



January 6, 2020

Via U.S. and Electronic Mail (LTO@water.ca.gov)

You Chen (Tim) Chao, PhD, PE, CFM
Executive Division
California Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001

Re: North Delta Water Agency's Comments to California Department of Water Resources' Draft Environmental Impact Report for Long-Term Operations of the California State Water Project

Dear Dr. Chao:

To secure the current contractual and individual water rights of constituent landowners in the North Delta of the Sacramento and San Joaquin Rivers to adequate water supply and quality, the North Delta Water Agency (the "Agency") submits these comments on the Draft Environmental Impact Report for Long-Term Operations of the California State Water Project ("Draft EIR"). The Agency appreciates this opportunity to provide feedback on the proposed changes to the long-term operations of the State Water Project.

I. Background

In 1973, the Agency was formed by a special act of the Legislature to represent northern Delta water users in negotiating a water supply and quality contract with both the United States Bureau of Reclamation and California Department of Water Resources in order to mitigate the water rights impacts of the Central Valley Project and the State Water Project. In 1981, the Agency and the Department of Water Resources ("DWR") executed the Contract for the Assurance of a Dependable Water Supply of Suitable Quality ("1981 Contract"). The 1981 Contract guarantees that DWR will maintain a suitable supply of water to satisfy all agricultural and other reasonable and beneficial uses in all channels within the Agency's boundaries. Specifically, the State is obligated to furnish "such water as may be required within the Agency to the extent not otherwise available under the water rights of water users." The 1981 Contract contains specific minimum water quality criteria to be maintained year-round and obligates DWR to avoid or repair damage from hydrological changes

resulting from the operation of the State Water Project. California law also requires that the operation of the federal Central Valley Project and State Water Project protect area-of-origin water rights.

Under the 1981 Contract, 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.***” In other words, if through modification of the long-term SWP operations proposed in the Draft EIR, the State is unable to maintain the water quality criteria in the 1981 Contract, then the Agency’s consent for water to be exported by the SWP is revoked until the water quality criteria specified in the 1981 Contract is no longer being exceeded.

The 1981 Contract also prohibits the State from conveying State Water Project water if doing so would cause a decrease in natural flow, increase in natural flow, reversal of natural flow direction, or alteration of water surface elevations in Delta channels to the detriment of Delta channels or water users within the Agency. The State must also either repair or alleviate damage, improve the channels as necessary, or provide diversion facility modifications required for any seepage or erosion damage to lands, levees, embankments, or revetments adjacent to Delta channels within the Agency associated with conveyance of State Water Project water supply. In addition to enforcement of the 1981 Contract, the Agency has a clear statutory mandate under its Agency Act to take all actions necessary to assure that the lands within the North Delta have a dependable supply of water of suitable quality sufficient to meet present and future needs. It is with this background that the Agency submits these comments on the Draft EIR.

In 1998, DWR and the Agency executed a memorandum of understanding wherein DWR acknowledged responsibility for any obligation imposed by the State Water Resources Control Board (“SWRCB”) upon the use of water within the NDWA to assist in achieving the objectives of the 1995 Delta Water Quality Control Plan. This DWR obligation to provide flows assigned within NDWA was further supported when the SWRCB adopted Water Decision 1641.

II. The Draft EIR Fails to Adequately Identify, Analyze, or Mitigate for the Impacts of the Project.

An EIR is 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. It is intended “to 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). To serve that purpose, 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. When a project will cause potentially significant environmental impacts, the 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. Res. Code §§ 21002.1(a), 21100(b)(3); State CEQA Guidelines, 14 C.C.R. § 15126.4(a)(1). This Draft EIR does not meet CEQA's requirements because the Draft EIR contains an inadequate analysis of the project's impacts to water supply and quality, water diversion infrastructure, or water channels and embankments. The document further fails to provide adequate, enforceable mitigation measures and monitoring programs to minimize or avoid those impacts.

A. The Draft EIR Project Description Is Inadequate

The Agency is concerned that recent modifications to DWR's proposal to update the long-term operations of the State Water Project will alter water quality, water surface elevations, and velocities in the North Delta to the detriment of water users. Such impacts must be fully analyzed and mitigated in the Draft EIR.

In particular, the Draft EIR fails to acknowledge or describe DWR's contractual obligations under the 1981 Contract nor does it explain how DWR will operate the State Water Project in accordance with the terms of the 1981 Contract. Therefore, the Draft EIR's Project Description and each alternative should be revised to explain that the long-term State Water Project operations will all DWR to fully comply with the year-round water quality criteria and other terms and conditions of the 1981 Contract.

The final Project Description and alternatives should include a comprehensive description of the 1981 Contract; identify the 1981 Contract as a significant legal constraint on the long-term operation of the State Water Project; and identify how proposed long-term coordinated operations will assure water supply reliability, availability, and quality for all North Delta water users, including compliance with the water quality criteria contained in the 1981 Contract, and avoid erosion and seepage impacts to channels and embankments.

B. The Draft EIR Does Not Consider the Effects of Operating the State Water Project in Compliance with the 1981 Contract.

DWR's compliance with the 1981 Contract is not discretionary. Therefore, while CEQA requires DWR to implement feasible mitigation measures to reduce significant impacts of projects to less-than-significant levels, the 1981 Contract still forbids DWR from choosing not to comply with the specific requirements of the 1981 Contract based on a determination of infeasibility, or otherwise.

