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January 19, 2024

VIA E-MAIL (SacDeltaComments@waterboards.ca.gov)

Courtney Tyler
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: North Delta Water Agency Comment Letter - Sacramento/Delta Draft Staff Report

Dear Ms. Tyler:

To secure North Delta landowners' current contractual and individual rights to adequate water supply and water quality, the North Delta Water Agency (NDWA or Agency) submits these comments on the State Water Resources Control Board's (State Water Board) Draft Staff Report/Substitute Environmental Document for the Bay-Delta Water Quality Control Plan (Bay-Delta Plan) Update for the Delta and Sacramento River (Draft Staff Report).

NDWA previously commented on the 2017 Draft Scientific Basis Report, 2018 Framework, 2023 Draft Scientific Basis Report Supplement, and the Framework for the proposed Bay-Delta Plan Update, and incorporates those comments herein by reference. The Agency's comments are intended to facilitate the State's compliance with the *Contract for the Assurance of a Dependable Water Supply of Suitable Quality* (1981 Contract) and to ensure that any significant adverse impacts to water users and Delta channels associated with changes contemplated in—or implemented pursuant to—the Draft Staff Report are properly described, analyzed, and mitigated in accordance with applicable law.

BACKGROUND

A. North Delta Water Agency

NDWA was formed by a special act of the Legislature in 1973. (North Delta Water Agency Act, Chapter 283, Statutes of 1973). The Agency's boundaries encompass approximately 300,000 acres, representing nearly half of the legal Delta. This includes all of that portion of the Sacramento-San Joaquin Delta, as defined in Water Code Section 12220, situated within Sacramento, Yolo and Solano Counties, and New Hope Tract, Canal Ranch, and Staten Island in northeastern San Joaquin County.

Beginning over 170 years ago, farmers within the area now comprising NDWA began reclaiming lands from flooding, appropriating water to beneficial use, and establishing vibrant agricultural communities. The U.S. Bureau of Reclamation (Reclamation) began constructing the Central Valley Project (CVP) in the late 1930s, damming the major tributaries on the Sacramento River and holding back substantial quantities of the Delta water supply. As it did with landowners along the Sacramento River, Reclamation conducted extensive studies and negotiations to ensure a sufficient supply for water right holders in the northern Delta. Discussions with Delta landowners were protracted, however, due to the complex issues of both water quantity and quality, and the issues only intensified with the subsequent construction of the State Water Project (SWP) by the California Department of Water Resources (DWR).

Before the CVP and SWP began withholding much of the Sacramento River system's high winter flows, the Delta channels served as seasonal storage, holding sufficient fresh water to sustain water quality in the North Delta throughout and often beyond the irrigation season. The Projects altered the regimen of unregulated flows in the Delta and its channels, resulting in fluctuations to the quality and elevation of water therein. (See 1981 Contract, Recital (d).) Now, the Delta functions more like a flowing stream and, as a result, relatively minor decreases in outflow can have a serious impact on North Delta water quality. NDWA was formed to represent northern Delta interests in negotiating a contract with both Reclamation and DWR in order to mitigate the water rights impacts of the Projects.¹ From 1974 to 1979, NDWA, Reclamation and DWR determined the outflow necessary to meet water quality standards for irrigated agriculture and generally reviewed the paramount water rights of landowners within Agency boundaries.

B. The 1981 Contract

On February 28, 1981, DWR and NDWA executed the 1981 Contract, a copy of which is enclosed, to address the changes to Delta flows caused by the Projects. The 1981 Contract embodies a guarantee by the State of California that, on an ongoing basis, it will ensure that suitable water will be available in the northern Delta for agriculture and other beneficial uses. The 1981 Contract requires DWR to operate the State Water Project to provide water qualities of at least equal or better of the standards adopted by the State Water Board from time to time and to meet specified year-round water quality criteria at seven monitoring locations while providing enough water to satisfy all reasonable and beneficial uses of water within NDWA's boundaries, while also providing protection from adverse changes to natural flow direction and water surface elevations caused by the State's export of water. (1981 Contract, Art. 2, 3, and 6.) The 1981 Contract further provides that DWR shall furnish such water as may be required within the Agency to the extent not otherwise available under the water rights of individual water users and the "diversions and uses" of water within NDWA "shall not be disturbed or challenged by the State so long as this contract is in full force and effect." (*Id.*, Art. 8(a)(i).)

The provisions of these articles are further supported by a Memorandum of Understanding, dated

¹ Section 4.1 of the Agency Act states: "The general purposes of the agency shall be to negotiate, enter into, executed, amend, administer, perform and enforce one or more agreements with the United States and with the State of California . . . To protect the water supply of the lands within the agency against intrusion of ocean salinity; and . . . To assure the lands within the agency of a dependable supply of water of suitable quality sufficient to meet present and future needs."

May 26, 1998 (1998 MOU), that confirms the joint position of NDWA and DWR that any obligation imposed upon the use of water within NDWA to assist in achieving the objectives of the 1995 Delta Water Quality Control Plan is within the scope of the 1981 Contract. A copy of the 1998 MOU is also enclosed. NDWA and DWR's joint position was endorsed in findings by the State Water Board in Water Right Decision 1641 (D-1641). D-1641 assigns responsibility for any obligation of the 1995 Bay-Delta Plan within NDWA to DWR, so long as the 1981 Contract and 1998 MOU are in effect.

In return for the assurances provided, NDWA makes an annual payment to DWR. (*Id.* Art. 10.) Although the two signatories are public agencies, the 1981 Contract also extends to individual landowners who, under the terms of the Contract, have executed subcontracts guaranteeing that their lands will receive all the benefits and protections of the 1981 Contract. (*Id.* Art. 18.) Many of these subcontracts have been signed and recorded, enabling the subcontractors to enforce the terms of the 1981 Contract.

NDWA has a clear statutory mandate under its Agency Act to protect local water supply from salinity intrusion and assure that the lands within the North Delta continue to receive a dependable supply of water of suitable quality, sufficient to meet present and future water needs. For this reason, NDWA has maintained during the various Delta planning processes that any projects, programs, and actions pursued in the name of coequal goals codified in the Delta Reform Act of 2009 must, at a minimum: (1) be based on the best available science; (2) be consistent with the State's contractual obligations under the 1981 Contract; and (3) be undertaken in compliance with all applicable state and federal law. It is with this background that the Agency submits these comments on the Draft Staff Report.

SUMMARY OF KEY CONCERNS

- A. As an informational document under the California Environmental Quality Act (CEQA), the Draft Staff Report fails to adequately describe the potential impacts from implementation of the Bay-Delta Plan on water quality and beneficial uses of water in the Delta, particularly the extent to which changes might occur as a result of climate change.
- B. The Draft Staff Report does not include sufficient analysis regarding the effects on Delta water quality conditions in relation to the year-round salinity criteria contained in the 1981 Contract. The 1981 Contract water quality criteria should be considered along with obligations under the Delta Protection Act (Wat. Code, §§ 12201-12204) and area of origin laws (Wat. Code, §§ 11460-11465) as baseline conditions before the State Water Board implements the proposed Bay-Delta Plan Update.
- C. The inflow-based outflow objective does not sufficiently account for beneficial uses within the Delta. The Draft Staff Report consolidates water supply impacts in the Delta, making it challenging to discern the specific local impacts on in-Delta water users. The SacWAM modeling utilized for the Draft Staff Report shows little to no reduction to water use within the Delta. However, narrative description indicates in-Delta water users' diversions may be reduced. The lack of an implementation plan

does not allow NDWA to adequately review and evaluate impacts. An assumption that NDWA water users' diversions will be subject to reduction based on insufficient Delta inflows or outflows runs counter to the express guarantees of the 1981 Contract (1981 Contract Art. 8) and prior determinations of the State Water Board.

