



## CENTRAL DELTA WATER AGENCY

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September 2, 2008

**Via Email to [dv\\_context@calwater.ca.gov](mailto:dv_context@calwater.ca.gov)**

Delta Vision Blue Ribbon Task Force

Re: Comments on the Third Staff Draft of the “Delta Vision Strategic Plan.”

Dear Task Force:

Thank you for the opportunity to comment on the above-referenced matter. The Central Delta Water Agency (CDWA) hereby joins in the comments on this matter submitted by Alex Hildebrand, dated August 19, 2008, which cover many topics and shortcomings in the Third Staff Draft. (A copy of those comments are attached hereto as “Exhibit A.”) While as Mr. Hildebrand’s comments recognize, various aspects of the Third Staff Draft are indeed beneficial, there are also many negative aspects. Below, the CDWA will highlight some of the most negative aspects which CDWA respectfully urges be stricken or substantially modified.

1. **The Task Force’s Recommendation to Construct an Isolated Canal Unfairly Circumvents the CEQA (and NEPA) Processes and Should be Stricken.**

While it remains to be seen what influence your recommendations in your Strategic Plan will ultimately have on the future management of the Delta, we must at least presume that the influence will be significant in light of the substantial effort you and your staff and other interested parties have put into the creation of the Plan. Accordingly, it goes without saying that your recommendations should be based on a thorough and good faith, and most importantly, fair assessment of the subject matter of your recommendations. Your recommendation that “the linchpin to managing Delta water supply and ecosystem functions as co-equal objective will be construction of a new canal isolated from the Delta’s natural waterways . . .” is not based on such an assessment. (Third Draft, p. 41.)

Not even DWR, an entity that has presumably wanted an isolated canal (for the benefit of its export contractors) for at least the last 30-plus years, will publically state that it believes some form of an isolated canal is a necessary part of the solution to the Delta’s ecosystem and the state’s water supply problems. Nor will the state’s Resources Agency. Both DWR, as well as the Resources Agency, have made it clear in recent public meetings in Stockton relating to the Bay Delta Conservation Plan, that neither of them “have made up their minds on the issue.” Instead,

they have made a commitment that they will honor the CEQA (and NEPA) processes and will not make up their mind until the full range of potential environmental impacts associated with an isolated canal are thoroughly investigated and compared and contrasted to a range of alternatives to such a canal that are thoroughly explored and set forth in detail and in good faith in the EIR for the BDCP.

By the Task Force's recommendation that an isolated canal "must be constructed" (Third Draft, p. 41), the Task Force is essentially signaling to the public and Legislature that it does not care about the environmental impacts from an isolated canal and it does not care about thoroughly exploring alternative approaches to addressing the issues which it believes an isolated canal will address. This is extremely bold and extremely unfair.

While we are still exploring whether such a recommendation by the Task Force is legally required to comply with CEQA (see discussion immediately below), regardless of whether CEQA analysis is legally required it is unfair to the environment and to all of those affected by the physical changes to the environment from an isolated canal for such a presumably influential body such as yourselves to conclude, as you have done in your Strategic Plan, that an isolated canal should be constructed without first undergoing a CEQA analysis to ensure that such a conclusion is duly informed.

Since the Legislature has declared that CEQA is "an integral part of any public agency's decisionmaking process" (Pub. Resources Code, § 21006), and something which DWR, the Resources Agency, and all other so-called "public agencies" must comply with, why is the Task Force situated such that it can make a presumably, substantially influential recommendation that public agencies and the taxpayers should construct an isolated canal without the benefit of a thorough CEQA analysis? Is the Task Force more knowledgeable and/or disciplined than all other public agencies in the state about the full range of direct and indirect environmental impacts and potential alternatives to an isolated canal that it does not need a CEQA analysis "to assist [it] in systematically identifying both the significant effects of [an isolated canal] and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects" (Pub. Resources Code, § 21002)? Has the Task Force completed a process that is substantially equivalent to the depth and comprehensiveness of the CEQA process, such that the Task Force can assure the public that it has substantially complied with the substance of CEQA? The answer is clearly "no" since, among other reasons, the isolated canal which the Task Force is recommending be constructed has not even been defined, which is a threshold task to even begin a CEQA-type analysis.

The decision to construct an isolated canal is arguably the most contentious decision in the state regarding water. It is respectfully submitted that the Task Force is doing a tremendous disservice to the environment and to all those affected by an isolated canal to jump to the conclusion that such a canal should be constructed without out *first* subjecting such a decision to the CEQA process. If the Task Force wants to recommend, based on its limited analysis and based on an open concession of the limitedness of its analysis, that it believes an isolated canal should be considered for inclusion in a future CEQA process to discuss approaches to restore the

Delta and help with the state's water supply, then so be it. However, for the Task Force to do what it has done in the Strategic Plan, i.e., conclude that an isolated canal is "the linchpin to managing Delta water supply and ecosystem functions as co-equal objectives" and "must be constructed" is totally and completely inappropriate and unfair. (Third Draft, p. 41.) Such a conclusion should be stricken from the Strategic Plan.

a. **CEQA Compliance May Be Mandatory.**

Since the Task Force has, to CDWA's knowledge, made no effort to comply with the CEQA process, presumably the Task Force has determined that such compliance is not required. CEQA applies to actions by "public agencies" which CEQA Guidelines section 15379 defines as follows: :

"'Public agency' includes any state agency, board, or commission and any local or regional agency, as defined in these guidelines. It does not include the courts of the state. This term does not include agencies of the federal government."

CEQA Guidelines section 15383 goes on to provide:

"'State agency' means a governmental agency in the executive branch of the State Government or an entity which operates under the direction and control of an agency in the executive branch of State Government and is funded primarily by the State Treasury."

It is not clear to CDWA at the present time whether the Task Force falls within that definition of "state agency." If the Task Force does fall within that definition, then further analysis will have to be conducted to determine what portions of CEQA, if any, legally apply to the Task Force's determinations. While it is clear that if the present draft of the Strategic Plan is adopted the Task Force will have "approved" and "adopted" the conclusion that an isolated canal should be constructed (and has gone so far as to establish a deadline, i.e., by December 2010, to "establish an action plan for the design, funding and construction of an isolated facility . . ." (Third Draft, p. 41), even if it were somehow deemed that it did not so approve or adopt such a conclusion within the meaning of CEQA, CEQA Guidelines section 15262 would nevertheless require the Task Force to duly "consider[] environmental factors" which the Task Force has not by any means thoroughly done thus far.<sup>1</sup>

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<sup>1</sup> CEQA Guidelines section 15262 provides: "A project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded does not require the preparation of an EIR or negative declaration but does require consideration of environmental factors. This section does not apply to the adoption of a plan that will have a legally binding effect on later activities."

Accordingly, CDWA hereby requests that the Task Force provide it with the following information at its earliest convenience:

- (1) Detailed information regarding how the Task Force and all of its staff and operations are being funded to enable a determination of whether it is “funded primarily by the State Treasury” (Guidelines, § 15383); and
- (2) A statement of reasons why the Task Force believes it does not have to legally comply with any aspect of CEQA.

2. **The Task Force’s Recommendation to Construct an Isolated Canal Fails to Consider Whether Such Construction is Contrary to Existing Law.**

The Task Force has not only concluded that an isolated canal must be constructed without first subjecting that decision to the CEQA process, but has also reached that conclusion without evaluating the legality of the construction and operation of such a canal. Even if it is the Task Force’s opinion that existing laws are irrelevant and that any laws that are obstacles to such construction and operation should be ignored or rewritten to accommodate such actions, fairness and prudence would require such a presumably influential entity such as the Task Force to thoroughly evaluate the legality of its recommendations and determine whether what it is recommending would be contrary to laws that have been put in place to protect the Delta and the Delta watershed, and all the water users and environmental resources therein. While CDWA has seen the letter to the Delta Vision Task Force from Deputy Attorney General, Virginia A. Cahill, dated July 2, 2008, that letter merely discusses the various “area of origin” laws in general terms and does not purport to address the critical question whether the construction and operation of an isolated canal would be contrary to such laws.

It is not only essential and equitable for the public, as well as those receiving your recommendations, to be informed as to what legal protections your canal recommendation might circumvent, but, in addition, it is important that the Task Force itself be mindful of any such circumventions *before* it makes a recommendation to circumvent them.

Attached hereto as “Exhibit B” are some of the reasons why the construction and operation of an isolated canal are contrary to existing law. Before the Task Force makes a recommendation to construct and operate an isolated canal, all of these reasons, in addition to all other potential conflicts with existing law, must be thoroughly evaluated and publically disclosed to ensure that (1) the Task Force itself has duly evaluated and considered such conflicts; and (2) that those the Task Force intends to influence with its recommendation are equally mindful of the consequences of such a recommendation.

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3. **The Task Force's Recommendation to Eliminate the Direct Stake of Two-Thirds of Californians and Farmers of Millions of Acres of Farmland in the Water Quality of the Delta is Shortsighted and Will Result in the Abandonment of the Delta.**

It is most appreciated that one of the four key themes of the Strategic Plan is the following:

**“Recognition, not Abandonment. . . .** This strategic plan recommends actions which will change the Delta, but the strategic approach is to encourage recognition, not abandonment, of the Delta's unique character. That unique character includes agriculture, recreation and a distinct social and cultural fabric. Strategic improvements to the levee system, support for sustainable agriculture, investments in the tourism and recreation economies, and decisions about land use should contribute to the recognition and preservation of the Delta's special values as a place.”

What, however, is not appreciated is the Task Force's failure to appreciate, in a practical and political sense, the consequences of removing the direct stake which two-thirds of the state's population and farmers of millions of acres of farmland have in the water quality of the Delta. The construction of an isolated canal would precisely do that. Instead of worrying about water quality in the Delta, those millions of people and farmers would only have to worry about the water quality at their intakes to the isolated canal at the very northernmost tip of the Delta. Right now, all of those people and farmers have a direct interest in ensuring Delta levees and all the multitude of benefits resulting from such levees (agriculture, open space, wildlife habitat, protection of infrastructure, communities, culture, etc.) are protected and preserved. The reason, of course, is because those levees help protect the water quality at their current export facilities in the southern delta.

Does the Task Force genuinely believe that with the existence of an isolated canal, all of those people and farmers will continue to strongly support through legislation, budgetary determinations, bond measures, etc., the protection and preservation of the existing levee system and the protection and preservation of the water quality throughout the portions of the Delta downstream of their intake at the northernmost tip of the Delta? With an isolated canal, protecting and preserving the water quality downstream of the canal's intake will become directly contrary to their interests. The more they have to let water flow past that intake the worse their water supply becomes. There would be a huge, inevitable shift from those millions of people and farmers from wanting water quality in the Delta to be as good as feasibly possible to wanting such water quality to be as bad as they can get away with. That their priorities will do a “180” is not a secret and not rocket science. It should be 100% anticipated and expected. Yet, the Task Force does not seem to acknowledge this shift in any respect.

To the argument by some that various laws or regulations will be put in place to ensure the protection of the water quality in the Delta, why would those millions of people and farmers support the passage of such laws, and, assuming they were somehow initially passed, why would

they not actively lobby to remove those laws and/or argue in courts that those laws really do not provide the Delta with any meaningful protection and/or they should not be enforced? The answer is they would, it is only natural and squarely in their direct interests to do so.

The Delta Protection Act of 1959 (i.e., current law, Wat. Code, § 12200 et seq.) requires the Projects to divert from the “common pool” that is collected within the Delta *not* from the uppermost tip of the Delta. That common pool concept is arguably the greatest concept ever created to ensure the ongoing protection and preservation of the Delta because it ensures that those who wish to export water from the Delta watershed have a direct stake in the quality of water throughout the Delta. Removal of that stake, which the Task Force seemingly does without hesitation in its Strategic Plan, will result in the eventual destruction of the Delta, its levee system, its water quality and all of its environmental, economic, social, historical and cultural characteristics dependent on those levees and water quality. The fact that the Task Force does not recognize that is most unsettling and, once again, manifestly unfair to those who truly want to preserve and protect the Delta.

**4. Governance Must be Controlled by Representatives With a Direct Stake in the Preservation of the Delta.**

As if the recommendation for an isolated canal without first undergoing a CEQA analysis, and the removal of the direct incentive for two-thirds of the state and farmers of millions of acres of farmland to fight to protect and preserve the Delta was not bad enough, the Strategic Plan encourages the Delta’s ultimate demise even further by recommending the creation of a governing entity that has no provision for representation, much less control, by any interests that live, breath, work or recreate in the Delta, i.e., anyone with a direct stake in the preservation of the Delta. That is unacceptable.

If the Task Force wishes to create a new governing entity then it must redesign it such that, at a minimum, the majority of voting members are representatives of interests that have a direct stake in the preservation of the Delta. In order to reduce the potential for manipulation, members should be elected from within the Delta area and not appointed by the Governor.

Moreover, land use should remain within the control of the five (5) Delta counties and the Central Valley Flood Protection plan should be the means for determining the area over which flood easements should be acquired. With regard to the operation of the State Water Project, such operation should be placed with a watermaster appointed by and subject to direct oversight by the California Appellate Courts with the specific directive to give first priority to meeting the present and future needs within the Delta and other areas of origin and secondarily to provide for exports.

