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SENT VIA EMAIL (DeltaConveyanceScoping@water.ca.gov)

Delta Conveyance Scoping Comments
Attn: Renee Rodriguez
Department of Water Resources
P.O. Box 94236
Sacramento, CA 94236

RE: Comments on Delta Conveyance Project Notice of Preparation.

Dear Ms. Rodriguez:

These comments on the Department of Water Resources' ("DWR") Delta Conveyance Project ("project") Notice of Preparation ("NOP") are submitted on behalf of Local Agencies of the North Delta ("LAND"). Formed in 2011, LAND is a coalition of local reclamation and water agencies. LAND member agencies cover an approximately 90,000 acre area of the northern Delta. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to Delta communities and farms.

As an initial matter, LAND objects to DWR's failure to extend the comment period on the NOP, given that the state is essentially shut down right now with the COVID-19 pandemic. Notably, planning for the Delta Conveyance Project is not part of essential work as defined in the Governor's COVID-19 orders, and the public processes around it should be paused until it is possible for the public to meaningfully engage. In any case, DWR must fully analyze the environmental impacts of the project in its Draft Environmental Impact Report ("EIR") for the project.

Shift to Delta Conveyance Project from California WaterFix Project

According to Governor Newsom's Executive Order N-19, the state would inventory and assess "[c]urrent planning to modernize conveyance through the Bay Delta with a new single tunnel project." According to the California Natural Resources Agency's ("CNRA") May 2, 2019 Press Release, "DWR will work with local public water agencies that are partners in the conveyance project to incorporate the latest science and innovation to design the new conveyance project, and work with Delta communities and other stakeholders to limit local impacts of the project." In the same Press Release,

CNRA Secretary Crowfoot explained that “A smaller project, coordinated with a wide variety of actions to strengthen existing levee protections, protect Delta water quality, recharge depleted groundwater reserves, and strengthen local water supplies across the state, will build California’s water supply resilience.”

Yet the NOP outlines a cursory description of a Single Tunnel project that is the same in almost every respect to the failed California WaterFix (“CWF”) project. Moreover, the NOP contains no references to coordination on actions such as levee strengthening, water quality improvements, groundwater recharge or other “resilience” tools. In addition, the Delta Conveyance Design and Construction Authority has thus far refused to pause its Stakeholder Engagement Committee process despite the COVID-19 pandemic, undermining prior commitments to work with Delta communities and other stakeholders to limit local impacts of the project. Thus, it appears that project design and engineering is continuing without the promised local engagement, and without substantive progress on related actions to improve California’s water supply resilience.

Since the project proposed now is basically the same as the CWF project approved by DWR in 2017,¹ LAND refers DWR to the voluminous and detailed comments submitted by LAND and by this law office on that prior project since 2009. In the course of litigation over the adequacy of the California WaterFix project review and approvals, those comment letters were compiled by DWR counsel and staff into a draft administrative record.² In addition, LAND, alongside numerous other protestants, prepared, presented and defended voluminous evidence in the form of expert and lay testimony, as well as supporting references for the State Water Resources Control Board’s (“SWRCB”) water rights hearings on the CWF project.³ These previously prepared comments and testimony apprise DWR of the reasonably foreseeable environmental and other effects of the project, along with the shortcomings of the prior approaches to review and analysis. LAND suggests that DWR thoroughly review these comments prior to completing the project description and analysis in the draft EIR for the “new” Delta Conveyance Project. A few key issues are also highlighted below.

¹ This fact undermines the NOP claim on page 9 that: “As described above, the proposed project has been informed by past efforts taken within the Delta and the watersheds of the Sacramento and San Joaquin Rivers, including those undertaken through the Bay Delta Conservation Plan (BDCP)/California WaterFix.”

² Should DWR have trouble locating these comments, please contact my office.

³ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/ (see especially evidence submitted by Groups 19 and 24). Should DWR have trouble locating this evidence, please contact my office.

Project Description

The level of detail in the NOP is inadequate to fully understand the proposed project, including both the proposed physical components as well as proposed operations. The planned volumetric capacity of the project and its alternatives must be clearly defined. During the time period under which a single or phased tunnel project was considered in 2018, engineers for the Metropolitan Water District (“MWD”) explained that “In order to accommodate a higher flow rate in the tunnels, the original 2015 concept design of the pumping facilities, the facilities included in the Final EIR/EIS was modified. Examples included utilizing larger pumps and deepening the pump well structure to accommodate the larger pumping equipment.”⁴ If a 4,500 cfs tunnel can be modified to carry up to 6,000 cfs or more of water (as described by MWD), that means the project (now apparently proposed at 6,000 cfs) might also be later modified divert much more than 6,000 cfs. With the unending pressure to divert more water from the Delta, the Draft EIR must disclose and analyze the maximum amount of water that may be diverted from the Sacramento River by the project.

Similarly, proposed project operations must be provided in the project description. During environmental review of the CWF project, the EIRs presented various modeling scenarios that provided only a general idea of how the project might be operated, with retention of maximum flexibility for the operators. The vague operations description, along with constantly shifting approaches to modeling rendered the resulting environmental analysis of operations virtually meaningless. The new Draft EIR must actually analyze the fully range of potential effects from operation of the project.