NDWA COMMENTS

A. The Draft Staff Report Does Not Adequately Detail the Potential Impacts From Implementation of the Proposed Bay-Delta Plan Update on Delta Water Quality and Supply

The Draft Staff Report is intended to serve as the State Water Board's Substitute Environmental Document for the Bay-Delta Plan Update for the Sacramento River watershed and the Delta, a certified regulatory program under CEQA. (Draft Staff Report, pp. 7.1-2 to 7.1-3; Cal. Code Regs., tit. 23, § 3777(a)-(b).) A Substitute Environmental Document is the "functional equivalent" of an environmental impact report (EIR), and it is subject to the same substantive standards applicable to EIRs. (*Envtl. Prot. Info. Ctr. v. Johnson* (1985) 170 Cal.App.3d 604, 618 [finding certified regulatory programs are not exempt under CEQA]; CEQA Guidelines § 15250.) Under CEQA, an EIR serves as an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 822). An EIR must "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*No Oil, Inc., v. City of Los Angeles* (1974) 13 Cal.3d 68, 86; State CEQA Guidelines, § 15003(d).) When a project will result in potentially significant environmental impacts, an EIR must 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); State CEQA Guidelines, 14 C.C.R. § 15126.4(a)(1).) To serve that purpose here, the Draft Staff Report must provide the necessary detail in its project description to allow the public and decision-makers to make informed decisions about the potential impacts. (See *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672 [EIR was fundamentally flawed due to a curtailed and shifting project description].)

To satisfy CEQA, the Draft Staff Report must include a complete analysis of the reasonably foreseeable impacts to water supply and quality, water diversion infrastructure, and water channels and embankments in the Delta to inform the public. (Cal. Code, Regs., tit. 23, § 3777(b)(1); see also *Save Our Capitol! v. Dept. of General Services* (2023) 87 Cal.App.5th 655, 673 [an "accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR."].) In other words, the Draft Staff Report must provide an adequate, stable project description that informs the public of the proposed program's potential environmental impacts. As presented, the Draft Staff Report fails to meet those requirements, as

it does not sufficiently describe the proposed alternatives with enough detail for NDWA or the public to understand how those alternatives will affect Delta water quality, surface water elevations and velocities, in-Delta diversions, and individual water rights.

Climate change analysis has become an integral aspect of future planning in California, exemplified by Governor Newsom's Executive Order N-10-19 signed in 2019, which aims to develop a "water resilience portfolio" to create a more climate-resilient future for the state. Scientific literature on anticipated climate conditions in California indicates potential increases in sea levels, salinity intrusion, and shifts in the seasonal timing of runoff, potentially impacting water supply and quality in the Delta. The long-term effects of reduced snowpack levels may lead to the utilization of stored water from upstream reservoirs, including Oroville, to meet projected demands under changing climate conditions is expected to rise, further exacerbated by the implementation of unimpaired flows. These climate change-induced impacts can be significant and are not analyzed in the Draft Staff Report.

In conjunction with not modeling or analyzing climate change, the Draft Staff Report fails to address potential impacts of the proposed Bay-Delta Plan changes on Delta water supply and water quality in the event of multi-year droughts. The Draft Staff Report presents results aggregated by water year types, which masks the potential impacts that multi-year droughts can have on water supply management. Multi-year drought analysis is a vital component of water planning in California, as highlighted by former Governor Brown's Executive Order B-17-2014. The declaration of a state of emergency due to severe drought conditions underscores the importance of long-term, comprehensive water management.

The Draft Staff Report does not assess the performance of the proposed Bay-Delta Plan measures during extended drought conditions. Assessing the impact of multi-year droughts is especially important for NDWA, as that information is needed to identify vulnerabilities and risks to the beneficial in-Delta water uses that NDWA is statutorily obligated to protect. This includes issues such as reduced available stored water for beneficial uses and increased salinity intrusion in the Delta, which are both correlated with long-term drought. Considering that the implementation of unimpaired flow requirements would require bypassing reservoir inflows that are otherwise stored, the upstream storage in reservoirs of the CVP and SWP could be reduced. This situation would impact DWR's ability to maintain the 1981 Contract's year-round salinity criteria (1981 Contract Art. 2) and to furnish such water not otherwise available under individual water rights (1981 Contract Art. 8), especially during prolonged drought years. It can be anticipated that these droughts could become more erratic and severe under future climate change, a factor that is not assessed in the Draft Staff Report.

The Draft Staff Report and its modeling currently suggest implementation of the Bay-Delta Plan under the proposed alternatives will not result in water quality impacts in the Delta. If that projection changes, NDWA expects that the Draft Staff Report will be revised so that all

potential impacts to in-Delta resources are identified and evaluated, including implementation projects and the cumulative impacts of all proposed projects on in-Delta hydrology under each alternative. Any direct or indirect changes that will affect existing Delta water quality, water surface elevations, local diversions, or flow velocities that can erode levees should be fully considered and analyzed so that affected agencies and water users, including NDWA, reclamation districts in the vicinity, and the public are properly informed.

B. Implementation of the Bay-Delta Plan Update Must be Consistent with the Analysis in the Draft Staff Report and the Requirements Under the 1981 Contract, Area of Origin Protection, and the Delta Protection Act.

In 1995, the State Water Board adopted an update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta (“1995 Plan”). In conjunction therewith and as required by the 1995 Plan’s water quality standards, the State Water Board initiated a water right proceeding to allocate relative flow contribution responsibilities among water right holders, culminating in D-1641². Holders of post-1914 appropriative water rights within the North Delta were put on notice that their water rights were subject to potential curtailment to help meet the new water quality objectives of the 1995 Bay-Delta Plan.

During the D-1641 proceeding, DWR and the Agency entered into the 1998 MOU, which provides in relevant part:

DWR agrees that any obligation to curtail or modify diversions in order to assist in achieving any flow or salinity objective of the 1995 Plan imposed upon the use of water within the Agency is entirely within the scope of the existing obligation of DWR under the 1981 Contract to provide water from the State Water Project supply, subject to the limitations of reasonable and beneficial use. During the term of this Memorandum of Understanding, no party shall assert, before the State Board or any court, that any other party must reduce or eliminate any of its direct diversions, diversions to storage or re- diversion of stored water, or release any previously stored water so long as the other party’s method of use and method of diversion are reasonable under Article X, Section 2 or the California Constitution. (1998 MOU, para. 1)

The parties further agreed “that the payments made by Agency to DWR pursuant to the 1981 Contract constitute full and adequate consideration for the obligation of DWR described in paragraph 1 of this Memorandum of Understanding.” As a result, any responsibility assigned to water users within the Agency to implement flow and salinity objectives contemplated in the 1995 Bay-Delta Plan was “backstopped” by DWR.

The State Water Board acknowledged then that DWR’s responsibility for any obligation of the Agency or its constituents to meet flow objectives arose from the terms and conditions of the 1981 Contract. (D-1641, at pp. 64-65.) In approving the 1998 MOU, the State Water Board formally found that DWR would “provide the backstop for any water assigned to the parties within the NDWA as specified in the 1998 MOU. This decision assigns responsibility for any

² Originally issued December 29, 1999, revised on March 15, 2000.

obligations of the NDWA to the DWR consistent with the MOU.” (D-1641 at p. 66). The State Water Board’s findings and determinations were upheld by the trial and appellate courts that subsequently reviewed D-1641.