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## 5. The Task Force's "Co-Equal Goal" Vision is Misleading and Misplaced.

Still making matters considerably worse, the proposed new governing entity will be charged with "governing the co-equal values of healthy estuarine ecosystem function and a reliable water supply . . . ." (Third Draft, p. 72.) At the outset, the focus on "reliable" water supplies clouds these two co-equal values since if all that is sought is a "reliable" water supply with no regard to the "quantity" of that supply, then it would seem clear to everyone that there is a certain quantity of water that could be reliably delivered to export interests every year from the Delta. The more you scale back the quantity, the more reliable that quantity becomes. And, similarly, if there is no regard to "quality," then, once again, the more you scale back the quality, the more reliable the export of that quality becomes. As others have repeatedly pointed out, the Task Force needs to clarify what its goal actually is as far as a providing a "reliable water supply."

An even more egregious problem with the Task Force's "co-equal goals" vision, however, is that it at least suggests, if not explicitly states, that the goal of meeting the needs of water users *outside* the Delta watershed with Delta watershed water is somehow on an equal priority with meeting the needs of water users and the ecosystem *within* the Delta watershed with Delta watershed water. In light of the influentialness of the Task Force's recommendations and potential ramifications therefrom, the Task Force should eliminate any vagueness in what it is recommending on this critical topic and should clarify precisely what it means by its co-equal goals vision.

Existing law could not be clearer that the human and environmental water needs *within* the Delta watershed are entitled to priority over the water needs *outside* of that watershed. Only Delta watershed water that is *surplus* to the needs within the Delta watershed may be exported to meet the needs of those outside that watershed. This is a concept deeply embedded in law and was the fundamental promise and assurance given to those within the Delta watershed when the massive state and federal export projects first came on line.<sup>2</sup>

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<sup>2</sup> See for example.:

Water Code section 11460: "In the construction and operation [of the SWP and CVP] 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 [SWP or CVP] 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."

Water Code section 12200 (Delta Protection Act of 1959): "[T]he State Water Resources Development System has as one of its objectives the transfer of waters from water-*surplus* areas in the Sacramento Valley and the north coastal

To avoid any confusion over this critical matter, the Task Force should clarify whether it is recommending that said concept, promise and assurance be thrown to the wayside and ignored or whether it should be upheld and honored. Needless to say, the CDWA strongly urges that the Task Force clarify that it is recommending the latter.

Attached hereto as “Exhibit C” is an article by Dante Nomellini, Sr. from “The Water Report” entitled, “The Peripheral Canal,” which discusses at length both the physical problem with trying to meet the water needs of those *outside* the Delta watershed with Delta watershed water as well as the clear recognition, and deeply embedded promise, that only Delta watershed water that is surplus to the present and future needs of water users within that watershed can and would ever be exported from that watershed. The article also explains why an isolated facility should have no part whatsoever in any true and good faith effort to restore the Delta ecosystem and address the state’s water supply problems.

The linchpin for any planning for exports from the Delta is identification of the source of surplus water to be exported. Planning for the State Water Project required development of five (5) million acre feet of water from North Coast watersheds to supplement flows into the Delta by the year 2000. It is critical to identify the source of water for the State Water Project and the San Luis Unit of the Central Valley Project. The Delta watershed was never expected to yield sufficient water to support such exports and still meet the needs within the watershed.

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area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water *surplus* to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas.” (Emphasis added.)

Water Code section 12204 (Delta Protection Act of 1959): “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 [i.e., necessary to provide salinity control and an adequate water supply for water users *within* the Delta].”

*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168: “[B]ay-Delta ecosystem restoration to protect endangered species is mandated by both state and federal endangered species laws, and for this reason water exports from the Bay-Delta ultimately must be subordinated to environmental considerations.”

6. **The Task Force’s Statements Regarding Water Right Priorities and “Preferential Treatment” Towards Water Interests Need Clarification.**

At several places in the Strategic Plan statements are made regarding water right priorities and “preferential treatment” towards water interests, usually in the context of discussing the reasonable use and public trust doctrines. Examples include the following:

“California’s system of water rights, including reasonable use and public trust principles, provides a sound framework for implementing these recommendations.” (Third Draft, pp. 3-4.)

“Granting preferential treatment upon any interest now will only compound and increase the difficulty of future policy making and the cost of eventual adaptation.” (Third Draft, p. 4.)

“The goal of choice and action now—even in the face of feared change, *claims of privileged position*, and the impacts of increased costs—is a better future for California. Increased effective investments in ecosystem functions, increased water conservation, regional self-sufficiency, and other strategies recommended in this Strategic Plan can result in a future better for Californians *than the continuation of inconsistent and unbalanced current behaviors or policies that favor one or another interest or region.*” (Third Draft, p. 4.)

It is not clear what the Task Force is driving at with such statements. The latter two statements suggest that the Task Force views the state’s long-established and deeply embedded water right priorities and preferences a hindrance to the Task Force’s vision rather than a framework to guide that vision and its implementation, as suggested by the first statement.

To the extent the Task Force views any existing priorities and preferences a hindrance to the accomplishment of any aspect of its vision, then such aspects must be stricken or modified to comport to such priorities and preferences. Adherence to the existing priorities and preferences would have avoided the current Delta ecosystem collapse. Any vision based on an abolition of such priorities and preferences is a vision that is destined to fail and will perpetuate the destruction of areas with adequate water supplies to serve those that do not. The Task Force should make it crystal clear in its Strategic Plan that it is *not* advocating the abolition of any such priorities or preferences.

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7. **CDWA's Vision/Strategic Plan.**

- Accelerate funding for water self-sufficiency projects with particular emphasis on desalination and interconnections to assure reliability for urban areas in the event of the failure of out-of-basin delivery supplies.
- Reduce exports from the Delta to what is truly surplus to the needs (both human and environmental) within the Delta and other areas of origin.
- Curtail export pumping at all times when significant numbers of fish are present near the intakes.
- Curtail export pumping when Delta channel water levels are adversely impacted.
- Improve fish screens at existing SWP and CVP intakes. (Something the CALFED Program committed to do prior to 2006, but failed to pursue [see CALFED Record of Decision, pp. 23 & 49].)
- Increase minimum Delta outflow in January through July.
- Curtail diversions through the Montezuma Gates and restore fresh water flow to and water quality in Suisun Bay.
- Reconnect Suisun Marsh to Suisun Bay.
- Restore San Joaquin River flow and water quality.
- Improve all non-project levee systems within the Delta to the PL 84-99 agricultural standards and project levees to the project design standards. Improve urban and other critical area levees to higher standards. (Attached hereto as "Exhibit D" is a copy of CDWA's "Five (5) Year Levee Plan" for funding Delta levee works.)
- Evaluate and install gated barriers and master levees at strategic locations within the Delta consistent with maintaining the "common pool" to improve Delta operations and facilitate restoration and recovery after catastrophic events.
- Restore the arms length relationship between the state and federal regulatory agencies and the operations of the SWP and CVP.
- Place control of the operations of the SWP in the hands of a watermaster appointed by and subject to direct oversight by the California Appellate Courts with the specific directive to give first priority to meeting the present and future needs (both human and environmental) within the Delta and other areas of origin

and secondarily to provide for exports.

8. **Conclusion.**

Thank you for your time and consideration of these comments and concerns.

Very truly yours,

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

Dante John Nomellini, Jr.  
Attorney for the CDWA

DJR/djr  
Enclosures

# **Exhibit A**

# SOUTH DELTA WATER AGENCY

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August 19, 2008

Public Comment on August 14, 2008 Staff Draft of Delta Vision Strategic Plan  
By Alex Hildebrand, Engineer for South Delta Water Agency

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## Introduction

The Delta Vision Task Force has requested public comment on their Staff's draft Strategic Plan. This technical critique of the Plan will be submitted at the 8/28 public meeting in Stockton.

This draft Strategic Plan provides a lot of thought and information on a very complex subject, and it includes many worthy proposals. The worthy proposals include, for example, the need for regional storage and regional self sufficiency, (pages 16, 18); also, the need for an independent Science and Engineering Board rather than just a Science Board (pages 73, 78, 79); the integration of measures for flood management, water supply management, and Delta protection (page 34), etc. However, some of the goals and strategies are somewhat conflicting, are not well defined, have not been determined to be technically feasible, have not been quantified as to approximate water need and water availability, and probable unintended consequences have not been considered.

The Vision Task Force was given a largely impossible assignment. It was to "describe a future in which the Delta can continue thriving over coming generations" (page 3). It was to do this while also meeting a co-equal goal of providing "a reliable state water supply" that is "adequate for its future population" (Figure 2 and page 81). Conflicting with this, the Task Force's assignment included great political pressure to assure that the Strategic Plan would include some form of an isolated canal, which would be physically capable of intercepting and exporting most or all of the remaining fresh water inflow to the Delta during low river flows (pages 18, 44-46, 82). The doubtful feasibility (page 6) of a dual conveyance system and the potential for a greatly improved through-Delta system without a canal was therefore ignored.

## What level of Delta protection is intended?

There is no definition of what would constitute a "thriving" Delta, and no discussion of the amount and reliability of fresh water inflow to the Delta that this would require. There is no

indication of how this inflow would be provided and distributed throughout Delta channels, and how it would be assured, particularly if an isolated canal is used to further deplete and destroy inflow. The Task Force may have relied on DWR analyses that are based on average summer river flows into the Delta including wet year flows. The DWR has apparently not analyzed what would happen if summer river flows were as low as they have been during three of the last four summers.

#### What constitutes an adequate water supply?

The Task Force has also not quantified even in principle what will constitute an adequate State water supply, and over what time frame. The State's population is growing at a rate of about 5 million people in 10 years. A developed water supply that would be adequate now will not be adequate in 10, 20, or 30 years. It would also not be adequate when our 2 million acre feet overdraft of groundwater becomes unsustainable. The State legislature adopted Agriculture Code 411 (2002) which states that the State Water Plan must provide enough farm water so that the State and the Nation do not become dependent on a net importation of food. DWR ignored the intent of this legislated policy and adopted, without comment, a de facto policy of future dependence on a net importation of food. DWR's attitude was apparently that agriculture was only important for farmers, and that the domestic production of food was not an activity of social importance. Does the Vision Task Force define an adequate water supply based on legislated policy or on DWR de facto policy?

#### Unexplained proposals

It is not clear whether the co-equal Delta preservation and water supply goal is to be achieved statewide or also within the Delta (pages 76, 80, and 83). It is not clear how water will be provided for the flows per pages 46 and 50. It is not clear how the substantial increase in water consumption will be provided when farm lands are converted to open water or marshes (pages 27, 46, 47, 60-61, 66, 71). (Testimony before CALFED or before the SWRCB long ago explained and quantified the increase in evaporation from an acre of open water as compared to an acre of farmland, and the further increase in water consumption for an acre of tulle marsh). These conversions of ag land also appear to be at odds with the statement on page 11 that the strategic plan does not abandon the unique character of the Delta which includes "support for sustainable agriculture". If those conversions combine with other features of the Strategic Plan to substantially reduce Delta farms, the remaining farms may be lost due to loss of food processors and other farm services. Preservation of the unique Delta also appears to require preservation of the channel system rather than an open water Delta.

Neither the State Water Plan nor the Vision Plan adequately distinguishes between water that is used but not consumed, and water that is consumed. Most indoor water is not used consumptively. In the Central Valley most unconsumed water is treated, if necessary, and then either returned to the stream system or percolated to recoverable groundwater. However, a majority of the developed water supply is consumed by farm crops and other plants. Plants must take up a rather fixed amount of water through their root systems and evaporate it through their

leaves in order to grow a pound of plant biomass. Farm crops cannot, therefore, be grown without this consumed water, and in the Central Valley excess applied water is almost all recovered as either surface water or groundwater. The consumed water can not be recovered. Some excess water must be applied to flush from the root zone the salt that is removed by the roots from the consumed water.

On page 51 it is proposed to “reconfigure Delta waterway geometry to increase variability of circulation patterns”. This proposal is not sufficiently defined to determine its merit or unintended consequences.

#### Some strategies would create paperwork bureaucracies

Some of the proposed Strategies would create a lot of expensive paperwork but could do little to increase farm water use efficiency (page 31, Strategy 1). The Strategies should all be examined to determine whether they are needed and whether potential benefits would justify the cost and regulatory burdens.

The proposal on page 33 to “reduce or eliminate any return flows” is unreasonable and unwise. Salt in a water user’s source water could then only be disposed of by percolating to groundwater which would then become too salty to use. There must be a salt balance in each watershed. That can only be achieved if both indigenous and imported salt is conveyed to the ocean or some other permanent salt sink.

#### Restoration of flood plain overflow

On page 69 (see also p. 47 and 50) it is proposed that there be “non-structural floodplain management” in seven of the sixteen Reclamation Districts in the South Delta Water Agency (SDWA). This apparently means no levees. Two more districts, including an urban district, would also be inundated by any adjacent flood plain overflow. This was never discussed with SDWA. Furthermore, the SDWA Flood Conveyance plan is ignored. This is a prime example of “brainstorming” by people outside the Delta without examination of efficacy and consequences. These lands are above channel water level except during floods. They have an area-wide slope from south to north and drain out quickly after a flood if flooded. They are levied farm lands. If not protected by levees some portions would flood on average about once in ten years and other portions once in fifty or more years. There would be no wetland habitat. Any upland habitat would be dry and subject to fire. Minor floods would cover county roads including the south end of Airport Way which is a major travel route that crosses the river. Major floods would inundate several large dairies and flood rural housing beyond the reclamation district boundaries. The proposal would provide no benefit that is not better provided by the SDWA Flood Conveyance Plan which includes increasing the flood conveyance capacity of the Paradise Cut bypass.

