

**North Delta Water Agency**  
**Board of Directors Meeting**  
14120 Grand Ave, Walnut Grove, CA 95690  
Thursday, October 9, 2014 at 9:00 a.m

**Minutes**

**Call to Order**

Chair Henry Kuechler called the meeting to order at exactly 9:00 a.m. on Thursday, October 9, 2014. A quorum was determined at that time. Those present:

Directors

Henry Kuechler, Division 3  
Steve Mello, Division 1  
Topper van Loben Sels, Division 2  
Tom Hester, Division 5

Absent

Ken Ruzich, Division 4

Staff

Melinda Terry, Manager  
Colleen Flannery, Assistant Manager  
Gary Kienlen, MBK Engineers  
Kevin O'Brien, Downey Brand  
Steve Saxton, Downey Brand (arrived 10:30 AM).

Others

Please see attached sign-in sheet.

**Closed Session**

The Board moved to close the regular business at 9:03 a.m. and move into closed session. **(Yes - Kuechler, Mello, Hester, van Loben Sels)**

**The Board met in closed session to discuss possible litigation. There was no reportable action taken during closed session.**

**Closed Session Report**

The Board reconvened its regular business at 9:32 a.m. and reported that no reportable action had been taken during closed session.

**Approval of Minutes**

Engineer Kienlen provided corrections to the comments he made regarding curtailment of water rights for the July 2, 2014 meeting, in order to ensure the minutes accurately reflected his comments. The incorrect date was also posted for the meeting.

**Motion and second to approve the minutes of the July 2, 2014 and July 28, 2014 Board meetings, as corrected by Engineer Kienlen and staff. Motion approved. (Yes - Kuechler, Mello, Hester, van Loben Sels)**

## **Financial Reports**

Assistant Manager Flannery provided the financial reports to the Board. There was some discussion of the difference between expenses for consulting in the current year and the previous year. It was determined that some of the difference between the two fiscal years was due to the timing of various expenses, including comments on the Bay-Delta Conservation Plan.

For the edification of the Board, Assistant Manager Flannery also provided an update of the projected assessment revenue. If the Agency successfully collects all of its revenue from property taxes and from directly billing state and local agencies, it will take in approximately \$1.3 million from the Proposition 218 assessment on parcels located within its boundaries. However, there have been past issues in collecting from some state agencies and others, so the Agency may not collect the full amount. Flannery reported that the Agency will know more about the amount it will be collecting at the time of the next meeting.

**Motion and second to approve the financial reports. Motion approved. (Yes – Kuechler, Mello, Van Loben Sels, Hester).**

## **Engineer's Report**

### **A. Contract Water Quality - Bi-monthly Water Quality Report**

Engineer Kienlen provided the Engineer's Report. He reminded everyone that MBK is monitoring the mean daily electrical conductivity (EC), because if the contract standard is exceeded for 14 days, the State is in violation of the 1981 Contract with North Delta Water Agency. He also clarified that the current standard for salinity in the north Delta is the Contract standard, because the State Water Resources Control Board's D-1641 standard is only in effect through August. The compliance point is Three Mile Slough.

Salinity has been an issue very recently, because there has been an increase in tidal flows into the north Delta. Both the high tides and the low tides are higher than they have been. This means that the salts are not being pushed out of the Delta.

Board member Mello observed that Georgiana Slough near him has been still, meaning that fresh water flows have not been flowing into the slough.

### **B. Four River Index Presentation – Historical trends**

Engineer Kienlen reminded the Board, staff, and public of the three conditions of the emergency drought provision in the 1981 Contract, to wit: 1) The Four Rivers Basin Index drops below nine million acre feet over 2 years; 2) The State Water Contractors are offering agricultural users less than 50 percent of water; and 3) The State Water Board has issued certain specific emergency regulations. He said that the Four Rivers Index represents the flow from four rivers (Feather, Yuba, Sacramento, and American), without counting dams or diversions. Contractors are likely to offer less than 50 percent of their water in the coming year, and said that the State Water Board could issue regulations but has not. He also said that 2014 looks to be the No. 4 lowest year on record, with just 7.3 million acre feet recorded for this year, according to preliminary numbers. For that reason, we need 10.7 million acre feet this year to avoid the drought determination.

