



CENTRAL DELTA WATER AGENCY

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Via Email: wmoore@usbr.gov

Mr. Louis Moore
Bureau of Reclamation
2800 Cottage Way, MP-700
Sacramento, CA 95825

Re: Comments on the Draft Environmental Impact Statement for the Delta-Mendota Canal/California Aqueduct Intertie.

The Central Delta Water Agency (CDWA) joins in the comments submitted on the above-entitled matter by the California Water Impact Network and the California Sportfishing Protection Alliance, dated August 28, 2009, and supplements those comments with the following additional comments and concerns.

1. Further CEQA Review is Required.

It is not readily apparent from the DEIS whether further CEQA review beyond the 2005 Mitigated Negative Declaration adopted by the San Luis and Delta Mendota Water Authority (“Authority”) is pending. Nor does the DEIS discuss the various state and local “responsible agencies” that are involved in the project. (See e.g., CEQA Guidelines, § 15381 [“For the purposes of CEQA, the term ‘responsible agency’ includes all public agencies other than the lead agency which have discretionary approval power over the project”].)

CEQA Guidelines section 15162 specifies the circumstances under which a “subsequent” EIR or negative declaration must be prepared. While the DEIS does not provide sufficient information regarding the status of CEQA compliance for the project nor the state and local agencies who have yet to approve one or more aspects of the project, it is clear, as acknowledged throughout the DEIS (and for the reasons set forth in the above-referenced C-WIN and CSPA comments), that at a minimum, there have been “[s]ubstantial changes . . . with respect to the circumstances under which the project is undertaken” and “[n]ew information of substantial importance” within the meaning of Guidelines section 15162 which mandate the preparation of a subsequent EIR.

The DEIS itself must be revised to list all applicable state and local “responsible” agencies and explain the nature and status of their respective CEQA review of the project since such review is an integral and mandatory part of this joint state and federal project.

2. Compliance With Applicable Laws.

a. PL 108-361 (HR 2828)–Program to Meet Water Quality Standards.

Section 103, subdivision (d)(2)(D), of PL 108-361 provides:

“(i) IN GENERAL.--Prior to . . . increasing deliveries through an intertie, the Secretary shall, not later than 1 year after the date of enactment of this Act, in consultation with the Governor, develop and initiate implementation of a program to meet all existing water quality standards and objectives for which the Central Valley Project has responsibility.

“(ii) MEASURES.--In developing and implementing the program, the Secretary shall include, to the maximum extent feasible, the measures described in clauses (iii) through (vii) [i.e., (iii) Recirculation Program; (iv) Best Management Practices Plan; (v) Acquisition of water; (vi) Purpose; and (vii) Updating of New Melones Operating Plan.]”

While the DEIS at page 3.3-4 states that “[i]n 2006, Reclamation prepared such a plan,” the DEIS seemingly fails to provide any details of that plan. Moreover, since the plan is prerequisite to utilization of an intertie, the plan must be properly taken into consideration in all of the modeling and other analyses in the DEIS. Thus far, it does not appear that the details of the plan were even discussed much less incorporated into the analyses.

For example, at page 3.1-11, the DEIS states that “[o]peration of New Melones is governed by the interim operations plan” However, PL 108-361 specifically requires that the interim operations plan be updated and it is not at all clear whether the DEIS used the updated plan or the pre-existing plan. (See, PL 108-361, § 103, subd. (d)(2)(D)(vii) [“UPDATING OF NEW MELONES OPERATING PLAN.--The Secretary shall update the New Melones operating plan to take into account, among other things, the actions described in this title that are designed to reduce the reliance on New Melones Reservoir for meeting water quality and fishery flow objectives, and to ensure that actions to enhance fisheries in the Stanislaus River are based on the best available science”].)

If the PL 108-361 plan was indeed “develop[ed] and initiate[d]” (§ 103, subd. (d)(2)(D)(i)) in 2006, then it missed the required one-year deadline. In addition, in light of the CVP’s violation of the Delta water quality standards since 2006, it is clear than the current PL 108-361 plan, to the extent there is one, is inadequate and fails to achieve its statutory purpose.