The Strategies do not include the restoration of natural flood overflow during major floods onto about 100,000 acres of existing dedicated wildlife refuges and other wetlands in the Los Banos area. The flat terrain lends itself to water retention for transient storage. A U. S.

Corps reconnaissance survey established that up to 200,000 acre feet of flood water could be retained until the river went down. It might be possible to transfer some of this to storage.

### The Delta cannot be preserved if there is an isolated canal

The Vision Plan does not explain that a major cause of Delta degradation in the last 60 years has been the very substantial decrease in fresh water inflow to the Delta. Exports from rivers upstream of the Delta and increased consumptive use of water in the watersheds have largely eliminated any effective fresh water inflow from the San Joaquin, Calaveras, and Mokelumne Rivers during summer months of most years. (The San Joaquin inflow has at times been down to about 600 cfs this year, and has been less than needed in the South Delta for farm diversions in many months during the last four years). This low inflow has resulted in increased salinity in Delta channels, and causes stagnant channel reaches where neither salinity nor dissolved oxygen (for fish) can be controlled. The Vision Task Force and others illogically assume that these impacts of low inflow can be corrected by using an isolated canal to further reduce inflow by capturing and exporting most of the remaining Sacramento inflow before it enters the Delta. The canal would also destroy the channel flows that now distribute Sacramento inflow through most Delta channels. They talk vaguely about correcting this impact of low inflow by releases from the canal. Where would that extra canal water come from, how would it be disbursed, and, if the water is available, why is it better to put it in a canal instead of letting it flow into the Delta? To believe that a canal can operate while also restoring and maintaining the Delta as a “special place” is like believing in Santa Claus.

There are no publicly released analyses that show that a canal can be operated during typical summer months of average and drier years without increasing salinity far above salinity standards in most Delta summer months. This would put farmers out of business, and exporters would not want high salinity water taken through the Delta. Furthermore, farmers are the primary maintainers of non-urban levees. When the farm income is lost, the levees will not be maintained, and failed levees will not be restored. This will lead to a salty open water Delta. It will not be much better than San Francisco Bay for endangered fish habitat.

Page 55 discusses “adaptive management”. Building a canal is a very expensive, irreversible measure. It could only adaptively manage the tradeoff between preserving the Delta versus sacrificing the Delta for exports. It can do nothing to increase overall water supply.

The Strategic Plan also does not discuss or acknowledge the enormous havoc that a canal would have on the Delta and its preservation as a “special place”. It would necessarily go through the Delta and divide it into two parts. It would sever waterways, roads, farms, irrigation systems, drainage systems, recreational boating routes, vistas, evacuation routes, utility lines and pipes, etc., and it would increase flood levels south and east of the canal. It would be vulnerable to the same seismic, wave erosion, seepage problems, etc. as would upgraded nearby levees.

## The non-canal alternative is ignored

The Comprehensive Water Management Plan which was developed and presented by in-Delta experts solves many problems without the costs, construction times, irreversible features, uncertainties and havoc that could be caused by a canal. It would provide an Old River Corridor which would keep all San Joaquin fish away from fish screens and exports. It would provide a means for eliminating the “dead end” problem with the existing export screens. Sacramento fish that would still be screened in the South Delta could be provided with a pumped flushing flow past the screens. This flushing flow with its screened fish would then be discharged into the old River Corridor. If multiple levee failures ever caused Bay water to reach the Central Delta, it could be pumped back to the Bay via the Old River Corridor.

No plan, including a canal, can guarantee that there will never be levee or canal bank failures. The In-Delta Group’s Plan would minimize that risk and prepare for a quick repair of key levees so that export and in-Delta water needs can be restored within about a year.

The In-Delta Group’s Plan covers much more, including measures to reduce peak flood inflows. However, this critique focuses on the reasons why this plan is a much better alternative than a canal plan.

## Governance

Other sections of the Vision Strategy deal with how a Vision Plan would be refined, and how its implementation would be governed, and who would pay. The choice is like the choice between the efficiency of a dictatorship and the protections of a democracy. We need a democratic solution. We cannot agree to a governance system in which the people who work and live and produce food, and recreate in the Delta would have little effective voice. We have already seen that people outside the Delta think they know best how to manage the Delta. And we don’t want the DWR to decide whether farmers are the primary beneficiaries of farming, or whether there is an overriding social interest in the production of food, and in the future price of food if we don’t have enough water to grow enough food.

It is suggested that we should trust that the SWRCB will have the wisdom, the knowledge, and the political independence to protect the Delta from exporters, and that the DWR and USBR will abide by SWRCB mandates. There is no basis for such trust. For example, the Congress authorized the CVP with a stipulation that no water would be delivered until a valley drain was built. We still have no drain. The SWRCB stipulated that compliance with salinity standards by DWR and USBR is a condition of their export permits. The exporters have not complied. DWR and USBR alleged to the SWRCB again this year that there was no way they could comply. The SWRCB did not then enforce the requirement. SDWA and DWR and USBR technical personnel know and have described how the standards could be met, and SWRCB is aware of that fact. Until very recently, DWR has widely and frequently distributed forecasts of South Delta channel salinity which predicted that salinity standards would be met. They knew

that these forecasts were wrong; as much as 40% below measured salinity. DWR and SDWA engineers have known for a long time that the model used to make these erroneous forecasts was wrong because it was incorrectly calibrated. These are just examples of many reasons for distrust. We have cordial relations with DWR and USBR engineers. It is the organizations that we can't trust.

### Conclusion

We do not criticize the individual members of the Task Force. They were given a largely impossible assignment and supplied with erroneous and misleading information. They were not provided with analyses that would reveal what is and what is not physically feasible.

If billions of dollars are spent on a canal, it will be an irreversible monster that cannot preserve the Delta and cannot increase the state's developed water supply. The population has already outgrown the developed water supply to a degree that makes environmental protection and development of an adequate water supply as difficult as it is urgent. We cannot do it with a canal. The alternative proposed by the In-Delta Group would move us in the right direction with less time, less cost, more adaptability, and more potential for further progress.

# **Exhibit B**

1. **Some Reasons Why The Construction and Operation of An Isolated Facility is Contrary to Law.**

Two paramount questions regarding any form of an isolated facility include whether such a facility can be legally constructed and, if so, whether such a facility can be legally operated in a manner which successfully accomplishes the purposes for which it is constructed. Unless existing law is substantially overhauled the answer is “no” on both counts.

a. **Delta Protection Act of 1992** (Pub. Resources Code, § 29700 et seq.).

“The Legislature finds and declares that the Sacramento-San Joaquin Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state *to recognize, preserve, and protect those resources* of the delta for the use and enjoyment of current and future generations.” (Pub. Resources Code, § 29701, emphasis added.)

“The Legislature further finds and declares that the basic goals of the state for the delta are the following:

(a) *Protect, maintain, and, where possible, enhance and restore* the overall quality of the delta environment, including, but not limited to, *agriculture, wildlife habitat, and recreational activities.*

...

(c) Improve flood protection by structural and nonstructural means to ensure an increased level of public health and safety.” (Pub. Resources Code, § 29702, emphasis added.)

“The Legislature further finds and declares as follows:

(a) The delta is an agricultural region of great value to the state and nation and *the retention and continued cultivation and production of fertile peatlands and prime soils are of significant value.*

(b) The agricultural land of the delta, while adding greatly to the economy of the state, also provides a significant value as open space and habitat for water fowl using the Pacific Flyway, as well as other wildlife, and *the continued dedication and retention of that delta land in agricultural production contributes to the preservation and enhancement of open space and habitat values.*

(c) *Agricultural lands located within the primary zone should be protected from the intrusion of nonagricultural uses.*” (Pub. Resources Code, § 29703, emphasis added.)

The construction of an isolated water transfer facility through the Delta will constitute a massive “intrusion of nonagricultural uses.” Considerable acreage of agricultural land will be forced out of production by the direct take and by way of seepage, water quality will be degraded, and flood protection will be made more difficult. This will result in the destruction of the associated economic, open space and habitat values associated therewith, which is squarely contrary to State’s goal and policy to “recognize, preserve, and protect” such agricultural lands and values. (Pub. Resources Code, §§ 29703 & 29701, respectively.)

Similarly, with regard to the “operation” of an isolated facility, the diversion of substantial amounts of fresh water flows into such a facility is inconsistent with the basic goal of the state to “[p]rotect, maintain, and, where possible, enhance and restore the overall quality of the delta environment, including, but not limited to, agriculture, wildlife habitat, and recreational activities.” (Pub. Resources Code, § 29702.)

b. **Water Code sections 12980 et seq.** (From Division 6, Part 9 of the Water Code Entitled, “Delta Levee Maintenance”).

“The Legislature finds and declares that the delta is endowed with many invaluable and unique resources and that *these resources are of major statewide significance.*” (Wat. Code, § 12981, subd. (a), emphasis added.)

“The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, *the physical characteristics of the delta should be preserved essentially in their present form; . . .*” (Wat. Code, § 12981, subd. (b), emphasis added.)

Neither the construction of an isolated water transfer facility through the Delta, nor the diversion of fresh water inflows into such a facility, come anywhere near “preserv[ing]” “the physical characteristics of the delta . . . in their present form; . . .” (*Ibid.*) Such construction and operation constitute an obvious and drastic alteration of the present physical characteristics of the Delta in direct contravention of the Legislature’s finding and declaration in section 12981.

c. **Delta Protection Act of 1959** (Wat. Code, § 12200 et seq.).

“The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220, Chapter 2, of this part, *and to provide a common source of fresh water for export to areas of water deficiency* is necessary to the peace, health, safety and welfare of the people of the State . . .” (Wat. Code, § 12201, emphasis added.)

If water is exported at the northernmost tip of the Delta via an isolated facility, then such water is plainly *not* providing a “*common* source of fresh water for export,” instead, it is providing an *isolated* source of fresh water for export entirely devoid of common benefits to the Delta and, hence, is squarely contrary to section 12201 and “to the peace, health, safety and welfare of the people of the State.”

Moreover, Water Code section 12205 provides:

“It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates *shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part.*”  
(Emphasis added.)

Since one of the “objectives of this part” is to “provide a *common* source of fresh water for export” (Wat. Code, § 12201, emphasis added), the Projects have a duty to integrate their releases from storage into the Delta “to the maximum extent” possible to provide that “common” source. Diverting any amount of such releases in an isolated canal, which by definition is entirely devoid of the required commonality of benefits, is obviously not providing the “common” source of fresh water to the maximum extent possible. Rather, it would be blatantly disregarding that mandate.

The provision of salinity control and an adequate water supply “to maintain and expand agriculture, industry, urban, and recreational development in the Delta” (Wat. Code, §§ 12201 & 12202) is not incidentally benefitted to the maximum extent possible when Sacramento River water is separated from the common pool and transported to the export pumps in an isolated facility. The loss of dilution or assimilative capacity cannot be avoided with a “peripheral canal” and Delta water quality will be degraded.

Water Code sections 12203 and 12204, respectively, provide:

“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.”

Even assuming that the “common pool” mandate can somehow be disregarded, before one drop of water is placed in an isolated facility, there needs to be a comprehensive analysis regarding how many drops of water, and at what times of year, and during what hydrological and

ecological situations, etc., can such drops of water be legally deemed to be surplus to what “users within [the] Delta are entitled” (Wat. Code, § 12203) and surplus to what is “necessary to meet the requirements of Sections 12202 and 12203 of this chapter.” (Wat. Code, § 12204.)

- d. **Water Code section 12934** (From Chapter 8 of the Water Code Entitled, “Water Resources Development Bonds”).

The argument that a “peripheral canal” can be constructed as an “aqueduct” under Water Code section 12934, subdivision (d)(2), ignores the plain meaning of the statute. Section 12934, subdivision (d)(2), clearly reflects the intent that the aqueducts are to convey water from the Delta to other points in the state and section 12934, subdivision (d)(3), describes the facilities in the Delta.

Section 12934, subdivision (d)(3), provides:

“Master levees, control structures, channel improvements, and appurtenant facilities in the Sacramento-San Joaquin Delta for water conservation, water supply in the Delta, transfer of water across the Delta, flood and salinity control, and related functions.”

To stretch this authorization to include an isolated facility ignores the provisions of the Delta Protection Acts of 1959 and 1992 as well as the Preliminary Edition of DWR’s Bulletin No. 76, Report to the California State Legislature on the Delta Water Facilities, December 1960, which shows all alternatives as using the Delta channels with various configurations of channel closures and gates. A copy of page 32 from said Bulletin showing the “Single Purpose Proposal” is attached hereto.

There is no evidence to suggest that an isolated facility such as a “peripheral canal” was within the intent of section 12934, subdivision (d).

- e. **The Central Valley Project Legislation** (Wat. Code, § 11100 et seq.).

