Blue Ribbon Task Force
CORRESPONDENCE SPCv2-5

NORTH DELTA WATER AGENCY

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July 29, 2008

Via e-mail to: dv_context@calwater.ca.gov

Phil Isenberg, Chair
Delta Vision Blue Ribbon Task Force
c/o Resources Agency
State of California
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: COMMENTS ON DELTA VISION STRATEGIC PLAN (SECOND STAFF DRAFT DATED JULY 11, 2008)

Dear Mr. Isenberg:

The North Delta Water Agency ("NDWA") respectfully submits these comments on the Delta Vision Strategic Plan (Second Staff Draft dated July 11, 2008).

BACKGROUND

NDWA was formed by a special act of the Legislature in 1973. (North Delta Water Agency Act, Chapter 283, Statutes of 1973). Its boundaries encompass approximately 277,000 acres including all of that portion of the Sacramento-San Joaquin Delta, as defined in Water Code Section 12220, that is situated within Sacramento, Yolo and Solano Counties. Also included within NDWA's boundaries are certain lands in northeastern San Joaquin County comprising New Hope Tract, Canal Ranch and Staten Island.

Beginning approximately 160 years ago, farmers within the area now comprising NDWA began reclaiming lands from flooding, appropriating water to beneficial use and establishing vibrant agricultural communities. The Bureau of Reclamation (Bureau) began constructing the Central Valley Project (CVP) in the late 1930s, damming the major tributaries on the Sacramento River and holding back substantial quantities of the Delta water supply. As it did with landowners along the Sacramento River, the United States conducted extensive studies and negotiations to ensure a sufficient supply for water right holders in the northern Delta. Discussions with Delta landowners were protracted, however, due to the complex issues of both water quantity and quality, and the issues only intensified with the construction of the State Water Project by the California Department of Water Resources (DWR).

Against this backdrop, NDWA was formed to represent northern Delta interests in negotiating a contract with both the Bureau and DWR in order to mitigate the water rights impacts of the Projects.[1] From 1974 to 1979, North Delta, the Bureau and DWR determined the outflow necessary to meet water quality standards for irrigated agriculture and reviewed the paramount water rights of landowners within North Delta's boundaries. The agencies also evaluated the Delta channels' historical function as natural seasonal storage. Before the Projects began withholding much of the Sacramento River system's high winter flows, the Delta channels stored sufficient fresh water to sustain water quality in the northern Delta throughout and often beyond the irrigation season. Since the Projects commenced, however, the Delta functions more like a flowing stream and, as a result, relatively minor decreases in outflow can have a serious impact on northern Delta water quality.

In 1981, DWR and NDWA executed a Contract for the Assurance of a Dependable Water Supply of Suitable Quality (1981 Contract), a copy of which is enclosed. The crux of the 1981 Contract is a guarantee by the State of California that, on an ongoing basis, it will ensure that suitable water will be available in the northern Delta for agriculture and other beneficial uses. The 1981 Contract requires DWR to operate the State Water Project to meet specified water quality criteria while providing enough water to satisfy all reasonable and beneficial uses of water within NDWA's boundaries. (1981 Contract, Art. 2) In return, North Delta makes an annual payment to DWR. (*Id.* Art. 10) Although the two signatories are public agencies, the 1981 Contract also extends to individual landowners who, under the terms of the Contract, have executed Subcontracts guaranteeing that their lands will receive all the benefits and protections of the 1981 Contract. (*Id.* Art. 18) Many of these Subcontracts have been signed and recorded, enabling the subcontractors to enforce the terms of the 1981 Contract.