Before further action is taken to assess the environmental impacts from an intertie, a plan must be developed which fully meets the requirements in PL 108-361, and that plan must be implemented in a manner that fully meets those requirements. Once such a plan is developed and implemented, then the environmental analysis must incorporate that plan in all of its analyses and alternatives. The DEIS's failure to incorporate a duly developed and implemented plan into its analyses is a fundamental and fatal flaw.

b. PL 108-361 (HR 2828)–No Redirected Impacts and Compliance with Delta Protection, Area of Origin and Other Laws.

Section 103, subdivision (d)(2)(A)(ii), of PL 108-361 provides:

“(ii) ACTIONS TO INCREASE PUMPING.--Actions to increase pumping shall be accomplished in a manner consistent with the Record of Decision requirement to avoid redirected impacts and adverse impacts to fishery protection and with any applicable Federal or State law that protects–

- (I) water diversions and use (including avoidance of increased costs of diversion) by in-Delta water users (including in-Delta agricultural users that have historically relied on water diverted for use in the Delta);
- (II) water quality for municipal, industrial, agricultural, and other uses;
- and
- (III) water supplies for areas of origin.

The DEIS must, and has thus far failed to, thoroughly demonstrate why the proposed increases in exports of Delta watershed water are consistent with those Record of Decision's requirements and applicable Federal or State laws. Some of those laws include the following.

i. Delta Protection Act of 1959 and the Watershed Protection Act.

The Delta Protection Act of 1959 provides in Water Code sections 12203 and 12204, respectively:

“It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled.”

“In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter.”

The DEIS must analyze and explain why the proposed increases in exports of Delta watershed water is not water “to which the users [both human and environmental] within [the]

Delta are entitled” and/or “necessary to meet the requirements of [Water Code] Sections 12202 and 12203”

Similarly, Water Code section 11460 (i.e., part of the Watershed Protection Act, § 11460 et seq.) provides:

“In the construction and operation by the department [i.e., SWP or CVP] 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.” (Emphasis added.)

The DEIS must analyze and explain why the proposed increases in exports of Delta watershed water is not “reasonably required to adequately supply the beneficial needs [human or otherwise] of the watershed, area, or any of the inhabitants or property owners therein.”

In light of the dire situation of fishery resources and overall poor water quality and lack of adequate dilution and assimilative capacity within the Delta, plus the Project’s history of violations of Delta water quality standards, it would appear that all of the water proposed to be exported pursuant to the intertie would be (1) water “to which the users with [the] Delta are entitled” and/or “necessary to meet the requirements of [Water Code] Sections 12202 and 12203” (Delta Protection Act of 1959); and/or (2) water that is “reasonably required to adequately supply the beneficial needs [human or otherwise] of the watershed, area, or any of the inhabitants or property owners therein” (Watershed Protection Act).

Only water that is truly “surplus” to the needs of the Delta and the Delta watershed can be legally exported. Thus far, the DEIS has failed to demonstrate that any portion of the proposed increase in exports constitutes such surplus water and is not water that is needed by the Delta and the Delta watershed at either the time of export or at some point in the future in the form of carryover storage, etc. (the recent March 2009 violations of the Delta outflow requirements, among other violations, make it clear that the Projects are not adequately forecasting the future water needs of the Delta and Delta Watershed).

ii. **State and Federal Anti-degradation Laws.**

The Federal Environmental Protection Agency (“EPA”) requires all states to adopt an “antidegradation policy” similar to the State Water Resources Control Board’s (“SWRCB”) Resolution 68-16. (40 C.F.R. 131.12.) Resolution 68-16 is further intended to, and does, implement Water Code section 13000 which requires the SWRCB to regulate all “activities and factors which may affect the quality of the waters of the state” such that they “attain the highest water quality which is reasonable.”

The State Water Resources Control Board's ("SWRCB") "Resolution 68-16 [commonly referred to as the SWRCB's "Anti-Degradation Policy"] provides in pertinent part:

“Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.”

The DEIS must analyze and explain why the proposed increases in exports of Delta watershed water and anticipated degradation of water quality within the Delta and elsewhere is “consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.” Thus far, the DEIS has failed to do so.

iii. **The San Luis Act of June 3, 1960, Public Law 86-488, 77 Stat. 156.**

PL 86-488 provides:

“Construction of the San Luis unit shall not be commenced until the Secretary has . . . received satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley, as generally outlined in the California water plan, Bulletin Numbered 3, of the California Department of Water Resources, which will adequately serve, by connection therewith, the drainage system for the San Luis unit, or has made provision for constructing the San Luis interceptor drain to the delta designed to meet the drainage requirements of the San Luis unit as generally outlined in the report of the Department of the Interior, entitled 'San Luis Unit Central Valley project,' dated December 17, 1956.” (Emphasis added.)