It is critically important that the current Bay-Delta Plan recognizes and incorporates the assurances of the 1981 Contract. The criteria set forth in the 1981 Contract should also be incorporated into the environmental baseline from which the Draft Staff Report analyzes the potential impacts of the proposed changes and updates to the Bay-Delta Plan. Modeling and analysis for the contemplated alternatives should address the potential effects in the North Delta and identify how the proposed implementation pathways and impact mitigation measures will assure adequate water supply reliability, availability, and quality for all North Delta water users. If the modeling indicates that there may be impacts to surface water quality, supply, or Delta hydrology and hydraulics, the program of implementation under the Draft Staff Report must include conditions that enable DWR to continue to meet its contractual obligations under the 1981 Contract.

A 2006 opinion by Justice Robie of the Third Appellate District in *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674 held that the export of water from the Delta by the CVP and SWP is subject to the area of origin assurances of the Watershed Protection Statute (*Id.* at 754-755.) Water Code Section 11460 provides:

In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

(*Id.*) Justice Robie held that the State Water Board may not reduce an area of origin users’ water right for the purpose of supplying water for use outside of that area of origin, absent a legal basis that trumps the Act. (*Id.* at p. 758.) Recital (g) of the 1981 Contract also confirms the joint position of DWR and NDWA that Part 4.5 of Division 6 of the California Water Code affords a first priority to the provision of salinity control and maintenance of an adequate water supply in the Delta, and relegates to lesser priority all exports of water to other areas for any purpose. The Delta Protection Act expressly incorporates protection for areas of origin contained in the County of Origin Law and the Central Valley Project Act, and extends similar protections to the Sacramento-San Joaquin Delta. (Wat. Code, §§ 12201-12204).

Accordingly, any Delta solution the State Water Board adopts that reallocates flow obligations relative to the state and federal water projects must include guarantees that the lands within NDWA will continue to receive the benefits of the 1981 Contract and other applicable law, including, without limitation, the Delta Protection Act and the area of origin laws. The final Staff Report should therefore: (a) include a comprehensive description of the 1981 Contract, including but not limited to its year-round water quality criteria; and (b) incorporate the requirements of 1981 Contract as part of the existing baseline, prior to the adoption of new Delta outflow criteria that would either overlook or adversely affect the water right priorities of in-Delta water users.

C. The Draft Staff Report’s Inflow-Based Outflow Objective Must Account for Beneficial In-Delta Water Use

The concept of an inflow-based outflow objective is theoretical and lacks clarity in terms of implementation, as it does not accurately account for in-Delta water uses. This ambiguity not only reflects the challenges and complexities that will come with implementing the proposed changes, but also impacts the ability of in-Delta water users to understand and assess how the inflow-based outflow objective will be put into practice and to what extent their water rights will be impinged.

The Draft Staff Report anticipates that in-Delta water users’ “diversions may be reduced depending on the specific circumstances of those diversions, including their water right priorities, the degree to which the diversions contribute to net depletions, and the hydrological conditions,” in order to meet the proposed inflow-based Delta outflow objective. (Draft Staff Report, at p. 6-8; see also at p. 5-31 [“Water users downstream of the tributaries, except for de minimis water users, also would bear responsibility for achieving the inflow-based outflow objectives through limits on their diversions, including Project diversions and other in-Delta diversions.”].) Despite this narrative assumption that in-Delta water users will contribute flows in addition to the contributions by diverters on the tributary river systems under the various considered alternatives, the SacWAM modeling results show little to no reductions. The modeling does not reflect the narrative description or recognize DWR’s obligation to be a “backstop” for NDWA water users in accordance with 1981 Contract Art. 2.

The Draft Staff Report identifies an outflow objective based on required Delta inflow, adjusted for “natural losses and gains/floodplain inundation.” (*Id.*, at p. 5-29.) The description of the proposed inflow-based outflow objective reflects an outflow objective that only makes “*adjustments for downstream natural depletions and accretions.*” (*Id.* at pp. 5-28 to 5-29, emphasis in original; see also *id.* at p. 5-31 [providing for deduction of depletions from required Delta outflows only for net depletions “when excluding the effects of diversions”].) By only accounting for natural depletions within the Delta, the inflow-based outflow objective effectively denies in-Delta users any assurance of water availability if only minimum inflows—and therefore outflows—are present in a given year.

The inflow-based outflow objective is at odds with the described framework that should account for in-Delta beneficial water uses. Appendix A.1. describes that water use in the Delta is “estimated by including Delta net channel depletions for the heart of the Delta.” (Draft Staff Report, Appx. A.1., at p. A1-5.) The net channel depletions used in SacWAM are, in turn, based on the Delta Channel Depletions model results produced by DWR. (*Id.*) Under that model, “Delta net channel depletions are the sum of consumptive uses from *agricultural diversions*, natural riparian evapotranspiration, and seepage to groundwater. Delta channel depletions are difficult to measure for various reasons, including inadequate measuring of agricultural diversions, return flows, and seepage, but are estimated to be as high as 1.3 million acre-feet (MAF) annually.” (*Id.* at p. 6-8, emphasis added.) However, the Draft Staff Report states “many uncertainties” regarding in-Delta water use still exist, and therefore it does not quantify or analyze the changes, nor does it evaluate the impacts to those unquantified uses, under *any* of the proposed alternative scenarios.

The Draft Staff Report also overlooks the effect of water supply cost increases in the Delta due to reductions in available inflows by broadly looking to the overall water supply costs across the state:

To the degree that reductions in these depletions occur due to the proposed Plan amendments, they would result in lower water supply costs in other regions and higher costs in the Delta, *but they would not result in additional overall water supply costs*. These effects are evaluated qualitatively in the Staff Report due to the above-referenced data limitations. As part of the proposed Plan amendments, the State Water Board would develop and refine depletion estimates for the purpose of implementing the proposed Plan amendments.

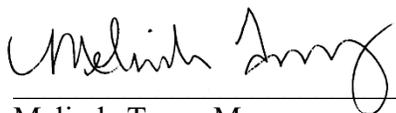
(*Id.*, at p. 6-8, emphasis added.) The Draft Staff Report improperly defers analysis of the scope of anticipated curtailments, reduced water availability, and higher water supply costs for in-Delta water users. Further, the conclusion that overall water supply costs would not increase because higher costs in the Delta would be offset by lower water supply costs in unidentified “other regions” lacks any factual support. The State Water Board should assume as a “baseline” condition that California will continue to provide flows that meet water quality and supply criteria required in the North Delta for reasonable and beneficial uses while the 1981 Contract remains in full force and effect.

CONCLUSION AND CLOSING REMARKS

The Agency appreciates the opportunity to provide comments on the Draft Staff Report and hopes the State Water Board will endeavor to ensure that any alternative and implementation pathway it selects will avoid and mitigate potential impacts water quality and water supply in the North Delta. To comply with CEQA, NDWA urges the State Water Board to revise the Draft Staff Report and conduct more comprehensive and robust analysis and modeling of in-Delta uses and the relevant impacts under all proposed alternatives prior to certifying the Substitute Environmental Document. The Draft Staff Report must be revised to include the details necessary for the public to comprehend the locations, severity, duration, and seasonal differences of all potential impacts to Delta water quality and elevation, and the State’s compliance with the NDWA 1981 Contract.

With coordination and sufficiently protective measures in place, the Agency is hopeful that it can support the State Water Board’s approval and implementation of the new Bay-Delta Plan Update for the Delta and Sacramento River watershed.

Sincerely,



Melinda Terry, Manager
North Delta Water Agency

Encls. (2): 1981 Contract; 1998 MOU

CONTRACT
BETWEEN
STATE OF CALIFORNIA
DEPARTMENT OF WATER RESOURCES
AND
NORTH DELTA WATER AGENCY

FOR THE ASSURANCE
OF A DEPENDABLE WATER SUPPLY OF SUITABLE QUALITY

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**CONTRACT BETWEEN THE STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES
AND THE NORTH DELTA WATER AGENCY
FOR THE ASSURANCE OF A DEPENDABLE WATER SUPPLY OF SUITABLE QUALITY**

THIS CONTRACT, made this 28 day of Jan., 1981, between the STATE OF CALIFORNIA, acting by and through its DEPARTMENT OF WATER RESOURCES (State), and the NORTH DELTA WATER AGENCY (Agency), a political subdivision of the State of California, duly organized and existing pursuant to the laws thereof, with its principal place of business in Sacramento, California.