In connection with the hearings that preceded the State Water Resources Control Board's adoption of Water Right Decision 1641, DWR and NDWA entered into a memorandum of understanding dated May 26, 1998 (MOU), which provides that DWR is responsible for any obligation imposed on NDWA to provide water to meet Bay-Delta flow objectives, so long as the 1981 Contract remains in effect. In Decision 1641, the State Water Board made the following findings and determinations: "Based on the agreement, the SWRCB finds that the DWR will provide the backstop for any water assigned to the parties within the NDWA as specified in the MOU. This decision assigns responsibility for any obligations of the NDWA to the DWR consistent with the MOU." (Decision 1641 at 66). The latter findings and determinations were upheld by the trial and appellate courts that subsequently reviewed Decision 1641.

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[1] Section 4.1 of the Agency Act states: "The general purposes of the agency shall be to negotiate, enter into, executed, amend, administer, perform and enforce one or more agreements with the United States and with the State of California . . . To protect the water supply of the lands within the agency against intrusion of ocean salinity; and ... To assure the lands within the agency of a dependable supply of water of suitable quality sufficient to meet present and future needs."

COMMENTS ON THE DRAFT STRATEGIC PLAN

General Comments

The Draft Strategic Plan does not adequately protect NDWA or the communities within its service area. In revising the Plan, the Task Force should be guided by the following principles:

1. Any Delta solution must include guarantees that lands within NDWA will continue to receive both the quantity and quality of water guaranteed under the 1981 Contract and under other applicable law, including but not limited to the Delta Protection Act, Cal. Water Code §§ 12201-12204 and the area of origin laws, Cal. Water Code §§ 11460-11465.

2. Productive agricultural land should not be taken out of production as a result of any Delta solution. To the extent that agricultural lands within NDWA will be affected by new Delta infrastructure or habitat restoration, acquisition of property rights should be limited to willing buyer/willing seller transactions, especially those involving lands owned by public agencies such as the California Department of Fish and Game, the U.S. Bureau of Reclamation, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and by non-governmental organizations such as Trust for Public Lands or Nature Conservancy. To be made whole does not mean to be bought out; non-willing sellers should not be forced to give up their property through eminent domain or other coercive processes.

3. Landowners and water users within NDWA should be protected from short-term and long-term "collateral damage" arising from habitat restoration efforts. This includes, but is not limited to, regulatory actions that may affect the right to divert (i.e. fish screen requirements) and the timing of diversions. Any Delta solution must include robust and secure "take" authorization for existing, in-Delta covered activities. Assurances must be flexible and open-ended, and must not shift the risk for changed conditions away from the State of California.

4. Any solution must include adequate, reliable, and permanent financing mechanisms (i.e. an endowment, annuity, or dedicated stream of revenue), especially for maintaining the properties and habitat so that they do not impact neighboring land uses.

5. Habitat restoration efforts must not trump all other concerns, and must particularly yield to public health and safety concerns, particularly in relation to (i) mosquito-borne diseases such as malaria or West Nile virus, and (ii) flood risks.

6. The Strategic Plan should make clear that no irretrievable commitments will be made to implement any project until all required environmental review processes are completed. The "piecemealing" of projects, including habitat restoration projects, is contrary to the California Environmental Quality Act and the National Environmental Policy Act and must be avoided.

7. Existing local taxes and/or assessments should be maintained, including the payment of assessments and fees to cities, counties, and special districts, and North Delta Water Agency assessments. Removing even a small part of the local funding for these agencies could compromise the ability to execute their critical roles in community governance.

8. The Delta Vision process must be open, fair, and transparent. Documents, including initial plans and/or workgroup materials, should be widely distributed and explained to Delta residents through ongoing public meetings. Such documents should also be available on the internet. It is imperative that the Delta Vision process be open to alternative ideas, rather than a mechanism to reach a predetermined outcome.

9. The most significant failing of the Draft Strategic Plan is its complete failure to examine or consider (i) the feasibility of the proposed actions relating to habitat restoration; and (ii) the socio-economic impacts of the proposed actions on local economies and communities within the Delta. It is critical that the Strategic Plan consider and discuss the latter category of impacts. Rural communities require a critical mass of agricultural activities to remain viable, and shifting too much of a community into habitat could very well increase development pressures by undermining the viability of local agriculture-based economies. In addition, removing agricultural land from production may reduce the pool of available mitigation lands, resulting in adverse secondary and tertiary effects in the region.