The suggestion that authorization can be based on the general authority authorizing “The Central Valley Project,” i.e., Water Code section 11100 et seq. originally enacted in 1943, would constitute an override of the later more specific statutes particularly the Delta Protection Act of 1959 (Wat. Code, § 12200 et seq.), the Delta Protection Act of 1992 (Pub. Resources Code, § 29700 et seq.), Water Code section 12980 et seq. “Delta Levee Maintenance” enacted in 1973, and Water Code section 12934 et seq. “Water Resources Development Bonds” enacted in 1959.

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f. **Watershed Protection Act** (Wat. Code, § 11460 et seq.).

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.”*

The State Water Project was intended to develop and provide as supplemental water to the Delta an annual supply of 5 million acre feet from north coast sources by the year 2000. The planning recognized that needs within the Sacramento and San Joaquin River Watershed would grow and surplus water would not be available for export after such date. The supplemental supply has not been provided and, thus, there is no “surplus water” to be exported by the SWP with or without a “peripheral canal.” The construction of a “peripheral canal” could easily be viewed as an action intended to directly or indirectly deprive the watersheds of origin within the Sacramento and San Joaquin River Watershed of water reasonably required to supply the future needs.

g. **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 water quality in the channels of the Delta constituting the “common pool” will be degraded with a “peripheral canal.” Although the anti-degradation policy in and of itself does not constitute a prohibition of an isolated facility it adds to the policy supporting such prohibition.

# **Exhibit C**



# The Water Report™

Water Rights. Water Quality & Water Solutions in the West

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## THE PERIPHERAL CANAL

SAN FRANCISCO BAY - DELTA ESTUARY PROPOSALS

by Dante Nomellini (Nomellini, Grilli & McDaniel: Stockton, CA)

**Editors' Introduction:** Whether it is referred to as the Sacramento-San Joaquin Delta, the San Francisco Bay-Delta Estuary or just the Bay Delta, this central California area has become a flashpoint of California water concerns. Covering more than 738,000 acres, the Delta is the largest estuary on the West Coast. Its primary sources of fresh water are the Sacramento and San Joaquin Rivers. Approximately 50 percent of all of California's total average annual streamflow flows to the Delta. Its position as the hub of California's water infrastructure has come under intense scrutiny due to endangered delta smelt and a subsequent court decision to drastically curtail pumping of water in aid of smelt protection. The ramifications of that decision have been felt throughout California, and arguably throughout the US due to the impacts on that state's widely distributed agricultural output.

The Delta's principal water management system is comprised of the pumping facilities of both the California State Water Project (SWP) and federal Central Valley Project (CVP) in the south Delta (near the town of Tracy) that have a maximum pumping capacity of 10,300 cubic feet per second (cfs) and 4,600 cfs, respectively. These facilities' combined capacity, pumping into both the SWP and CVP aqueducts, therefore approximates 15,000 cfs.

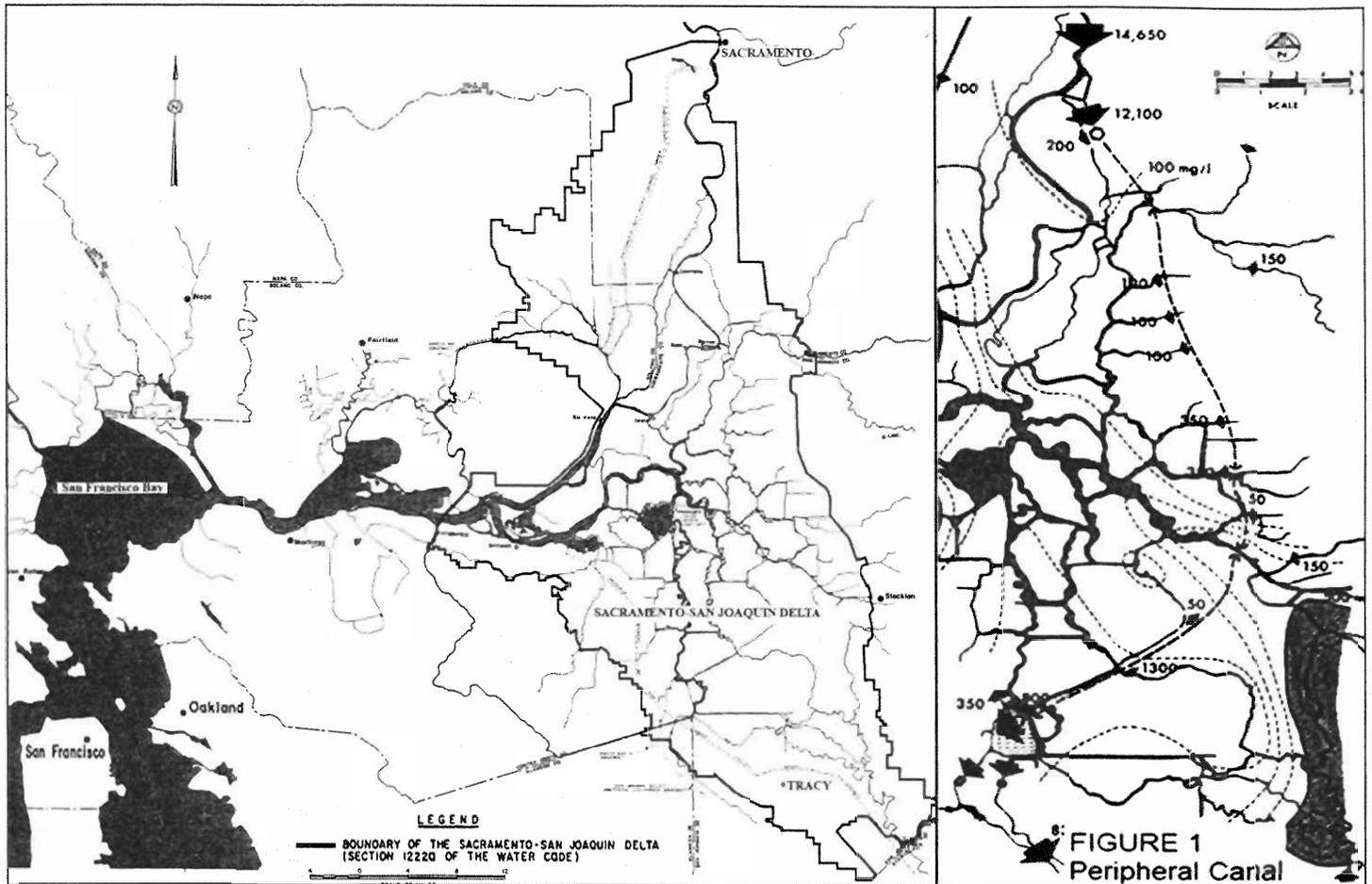
An estimated 23 million people, two-thirds of all Californians, obtain at least some of their water from the Delta making the Sacramento-San Joaquin Delta the single largest source of California's water (CALFED Bay Delta Program website). The SWP and CVP also provide water to more than 4 million acres of irrigated farmland in the State, primarily in the San Joaquin Valley. Within the Delta itself, more than 500,000 acres currently are in agricultural production.

The Delta supports more than 750 plant and animal species, including 130 species of fish — it supports an estimated 25 percent of all warm water and anadromous sport fishing species, and 80 percent of California's commercial fishery species live in, or migrate through, the Delta. The Delta also provides habitat for a number of species that are protected by the federal Endangered Species Act, including the Sacramento winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and the noted delta smelt.

In a recent development, the California Department of Water Resources released its operational assessment of a "Dual Conveyance System" as requested by the Delta Vision's Blue Ribbon Task Force on June 16, 2008. That report is focused on the factors of the combined operation of through-Delta (current system) and isolated facility improvements (peripheral canal) for the purposes of water supply reliability and ecosystem sustainability. [See CDWR website: [www.water.ca.gov/news/archive/](http://www.water.ca.gov/news/archive/); additional Delta information is available at: [www.water.ca.gov/deltainit/](http://www.water.ca.gov/deltainit/)]

On June 20, the California State Water Resources Control Board (SWRCB) staff released a draft plan of activities related to solving problems in California's important Bay-Delta area. This draft plan identifies how the State Water Board will achieve Bay-Delta commitments the Governor identified for it in his February 29, 2008 letter to legislative leaders. The draft was scheduled to be considered on July 15 by SWRCB. The draft plan is available at: [www.waterrights.ca.gov/baydelta/strategic\\_workplan.htm](http://www.waterrights.ca.gov/baydelta/strategic_workplan.htm).

The debate over possible options to address the many ongoing issues facing California's water system — including the Peripheral Canal proposal discussed in the following article — promises to be long and passionate. The following article presents one highly informed view shaped by years of involvement in the Peripheral Canal controversy. Additional perspectives will appear in future articles.



**FIGURE 1**  
Peripheral Canal

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**BAY-DELTA BACKGROUND & ONGOING ISSUES**

The term “peripheral canal” has been applied to canals of a variety of sizes that would connect the Sacramento River to the federal Central Valley Project (CVP) and State Water Project (SWP) water export pumping plants near Tracy, California. These pumping plants export water to agricultural and urban areas south of the Delta. The term “isolated transfer facility” would perhaps be a more descriptive term than “peripheral canal.” The critical and most distinguishing feature of such a facility would be the separation or isolation of the Sacramento River water from the Delta pool as it traverses to the export pumps.

The peripheral canal, as formerly and presently proposed, would traverse the eastern edge of the Delta from Hood to Clifton Court Forebay. Figure 1 depicts the peripheral canal as generally proposed at the time of the 1982 referendum. The 1982 referendum defeated legislation (SB 200) that would have authorized its construction.

The Delta (legally defined in California Water Code 12220) is an essential part of the San Francisco Bay-Delta Estuary. It is the area where the fresh waters of the Sacramento and San Joaquin River systems meet and mix to repulse Bay salinity and form a fresh water pool. The Delta channels are tidally connected to the Pacific Ocean through San Francisco Bay. There are two high tides and two low tides in each 25-hour period. Without fresh water flows into and through the Delta, the quality of water in the Delta pool would gradually deteriorate and become salty like the Bay. The greater the flow of fresh water into and through the Delta, the better the water quality. Although historically in late summer months of the driest years salinity would intrude well into the Delta, water quality in the western Delta previously was better on average than it is today. Figure 2 depicts the extent of Historical Salinity Incursion into the Delta for years 1920-1960. Even in years of the greatest intrusion of salt water the flushing action of spring flows of fresh water kept the Delta pool fresh well into summer.

Salinity control is a key element in protecting Delta water quality. Salinity intrusion from the Bay is a major contributor to water quality degradation adversely affecting all beneficial uses of Delta water. The CVP and SWP are obligated to provide salinity control for the Delta. However, both projects have aggressively resisted additional Delta outflow requirements, which would reduce the amount of water available for export to Southern California. Inadequate outflow may be a substantial factor in the pelagic organism decline.

Peripheral Canal

Salinity Control

River Water Quality

Drainage Needs

Salinity control for the Delta, which protects both in basin and out of basin uses, is one of the major tension points in an on-going North/South water struggle. Although intended to provide significant enhancement, there is serious concern that the present level of salinity control fails even to mitigate the impacts of federal and State of California (State) actions, including the operations of the SWP and CVP.

To avoid the detrimental impacts of salinity in the Delta, the CVP and SWP included plans to release stored water for salinity control. California Water Code section 11207, added by Statutes of 1943, specified "Salinity control in the Sacramento-San Joaquin Delta" as one of the primary purposes of Shasta Dam. Salinity control is currently achieved by allowing unregulated river flow, supplemented by releases of water from upstream reservoirs, to flow into and out of the Delta in sufficient quantities to constitute a hydraulic barrier to Bay salinity. The fresh water flow into the Delta comes from essentially two river systems: the Sacramento River on the north and the San Joaquin River on the south.