RECITALS

(a) The purpose of this contract is to assure that the State will maintain within the Agency a dependable water supply of adequate quantity and quality for agricultural uses and, consistent with the water quality standards of Attachment A, for municipal and industrial uses, that the State will recognize the right to the use of water for agricultural, municipal, and industrial uses within the Agency, and that the Agency will pay compensation for any reimbursable benefits allocated to water users within the Agency resulting from the Federal Central Valley Project and the State Water Project, and offset by any detriments caused thereby.

(b) The United States, acting through its Department of the Interior, has under construction and is operating the Federal Central Valley Project (FCVP).

(c) The State has under construction and is operating the State Water Project (SWP).

(d) The construction and operation of the FCVP and SWP at times have changed and will further change the regimen of rivers tributary to the Sacramento-San Joaquin Delta (Delta) and the regimen of the Delta channels from unregulated flow to regulated flow. This regulation at times improves the quality of water in the Delta and at times diminishes the quality from that which would exist in the absence of the FCVP and SWP. The regulation at times also alters the elevation of water in some Delta channels.

(e) Water problems within the Delta are unique within the State of California. As a result of the geographical location of the lands of the Delta and tidal influences, there is no physical shortage of water. Intrusion of saline ocean water and municipal, industrial and agricultural discharges and return flows, tend, however, to deteriorate the quality.

(f) The general welfare, as well as the rights and requirements of the water users in the Delta, require that there be maintained in the Delta an adequate supply of good quality water for agricultural, municipal and industrial uses.

(g) The law of the State of California requires protection of the areas within which water originates and the watersheds in which water is developed. The Delta is such an area and within such a watershed. Part 4.5 of Division 6 of the California Water Code affords a first priority to provision of salinity control and maintenance of an adequate water supply in the Delta for reasonable and beneficial uses of water and relegates to lesser priority all exports of water from the Delta to other areas for any purpose.

(h) The Agency asserts that water users within the Agency have the right to divert, are diverting, and will continue to divert, for reasonable beneficial use, water from the Delta that would have been available therein if the FCVP and SWP were not in existence, together with the right to enjoy or acquire such benefits to which the water users may be entitled as a result of the FCVP and SWP.

(i) Section 4.4 of the North Delta Water Agency Act, Chapter 283, Statutes of 1973, as amended, provides that the Agency has no authority or power to affect, bind, prejudice, impair, restrict, or limit vested water rights within the Agency.

(j) The State asserts that it has the right to divert, is diverting, and will continue to divert water from the Delta in connection with the operation of the SWP.

(k) Operation of SWP to provide the water quality and quantity described in this contract constitutes a reasonable and beneficial use of water.

(l) The Delta has an existing gradient or relationship in quality between the westerly portion most seriously affected by ocean salinity intrusion and the interior portions of the Delta where the effect of ocean salinity intrusion is diminished. The water quality criteria set forth in this contract establishes minimum water qualities at various monitoring locations. Although the water quality criteria at upstream locations is shown as equal in some periods of some years to the water quality at the downstream locations, a better quality will in fact exist at the upstream locations at almost all times. Similarly, a better water quality than that shown for any given monitoring location will also exist at interior points upstream from that location at almost all times.

(m) It is not the intention of the State to acquire by purchase or by proceeding in eminent domain or by any other manner the water rights of water users within the Agency, including rights acquired under this contract.

(n) The parties desire that the United States become an additional party to this contract.

AGREEMENTS

1. **Definitions.** When used herein, the term:

(a) "Agency" shall mean the North Delta Water Agency and shall include all of the lands within the boundaries at the time the contract is executed as described in Section 9.1 of the North Delta Water Agency Act, Chapter 283, Statutes of 1973, as amended.

(b) "Calendar year" shall mean the period January 1 through December 31.

(c) "Delta" shall mean the Sacramento-San Joaquin Delta as defined in Section 12220 of the California Water Code as of the date of the execution of the contract.

(d) "Electrical Conductivity" (EC) shall mean the electrical conductivity of a water sample measured in millimhos per centimeter per square centimeter corrected to a standard temperature of 25° Celsius determined in accordance with procedures set forth in the publication entitled "Standard Methods of Examination of Water and Waste Water", published jointly by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation, 13th Edition, 1971, including such revisions thereof as may be made subsequent to the date of this contract which are approved in writing by the State and the Agency.

(e) "Federal Central Valley Project" (FCVP) shall mean the Central Valley Project of the United States.

(f) "Four-River Basin Index" shall mean the most current forecast of Sacramento Valley unimpaired runoff as presently published in the California Department of Water Resources Bulletin 120 for the sum of the flows of the following: Sacramento River above Bend Bridge near Red Bluff; Feather River, total inflow to Oroville Reservoir; Yuba River at Smartville; American River, total inflow to Folsom Reservoir. The May 1 forecast shall continue in effect until the February 1 forecast of the next succeeding year.

(g) "State Water Project" (SWP) shall mean the State Water Resources Development System as defined in Section 12931 of the Water Code of the State of California.

(h) "SWRCB" shall mean the State Water Resources Control Board.

(i) "Water year" shall mean the period October 1 of any year

through September 30 of the following year.

2. Water Quality.

(a) (i) The State will operate the SWP to provide water qualities at least equal to the better of: (1) the standards adopted by the SWRCB as they may be established from time to time; or (2) the criteria established in this contract as identified on the graphs included as Attachment A.

(ii) The 14-day running average of the mean daily EC at the identified location shall not exceed the values determined from the Attachment A graphs using the Four-River Basin Index except for the period February through March of each year at the location in the Sacramento River at Emmaton for which the lower value of the 80 percent probability range shall be used.

(iii) The quality criteria described herein shall be met at all times except for a transition period beginning one week before and extending one week after the date of change in periods as shown on the graphs of Attachment A. During this transition period, the SWP will be operated to provide as uniform a transition as possible over the two-week period from one set of criteria to the next so as to arrive at the new criteria one week after the date of change in period as shown on the graphs of Attachment A.

(b) While not committed affirmatively to achieving a better water quality at interior points upstream from Emmaton than those set forth on Attachment A, the State agrees not to alter the Delta hydraulics in such manner as to cause a measurable adverse change in the ocean salinity gradient or relationship among the various monitoring locations shown on Attachment B and interior points upstream from those locations, with any particular flow past Emmaton.

(c) Whenever the recorded 14-day running average of mean daily EC of water in the Sacramento River at Sacramento exceeds 0.25 mmhos, the quality criteria indicated on the graphs of Attachment A may be adjusted by adding to the value taken therefrom the product of 1.5 times the amount that the recorded EC of the Sacramento River at Sacramento exceeds 0.25 mmhos.

3. **Monitoring.** The quality of water shall be measured by the State as needed to monitor performance pursuant to Article 2 hereof with equipment installed, operated, and maintained by the State, at locations indicated on "Attachment B". Records of such measurements shall at regular intervals be furnished to the Agency. All monitoring costs at North Fork Mokelumne River near Walnut Grove, Sacramento River at Walnut Grove, and Steamboat Slough at Sutter Slough incurred by the State solely for this contract shall be shared equally by the Agency and the State. All monitoring costs to be borne by the Agency for monitoring at the above locations are included in the payment under Article 10.