10. NDWA has reviewed the three letters dated July 2, 2008, July 9, 2008 and July 15, 2008 from Deputy Attorney General Virginia A. Cahill to John J. Kirlin, Executive Director of Delta Vision. These letters purport to examine the authority of the State of California to reallocate water under various legal theories. It is the position of NDWA that any attempt by the State of California to "reallocate" water from water users within NDWA to other uses would constitute an actionable breach of the 1981 Contract and a taking of private property. NDWA reserves the right to respond in detail to Ms. Cahill's assertions.

Comments on In-Delta Water Use

Proposal: Action 9.3 proposes to "[s]hift major in-Delta diversions away from sensitive habitats (high priority restoration areas, low-flow channels and terminal sloughs) to channels where drinking water quality is higher." Action 9.5 proposes to "[i]dentify mechanisms to connect legal in-Delta water users to improved Delta conveyance facilities."

Response: NDWA generally supports the two proposed actions described above, provided that all costs associated with the shifting of major in-Delta diversions (including major diversions by districts and landowners within NDWA) or the implementation of mechanisms to connect in-Delta water users to improved Delta conveyance facilities are borne by the State of California or export water users.

Comments on Governance

Proposal: A new gubernatorially-appointed California Delta Ecosystem and Water Council ("Delta Council") would adopt a California Delta Ecosystem and Water Plan ("Plan"). The Plan would address water conditions and land uses, in the Delta and possibly outside of it. The actions of state and local agencies that make decisions that affect the Delta – including the State Water Resources Control Board ("SWRCB") – would have to be consistent with the Plan. The Council would decide if an agency's action was consistent with the Plan.

Response: NDWA opposes creation of a Delta Council and the Plan because the SWRCB, DWR and the Delta Protection Commission, collectively, can achieve the same things without an additional agency. Counties should retain the principal decision-making role with respect to land use in the Delta.

Comments on proposal to "restore" the Delta Ecosystem

Proposal: The strategic plan proposes that: (i) "appropriate" Delta flows be "restored;" (ii) floodplains, including the Yolo Bypass, be flooded more often to improve the Delta ecosystem; and (iii) water for ecosystem restoration not be purchased, but "will be provided within the California's systems of water rights and the constitutional principles of reasonable use and public trust." (Pp. 23, 28, 30-31, 34-35.)

Response: These proposals presumably would require involuntary contributions of water by water users upstream of and potentially within the Delta. These proposals, however, appear to respond primarily to two conditions: (i) loss of habitat within the Delta caused by levee construction; and (ii) adverse stream conditions created by Delta export pumping. These conditions were not created by NDWA water users. NDWA water users have borne their fair share of the cost of maintaining water supply and water quality in the Delta through the payment requirements under the 1981 Contract. NDWA will oppose any involuntary and uncompensated reallocations of water.

Comments on Proposed Diversion Fees

Proposal: The strategic plan proposes "multiple revenue streams" and states (p. 25): "'Layering' revenue generation systems better allows matching revenues collected to perceived value and actual beneficiaries. [¶] For example . . . there should be a per-acre-foot fee levied on water diversions within the Delta watershed, and a separate fee on any water conveyed through or around the Delta."

Response: NDWA opposes diversion fees where there is no clear nexus between the fees imposed and impacts of diversions on the Delta ecosystem. No such nexus exists for diversions by NDWA water users. General funding of operations of agencies interested in the Delta is not an appropriate basis for imposing fees on Delta-watershed water users where there is no demonstration that those water users' activities have adversely impacted the Delta. Eliminating the Delta Council and its associated budget would limit any need for new funding sources.

