-bearing capacity, shrink-swell potential, corrosivity, or other parameters.

This puts levees in the Project Area at risk of failure. In this case, the EIR should include a map depicting the exact location of levees and drainage facilities (ditches/pipes/canals/pumping stations) that are expected to experience subsidence or liquefaction due to dewatering activities.

Finally, because DCP is still at a preliminary conceptual level of design, the Draft EIR inappropriately bifurcates the proposed project from disclosing legally required mitigation actions that are likely to be required once the Project reaches a 60% design level. This results in an incomplete picture of the environmental impacts for the decision maker to evaluate. Before releasing a Final EIR, DWR should complete all necessary surveys and investigations to support conclusions regarding significant impacts and to identify mitigation measures necessary to reduce the impact to a level of insignificance.

E. Inadequate Mitigation Measures

A public agency cannot approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen the significant environmental effects of the project. (Pub. Resources Code, § 21002.) As stated in the CEQA Guidelines, “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.” (CEQA Guidelines, § 15384.) However, some of the mitigation measures provided in the Draft EIR are too vague or otherwise defer to further study in the future, leaving CCVFCA unable to confirm that the proposed mitigation is in fact adequate to reduce the flood control impacts of the Project to less than significant.

The analysis and conclusions in the Draft EIR foster uncertainty because they make generally optimistic assumptions about the extent and duration of Project impacts, without site-specific analysis or scientific justification. The failure to fully analyze potential impacts undermines the credibility of the Draft EIR as a reliable environmental document, thereby harming the public’s trust in DWR and the State to uphold its statutory, regulatory, and contractual obligations to protect the unique and valuable ecosystem, water supply, agriculture, and communities of the Delta. Many evaluations and studies are delayed to an unspecified date, deferring the disclosure of all Project impacts. Failure to ensure the implementation and effectiveness of mitigation measures could result in an increase in significant impacts that must be analyzed.

Local Reclamation Districts (RDs) are trustee agencies under CEQA and responsible for daily inspection of levee conditions for issues such as cracks, slippage, encroachments, seepage, burrowing animals, etc., as well as for performing routine maintenance activities on and around the levees in order to meet USACE and FEMA levee standards. DWR conducts levee inspections twice a year and the USACE conducts more extensive Periodic Inspections every 5 years of the SPFC project levees. Over the 14-year Project construction period, local RDs, DWR, and USACE will find it difficult to conduct levee inspections, conduct levee maintenance or construct repairs or improvements due to competition or blockage by DCP construction activities and equipment staging. In addition, during an emergency, RDs and other responders may not be able to provide floodfighting if they are denied access to an area or are unable to stage equipment. In some cases, DWR may need to assume all levee maintenance and floodfighting responsibilities for several reaches of levees, particularly if there are not enough remaining landowners to sustain funding of levee maintenance and island drainage after lands are condemned for construction.

DWR should immediately engage local RDs, the CVFPB, DWR's levee inspection branch, and USACE to negotiate a memorandum of agreement (MOA). Prior to certification of the Final EIR, DWR should execute a binding agreement with the Central Valley Flood Protection Board (CVFPB) and local RDs that memorializes the intent to coordinate on the development of following mitigation measures necessary to reduce flood risk during DCP construction and operation:

- Establish general principles and guidelines for any proposed alterations of flood control facilities in the Plan Area, particularly those affecting the State Plan of Flood Control's (SPFC) location, configuration, purpose, and functionality;
- Design and operate DCP conveyance construction and operation to be consistent and complementary to the modifications of the SPFC and other flood protection facilities currently being planned in the Central Valley Flood Protection Plan (CVFPP) process, including Regional Plans;
- Avoid impacts that reduce the level of flood protection recently achieved from the construction of flood protection projects in the Plan Area that were financed with local, State and Federal funding (i.e., Prop. 1E and 84, WRRDA appropriations) as well as projects planned for implementation in the near future pursuant to the CVFPP or U.S. Army Corps of Engineers' ongoing feasibility studies in the Plan Area;
- The design and implementation of levee height increases on both sides of the Sacramento River upstream of the proposed temporary cofferdams and permanent new diversion intakes and/or setback levees across from the intakes;
- The design and implementation of any seepage berms, relief wells, and cutoff (slurry) walls;

F. Emergency Response and Flood Recovery

Risk from levee failures can be reduced, but not eliminated, so being prepared for a flood emergency is the best defense. This requires having an effective strategy for preventing failures with ongoing levee improvements and maintenance, protocols for responding with emergency flood fighting activities, and a plan for levee repair and local recovery after the flood event.

The inability to quickly floodfight and repair a damaged levee will result in loss of life and property in the area protected by that levee, and could have the domino effect of causing neighboring levee failures if construction activities/equipment prevent access to the levee break or staging of key floodfighting personnel and supplies.