4. Emergency Provisions.

(a) If a structural emergency occurs such as a levee failure or a failure of an SWP facility, which results in the State's failure to meet the water quality criteria, the State shall not be in breach of this contract if it makes all reasonable efforts to operate SWP facilities so that the water quality criteria will be met again as soon as possible. For any period in which SWP failure results in failure of the State to meet the water quality criteria, the State shall waive payment under Article 10, prorated for that period, and the amount shall be deducted from the next payment due.

(b) (i) A drought emergency shall exist when all of the following occur:

(1) The Four-River Basin Index is less than an average of 9,000,000 acre feet in two consecutive years (which occurred in 1933-4 and 1976-7); and

(2) An SWRCB emergency regulation is in effect providing for the operation of the SWP to maintain water quality different from that provided in this contract; and

(3) The water supplied to meet annual entitlements of

SWP agricultural contractors in the San Joaquin Valley is being reduced by at least 50 percent of these agricultural entitlements (it being the objective of the SWP to avoid agricultural deficiencies in excess of 25 percent) or the total of water supplied to meet annual entitlements of all SWP contractors is being reduced by at least 15 percent of all entitlements, whichever results in the greater reduction in acre feet delivered.

(ii) A drought emergency shall terminate if any of the conditions in (b) (i) of this Article ceases to exist or if the flow past Sacramento after October 1 exceeds 20,000 cubic feet per second each day for a period of 30 days.

(iii) Notwithstanding the provisions of Article 2 (a), when a drought emergency exists, the emergency water quality criteria of the SWRCB shall supersede the water quality requirements of this contract to the extent of any inconsistency; provided, however, that the State shall use all reasonable efforts to preserve Delta water quality, taking into consideration both the limited water supply available for that purpose and recognizing the priority established for Delta protection referred to in Recital (g).

(iv) When a drought emergency exists, and an overland supply is not available to an individual water user comparable in quality and quantity to the water which would have been available to the user under Attachment A, the State shall compensate the user for loss of net income for each acre either (A) planted to a more salt-tolerant crop in the current year, (B) not planted to any crop in the current year provided such determination not to plant was reasonable based on the drought emergency, or (C) which had a reduced yield due to the drought emergency, calculated on the basis of the user's average net income for any three of the prior five years for each such acre. A special contract claims procedure shall be established by the State to expedite and facilitate the payment of such compensation.

5. Overland Water Supply Facilities.

(a) Within the general objectives of protecting the western Delta areas against the destruction of agricultural productivity as a result of the increased salinity of waters in the Delta channels resulting in part from SWP operation, the State may provide diversion and overland facilities to supply and distribute water to Sherman Island as described in the report entitled "Overland Agricultural Water Facilities Sherman Island" dated January 1980. Final design and operating specifications shall be subject to approval of the Agency and Reclamation District No. 341. The Agency or its transferee will assume full ownership, operation, and maintenance responsibility for such facilities after successful operation as specified. After the facilities are constructed and operating, the water quality criteria for the Sacramento River at Emmaton shall apply at the intake of the facilities in Three Mile Slough.

(b) The State and the Agency may agree to the construction and operation of additional overland water supply facilities within the Agency, so long as each landowner served by the overland facilities receives a quality of water not less than that specified in Attachment A for the upstream location nearest to his original point of diversion. The design and operation of such facilities and the cost sharing thereof are subject to approval of any reclamation district which includes within its boundaries the area to be served. The ownership, operation, and maintenance of diversion works and overland facilities shall be the subject of a separate agreement between the Agency or its transferees and the State.

6. **Flow Impact.** The State shall not convey SWP water so as to cause a decrease or increase in the natural flow, or reversal of the natural flow direction, or to cause the water surface elevation in Delta channels to be altered, to the detriment of Delta channels or water users within the Agency. If lands, levees, embankments, or revetments adjacent to Delta channels within the Agency incur seepage or erosion damage or if diversion facilities must be modi-

fied as a result of altered water surface elevations as a result of the conveyance of water from the SWP to lands outside the Agency after the date of this contract, the State shall repair or alleviate the damage, shall improve the channels as necessary, and shall be responsible for all diversion facility modifications required.

7. Place of Use of Water.

(a) Any subcontract entered into pursuant to Article 18 shall provide that water diverted under this contract for use within the Agency shall not be used or otherwise disposed of outside the boundaries of the Agency by the subcontractor.

(b) Any subcontract shall provide that all return flow water from water diverted within the Agency under this contract shall be returned to the Delta channels. Subject to the provisions of this contract concerning the quality and quantity of water to be made available to water users within the Agency, and to any reuse or recapture by water users within the Agency, the subcontractor relinquishes any right to such return flow, and as to any portion thereof which may be attributable to the SWP, the subcontractor recognizes that the State has not abandoned such water.

(c) If water is attempted to be used or otherwise disposed of outside the boundaries of the Agency so that the State's rights to return flow are interfered with, the State may seek appropriate administrative or judicial action against such use or disposal.

(d) This article shall not relieve any water user of the responsibility to meet discharge regulations legally imposed.

8. Scope of Contract.

(a) During the term of this contract:

(i) This contract shall constitute the full and sole agreement between the State and the Agency as to (1) the quality of water which shall be in the Delta channels, and (2) the payment for the assurance given that water of such quality shall be in the Delta channels for reasonable and beneficial uses on lands within the Agency, and said diversions and uses shall not be disturbed or challenged by the State so long as this contract is in full force and effect.

(ii) The State recognizes the right of the water users of the Agency to divert from the Delta channels for reasonable and beneficial uses for agricultural, municipal and industrial purposes on lands within the Agency, and said diversions and uses shall not be disturbed or challenged by the State so long as this contract is in full force and effect, and the State shall furnish such water as may be required within the Agency to the extent not otherwise available under the water rights of water users.

(iii) The Agency shall not claim any right against the State in conflict with the provisions hereof so long as this contract remains in full force and effect.

(b) Nothing herein contained is intended to or does limit rights of the Agency against others than the State, or the State against any person other than the Agency and water users within the Agency.

(c) This contract shall not affect, bind, prejudice, impair, restrict, or limit vested water rights within the Agency.

(d) The Agency agrees to defend affirmatively as reasonable and beneficial the water qualities established in this contract. The State agrees to defend affirmatively as reasonable and beneficial the use of water required to provide and sustain the qualities established in this contract. The State agrees that such use should be examined only after determination by a court of competent jurisdiction that all uses of water exported from the Delta by the State and by the United States, for agricultural, municipal, and industrial purposes are reasonable and beneficial, and that irrigation practices, conservation efforts, and groundwater management within areas served by such exported water should be examined in particular.

(e) The Agency consents to the State's export of water from

the Delta so long as this contract remains in full force and effect and the State is in compliance herewith.

9. Term of Contract.

(a) This contract shall continue in full force and effect until such time as it may be terminated by the written consent and agreement of the parties hereto, provided that 40 years after execution of this contract and every 40 years thereafter, there shall be a six-month period of adjustment during which any party to this contract can negotiate with the other parties to revise the contract as to the provisions set out in Article 10. If, during this period, agreement as to a requested revision cannot be achieved, the parties shall petition a court of competent jurisdiction to resolve the issue as to the appropriate payment to be made under Article 10. In revising Article 10, the court shall review water quality and supply conditions within the Agency under operation of the FCVP and SWP, and identify any reimbursable benefits allocated to water users within the Agency resulting from operation of the FCVP and SWP, offset by any detriments caused thereby. Until such time as any revision is final, including appeal from any ruling of the court, the contract shall remain in effect as without such revision.

(b) In the event this contract terminates, the parties' water rights to quality and quantity shall exist as if this contract had not been entered into.

10. Amount and Method of Payment for Water.

(a) The Agency shall pay each year as consideration for the assurance that an adequate water supply and the specific water quality set forth in this contract will be maintained and monitored, the sum of one hundred seventy thousand dollars (\$170,000.00). The annual payments shall be made to the State one-half on or before January 1 and one-half on or before July 1 of each year commencing with January 1, 1982.