Comments on Proposed California Water Utility

Proposal: The draft strategic plan proposes that control of the SWP be removed from DWR and placed in a new "California Water Utility." The Utility eventually would take over the CVP, too. The Utility would manage Delta exports in coordination with a Delta operations team comprised of relevant state and federal agencies. (Pp. 18-19.) The draft strategic plan does not say how the Utility would be organized. Delta exporters have proposed a JPA in which they would participate.

Response: NDWA opposes the establishment of a new "California Water Utility." The State Water Project should continue to be operated by the Department of Water Resources. A California Water Utility funded and operated by export interests would not adequately represent the broader public interest in the operation and administration of the State Water Project. NDWA would object to the assignment of the 1981 Contract to a new entity of this type.

Comments on Proposed Conveyance System

Proposal: The draft strategic plan proposes dual Delta conveyance facilities with a peripheral canal and in-Delta channel improvements that are designed with capacity to deliver high wet-season supplies, which capacity would not be fully used during drier seasons. (Pp. 58-62.)

Response: The Strategic Plan must explain how the State of California intends to maintain through-Delta flows adequate to meet its water supply and water quality obligations under the 1981 Contract. NDWA will support cost-effective Delta-conveyance solutions, provided that such solutions are consistent with the ten general principles set forth on pages 3-4 of this letter.

Comments on Proposed Requirements for Water Use Reporting and Ag Water Conservation

Proposal: The draft strategic plan suggests requiring all water users to report their diversions to some entity, probably the SWRCB. (Pp. 4, 22-23, 42.) In addition, the draft

strategic plan proposes to increase agricultural water conservation with incentives for farmers to convert to "state-of-the-art drip or micro irrigation systems, or other equipment and methods that eliminate any return flows to surface water systems." The incentives would include: (i) increasing funding, and streamlining procedures, for grants and loans to farmers to implement these measures; and (ii) considering exemptions from Regional Board agricultural-runoff regulations for farmers who install heightened water-conservation measures. (P. 45.)

Response: While NDWA generally agrees that farms should be water-efficient, the Task Force must recognize that the hydrology and water use systems in the Delta are unique. Specifically, natural sub-irrigation occurs in many agricultural lands within the Delta; as a result, traditional methods for increasing agricultural water use efficiency (such as drip or micro-irrigation techniques) may have limited application in many parts of the Delta. NDWA opposes a "one size fits all" approach to agricultural water use measurement and agricultural water conservation. NDWA is willing to work cooperatively with the SWRCB, DWR and other agencies to develop an agricultural water conservation program for the Delta that makes sense given the unique characteristics of the Delta.

Comments on Proposed Storage Diversion Limits

Proposal: Under a conjunctive-use heading, the draft strategic plan proposes, among other limits, the following two limitations that are intended to "shift operations to take the greatest volume of exports during times of high flow": (i) "Do not divert to storage into upstream reservoirs until 15 days after inflows to on-stream reservoirs require real-time flood control operations;" and (ii) "Limit total monthly diversions to a percentage of the inflow to on-stream reservoirs so that high flows are not limited to those required by regulation." (Pp. 36-37.)

Response: These limits are not clear and must be clarified before NDWA can make complete comments on them.

Comments on Proposal to Store More Floodwater Upstream of Delta

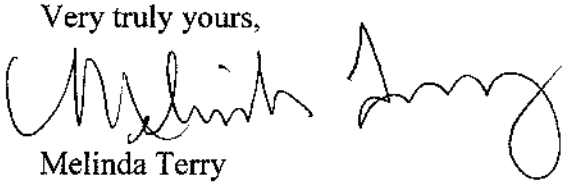
Proposal: The draft strategic plan proposes "infiltrating and storing more floodwater upstream of the Delta using both groundwater and floodplain storage . . . ." (P. 73.)

Response: It is not clear what this proposal would entail. If it would entail expanding

floodplains onto existing private property within NDWA, then NDWA would oppose the proposal because such a proposal would adversely affect the rights of NDWA landowners to exercise their rights under the 1981 Contract.

Thank you for the opportunity to comment on the Draft Strategic Plan.

Very truly yours,



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