DWR should identify through MOUs with local emergency response agencies a clear chain of command regarding who pays for what, coordination of response and funding, and cooperative effort to pursue federal reimbursements for recovery; and to mutually develop a flood emergency response plan that addresses floodfighting, worksite and community evacuation, and levee repairs.

VI. ECONOMIC ANALYSIS AND FISCAL ASSURANCES

A. Conduct Comprehensive and Unbiased Economic Evaluation of DCP

To be credible, DWR should undertake objective and comprehensive cost-benefit and socioeconomic analyses of the construction, operation, mitigation, and maintenance of the DCP. The new effort must be consistent with government economic analysis standards for public water projects; and independently peer-reviewed for accuracy and efficacy of the methodology, assumptions, models, and results.

DWR's Economic Analysis Guidebook specifically states: "*DWR should also broaden the economic analysis to include regional economic development (RED) or other social effects (OSE) accounts, which can significantly assist in the decision-making process. The RED account is particularly important if a proposed plan will have significantly different effects upon regions that might otherwise be irrelevant to the NED national perspective.*" As described in comments herein, the DCP alternatives certainly represent different benefits and impacts between Northern and Southern California, which should be accounted for as RED or OSE – but is not accounted for in this way.

A significant potential fiscal impact that should specifically be addressed in a new economic analysis is the State's exposure, both DWR and CVFPB, to tort liability related to DCP construction and operation of facilities on SPFC project levees. Inverse condemnation liability gives private individuals a pathway to recover for disproportionate damages caused by public improvements projects.

After the 1986 storms and subsequent levee failures, a lawsuit involving some 3,000 plaintiffs claiming damages from a SPFC Project levee failure which resulted in evacuations, deaths, and hundreds of millions of property damage was filed against the State (*Paterno v. State of California*). Key factors in assessing the "reasonableness" of the risk inherent to the state's levee project included the large size of the project, the lack of direct benefit to the plaintiffs from the project, the feasibility of alternatives, and the fact that the state benefitted as a whole from the decision not to fund the levee improvements that would have prevented the breach, with foreseeability a supplemental issue considered.

The appellate decision also cited case law stating that a public entity is a proper defendant in an action for inverse condemnation if the entity "substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. So long as the plaintiffs can show substantial participation, it is immaterial 'which sovereign hold title or has the responsibility for operation of the project.'"

In 2003, the State of California settled the *Paterno* case for \$467 million after the Third Appellate Court concluded in an appeal of the inverse condemnation lawsuit that the State was liable as the party responsible for the SRFCP facilities. The court agreed that the *Paterno* plaintiffs' damages were "directly caused by an unreasonable State plan which resulted in the failure" of the levee, therefore finding the State liable to pay for these damages.²⁴ Therefore, the significant financial exposure to the State (DWR/CVFPB) from liability should be disclosed and analyzed in a new, more comprehensive economic analysis.

In the case of DCP, the purpose of this project is increasing water supply in export Service Areas, so there are no direct benefits to residents in the Delta that pay assessments for levee maintenance and improvements. In addition, many of the project components propose a substantial amount of moving, modifying, or building on SPFC levees, so meets the large size criteria. The Association and many others have recommended DCP include maintenance of levees that provide a pathway for the conveyance of SWP/CVP water supply to pumps in the South Delta as a critical project component.

B. Redirected Financial Burdens Not Analyzed or Mitigated

The reclamation and levee districts that operate and maintain most flood protection and control infrastructure in the Delta rely on the local assessment roll as their primary direct funding source, and

it would be highly inequitable to leave them to protect new levee improvements or higher maintenance costs associated with DCP construction, operation, and mitigation actions.

CCVFCA requests a mitigation measure be added requiring DWR to pay for all additional O&M or other related district costs (i.e., higher electricity costs for drainage pumping, levee improvements to add freeboard due to sediment increases raising water surface elevations, wave fetch erosion damage from open water/tidal habitat restoration, etc.) incurred by reclamation districts as a result of implementation of any DCP actions. These costs must have their own section and budget line item in the DCP's Annual Work Plan and Budget.

VII. CONCLUSION

The very preliminary conceptual nature of the DCP project design, results in the development of CEQA conclusions that are primarily based on conjecture due to lack of completed surveys and analyses. This prevents CCVFCA, its member agencies, and the general public from fully understanding the true scope, severity, and duration of potential environmental and economic effects associated with the construction, permitting, operation, and mitigation of DCP project components.

The inadequacies of the DCP alternatives and EIR fail to protect people and property in the Plan Area or meet the legal requirements for state and federal endangered species, environmental assessment, or various Delta protection laws. Therefore, the Association requests the State to revise per comments contained herein and once again recirculate the EIR for public review and comment.

Respectfully,



Melinda Terry, Executive Director
CA Central Valley Flood Control Association