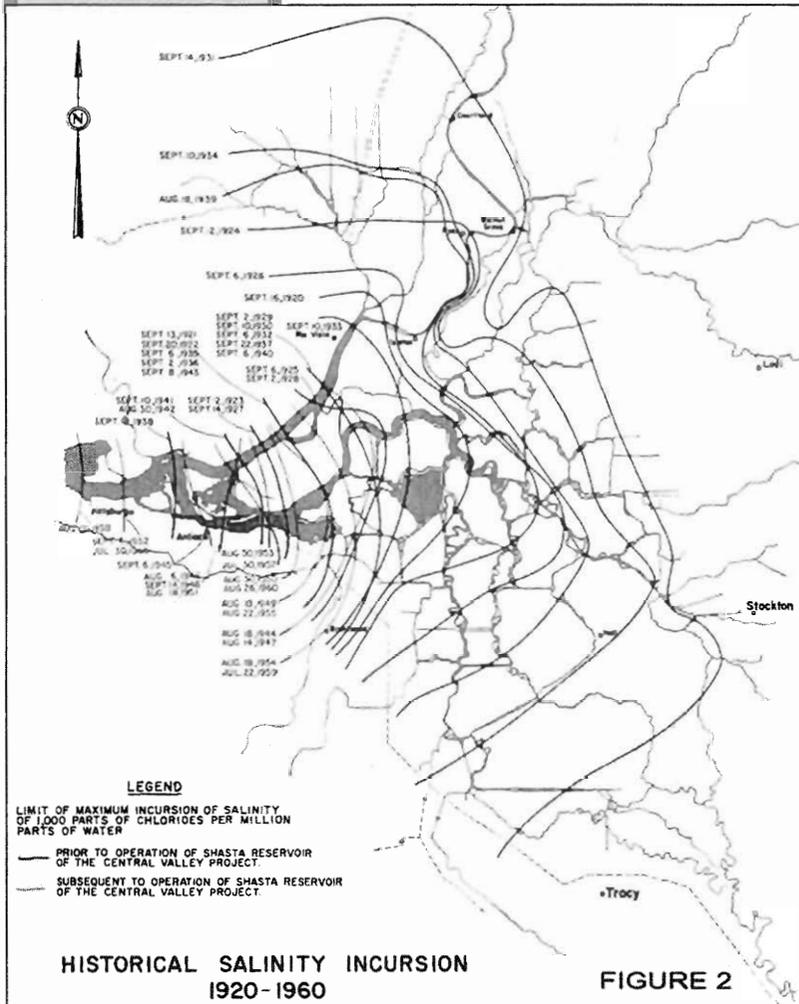
The Sacramento River on average provides about seventy-three percent (73%) of the fresh water inflow to the Delta and the San Joaquin River about eleven percent (11%). In contrast to the Sacramento River, the San Joaquin River water quality is quite poor. The need for a solution to drain saline water emanating from water applied to the west side of the San Joaquin Valley has long been recognized. Upstream diversions to areas outside the watershed and the lack of a drainage solution for the hundreds of thousands of acres of irrigated land and wetlands along the west side of the San Joaquin Valley are the principal causes of the poor San Joaquin River water quality.

The San Luis Act of June 3, 1960 Public Law 86-488, 77 Stat. 156, precluded construction of the San Luis Unit without a master drainage outlet and disposal channel for the San Joaquin Valley. This federal mandate has been ignored. Millions of acre-feet (AF) of San Luis Unit water have been delivered to federal service areas. In 2007, major deliveries of about 928,000 AF went to Westlands Water District, about 70,000 AF to San Luis Water District, 45,000 AF to Panoche Water District and 17,000 AF to the Kern National Wildlife Refuge. The San Luis Unit has resulted in the leaching of selenium and other salts from the naturally highly saline soils along the west side of the San Joaquin Valley, which add to the salt load in the delivered water. These salts presently, and for many years to come, will degrade the quality

of the San Joaquin River by discharge of runoff and accretion. Without San Joaquin River restoration, the Delta will continue to be degraded. Salinity standards have not been set for points upstream of Vernalis and the problem has continued for years without resolution.

The State and federal flood control projects for the Sacramento River system, the Sacramento Ship Channel and the Stockton Ship Channel have all enlarged channels in the western Delta, which result in greater Bay salinity intrusion into the Delta. SWP and CVP actions — including upstream water use, project direct diversions and diversions to storage during spring and summer months, operation of export pumps with insufficient outflow, and other project actions such as operation of the Montezuma Slough gates and Delta cross-channel gate closure — all resulted in greater salinity intrusion into the western Delta. Project related water use (both SWP and CVP) in areas draining into the Delta, particularly along the west side of the San Joaquin Valley, also greatly increases the salinity concentration in water entering the Delta.

Water protected for Delta outflow, including that which is needed for salinity control, is water which cannot be exported for use in Southern California. Delta outflow, however, is viewed by those water exporters as water that is simply "wasting" to the ocean, as opposed to usefully meeting their needs. The difference between Delta outflow, which is crucially needed to control salinity, and the outflow of flood water which occurs somewhat infrequently (on the order of once every five to ten years) is conveniently overlooked.



## Peripheral Canal

## Delta Pool Water Quality

## Competing Interests

## Salinity Impacts

## Undeveloped Supply Projects

## Water Export v. Delta Needs

Without a peripheral canal, the Delta serves as a common pool of freshwater for diversion by both in-Delta and export water users. Reductions in salinity control results in increased salinity in the Delta pool and also the salinity of the water exported. This creates a common interest in preserving Delta water quality, at least to the level preferred by the water exporters. A peripheral canal, however, will eliminate the common interest in protection of water quality in the Delta pool and the exporters' real interest will then be water quality *only* at the intake of the peripheral canal. Water export contractors, the California Department of Water Resources (CDWR) and the US Bureau of Reclamation (Reclamation) have all been steadfast in their efforts to reduce Delta outflow to the minimum level necessary to meet the salinity objectives specified in their export contracts regardless of the impact on other uses. If a peripheral canal intake at Hood is constructed, much greater Bay salinity intrusion in the Delta pool could be allowed before it will affect exported water quality. Improved water quality for export is one of the principal reasons given for urban exporters' support for a peripheral canal. However, improving export water quality by removing fresh water inflow to the Delta pool will unfortunately degrade the quality of water in the Delta pool.

There is strong evidence that protection of the Bay-Delta ecosystem, maintenance of the Delta as a fresh water system, and maintenance of Delta lands will be abandoned in favor of greater exports. This evidence includes: the failure of the SWP to develop the five million AF of supplemental water from North Coast Rivers; the compromised condition of pertinent regulatory processes; and past conduct of the water exporters, the State and the nation (see discussion below). If this trend continues, the Delta will become an inland Bay of saline water with dramatic, negative results. Land surfaces within the Delta islands, in the portions which would constitute the new bay, are below sea level and are protected from inundation by levees. The land surface varies in elevation. Levee remnants could wash away and, primarily because of oxidation of organic soils, the depth of a new, saline bay would be on the order of 10 to 20 feet. The saline bay water will infiltrate and contaminate adjoining fresh groundwater basins and seep into adjoining levees and lands. Wind waves generated across miles of open water will crash into surrounding area levee systems, including the banks of the peripheral canal. Fish and other species in search of fresh water will move upstream and concentrate in the areas of good quality, which will be the area of the intake to the peripheral canal.

### INADEQUATE WATER SUPPLY

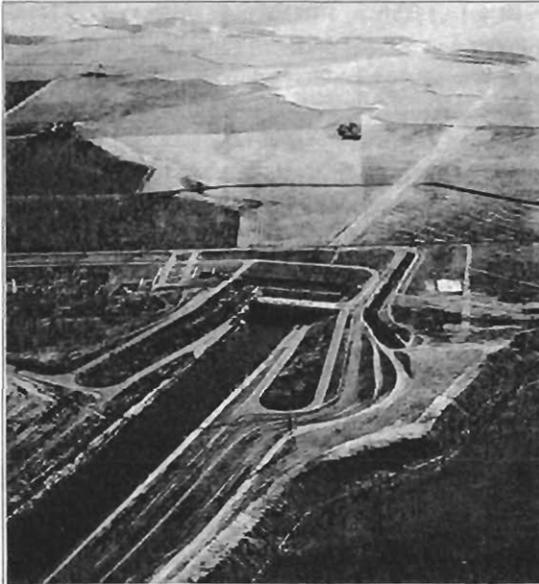
The force behind the current water conflict is demand that is greater than supply. The consumptive use of water increases with the number of people, plants and animals and the surface area of waterbodies (including ponds, lakes and swimming pools). Consumptive use also increases in areas where temperatures are higher. When irrigated lands are converted into urban development, the consumptive use of water per acre is roughly the same. When arid lands are developed or put under irrigation, though, a totally new demand for water is created. The amount of arid land remaining in California that can potentially be developed — if water is available — far outstrips even the most optimistic possibility of potential supply.

The current water supply crisis is primarily due to the failure of the SWP to develop various projects on North Coast rivers (North Coast Projects) to annually supplement the water supply in the Delta. In a report to the State Legislature by the California Department of Water Resources (CDWR) on "Delta Water Facilities" it was stated that "...economical development of water supplies will necessitate importation of about 5,000,000 acre-feet of water seasonally to the Delta from north coastal streams for transfer to areas of deficiency." CDWR Bulletin No. 76, *Preliminary Edition Report to the California Legislature on the Delta Water Facilities* (December 1960) p. 13. Figure 3 is a copy of page 11 from Bulletin No. 76. It discusses the plans for development, water sources and uses. Figure 4 from page 13 of Bulletin No. 76, shows that by the year 2000, the entire five million AF of water that was to be developed from the North Coast Projects would be required. Wild and Scenic River legislation, increased environmental concerns and the cost of water development appear to be the factors that discouraged construction of the North Coast Projects. It is important to recognize that for the year 2000 — when due to the lack of North Coast water development it was expected that there would be no water for delivery by the SWP — the Water Education Foundation *Layperson's Guide to the State Water Project* (updated 2008) reported: "SWP delivers 3.5 million acre-feet of water, highest total since project began operations."

The continuing shortage of SWP water supply and the cost to SWP contractors of replacing the undeveloped North Coast supply create a tremendous incentive for exporters to simply take water that is needed within the San Francisco Bay-Delta Estuary for environmental protection and consumptive use in the area. An isolated transfer facility or peripheral canal will clearly facilitate the export of water to Southern California, but it would export water that is *not* surplus to the needs of the Delta. If an isolated transfer facility becomes a reality, it is reasonable to assume that the present pressure to reduce northern California water diversions, increase restrictions on discharges, and reduce environmental protection will continue to intensify.

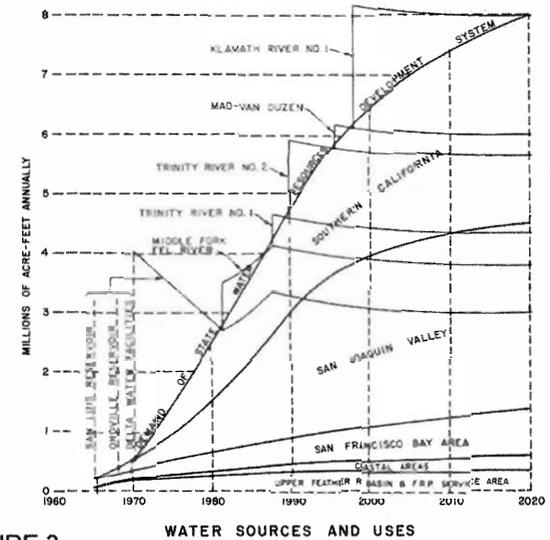
Peripheral Canal

Supply Issues



**Tracy Pumping Plant**

Full demands on the State Water Resources Development system can be met until about 1981 from surplus water in and tributary to the Delta with regulation by the proposed Oroville and San Luis Reservoirs. However, upstream depletions will reduce the available surplus supplies and water will have to be imported from north coastal sources after that year. It is anticipated that coordinated operation of the State Water Resources Development System and the Federal Central Valley Project will afford a limited increase in usable surplus Delta supplies beginning in 1981. As indicated in the chart, upstream depletions will continue to decrease the available surplus supplies.



**FIGURE 3**

**WATER SOURCES AND USES**

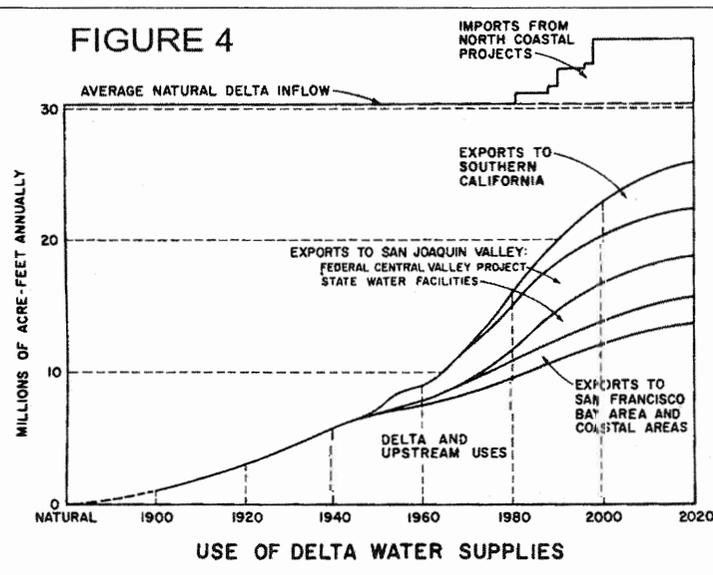
Dry Cycle

If hydrology similar to the dry period of 1928 through 1934 reoccurs, even the areas from which the water originates will be substantially short of water. Without the supplemental five million AF from the North Coast rivers, the reliability of water for export cannot be provided from surplus water in the Sacramento and San Joaquin Rivers Watershed — with or without a peripheral canal. During such a dry period the reliable yield of the watershed is about 17 million AF, which is far short of even the expected 25 million AF for local needs. Figure 5 (next page) contains charts from the Weber Foundation Studies reflecting the data used in the planning for the State's water project. The 1928 through 1934 period, sometimes referred to as the six or seven year dry cycle, is the critical period. During such a period, reservoirs will empty and not be refilled. Substantial local water development, including: conjunctive use;

surface and groundwater storage; water reclamation; desalination and stringent conservation will all be needed to address such severe shortage even in the areas of origin. Environmental needs have proven to be greater than originally anticipated and will further reduce the amount of surplus water available for export from the Delta.