(b) The payment established in (a) above shall be subject to adjustment as of January 1, 1987, and every fifth year thereafter. The adjusted payment shall bear the same relation to the payment specified in (a) above that the mean of the State's latest projected Delta Water Rate for the five years beginning with the year of adjustment bears to \$10.00 per acre foot; provided that, no adjusted payment shall exceed the previous payment by more than 25 percent.

(c) The payments provided for in this article shall be deposited by the State in trust in the California Water Resources Development System Revenue Account in the California Water Resources Development Bond Fund. The trust shall continue for five years (or such longer period as the State may determine) but shall be terminated when the United States executes a contract as provided in Article 11 with the State and the Agency at which time the proportion of the trust fund that reflects the degree to which the operation of the FCVP has contributed to meeting the water quality standard under this contract as determined solely by the State shall be paid to the United States (with a pro rata share of interest). In the event that the United States has not entered into such a contract before the termination of the trust, the trust fund shall become the sole property of the State.

11. Participation of the United States. The Agency will exercise its best efforts to secure United States joinder and concurrence with the terms of this contract and the State will diligently attempt to obtain the joinder and concurrence of the United States with the terms of this contract and its participation as a party hereto. Such concurrence and participation by the United States in this contract shall include a recognition ratified by the Congress that the excess land provisions of Federal reclamation law shall not apply to this contract.

12. Remedies.

(a) The Agency shall be entitled to obtain specific perfor-

mance of the provisions of this contract by a decree of the Superior Court in Sacramento County requiring the State to meet the standards set forth in this contract. If the water quality in Delta channels falls below that provided in this contract, then, at the request of the Agency, the State shall cease all diversions to storage in SWP reservoirs or release stored water from SWP reservoirs or cease all export by the SWP from Delta channels, or any combination of these, to the extent that such action will further State compliance with the water quality standards set forth in this contract, except that the State may continue to export from Delta channels to the extent required to meet water quality requirements in contracts with the Delta agencies specified in Section 11456 of the California Water code.

(b) To the extent permitted by law, the State agrees to forego the use of eminent domain proceedings to acquire water rights of water users within the Agency or any rights acquired under this contract for water or water quality maintenance for the purpose of exporting such water from the Delta. This provision shall not be construed to prohibit the utilization of eminent domain proceedings for the purpose of acquiring land or any other rights necessary for the construction of water facilities.

(c) Except as provided in the water quality assurances in Article 2 and the provisions of Article 6 and Article 8, neither the State nor its officers, agents, or employees shall be liable for or on account of:

(i) The control, carriage, handling, use, disposal, or distribution of any water outside the facilities constructed, operated and maintained by the State.

(ii) Claims of damage of any nature whatsoever, including but not limited to property loss or damage, personal injury or death arising out of or connected with the control, carriage, handling, use, disposal or distribution of any water outside of the facilities constructed, operated and maintained by the State.

(d) The use by the Agency or the State of any remedy specified herein for the enforcement of this contract is not exclusive and shall not deprive either from using any other remedy provided by law.

13. Comparable Treatment. In the event that the State gives on the whole substantially more favorable treatment to any other Delta entity under similar circumstances than that accorded under this contract to the Agency, the State agrees to renegotiate this contract to provide comparable treatment to the Agency under this contract.

GENERAL PROVISIONS

14. Amendments. This contract may be amended or terminated at any time by mutual agreement of the State and the Agency.

15. Reservation With Respect to State Laws. Nothing herein contained shall be construed as estopping or otherwise preventing the Agency, or any person, firm, association, corporation, or public body claiming by, through, or under the Agency, from contesting by litigation or other lawful means, the validity, constitutionality, construction or application of any law of the State of California.

16. Opinions and Determinations. Where the terms of this contract provide for action to be based upon the opinion, judgment, approval, review, or determination of either party hereto, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious, or unreasonable.

17. Successors and Assigns Obligated. This contract and all of its provisions shall apply to and bind the successors and assigns of the parties hereto.

18. Assignment and Subcontract. The Agency may enter into subcontracts with water users within the Agency boundaries in which the assurances and obligations provided in this contract as

to such water user or users are assigned to the area covered by the subcontract. The Agency shall remain primarily liable and shall make all payments required under this contract. No assignment or transfer of this contract, or any part hereof, rights hereunder, or interest herein by the Agency, other than a subcontract containing the same terms and conditions, shall be valid unless and until it is approved by the State and made subject to such reasonable terms and conditions as the State may impose. No assignment or transfer of this contract or any part hereof, rights hereunder, or interest herein by the State shall be valid except as such assignment or transfer is made pursuant to and in conformity with applicable law.

19. Books, Records, Reports, and Inspections Thereof. Subject to applicable State laws and regulations, the Agency shall have full and free access at all reasonable times to the SWP account books and official records of the State insofar as the same pertain to the matters and things provided for in this contract, with the right at any time during office hours to make copies thereof, and the proper representatives of the State shall have similar rights with respect to the account books and records of the Agency.

20. Waiver of Rights. Any waiver at any time by either party hereto of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any other default or matter.

21. Assurance Relating to Validity of Contract. This contract shall be effective after its execution by the Agency and the State. Promptly after the execution and delivery of this contract, the Agency shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings of the Agency's Board of Directors and of the Agency leading up to and including the making of this contract and the validity of the provisions thereof as a binding and enforceable obligation upon the State and the Agency. If, in this proceeding or other proceeding before a court of competent jurisdiction, any portion of this contract should be determined to be constitutionally invalid, then the remaining portions of this contract shall remain in full force and effect unless modified by mutual consent of the parties.

22. Notices. All notices that are required either expressly or by implication to be given by one party to the other shall be deemed to have been given if delivered personally or if enclosed in a properly addressed, postage prepaid, envelope and deposited in a United States Post Office. Unless or until formally notified otherwise, the Agency shall address all notices to the State as follows:

Director, Department of Water Resources
P.O. Box 388
Sacramento, California 95802

and the State shall address all notices to the Agency as follows:

North Delta Water Agency
921 - 11th St., Rm. 703
Sacramento, California 95814

IN WITNESS WHEREOF, the parties hereto have executed this contract on the date first above written.