Such drain to remove salts from the valley has never been constructed yet over a million acre feet of water per annum from the San Luis Unit was committed to use. With every acre foot of water delivered to the San Joaquin Valley from the Delta Mendota Canal and San Luis Unit, there is delivered a significant quantity of salt which must be retained in the San Joaquin Valley or returned to the Delta via the San Joaquin River. The substantial degradation of the San Joaquin River from such drainage is well-understood and recognized (and discussed further below).

Without the required drain, existing exports, much less the proposed increase in exports from the intertie, are contrary to law. The DEIS must explain how the proposed project as well as existing conditions are in compliance with PL 86-488.

3. Unduly Narrow Project Objectives and an Inadequate Range of Alternatives.

The objectives of the project help shape the range of potential alternatives to be evaluated. Here, the DEIS too narrowly defines the objectives and, as a result, unduly limits the range of reasonable alternatives. The underlying basic objective is “to improve the water supply reliability of the [CVP].” (DEIS, p. ES-1.) That basic objective should guide the consideration of alternatives. While one way to meet that objective may be to increase the Projects’ physical ability to export more Delta water, that is by no means the only way and the DEIS is presently inadequate for failing to thoroughly consider other ways to meet that objective (all of the DEIS’ current alternatives seek to meet that objective by increasing the Projects’ physical ability to export more Delta water).

Examples of other alternative approaches to meeting the Projects’ basic objective, and which must be thoroughly considered in the DEIS, include the following:

–An alternative of “regional self-sufficiency” where Peter (human and environmental water users within the Delta watershed) are not robbed to pay Paul (i.e., export contractors). Instead, every feasible effort is made to the maximum extent possible to develop new non-Delta watershed water and/or make better use of existing non-Delta watershed water to improve the water supply reliability of the CVP.¹ The intended result being, that the CVP export contractors can ultimately wean themselves off Delta watershed water, substantially or entirely, such that the Delta watershed water can be used to meet the needs within that watershed. The devotion of resources to such efforts should be at least as much as the *total* economic and environmental costs incurred in the planning, construction, mitigation, operation, etc. of the proposed intertie.

–In light of the inherent unreliability of the Delta watershed as a source of water for CVP (and SWP) export contractors, additional alternatives which contemplate, and are designed to produce, a *reduction* in exports from the Delta over historical levels should also be included. For example, the DEIS should include an alternative that reduces deliveries of Delta watershed water to areas south of the Tehachapi Mountains to “free up” water for CVP export contractors, and includes the above-described devotion of resources to developing self-sufficiency in such areas to offset such reductions.

¹ Such efforts should include 1) water conservation; 2) water reclamation, including desalting brackish and if necessary sea water; 3) storm water capture and reclamation; 4) higher levels of treatment of sewage effluent to allow for safe use of effluent for irrigation of golf courses and landscaping, industrial use, and in suitable cases human consumption; 5) installation of dual water systems particularly in new developments; 6) installation of brine lines; and 7) improvements to water treatment facilities so that water from less desirable sources can be beneficially used.

–A Demand Reduction alternative within the CVP export service areas which reduces that area’s demand for all sources of water, Delta sources or otherwise. Retirement of drainage impaired lands should be among the methods to reduce such demand.

–With regard to protecting fishery resources within the Delta, actual, state of the art, fish screens on all Project export facilities should be evaluated to enable water that is truly surplus from the needs of the Delta, assuming there is any such water, to be exported with minimal impacts to fish.

–An alternative should be considered that includes substantially increased Delta outflows. Such an alternative could draw sensitive fishery species away from the existing export facilities, thereby increasing the “reliability” of such exports, and also enable the restoration of the Suisun Marsh which could provide tremendous benefits to numerous fishery species.