Development of self-sufficiency in the areas dependent upon exports from the Delta is the most obvious solution to the problems described above. For urban areas, local interties or interconnections between water suppliers, water conservation, water reclamation and desalination will be required.

**FIGURE 4**



Export Options

Peripheral Canal

Delta Protection

REPUDIATION of PROMISED PROTECTION

The cornerstone to the export of water from northern California to the San Joaquin Valley and Southern California was the promise that only water which existed in surplus to the present and future needs of the north would be exported.

SACRAMENTO VALLEY WATER NEEDS WERE EXPLICITLY PROTECTED:

"On October 12, 1948, Secretary of the Interior Krug, in a public speech at Oroville, stated: 'Let me state, clearly and finally, the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it.' He added: 'There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later.' (Staff 9, p. 799 & SRDW 19)."

(See SWRCB D 990, p. 70 & 71.)

WEBER FOUNDATION STUDIES

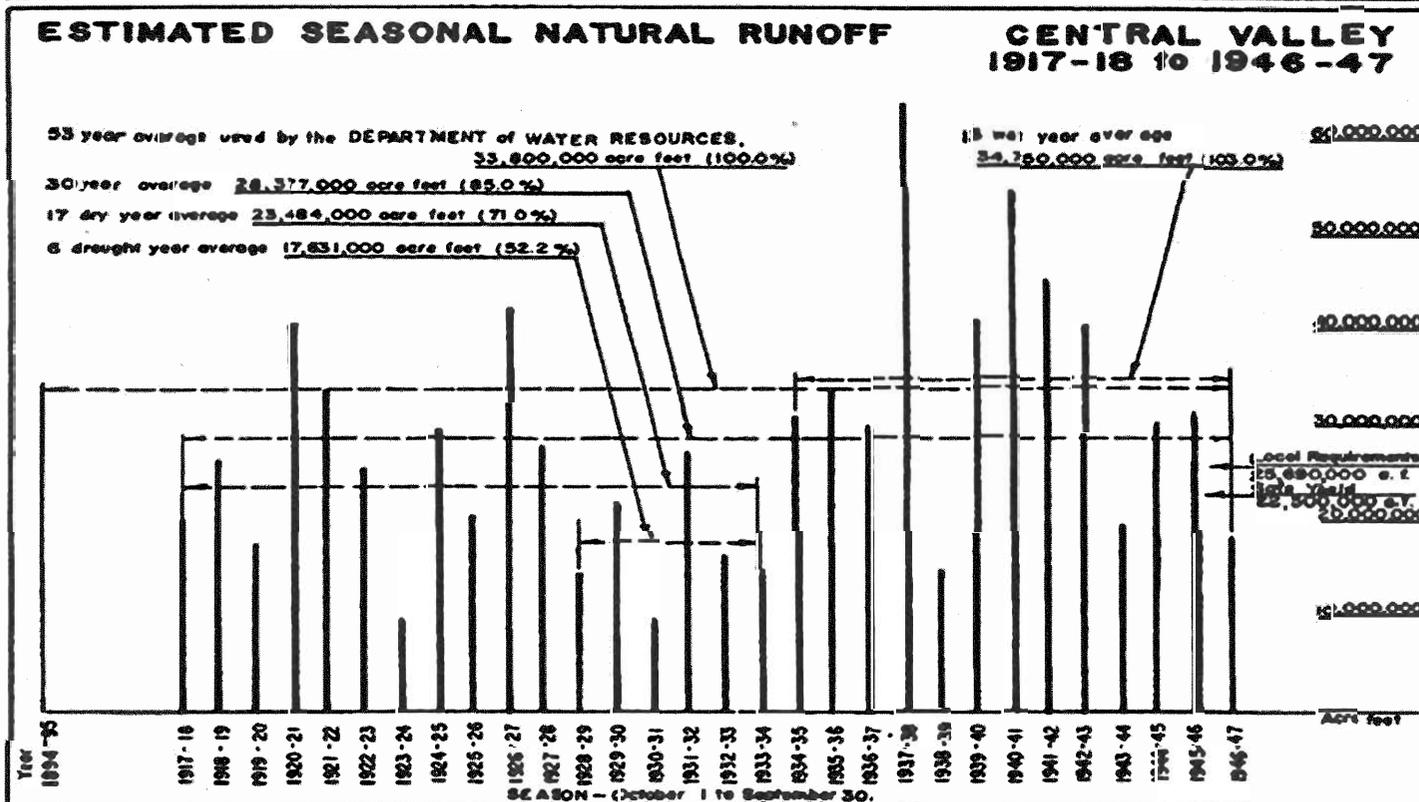
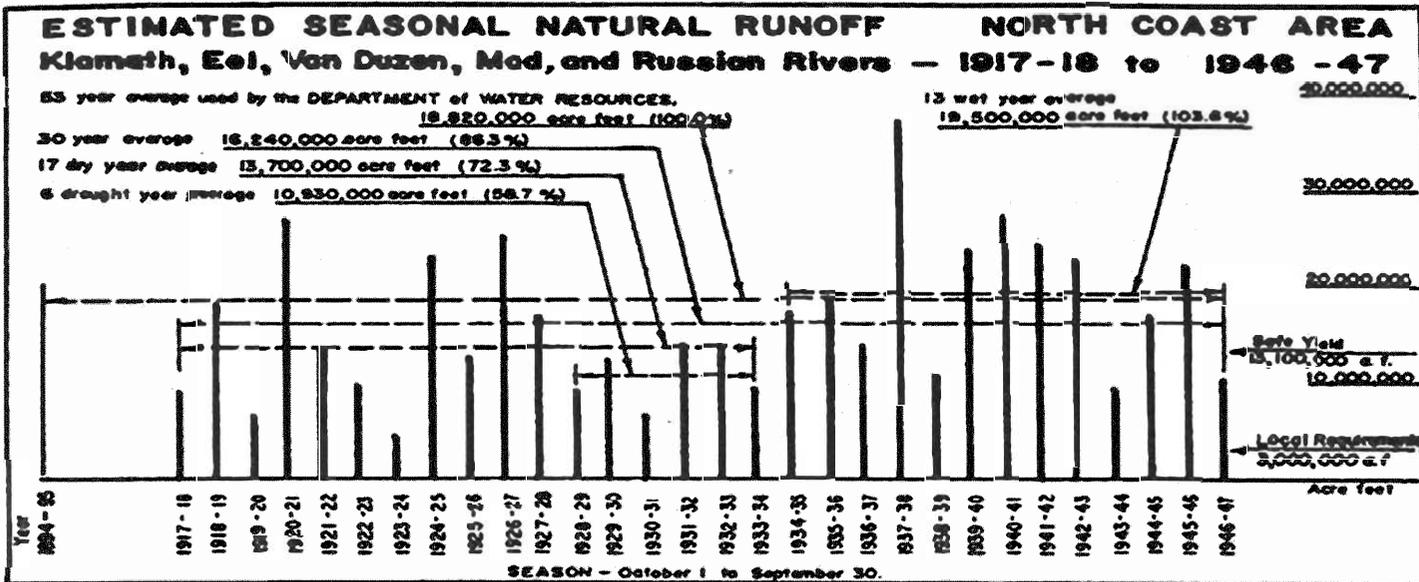


FIGURE 5

Peripheral Canal

State Policy

Salinity Controls

Areas of Origin Protection

Conflicts of Interest

The promised protection is memorialized in California statutes. The Watershed Protection Act, Water Code section 11460 et seq. and The Delta Protection Act, Water Code section 12200 et seq., establish the priority for salinity control and an adequate water supply for the Delta and other areas of origin. Included in these rights is the right to recapture water back from the export projects.

OF PARTICULAR RELEVANCE TO A PERIPHERAL CANAL PROPOSAL IS WATER CODE SECTION 12205, WHICH PROVIDES:

§12205. Storage of water; integration of operation and management of release of water

It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be *integrated to the maximum extent possible* in order to permit the fulfillment of the objectives of this part [i.e. the objectives of salinity control, an adequate water supply and maintenance of the common pool].

(Added by Stats. 1959, c. 1766, p. 4249, '1.)" (emphasis added)

This promise specifically included instituting effective salinity controls. Measures were to be taken to eliminate the historically infrequent naturally occurring intrusions of salinity from the Bay into the Delta. Measures were to also mitigate for the salinity intrusion caused by State and federal flood control channel projects as well as impacts from project-induced diversions both upstream and downstream from the Delta. The interior of the Delta was to serve as a "common pool" — i.e. serving both in-Delta diverters as well as the exporters. Although imperfect, this common pool resulted in a common interest for Delta preservation. If the water quality is bad for the in-Delta users, it will be bad for the exporters as well.

CDWR and five of the 29 SWP export contractors met in Monterey in 1994 and agreed to amend certain parts of their SWP contracts. Through the "Monterey Agreement" they tried to eliminate the standard provision in SWP contracts which spells out the priority protection for areas of origin. CDWR, Reclamation and the export contractors have also attempted to integrate the premise that reliable supply for export is a co-equal goal to that of protection of the Delta and other areas of origin into the current State "Delta Vision" process and the State and Federal Bay-Delta Conservation Plan process.

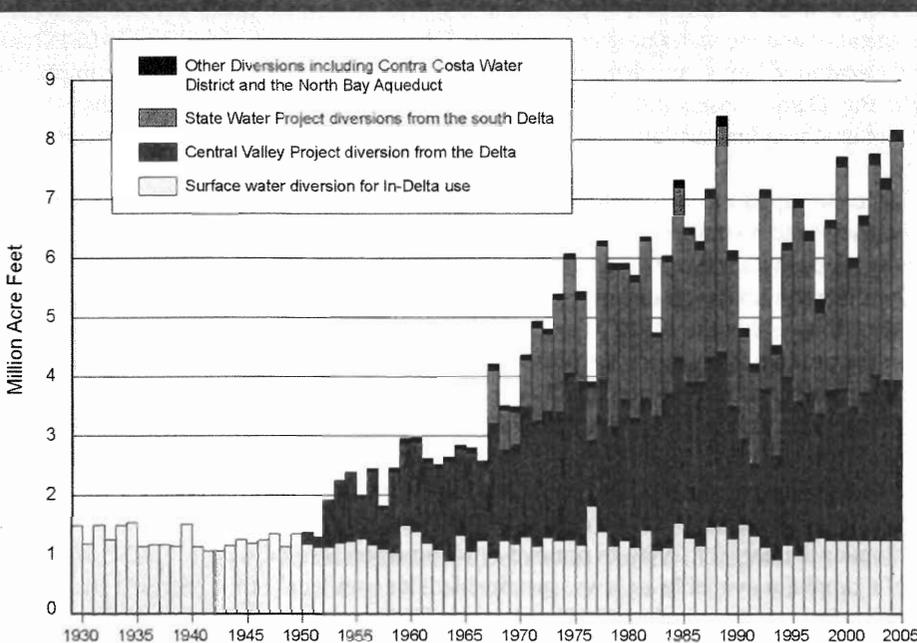
COMPROMISED REGULATORY PROCESSES

CVP is a federal project operated by Reclamation. SWP is a State project operated by the California Department of Water Resources (CDWR). With the US and the State both operating the projects to serve contractors with water exported from the Delta, a critical and debilitating conflict of interest was created with the other federal and State departments and agencies which have a duty to protect the environment, fish and wildlife resources, and the public trust. Even within Reclamation and CDWR there is a conflict between the responsibility to serve the contractors and the duty as public officials to protect the public

interest and public trust, while also meeting the common law duty to avoid deprivation of honest services (including honest and impartial government).

The Resources Agency of the State of California, the California Department of Fish and Game (CDFG), the California State Water Resources Control Board (SWRCB) and CDWR have in the past failed to protect the Delta. Their primary focus has been — and still appears to be — avoiding any loss to exports of water from the Delta. Since at least August of 1978, when SWRCB issued its Decision 1485, it was clearly recognized that, "To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps." (SWRCB D-1485, p. 13) Figure 6 shows SWP and CVP exports (excluding Friant-Kern Canal) from the Delta from 1950 through 2005. With full knowledge of the detrimental impact to fish, the exports of water nevertheless steadily increased.

FIGURE 6 Historic Diversions from within the Delta



Source: Measured, calculated and modeled from an array of data sources as compiled by Tully & Young, Inc.

## Peripheral Canal

## Court Intervention

## Agencies' Relationships

## CALFED Framework

## "Environmental Water Account"

## ESA Impacts of Export

## Striped Bass

As a result of the increase in water exports the courts have now intervened. In *Natural Resources Defense Council et al. vs. Dirk Kempthorne (Secretary of the Interior) et al.*, United States District Court, Eastern District of California, Case No. 1: 05-CV-01207 OWW (TAG), Judge Wanger ordered SWP and CVP to curtail export pumping of water to the San Joaquin Valley and Southern California in order to protect Delta Smelt. See TWR #47 and #51.

The State regulatory agencies are ill equipped to regulate the CDWR, especially when political influences are considered. Prior to 1994, the US Environmental Protection Agency (EPA) and US Fish and Wildlife Service (USFWS) made some efforts which appeared to be directed at serious regulation of the two projects. Such efforts, however, have recently all but disappeared. Thus, an appropriate arms-length relationship between the regulators and the regulated now appears weak to non-existent.