Approved as to legal form and sufficiency: STATE OF CALIFORNIA

By /s/ P. A. TOWNER
Chief Counsel
Dept. of Water Resources

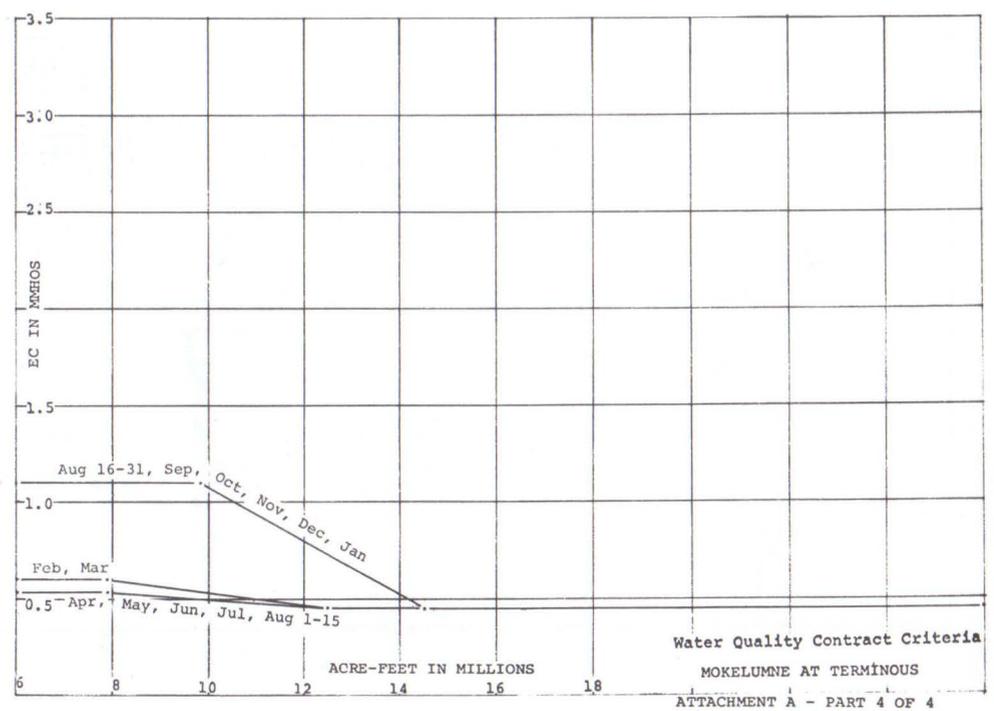
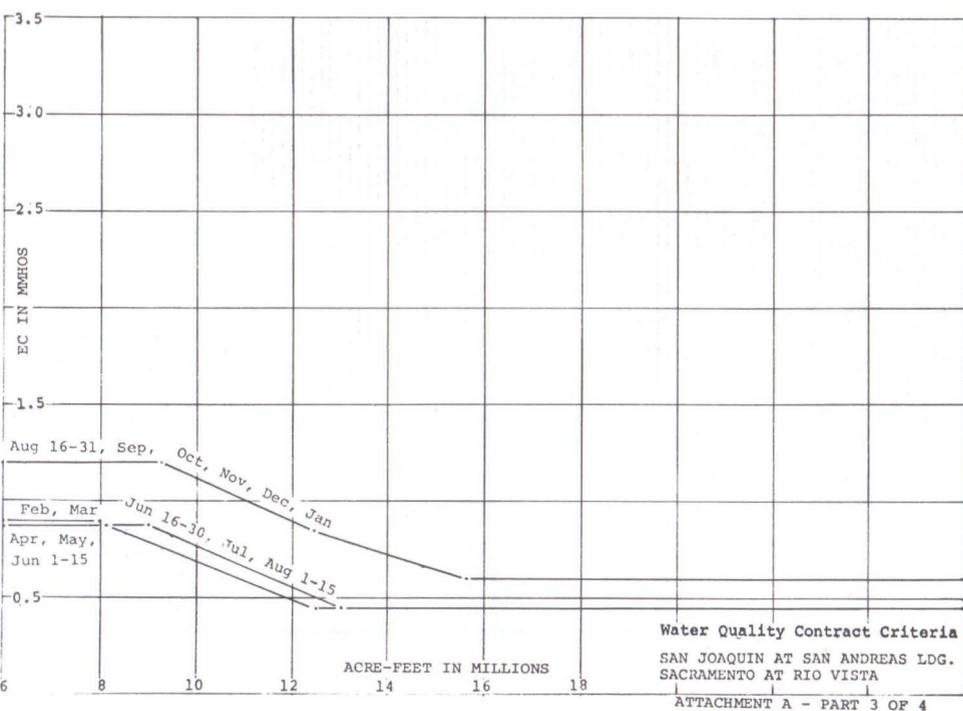
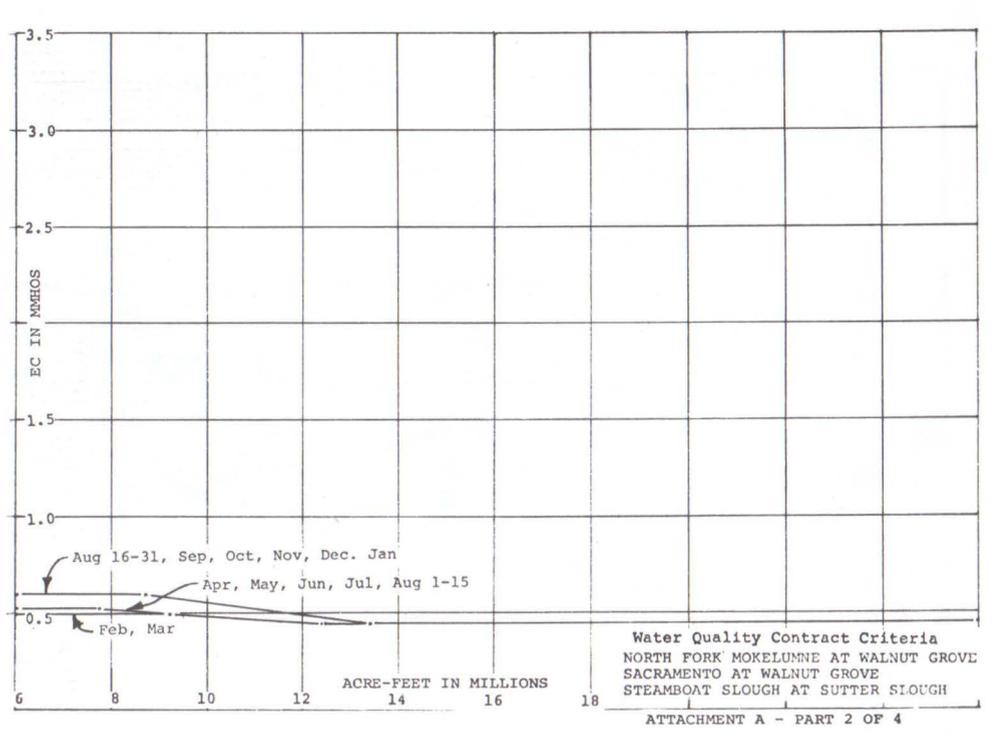
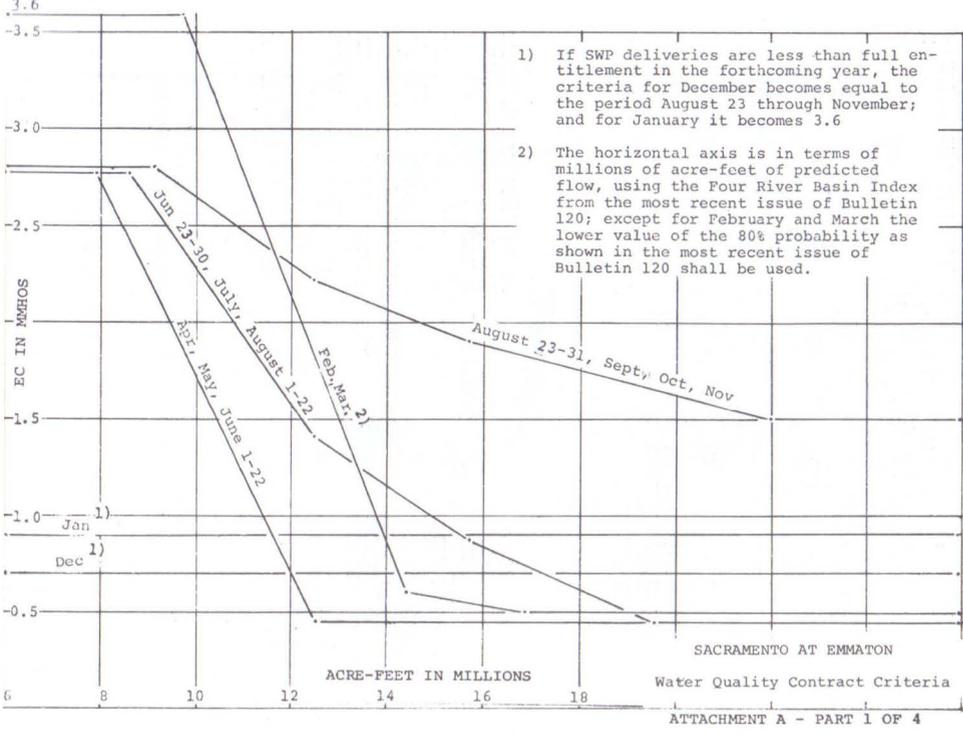
By /s/ RONALD B. ROBIE
Dept. of Water Resources