The DEIS should also include, in the context of the analysis of some of the foregoing alternatives or otherwise, an extensive discussion of desalinization options in order to promote regional self-sufficiency and, hence, improved water reliability for CVP export contractors. Such a discussion would be in furtherance of Water Code section 12946 which provides:

“It is hereby declared that the people of the state have a primary interest in the development of economical saline water conversion processes which could eliminate the necessity for additional facilities to transport water over long distances, or supplement the services to be provided by such facilities, and provide a direct and easily managed water supply to assist in meeting the future water requirements of the state.”

Opportunities for environmentally friendly desalinization of ocean waters as well as brackish ground waters should be thoroughly examined.

4. Inadequate Impact Analysis.

The CALSIM’s “monthly timestep” limitation is not sufficient to evaluate the significance of the proposed environmental impacts from the increased export pumping and water deliveries from the intertie. As a result, the DEIS has clearly not provided a “worst case scenario” and the DEIS must be revised to assess true worst case scenarios which depict what can happen to water levels, water quality, fishery resources, etc. on any particular day during various water year types and conditions. After those scenarios are depicted then feasible mitigation measures and/or alternatives can be meaningfully considered to prevent potentially significant impacts from occurring.

As noted above and in CWIN and CSPA's above-referenced comments, the modeling for the project is also deficient, among other reasons, since it (1) assumes the South Delta Improvement Program permanent barriers are in place, which is prohibited by the new salmon biological opinion; (2) assumes the Environmental Water Account is in place when there has thus far been no authorization that it be in place in the future; (3) fails to incorporate the plan called for in PL 108-361; and (4) fails to take into consideration the various laws discussed above that impose constraints on allowable exports from the Delta watershed.

With regard to water level impacts in the Southern Delta, an additional 467 cfs clearly is significant. Even without the additional 467 cfs, Reclamation should be well aware that exports can render portions of channels dry. This not only substantially impairs agricultural diverters' ability to divert from the channels, but also substantially impairs navigation, not to mention fish passage.

In this regard, the DEIS's determination at page 1-11 that "[n]avigation would not be affected by the Proposed Action . . ." is false. The DEIS must be revised to thoroughly evaluate the potential impacts on navigation and potential mitigation measures and alternatives to address those impacts.

5. Scope of Impact Analysis.

The DEIS' modeling contemplates an increase in exports of up to 250,000 af per year. (If you multiple the 467 cfs intertie capacity by 1.98 you get 924.66 af per day or 337,501 af per year.) To properly assess the potential environmental impacts from such substantial increases in exports, the DEIS must identify precisely where those increased exports are going to come from and where they are going to be delivered after they are exported. The DEIS must also identify when such exports and deliveries are going to occur. The NEPA task is to investigate, discuss and analyze how all aspects of the environment (both in-Delta and out-of-Delta) may be directly or indirectly affected by such exports, which, in the absence of the proposed project, would not be exported. The full range of potential direct and indirect impacts to the entirety of the affected environment, i.e., from the areas where the exports originate to the areas where the exports are ultimately delivered and everywhere in between, must be thoroughly examined. Thus far, the DEIS fails to both adequately identify the sources of water to be exported by the project as well as examine said full range of impacts resulting from the export and delivery of such water.

To the extent the source of water to be exported by the project comes from reservoir releases, then the DEIS must at a minimum do the following, which it thus far has not done: (1) sufficiently set forth and describe the affected reservoirs' historic and current "release programs;" (2) provide an adequate analysis of how those release programs may be modified by the implementation of the project; and (3) provide an adequate investigation, discussion and analysis of how the environment, including downstream water quantity and quality and aquatic resources may be adversely impacted by any such modifications.

a. **Drainage Impacts from Use of Exported Water.**

With regard to the evaluation of impacts in the areas where exported water will ultimately be delivered, one of the critical direct and/or indirect impacts which the DEIS must properly evaluate is the potential for such exported waters to be delivered to areas which directly drain surface and subsurface waters, and, hence, the various pollutants contained in such waters, into the San Joaquin River or delivered to upslope areas which generate hydraulic pressure which thereby increases the drainage of waters from the downslope lands into the San Joaquin River. The potential for such impacts is widely recognized and well-established.²

While the proposed project intends to facilitate exports of water to such areas, the DEIS fails to properly investigate, discuss, analyze, and ultimately mitigate to the extent feasible, the potential impacts from those exports on the water quality in the San Joaquin River.