These conditions persist even though the 1994 Framework Agreement which created CALFED — the region's current intergovernmental water project management agreement — formalized certain environmental responsibilities. ["CAL" includes the Governor's Water Policy Council which included the California Department of Fish & Game, CDWR and the SWRCB. "FED" includes US Fish & Wildlife Service, National Marine Fisheries, EPA and Reclamation. See CALFED website: <http://calwater.ca.gov/index.aspx>]

Under CALFED, the regulators, including the SWRCB (the adjudicator of water rights), and the export project operators, agreed to jointly facilitate the coordination of water project operations with regulatory requirements and undertake a joint long-term solution finding process.

THE 1994 AGREEMENT, IN PART, STATES:

5. We agree that it is essential for the State and Federal agencies with regulatory and resources management responsibilities in the Bay-Delta Estuary to reach *consensus*, consistent with applicable procedural limitations, *on the appropriate level of protection* to be achieved for the Bay-Delta Estuary. Framework Agreement 1994 (emphasis added.)

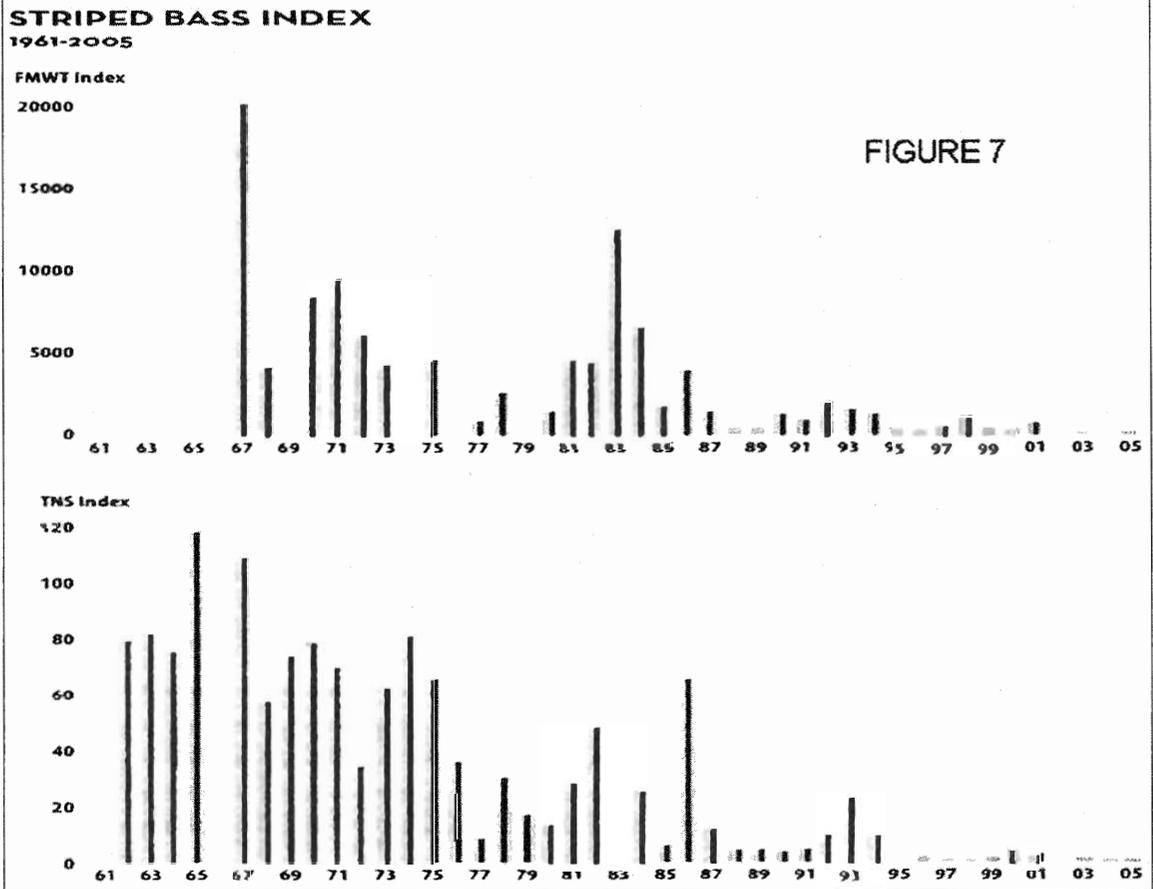
Countering CALFED's environmental commitments, the "Delta Accord" (sometimes referred to as the December 15, 1994 Principles Agreement) included an agreement that no reduction to water exports were to occur as a result of endangered species requirements, so long as anticipated SWRCB water quality standards were met. This "no net loss" for exported water agreement was made even though these water quality standards were inadequately protective according to previous biological opinions and EPA requirements. Establishment of the "Environmental Water Account" in October of 2000 by the CALFED Bay-Delta Program, where fishery protection could not be required unless water was available from other sources to make up for export losses, added to the erosion of protection of the environment and turned the concept of exporting only "surplus" water on its head. [Editor's Note: The Bay Institute of San Francisco, in its *First Annual State of the Environmental Water Account Report* of September 2001 noted that the Environmental Water Account "was intended to provide a buffer for endangered species by acquiring water that would be immediately available for fish protection while longer-term arrangements were being made between the resource agencies and the water project operators. This concept was adopted by CALFED and export water users and transformed into a mechanism for providing fish protections without ever impacting project supplies."] The Bay Delta Conservation Plan — which is the vehicle for implementing the peripheral canal — is yet another joint regulator and regulated process constrained by the need to sustain exports from the Delta.

There is little evidence to support an assumption that State and federal regulatory agencies will be able to adequately assert themselves to restrain exports in favor of protection of the San Francisco Bay-Delta Estuary. It remains to be seen whether the ongoing court proceedings before Judge Wanger will result in meaningful relief from export impacts on endangered species. Lawyers for export contractors have expressed their confidence that neither the SWRCB nor the courts would impose restrictions on SWP or CVP exports to enforce the promised protection for protection of the Delta and other areas of origin.

The results of the regulatory failures are graphically depicted by the impact on Striped Bass. Although an introduced species, it is common knowledge that Striped Bass were viewed as the indicator of the health of the San Francisco Bay-Delta Estuary. Figure 7 shows the Striped Bass Index for the years 1962 through 2005. When the index dropped below the level critical to sustainability, the index was ignored and the existence of Striped Bass was criticized as being a detriment to other fish species. There was even a lawsuit filed by export contractors on January 29, 2008, to remove catch limits on Striped Bass to further reduce their numbers (Copy of Complaint available at: [www.sustainabledelta.com/legal.html](http://www.sustainabledelta.com/legal.html)). Striped Bass and other species thrived in the Delta before the late 1960's when the SWP commenced Delta operations and the San Luis Unit came on line. Even the federal agencies, which have a mandate under the Central Valley Project Improvement Act to double the population of Striped Bass, have ignored the law and failed to protect Striped Bass. The canary in the coal mine is dying and the regulators are looking the other way.

**Editor's Note:** Striped bass may prey on several species listed under the federal and state Endangered Species Acts (ESAs): winter-run Chinook salmon, spring-run Chinook salmon, steelhead, delta smelt, and splittail. The California Department of Fish & Game (CDFG) negotiated with the US Fish and Wildlife Service and the National Marine Fisheries Service to stock striped bass. These negotiations resulted in a Striped Bass Management Program Conservation Plan and associated Incidental Take Permit under the federal ESA "Section 10" permit obtained in June 2000. This allowed CDFG to stock striped bass as long as population estimates stayed under 912,000. If the population estimate reached this point, then DFG is required to initiate discussion with the Federal agencies. The population estimate exceeded this number in 2000 and CDFG initiated discussions with the federal agencies. These discussions led to reduced stocking in 2001 and a hold on additional stocking until the striped bass population estimate dropped. (Information from CDFG's website)

Peripheral Canal



Even assuming that a regulatory process can be rehabilitated through massive changes in personnel and leadership, the prospect of using emergency powers to circumvent Delta protection is real. The 1976-77 and 1991-92 droughts were the subject of emergency declarations and although current conditions are not as critical, emergency authority is being applied.

**ADVERSE IMPACTS TO DELTA WATER QUALITY**

Any isolated transfer facility, even if operated properly, will remove Sacramento River water that would otherwise flow into and through the Delta pool. Removal or separation of such water will increase the temperature of Delta waters and will degrade the water quality. Temperature is important for salmon migrating back to the rivers to spawn. Increased temperature in the Delta could degrade the vitality of the salmon eggs and thus jeopardize reproduction. Similarly, removal of the good quality Sacramento River water from the Delta pool will result in less dilution and less assimilative capacity. Higher concentrations of contaminants will result. Degraded Delta water quality will not only adversely impact in-Delta surface water uses but will degrade groundwater both within and outside the Delta.

Emergency Drought Authority

Delta Pool Impacts

## Peripheral Canal

### Proposed Intake

### Additional Impacts

### Delta Future?

#### Intake Impacts on the Sacramento River

The relocation of the intakes for the SWP and CVP to the Sacramento River would also adversely impact greater numbers of fish. The Sacramento River contains a far greater number of fish than the San Joaquin River and therefore the potential for damage is much greater. The effectiveness of screening and protecting fish, eggs and larvae will depend somewhat on the size of the diversion but in any event the damage will be great. For the sizes of diversions contemplated, the effectiveness of screening has not been demonstrated. Use of an isolated transfer facility will degrade Delta water quality, thus it is likely that more fish, including Delta Smelt, will follow the good quality water to the intake on the Sacramento River, thereby exacerbating adverse impacts.

#### Stranding of In-Migrating Salmon

Salmon depend upon olfactory senses to find the spawning grounds from which they originated. With an isolated transfer facility, releases, leakage, or seepage of Sacramento River water at various locations across the Delta could result in stranding of salmon at or near the facility where their passage to the Sacramento system is blocked.

#### Loss of Agricultural Land and Seepage Into Urban Areas

The peripheral canal will require thousands of acres of rights of way, most of which would be located on highly productive agricultural land. There will be additional impacts to agricultural lands outside the rights of way from leakage and seepage. In addition to loss of agricultural production due to seepage from the canal, there is the potential for seepage damage to the nearby levees and residential areas.

#### Disruption of Roads and Utilities

The routing along the eastern rim of the Delta would intersect and potentially disrupt numerous local roads and utilities, two major highways, the Burlington Northern Santa Fe Railway, the East Bay Municipal Utility District aqueducts, major fuel and gas transmission lines, the Stockton Ship Channel and a number of high voltage power lines.

#### Interference with Flood Flows

The proposed facilities will likely interfere with the free passage of flood waters and drainage from east to west and south to north. The capacity for passage must anticipate climate change and sea level rise. If flood waters escape the natural channels, the canal embankments could cause the flood waters to rise and/or flow into areas not otherwise flooded, some of which could be highly developed.

### YIELD – WATER SUPPLY

Obviously, the peripheral canal would not in and of itself increase water supply. It is rather a question of how the available water is used and the consequences of that usage.

Constructing such a canal would result in an increase in the area of surface water subject to evaporation. Some water would seep or leak into unusable saline groundwater. If Delta water quality is maintained, there will be no saving of Delta outflow. If the Delta is maintained as a fresh water area and Delta islands are allowed to flood, there will be a significant loss of fresh water. Evaporative losses from waterbodies and wetlands is much higher than from farmed lands. The additional loss varies depending upon the crop being displaced but on average is about two AF per acre. If 400,000 acres of the approximately 700,000 acres in the Delta is allowed to become flooded, the annual shortage of water supply will be increased by about 800,000 AF. With so much rhetoric about the potential catastrophic failure of Delta levees, it would appear that the plan is to allow the Delta to become a saline bay. When the Delta is abandoned, there will be some loss in yield due to loss of storage in the Delta pool.

### CONCLUSIONS

In order for a peripheral canal to actually increase water supply for the exporters, the Delta would have to be turned into a saline bay and water otherwise needed in the Sacramento River Watershed taken for export. Currently, water transfers are the method used to obtain Sacramento River water. Ultimately, acquisition and retirement of land is likely. These methods may secure profits for the individual sellers but ultimately the economy and environmental values of the region will be significantly impacted, much like what occurred in the Owens Valley from the City of Los Angeles' actions (portrayed in the movie *Chinatown*).

## Peripheral Canal

### Agencies' Conduct

A peripheral canal is purely and simply a tool for another "water grab." The past conduct of the State and federal agencies and the export water contractors indicates that the San Francisco Bay-Delta Estuary, including its fish, wildlife, waterfowl, agricultural and recreational uses, will not be protected.

#### VARIOUS AGENCIES' CONDUCT INCLUDES:

- Failing to develop the 5 million AF of supplemental water for the Delta (North Coast Projects)
- Failure to reduce exports to protect fish in 1978 when it was clear that mitigation of project impacts required such reduction
- Not providing sufficient outflow into Suisun Bay to protect the fisheries and Suisun Marsh and instead constructing the Montezuma Slough Gates
- Failing to require the SWP and CVP to comply with State and federal endangered species laws
- Not curtailing delivery of water to the San Luis Unit until a drainage solution was in place
- Neglecting to address San Joaquin River salinity upstream of Vernalis
- The "no net loss" to exports deal in the "Delta Accord"
- The Monterey Agreement's elimination of the protection for areas of origin provisions in the SWP contracts
- Ongoing pressure on Delta diversions and Delta diverters' water rights
- Increasing regulation of in-Delta and upstream discharges

What seemingly amounts to a campaign for an unsustainable Delta reveals a movement to turn the Delta into a saline bay and steadily take more and more water from the Sacramento and San Joaquin Rivers Watershed.

