

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791

**VIA-EMAIL**

12/22/2022

Ms. Melinda Terry
General Manager
North Delta Water Agency
910 K Street, Suite 310
Sacramento, California 95814-3512

Subject: Response to North Delta Water Agency's December 13, 2022 "Notice of Continued Exceedances of the Water Quality Criteria Under the 1981 Contract Between the Department of Water Resources and North Delta Water Agency ("1981 Contract")"

Dear Ms. Terry,

This letter is the Department of Water Resources' (Department) initial response to the North Delta Water Agency's (Agency) December 13, 2022 letter regarding the recent salinity level exceedances under the 1981 Contract between the Department and the Agency.

As we have communicated to you via several emails, the Department has made operational changes in response to the exceedances, but unprecedented hydrologic conditions have still caused the circumstances in which we find ourselves.

The Department is seriously considering the Agency's offer to extend the special claims process. While we do not commit to such an approach at this time, we would like to discuss this approach at the upcoming January 23, 2023 meeting already scheduled between our agencies. Over the next month, we believe it would make sense for the Agency to advise landowners within its boundaries to collect information on any loss of net income that resulted from the recent exceedances.

The Department is looking forward to the upcoming meeting in January. In the meantime, please don't hesitate to contact me for any questions.

Sincerely,

Jacob McQuirk On behalf of John Leahigh

John Leahigh
Assistant Division Manager, Water Management
Division of Operations and Maintenance
State Water Project

Ms. Terry

Page 2

Attachment:

December 13, 2022, Notice of Continued Exceedance



NDWA
NORTH DELTA WATER AGENCY

Chairman

Vice-Chairman

Secretary/Treasurer

Director

Director

Manager

Steve Mello

Jack Kuechler

Tom Slater

Justin van Loben Sels

Mark van Loben Sels

Melinda Terry

December 13, 2022

Via email and U.S. Mail

John Leahigh, Water Ops. Exec. Mngr.
State Water Project Analysis Office
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001
John.Leahigh@water.ca.gov

Re: Notice of Continued Exceedances of the Water Quality Criteria Under the 1981 Contract Between the Department of Water Resources and North Delta Water Agency (“1981 Contract”)

Dear John:

I am writing this by way of follow-up to my letter to you dated November 7, 2022 to notify DWR that additional exceedances of the water quality criteria in the 1981 Contract have occurred and are ongoing. DWR’s failure to comply with its contractual obligations has caused injury to water users within NDWA. In my November 7 letter I requested that DWR extend the special contract claims procedure that was established during the term of its 2022 Temporary Urgency Change Permit. In light of the recent additional exceedances, the Agency reiterates that request. If DWR declines to extend the special contract claim procedure NDWA will have no choice but to consider other legal and equitable remedies.

The 1981 Contract remains in full force and effect. It requires among other things, that DWR “operate the SWP [State Water Project] to provide water qualities at least equal to the better of: (1) the standards adopted by the [State Water Resources Control Board] 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.” (1981 Contract, Article 2(a)(i).) The livelihoods of the many families and businesses within NDWA depend upon the year-round water quality criteria of the 1981 Contract being met.

As noted in my November 7 letter, prior exceedances of the 14-day mean electrical conductivity (EC) standard at Three Mile Slough began on September 25, 2022. Salinity levels in excess of the 14-day 2.55 mS/cm standard lasted 41 days (with a peak daily average EC of 3.69 mS/cm on October 22), before precipitation brought them back below the contractual threshold on

November 5. Even though water quality conditions eventually improved, those exceedances are expected to have lasting impacts on crop yields for farmers and water users within the affected areas.

Less than two weeks later, a severe spike in EC beginning November 16 (including a peak daily average of almost 4.5 mS/cm on November 28) has caused the 14-day mean EC at Three Mile Slough to once again exceed the 2.55 mS/cm criterion since November 26. As of the date of this letter, water quality remains out of compliance with DWR's contractual requirements.

As noted in my November 7 letter, it is essential that DWR meet the 1981 Contract's water quality criteria. The 1981 Contract provides several remedies to ensure compliance, including Article 12(a), which allows NDWA to require that DWR "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," in addition to other legal remedies the Agency may have. Historically, NDWA has endeavored to work with DWR to address contract exceedances through less disruptive means.

For instance, Article 4(b) of the 1981 Contract provides that during a drought emergency, DWR may compensate North Delta water users through a special claims process when an overland water supply of suitable quantity and quality is not available, and DWR's reasonable efforts to preserve Delta water quality are inadequate. Not all of the necessary conditions for the drought emergency procedures presently exist; however, NDWA has expressed a willingness to execute an interim agreement that would enable DWR to implement a claims procedure to help mitigate water quality impacts.

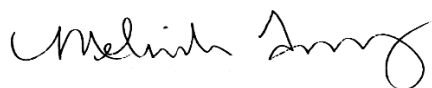
Pursuant to its statutory mandate to assure that lands within the North Delta have a dependable supply of water of suitable quality sufficient to meet present and future needs and in accordance with the 1981 Contract, NDWA hereby reiterates its request that DWR extend the special claims procedure process established earlier this year, to assist landowners within NDWA who have been and will continue to be adversely affected by the recent exceedances.

As stated previously, NDWA recognizes that DWR faces operational constraints due to ongoing dry conditions and it is willing to work cooperatively with DWR provided that doing so will result in NDWA water users being made whole. Accordingly, NDWA requests that DWR respond to this letter by December 23, 2022 with a draft agreement to extend the special claims procedures for North Delta landowners.

If we do not receive a written response by that date the NDWA Board of Directors will have little recourse but to consider further actions pursuant to its available legal rights, claims, and defenses, including the remedies recognized under the 1981 Contract. The Agency remains hopeful that it will be able to reach an agreement with DWR to extend the special claims procedure. NDWA representatives are available to meet with you and your staff to discuss the terms and conditions of such a procedure.

Please call if you have any questions or wish to discuss this matter further.

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

Cc: Board of Directors, North Delta Water Agency

Kevin O'Brien (kobrien@downeybrand.com)

Austin Cho (acho@downeybrand.com)