More information about the drought determination will be provided at the Agency's drought update meeting.

## Legal Report

Attorney O'Brien noted that he had a conflict with the date of the current meeting, and requested that the meeting be moved up a day to Tuesday, October 28, 2014. The meeting was rescheduled.

He also briefly discussed what happens if the drought emergency provision is triggered and a claims procedure is put in place, noting that more information will be provided at the Oct. 28 meeting. At this point, O'Brien said, the Agency does not know whether there even will be a claims procedure, and will not know until May. Should the process be put in place, the contract provides for reimbursement for landowners who, as a result of the drought emergency: 1) Suffer crop damage; 2) Plant a more salt-tolerant crop in reasonable anticipation of a drought emergency and can prove damages; or 3) Reasonably decide not to plant crops at all, and can prove damages. The emphasis is on the word "reasonable" based on the drought emergency, because there is a potential for disputes.

To avoid these disputes, he recommended that it is best to agree in advance of the actual drought emergency on what manner of proof should be required of landowners, in order to avoid uncomfortable discussions with the Department.

Board members and the public raised concerns about the need to make decisions about crops right now, because of the need to obtain crop insurance, supplies, and other necessities in advance of the planting season. The merits of various crops, in terms of salt tolerance and drought tolerance, were discussed, as the wording of the contract stresses that only a decision to plant a more salt-tolerant crop is covered.

The merits of not planting were also discussed, as the contract provision is only triggered if the drought emergency segment of the contract is triggered. Attorney O'Brien pointed out that someone who does not plant a crop runs the risk that the contract emergency provision will not be triggered, as well as the risk that a decision not to plant will not be considered "reasonable." More information and a fuller discussion of the issues will be provided at the October 28 public meeting.

He also updated the Board on the actions taken at a September 24 State Water Resources Control Board meeting. The Board met regarding the availability of water in the Central and South Delta. The board is gearing up for the contingency of a drought in 2015, and is requiring the DWR to be proactive in their drought planning, and to make decisions earlier in the year. DWR is also going to have to submit a drought plan

Additionally, he reported, DWR and the U.S. Bureau of Reclamation submitted letters that questioned the legality and propriety of diversions by the South Delta Water Agency and Central Delta Water Agency. In response, the State Water Board had drafted a proposed order that would require the submission of diversion information by "[a]ll pre-1914 and riparian water rights holders in the Sacramento-San Joaquin Delta." As drafted, this order would apply to landowners within North Delta Water Agency boundaries – even though the 1981 Contract with DWR remains in effect. The Agency had asked the Board to avoid applying such an order to the Agency landowners, but State Water Board staff had said that they need the information about North Delta diversions as well. It remains "unclear" where the state board will come out on this.

Engineer Kienlen said that the Water Board is looking for the basis of the water rights for pre-1914 and riparian diversions, and as such may need information from the Agency, despite the existence of the Contract.

Attorney O'Brien noted that the water board also finalized an order regarding the Temporary Urgency Change Petition, which proposes modifications of Delta water quality standards pursuant to changes allowed

for operations of CVP and SWP, and which proposes some modification of D-1641 flows. This is important for the North Delta because DWR decided to not pursue its original plan to control Delta salinity by installing temporary barriers this year because the Department believes it can achieve similar water quality objectives through the relaxed D-1641 criteria allowed in the TUCP approved by the SWRCB. One key thing to watch is the required development by DWR of two separate drought plans – one due to discuss November 1 to the end of the year, and the next to discuss the 2015 water year (due in January 2015).