### Levee Upkeep

The Delta is sustainable. Levee systems are already in place and can be improved over time. If necessary, primary levees can be improved to higher standards and channel closure structures incorporated to better withstand sea level rise and shorten the time for restoration in the event of levee failure.

The emphasis on export reliability based on the potential for catastrophic earthquake failure of Delta levees is misplaced. The hundreds of miles of canals and pipelines and related pumping facilities located along the active earthquake fault lines running north and south are far more vulnerable to earthquakes, terrorism and other catastrophes than Delta levees. True reliability is dependent on local self-sufficiency.

The public interest would be better served with alternative courses of action.

#### REALISTIC EFFORTS SHOULD FOCUS ON:

- Developing self-sufficiency — especially in the areas which import water — with particular support for water conservation, water reclamation of municipal wastewater and desalting of brackish groundwater
- Supporting local water development throughout the State including interties, conjunctive use of surface and groundwater, and groundwater banking
- Improving Delta levees to the Corps of Engineers' agricultural levee standards with improved capability for emergency response and rapid restoration
- Honoring the promised protection and priority for the present and future needs of the Delta and other areas of origin, including the environmental needs.

A peripheral canal would dramatically alter the San Francisco Bay-Delta Estuary and provide no significant benefit to the cause of meeting California water needs. It is simply a tool to take water needed in the north, to serve west side San Joaquin Valley agribusiness and development interests in Southern California. The solution to California's water needs is not water exported from the Sacramento River and San Joaquin River watersheds but rather is in areas outside those watersheds, including areas now importing water from the Delta.

Destroying one area of the State to benefit development in another is shortsighted. The goal should be to meet the needs of the entire State without harm to any part. The threshold policies and promises of the SWP — that no water will be exported from any area unless it is truly surplus to the present and future needs of such area — are sound and should be honored.

**FOR ADDITIONAL INFORMATION, CONTACT:** DANTE JOHN NOMELELLINI, of Nomellini, Grilli & McDaniel (Stockton, CA), 209/ 465-5883 or email: [ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net)

**Dante John Nomellini** is an attorney practicing in California water-related matters since 1968. He is currently manager and co-counsel for the Central Delta Water Agency.

### Alternative Solutions

# **Exhibit D**



## CENTRAL DELTA WATER AGENCY

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July 9, 2008

Via email [mikemi@water.ca.gov](mailto:mikemi@water.ca.gov)

Mike Mirmazaheri  
Program Manager  
Delta Levee Program  
Department of Water Resources  
1416 Ninth Street  
Sacramento, CA 94236

Re: Five (5) Year Levee Plan

Dear Mr. Mirmazaheri:

Thank you for the opportunity to provide a suggested five (5) year levee plan. This submittal is intended to provide the overarching plan within which Districts would submit five (5) year plans outlining the intended levee work categories with rough estimates of cost. These work plans will necessarily change with conditions in the field and progress of work. The five (5) years included are 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. For 2008-09 we suggest the same priorities. For Delta Levees Proposition 84 provided \$275 Million and Proposition 1E \$500 Million for a total of \$775 Million. For the five years it is assumed that at least \$100 Million will be available each year.

Our view of the need to preserve Delta levees extends to all of the present levee systems. The inter-relationship of the various islands and tracts due to seepage, wind wave generation and as habitat for both local and migratory fish and wildlife mandates that the plan should attempt to preserve all levee systems with due consideration of the Legislature's concern that preservation of all may not be economically justifiable. Outlined herein are the priorities and constraints which will provide economic support with appropriate justification.

The Legislature's findings and declarations in Water Code sections 12981 and 12982 provide the guidance in which we concur.

**“§ 12981. Unique resources with statewide significance; preservation**

(a) The Legislature finds and declares that the delta is endowed with many invaluable and unique resources and that these resources are of major statewide significance.

(b) The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, the physical characteristics of the delta should be preserved essentially in their present form; and that the key to preserving the delta's physical characteristics is the system of levees defining the waterways and producing the adjacent islands. However, the Legislature recognizes that it may not be economically justifiable to maintain all delta islands.

(c) The Legislature further finds and declares that funds necessary to maintain and improve the delta's levees to protect the delta's physical characteristics should be used to fund levee work that would promote agricultural and habitat uses in the delta consistent with the purpose of preserving the delta's invaluable resources."

**"§ 12982. Public benefit from privately maintained levees**

The Legislature further finds and declares that while most of the delta's levees are privately owned and maintained they are being subjected to varied multiple uses and serve to benefit many varied segments and interests of the public at large, and that as a result of the varied multiple uses of such levees, added maintenance costs are being borne by adjacent landowners."

Although the smallest of islands may at first blush appear to be expendable, the habitat value (which in many cases is supported with private funds) would be lost. Such habitat value is extremely difficult to replace especially in terms of supporting habitat for waterfowl in the Pacific Flyway and providing meandering shoreline. With increasing development along the entire west coast of the United States, the opportunity to preserve supporting habitat for the Pacific Flyway is greatly diminishing. It is also extremely difficult to replace the meandering shoreline habitat and meandering waterway recreational opportunity provided by even the smallest levee systems. The impacts of seepage and wind-generated waves on surrounding levees and lands are assumed to be less critical with the flooding of smaller islands however, significant impacts can still result. Scour in adjoining channels resulting from levee breaks or even from the ongoing tidal flow of water in and out of the flooded area, scour from rerouting of channel flow (including the flow of water to the export pumps) and changes to the land surface such as from oxidation of organic soils can result in major long lasting adverse impacts to adjoining areas.

### Limited Ability to Generate Local Revenue for Cost Share and Project Funding

The limited ability to generate revenue from local assessments to meet cost-sharing requirements and to fund the levee work in advance of reimbursement is a primary constraint under the Levee Subvention Program. Local assessments are based on allocations of the benefits derived from the levee-related services provided by the local levee maintaining districts. In most cases these are reclamation districts. Pursuant to California Constitution Article XIII D increases in assessments must be submitted to an assessment ballot proceeding where a majority protest based on the maximum dollar amounts to be assessed will stop the assessment. The benefit allocations are typically based on land use where the ratios for allocation from one use to another are fairly well bracketed and the constraint is the agricultural use ability to pay. Further consideration of ability to pay for districts which have significant agricultural use is unnecessary as the limitations are clearly demonstrated by previous analysis. As to urban levee systems, it is important to continue to recognize that State funding is intended to provide contribution from beneficiaries of the levee system other than the landowners within a particular district and to in part compensate for damages to the levee system caused by users of the Delta other than the landowners. We believe the funding priorities and cost shares set forth herein adequately account for ability to pay for all eligible districts including those with urban levee systems.

As presently structured, the Delta Levee Subvention portion of the Delta Levee Program cannot facilitate timely completion of urgently needed levee work. The substantial under-funding of the Delta Levee Subvention Program in recent years coupled with substantially increased cost of meeting regulatory requirements has left most participating districts with very little capability to fund additional levee work.

### FEMA Eligibility

FEMA is applying a very rigid interpretation of the requirements under the so-called Delta Hazard Mitigation Plan (HMP). Instead of the good faith progress approach applied in previous years, FEMA has denied eligibility if any part of a levee system fails to meet HMP requirements. For the 2005/06 flood event, the one (1) foot above the 100 year flood elevation requirement was the greatest constraint. Portions of the Delta levees are settling and can be expected to continue settling for many years to come. The crowns of levees on which county roads and State highways are located are typically raised less frequently to reduce disturbance of costly road surfacing. Changes in historical benchmark elevations have added to the non-compliance. Although federal funding has not been made available to support the Delta levee programs, federal Disaster Assistance has at times been substantial. Priority funding is needed to re-establish and maintain HMP compliance to help assure future FEMA assistance. HMP compliance with a robust levee program should demonstrate a good faith effort on the part of the State and locals towards reasonably reducing the threat of future flooding. We would expect such effort to be recognized by FEMA.

HMP is not an acceptable levee standard but rather a means of measuring progress to satisfy FEMA. The PL 84-99 agricultural standard is viewed as the minimum acceptable level of protection against failure due to flooding. Any other higher levels of protection should be determined and prioritized by DRMS, Delta Vision, etc. and funding for those more expensive fixes would be expected to come from other sources of state money and other beneficiaries.

### 5-Year Plan

Definitions - Urban Islands and Tracts are those with levee systems which protect areas with existing and ongoing urban development where the levees have at one time been accredited or are in the process of being accredited as meeting FEMA requirements for urban development.

Non-Urban Islands and Tracts are those other than Urban Island and Tracts.

Project levee and non-project levee shall be as defined in WC 12980.

Special Project Program - The Special Project portion of the Delta Levee Program should incorporate broader funding of needed levee work throughout the Delta. We suggest that the Special Levee Project program be separated into two parts: State Special Projects and Local Special Projects.

The State Special Projects would continue the past practice with emphasis for the eight (8) western Delta islands thought to be most important to restrain salinity intrusions, assistance for levees protecting the towns of Thornton and Walnut Grove and for other levee projects. For the 5 year planning period, the expenditures should be focused on levee improvement. Other expenditures including habitat enhancement should not exceed ten (10) percent of the amount of funding for the State Special Projects.

The Local Special Projects would be applied throughout the Delta to the non-project, non-urban islands and tracts other than the eight (8) western Delta islands. The first priority for the local special projects should be funding of work necessary to achieve and maintain HMP requirements on the non-project, non-urban islands and tracts and achieving and maintaining minimum project levee standards on project levees. This work should be funded 100% by the State. The non-project levee work should be designed to raise crown elevations to one (1) foot above the 100 year flood elevation plus an additional one-half (1/2) foot to account for periodic levee settlement. For areas with public roadways the design should include the one (1) foot above the 100 year flood elevation plus an additional one (1) foot. For non-project levees, the crown width should at a minimum meet the HMP required sixteen (16) feet but should seek to achieve a minimum of twenty-two (22) feet on levees without public roadways and the then current crown width or twenty-eight (28) feet (whichever is greater) for levees with such roadways. The HMP required all weather road on the levee crown must be included. The second

priority should be funding ninety percent (90%) of the cost of habitat mitigation related to non-urban islands and tracts for all priorities of work including PL 84-99 and DWR Bulletin 192-82 agricultural standards. The third priority should be funding ninety percent (90%) of the cost of work on non-project, non-urban islands and tracts to reach the PL- 84-99 or DWR Bul. 192-82 agricultural standard with a height of eighteen (18) inches above the 100 year flood elevation plus one-half (1/2) foot of additional elevation for levees without public roadways and one (1) foot of additional elevation for levees with public roadways. Crown width should be twenty (20) feet on levees without public roadways and the then current crown width or twenty-four (24) feet (whichever is greater) for levees with such public roadways.

#### Levee Subvention Program

\$1,000.00 per mile deductible.

First Priority - 75% reimbursement up to \$20,000.00 per mile for annual levee maintenance.

Second Priority - 75% reimbursement for habitat mitigation.

Third Priority - 75% reimbursement for all levee work in excess of First Priority work up to an additional \$20,000.00 per mile including HMP work and work to meet the PL 84-99 or DWR Bul. 192-82 agricultural standards with an additional one-half (1/2) foot of crown elevation to account for periodic settlement on levees without public roadways and an additional one (1) foot on levees with public roadways. Crown width should be twenty-two (22) feet on levees without public roadways and the then current width or twenty-eight (28) feet (whichever is greater) for levees with such public roadways.

Fourth Priority - Third priority work in excess of \$20,000.00 per mile.

#### District Five Year Plans

Each participating district should provide a five year plan setting forth the general description and estimated dollar amount of work proposed for each of the categories set forth above assuming advances for the Subvention Program as currently applicable and payments by the State for Special Projects as invoices are received. Special State Projects and Special Local Projects will require specific plans and project review consistent with current practice. Local district development of plans, conduct of soil investigations and preparation of project documents will be funded through the Local Special Projects at a cost share of 90% State, 10% Local.

Additional Priorities Established Through the Annual Allocation of Funding to the Following Categories: (assumes One Hundred Million Dollars per year)

Delta Levee Subventions	12 million
State Special Projects	44 million
Local Special Projects	44 million

If funding is insufficient to fund all acceptable projects in the Delta Levee Subvention and/or the Local Special Projects Categories for the particular fiscal year, the funding will be allocated within each category first, based on the specific priorities and second, prorated within the underfunded priority to fully fund a segment of qualifying work in each applying District. The proration will be based on the total lineal feet of acceptable levee work within the underfunded priority which is included in the application of a particular district as compared to the total lineal feet of acceptable levee work included in all applications for the particular fiscal year in the specific priority. The District may elect to receive the funding available to provide maximum State cost share for a segment of the work and defer the remainder of the work in the priority to a subsequent year. Any excess of funds within the Delta Levee Subventions or Special Local Projects Categories shall be applied first to fund any shortfall in the other category within the particular fiscal year and second to supplement funding in the particular category in the subsequent fiscal year.



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