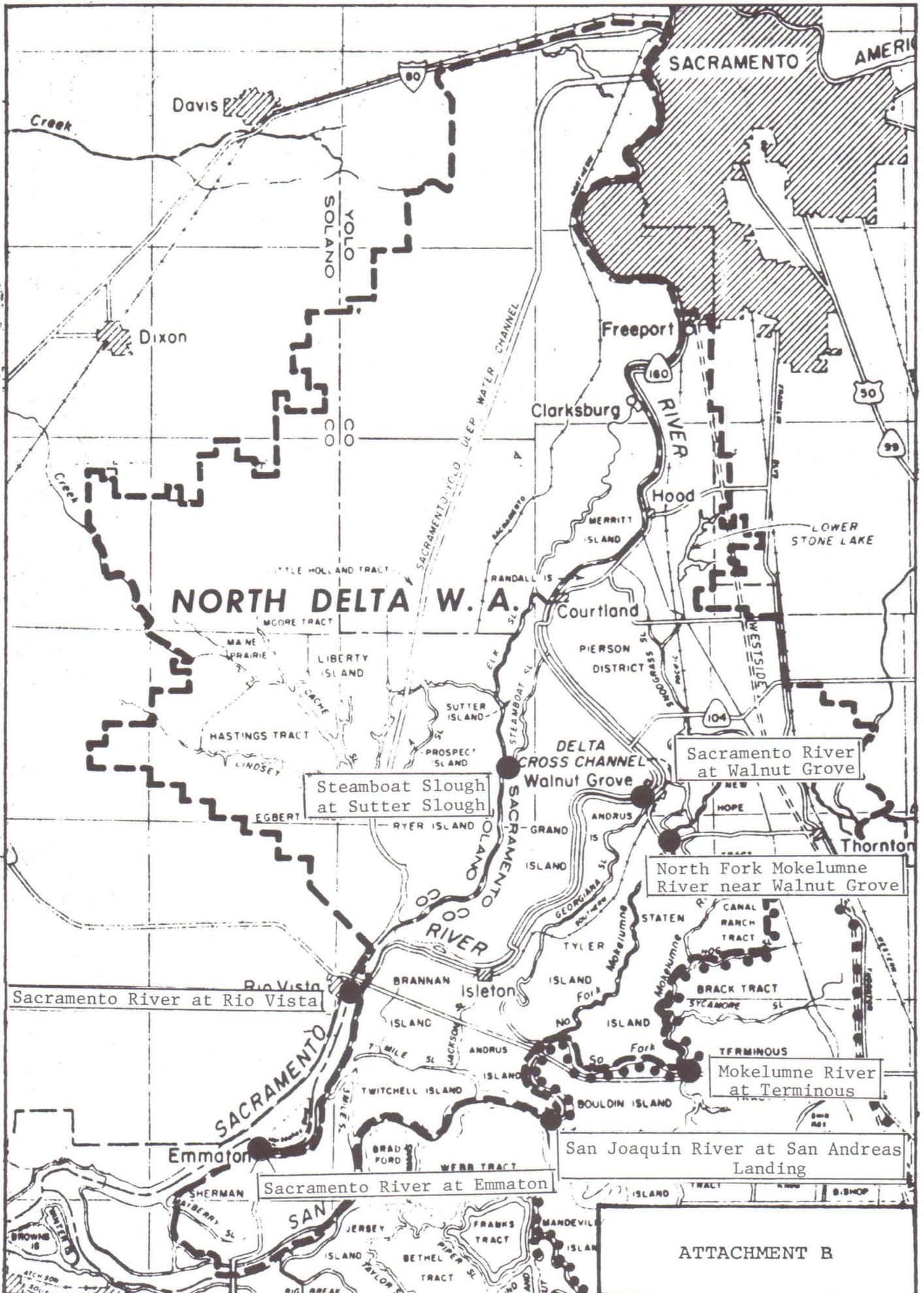
Approved as to legal form and sufficiency:

NORTH DELTA WATER AGENCY

By /s/ GEORGE BASYE
General Counsel
North Delta Water Agency

By /s/ W. R. DARSIE
Chairman
Board of Directors





NORTH DELTA W. A.

Steamboat Slough at Sutter Slough

Sacramento River at Walnut Grove

North Fork Mokelumne River near Walnut Grove

Mokelumne River at Terminous

San Joaquin River at San Andreas Landing

Sacramento River at Emmaton

ATTACHMENT B

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into this 26th day of May, 1998, by and between North Delta Water Agency (hereinafter "Agency") and Department of Water Resources, State of California (hereinafter "DWR").

RECITALS

A. In 1981, DWR entered into a contract (hereinafter "1981 Contract") with Agency under which Agency agreed to make certain payments to DWR in exchange for DWR making water of a specified quality and adequate quantity available for the use of diverters within the boundaries of Agency. The 1981 Contract remains in full force and effect.

B. The State Water Resources Control Board ("State Board") has initiated a water right proceeding in order to allocate the obligation to implement water quality objectives contained in the Bay-Delta Water Quality Control Plan adopted by the State Board on May 22, 1995 (hereinafter "1995 Plan").

C. The purpose of this Memorandum of Understanding is to set forth the joint position of Agency and DWR as to the legal effect of the 1981 Contract with respect to the obligation of water users within Agency, if any, to implement water quality objectives contained in the 1995 Plan.

UNDERSTANDINGS

1. DWR agrees that any obligation to curtail or modify diversions in order to assist in achieving any flow or salinity objective of the 1995 Plan imposed upon the use of water within Agency is entirely in the scope of the existing obligation of DWR under the 1981 Contract to provide water from the State Water Project supply, subject to the

limitations of reasonable and beneficial use. During the term of this Memorandum of Understanding, no party shall assert, before the State Board or in any court, that any other party must reduce or eliminate any of its direct diversions, diversions to storage or re-diversion of stored water, or release any previously stored water so long as the other party's method of use and method of diversion are reasonable under Article X, Section 2 of the California Constitution.

2. The parties agree that the payments made by Agency to DWR pursuant to the 1981 Contract constitute full and adequate consideration for the obligation of DWR described in paragraph 1 of this Memorandum of Understanding.

3. The parties agree that the assurances contained in the 1981 Contract, including the obligation of DWR to provide water to Agency users from State Water Project supplies, and in paragraph 1 of this Memorandum of Understanding, do not apply to any transfer of water outside Agency. The parties agree that the 1981 Contract does not affect any underlying rights the water users within the Agency may have to transfer water to the extent that such a transfer would be permissible under California law in the absence of the 1981 Contract.

4. Nothing in this Memorandum of Understanding constitutes an admission by Agency, express or implied, that the State Board has authority to limit or otherwise modify any right to divert water for use within Agency.

5. Nothing in this Memorandum of Understanding constitutes an amendment of the 1981 Contract as it presently exists.

6. This Memorandum of Understanding shall be effective only for the purposes of the currently pending SWRCB water right hearings to allocate the obligation to implement the 1995 Plan's water quality objectives, and for no other purpose.

THE NORTH DELTA WATER AGENCY

By: Dennis Leary

Date: 4/20/98

Title: Chairman

COUNSEL:

Clay Payne

THE DEPARTMENT OF WATER RESOURCES

By: [Signature]

Title: Director

Date: 5/26/98

APPROVED FOR LEGAL FORM
& SUFFICIENCY:

Susan N. Weber
Chief Counsel