Finally, in response to a question from a member of the public, Attorney O'Brien stated that the Board could order that water could be denied to even senior water rights holders in order to protect public safety. The 1981 Contract does provide for injunctive relief in cases where water is denied to NDWA users, he said.

### **Appeal to Board of Parcel Reclassification**

Assistant Manager Colleen Flannery provided some background for regarding the appeal to the Agency Board of the manager's dismissal of a parcel reclassification request. H-Pond, which operates a duck club, is seeking to reclassify some of its parcels as riparian. The parcels are currently classified as partly "pre 1914" and partly as undetermined.

Flannery explained that the process adopted in 2011 by the North Delta Water Agency allows landowners to submit "appropriate evidence" to the Manager of the Agency that the lands qualify for reclassification. The manager reviews this evidence with the assistance of the Agency engineer, and makes a determination. This determination can then be appealed to the Agency board. H-Pond made its request for reclassification on September 12, 2013. On February 27, 2014, the Agency determined that insufficient evidence had been presented to approve classifying the parcels as riparian for assessment purposes, because H Pond had not presented any evidence that the parcel ever had access to riparian water, or had reserved riparian rights. On July 21, 2014, H-Pond submitted its appeal of this determination, along with some additional evidence.

Agency staff, including Colleen, Attorney Steve Saxton, and Engineer Gary Kienlen, reviewed this additional information and provided the Board with a memo regarding their recommendations. Summing up the memo, Colleen provided four reasons that Agency staff and attorneys believe that the existing classification results in the best approximation of these contract benefits. First, she said, the Engineer's Report was based on an extensive review and analysis of numerous reports and records from reliable sources. Second, H-Pond has presented no justification to support reclassification. Third, she said, H-Pond has shown no evidence of intent to reserve to the parcels in question water rights in a natural watercourse, a prerequisite to a riparian right. Finally, she said, the Glide-In Ranch decision (on which H-Pond's argument relied) turned on significantly different facts from those before the Board here, and does not support H-Pond's appeal. In Glide-in Ranch, the appeal was granted because of the "unique circumstances" of the proximity to Babel Slough, and "in light of the evidence of actual riparian diversions provided." No such evidence has been presented here.

Attorney Saxton urged the Board to note that the burden of proof is much lower in this case than it would be for a water rights determination made in court or before the State Water Board.

He briefly discussed the layout of the H-Pond parcels. Geographically, the parcels are very far away from the riparian source of water. H-Pond must prove that the successive owners of H-Pond made an effort to preserve this riparian right to take water. In the Glide-In Ranch case, the owners of that parcel presented the Board with a map that showed the parcel abutted a natural riparian watercourse, which is a prerequisite for a riparian determination. As a result, they prevailed in their appeal – even though the Agency originally had determined that there was no documentary evidence that they had any riparian rights.

Attorney Saxton then opened the floor to Board member questions. Topper van Loben Sels asked whether the water right under the 1981 Contract with DWR was just as good or better than a riparian right. Attorney Saxton answered that the Contract right is legally very different from any other type of water right, but said that the Contract right does allow for diversions during curtailment of junior water rights. Board members also asked about a letter from the Delta Watermaster that concludes H-Pond has a riparian water right due to the existence of a specific deed. Attorney Saxton answered that the analysis in the letter is incorrect, and stated that the letter is not binding on the Agency because it is not a Board determination, but rather a response to a complaint.

Attorney Saxton invited Tom Adams, the attorney for H-Pond, to present his evidence. First, Mr. Adams asserted that the Engineers Report criteria had been applied unevenly, and pointed out that a “key component” for Proposition 218 is that assessments should be proportionate. He asserted that similarly situated parcels should be treated the same under the Proposition, and that the same standards applied to other parcels should be applied to H-Pond.

Mr. Adams also provided a copy of the deed mentioned in the Delta Watermaster’s letter, and explained that the deed had intended to provide a connection to a canal that would have connected the main parcel to the Toe Drain. An error in the description of the deed leaves a slight gap; however, the intent had been to preserve access to the Toe Drain. In response to a question, Mr. Adams stated that the canal had never been built.