While the DEIS purports to investigate “salinity” at and downstream of Vernalis, Reclamation’s NEPA responsibilities are by no means limited to addressing “salinity” impacts. It is well-recognized that drainage from exports to areas which directly or indirectly drain into the San Joaquin River can and do contain numerous other contaminants which Reclamation has a NEPA duty to properly investigate and evaluate (e.g., selenium, boron, molybdenum, other trace elements, etc.).

Reclamation’s NEPA duty is also not limited to avoiding or lessening impacts to agricultural water users which the Vernalis and other Delta salinity standard are intended to protect.

Moreover, Reclamation’s NEPA duty is by no means limited to evaluating impacts at or downstream of Vernalis. Instead, Reclamation is required to evaluate potentially substantial impacts in all of the areas directly or indirectly affected by the project. The area affected by drainage from exports to the CVP service areas extends considerably beyond, and upstream of,

² See e.g., SWRCB’s Decision 1641 at page 83 wherein the SWRCB states with regard to salinity: “[T]he SWRCB finds that the actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernalis. The salinity problem at Vernalis is the result of saline discharges to the river, principally from irrigated agriculture, combined with low flows in the river due to upstream water development. The source of much of the saline discharge to the San Joaquin River is from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP, primarily through the Delta-Mendota Canal and the San Luis Unit. The capacity of the lower San Joaquin River to assimilate the agricultural drainage has been significantly reduced through the diversion of high quality flows from the upper San Joaquin River by the CVP at Friant. The USBR, through its activities associated with operating the CVP in the San Joaquin River Basin, is responsible for significant deterioration of water quality in the southern Delta.” (See <http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf> at “pdf” p. 95.)

Vernalis.

With regard to the requisite detail of analysis, thus far, the DEIS lacks sufficient facts and analysis pertaining to (1) the amount of drainage water the project may introduce into to the San Joaquin River, in the form of surface or subsurface return flows; and (2) the extent such introduction of drainage water may result in potentially substantial impacts on the water quality in the San Joaquin River via the introduction of salt, boron, selenium and other contaminants. Questions which the DEIS must address include the following: precisely where did the EIS preparers assume the water would be delivered? When did they assume the water would be delivered and how did they assume they water would be used? Did the EIS preparers take into consideration both surface and subsurface return flows? Did the EIS preparers take into consideration the hydraulic pressure influence on return flows? When, where and how were such return flows measured. Were the measurements taken along all significant stretches of the San Joaquin River or just a few select locations?

It should be noted that a meaningful investigation, disclosure and analysis of the project's potential drainage impacts on the water quality in the San Joaquin River would clearly be reasonably feasible. There is a well-established computer model, the "SJRIO Model," which is specifically designed to evaluate such impacts and which could and should be used.

i. Impacts to New Melones' Area of Origin Contractors.

Since Reclamation contractors, such as Stockton East Water District, have a Water Code section 11460 prior right to New Melones water that cannot be directly or indirectly deprived by the Projects' operations, the DEIS must fully address the potential for the project to so result in such direct or indirect deprivation and describe potentially feasible mitigation measures to ensure that such an unlawful deprivation does not occur. Thus far, the DEIS has failed to do so.

Reclamation also has an obligation to thoroughly take PL 108-361 into consideration in its NEPA analysis. In addition to what was discussed above, PL 108-361 further imposing the following requirement on Reclamation which the DEIS has thus far failed to adequately address:

"[The Secretary of Interior] shall acquire water from willing sellers and undertake other actions designed to decrease releases from the New Melones Reservoir for meeting water quality standards and flow objectives for which the Central Valley Project has responsibility to assist in meeting allocations to Central Valley Project contractors from the New Melones Project." (PL 108-361, Section 103(f)(1)(F), emphasis added.)

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6. Thresholds of Significance.

The DEIS should be revised to clarify, and its assessment of the significance of impacts should be amended to take into consideration, the fact that a particular environmental effect meets a particular water quality standard or other standard does not mean that the effect is not significant. As discussed above, the state and federal Anti-degradation laws provide thresholds that go well beyond those set forth in the SWRCB and RWQCB's Water Quality Control Plans, or in any other national, statewide or regional plan or policy. Thus far, the DEIS fails to properly recognize and take into consideration those laws.

7. Conclusion.

Thank you for considering these comments and concerns.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Dante John Nomellini, Jr.", written over a horizontal line.

Dante John Nomellini, Jr.

DJR/djr