The Draft EIR section addressing thresholds of significance for water quality impacts states a potentially significant impact would occur if the Project would cause "violation of a water quality standard or waste discharge requirement, or otherwise substantially degrade water quality." Draft EIR, 4-24. But this section fails to address compliance with the water quality criteria of the 1981

Contract. Draft EIR, 4-24 to 4-25. Nor does the remainder of the Draft EIR and its appendices even mention or acknowledge the 1981 Contract. The salinity criteria of the 1981 Contract is separate and distinct from D-1641 standards and is year-round; therefore, the Draft EIR should include DWR's nondiscretionary obligation to abide by the terms of the 1981 Contract and should analyze the impacts of the project operating in compliance with those terms. All hydrological and hydraulic modeling undertaken to analyze the alternatives must assume that the terms and conditions of the 1981 Contract, including but not limited to its water quality requirements in the fall and winter months (August 16 through April 30) will remain in full force and effect.

C. The Draft EIR Fails to Adequately Identify, Analyze, or Mitigate Potential Significant Impacts to Water Quality.

Besides ignoring DWR's nondiscretionary obligation to abide by the terms of the 1981 Contract, the Draft EIR's analysis of the water quality impacts of the project is also insufficient. The Draft EIR acknowledges that DWR's modeling shows increased electrical conductivity (a proxy for salinity and thus water quality) at Emmaton in January, November, and December in wet and above-normal water years. Draft EIR, 4-25. The Draft EIR concludes, without any analysis, that such exceedances are not a potentially significant impact because "DWR does not anticipate that these exceedances would occur in real time." Draft EIR, 4-27. The Draft EIR simply explains that DWR will comply with D-1641 standards, but does nothing to explain how it will comply with the 1981 Contract or the potential impacts of doing so.

The Agency previously addressed its concern with DWR's use of the same modeling approach in support of the WaterFix project.¹ The 1981 Contract sets year-round water quality standards at Three Mile Slough, upstream of Emmaton, which DWR failed to include in the modeling for the EIR for that project. See SWRCB Hearing Transcript, Vo1.14; p. 29:15-20 (Aug. 24, 2016); see also *id.* at 21:1 through 29:23. When the 1981 Contract water quality criteria were applied against the modeling results used in the WaterFix EIR analysis, a significant and measurable increase in contract violations was apparent. MBK Engineers, Technical Comments on California WaterFix Modeling (Aug. 31, 2016) [SWRCB WaterFix Hearing Exhibit NDWA-032 Errata, at 6]; MBK Engineers, Technical Comments on California WaterFix Modeling (July 13, 2016) [SWRCB WaterFix Hearing Exhibit NDWA-502, at 6-8]; see also SWRCB WaterFix Hearing Exhibit NDWA-501; SWRCB WaterFix Part 2 Hearing Transcript, Vo1.5, p. 109-115.

Despite its own modeling and analysis of potential violations of the 1981 Contract, DWR does not identify exceedances of the 1981 Contract water quality criteria as a potential significant impact and does not provide any mitigation measures. In terms of operating the SWP, DWR may need to cease all diversions to storage in Oroville, release stored water from SWP reservoirs, cease all exports by the SWP from Delta channels, or a combination of these operational actions in order to

¹ Copies of the evidence and testimony presented during the WaterFix hearing before the State Water Resources Control Board are attached hereto and incorporated fully herein.

maintain the year-round water quality criteria specified in the 1981 Contract. DWR thus fails to provide sufficient accountability for the prevention of impacts. Instead of identifying and analyzing the impacts and proposing mitigation measures, DWR relies solely on its future non-binding discretionary decision making. This approach does not provide the certainty required by the law to determine whether the actions to avoid the project's impacts are adequate. This falls far short of CEQA requirements for identifying and mitigating significant impacts.

D. Additional Comments on the Draft EIR

The Agency makes the following additional comments to the Draft EIR:

1. The Draft EIR fails to meaningfully evaluate or quantify its ability to continue meeting its contract obligations to the Agency.
2. The Draft EIR does not meaningfully address or quantify the economic, health, and agriculture impacts due to identified and unidentified water quality exceedances and other changes in water surface elevation.
3. The Draft EIR fails to mention the thousands of individual diversion intakes, primarily agricultural siphons, located in the North Delta. The Final EIR must analyze and mitigate any adverse impacts to surface water elevation and water quality where these diversions are located.
4. The Draft EIR fails to analyze whether the flows necessary for DWR to comply with water quality criteria obligations in the 1981 Contract will be assured in long-term operations of the State Water Project.
5. The Draft EIR should incorporate the mitigation measures committing DWR to the repair, modification, or replacement of existing landowner diversion facilities and levees as required under Article 6 of the 1981 Contract due to the proposed long-term modification of the operations of the State Water Project.

III. Conclusion

The Agency has long been a stakeholder and highly engaged participant in DWR's operations of the State Water Project. Unfortunately, the Draft EIR fails to include a clear or finite project description; the lack of discussion of the significant obligations imposed on DWR via 1981 Contract throughout the Draft EIR; and the lack of real, meaningful mitigation measures and oversight to minimize hydrodynamic and water supply and quality impacts from the project.

Meaningful public review is the strongest assurance of the adequacy of the Draft EIR. For the reasons laid out above, and described in detail in our prior comments, this Draft EIR and the

analysis contained therein do not meet the requirements of CEQA. We urge you to revise the EIR to address comments herein and recirculate the revised document for public review and comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda Terry". The signature is fluid and cursive, with the first name "Melinda" written in a larger, more prominent script than the last name "Terry".

Melinda Terry,
Manager