Mr. Adams also clarified that he intended to assert reclassification was warranted based on historic diversions from Babel Slough, the same diversion point as the Tule Ranch Ditch.

Board member Mello asked if, when a parcel was sold or transferred, an easement was preserved to a riparian source of water, that would be enough to show the buyers and sellers intended to preserve riparian rights. Attorney Saxton replied that diversions from a riparian source must be demonstrated to prove riparian water rights have been preserved.

Attorney Saxton also stated that there must be some basis for asserting that the Toe Drain is a natural watercourse. There is evidence of a written agreement between many landowners and others that the Toe Drain would be treated as a natural watercourse. However, Attorney Saxton said it is not certain that parcels surrounding the Toe Drain would be classified as riparian as a result.

Engineer Kienlen explained that in the Engineers Report evaluation of the Yolo Bypass, none of the lands would be considered to have retained riparian rights. He also noted that Glide-In Ranch is treated as riparian on the basis of historic diversions, even though it currently diverts from non historic diversion points. The difference was that Glide-In Ranch physically abutted a natural watercourse.

Returning to the question of how adjacent lands should be classified, Mr. Adams also pointed to the criteria in the Engineers Report, which provides that all lands greater than five feet in elevation are “Uplands” and automatically characterized as non-riparian, while lands lower than five feet are “Lowlands,” and automatically riparian.

In response, Engineer Kienlen said that the 5 feet characterization is a “general” one, in that parcels over 5 feet in elevation are “generally” considered to be uplands. The Engineer’s report permits exceptions and additional information to also be incorporated. Additional information was incorporated into the report, such as a January 1963 report by the United States Bureau of Reclamation. The elevation criteria were never intended to define water rights by themselves.

**The Board took the evidence presented by H-Pond and staff under advisement. Members directed staff to prepare information regarding the treatment of “similarly situated” parcels, and to provide a letter that could be potentially adopted by the Board at its next meeting.**

### **Manager’s Report**

In light of the length of the previous items, Manager Terry briefly informed the board about recent items of interest:

- The Agency continues to try to follow up with Craig Trombly who manages NDWA’s annual Contract payment for DWR. He had emailed the Agency a spreadsheet of lands owned by the CA Dept. of Fish and Wildlife (DFW) in the Yolo Bypass in response to a request for parcel data by the Agency to provide DFW’s total acreage information for purposes of executing a new MOU with DWR. The MOU would confirm an existing agreement to not include DFW’s total annual assessment amount as part of the Agency’s annual Contract payment to DWR. Unfortunately, the spreadsheet sent by DWR only contained DFW properties owned in the Yolo Bypass and not the rest of the acreage owned throughout the entire NDWA jurisdiction. NDWA continues to subtract out the DFW total assessments from the annual Contract payment per a mutual agreement to do so until a new MOU is signed.
- Reclamation District 150 has requested a second public meeting be held in the Yolo Bypass regarding the drought issue.
- In big news for the Bay Delta Conservation Plan (BDCP), portions of the draft EIR/EIS for this project will be recirculated. This announcement followed a scathing set of comments by U.S. EPA. Manager Terry and Attorney O’Brien stated that they had heard that the Bureau of Reclamation might decide to do their own EIS for the project, but that was just a rumor.
- The Delta Protection Commission is also in discussions regarding the potential formation of a Delta-wide levee assessment district. This district would be intended to capture funds from all beneficiaries of the Delta, even companies that run power, gas, water, or other utilities through portions of the Delta. For now, it is unclear how the development of that assessment and district would affect the current assessment system in place, which is an important question because North Delta Water Agency and many reclamation districts derive their funding from Proposition 218.

### **Public comment**

None.

### **Adjournment**

The meeting was adjourned at 11:44 p.m. on Thursday, October 9, 2014.