The project description should also include details on the proposed role of adaptive management in defining future operations. Operation of the CWF included no input from affected water users and others within the Delta, with the adaptive management process only including the agencies, export water contractors and limited fishery organization input. As explained in expert testimony submitted to the SWRCB, the Interagency Implementation Coordination Group in the adaptive management plan was:

⁴ See SWRCB CWF Water Rights Hearing Exhibit LAND-309, Exhibit 1, MWD Email, February 2, 2018; see also the 2018 Conceptual Engineering Report, DWR-1304, PDF pp. 406-407 (discussing potential to transport up to 7,500 cfs in 40 foot diameter tunnels), available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/LAND/part2sur_rebuttal/land309.pdf and https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/petitioners_exhibit/dwr/part2_rebuttal/dwr_1304.pdf.

co-led by Reclamation and DWR, includes a representative of Reclamation, USFWS, and NMFS, as well as one designated representative each from DWR, CDFW, a participating SWP contractor, and a participating CVP contractor. [Citation.] The IICG makes recommendations and DWR and the Bureau of Reclamation provide the “management hub” for the AM process. [Citation.]⁵

There was also an advisory role for the Collaborative Science and Adaptive Management Program, which did not include any representatives from the Delta community or local agencies. This failed approach to operations and adaptive management must not be repeated. To the extent the project description provides operational flexibility and defers operational decisions, Delta stakeholders directly impacted by those operations must have a role in any adaptive management process.

As documented by LAND and others, the diversions proposed by the project are large enough to change river water levels, reduce local groundwater recharge to depleted aquifers, and impact water quality throughout the Delta. Especially with respect to water quality, the timing of the new water diversions makes a tremendous difference. For instance, diversions in the late summer and fall months, while possibly reducing potential impacts to certain listed fish species, would increase the potential for significant water quality effects during lower river flows, as well as pose impacts to recreation and other existing uses of the Delta water and waterways. References by project proponents to having the capacity to take a “big gulp” when flows are high should be matched by a commitment to take only “little sips” when flows are low. This type of operation, however, was not reflected in the CWF environmental review or modeling runs, with “big gulps” and inadequate bypass flows proposed in the summer and fall low flow months. The Draft EIR should clearly describe proposed operations that actually conform to this oft-repeated talking point, and then analyze the impacts of those operations.

The Draft EIR must also describe actions by other agencies to carry out the project, including “[a] list of related environmental review and consultation requirements [found in] federal, state, or local laws, regulations, or policies. To the fullest extent possible, DWR must integrate CEQA review with these related environmental review and consultation requirements.” (CEQA Guidelines, § 15124, subd. (d)(1)(C); see also

⁵ See SWRCB CWF Water Rights Hearing Exhibit LAND-240 Errata, p. 28, available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/LAND/part2rebuttal/land240errata.pdf.

CEQA Guidelines, § 15006, subd. (i.) An EIR must also consider related regulatory regimes when considering project alternatives. (See Guidelines, § 151126.6, subd. (f)(1).) Identifying competing regulatory authorities of other agencies and disclosing how those authorities may impact a project is essential information for an EIR. (See *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning Ranch*); see Pub. Resources Code, § 21003, subd. (a).) DWR must also “make a good faith attempt to analyze project alternatives and mitigation measures in light of applicable [regulatory] requirements” and may not “leav[e] it to other responsible agencies to address related concerns seriatim.” (*Banning Ranch, supra*, 6 Cal.5th at 941.)

With respect to review and permitting of the project by other entities, the NOP’s uncertain references to the role of the Bureau of Reclamation (“BOR”) in the project must be resolved prior to release of the Draft EIR. The participation of BOR in the project directly affects the environmental review and permitting process, including the critical issue of which agency would serve as the federal lead under the National Environmental Policy Act. In addition, local and state agencies have authority over various aspects of the project (e.g., roadways, facilities siting, groundwater and flood control structures), which should be clearly described. Without this information, the Draft EIR would not comply with the requirements described in California Supreme Court’s *Banning Ranch* decision.

Effects on Flood Control

The project would modify the State Plan of Flood Control by making modifications to levees in two locations along the eastern bank of the Sacramento River. Proposed designs must be developed in coordination with the Central Valley Flood Control Board, as well as local flood control agencies in order to avoid deleterious changes to the flood control system. The Draft EIR should also consider the potential for project facilities to be flooded, given proposed placement within a historic floodplain. In addition, project facilities are proposed to be placed within areas protected by levees maintained by local reclamation districts. The project should be designed to avoid interference with levee maintenance and flood fighting activities. As alluded to in Secretary Crowfoot’s remarks in a Press Release, the project should also be accompanied by *improvements* to the flood control system. Statewide and locally important infrastructure in the Delta must continue to be protected by the Delta’s levee system even if the project is constructed.

Effects on Agriculture

The Delta is home to the largest continuous swath of prime farmland in the state. Of the approximately 500,000 acres of farmland in the Delta, approximately eighty

percent (80%) is classified as Prime Farmland. Due to special statutory protections of the Delta, as well as local zoning, the Delta is largely protected from urban development. Without the project and with continuing local, state and federal investment in the levee system, the Delta is poised to continue providing high quality agricultural products for local, regional, national and international markets in the long term. The project, with its lengthy and disruptive construction, along with operations that deprive Delta farms of fresh water, is currently the largest threat to Delta agriculture.

Unlike the EIR for the CWF, this project's Draft EIR must clearly disclose the total acreage of agricultural land that would be permanently converted to other uses as a result of the project. The amount of agricultural land would be subject to indirect impacts from project construction and operation must also be disclosed. Such an analysis requires a complete and detailed project description, along with accurate baseline information regarding cropping, irrigation and harvesting practices, among other factors.

In addition, impacts to surface water quality that reduce agricultural productivity must also be disclosed. Extensive comments and testimony have been prepared regarding these issues. Thousands of senior water rights holders rely on high quality water supplies in the north Delta to produce crops. Any denigration of this water quality must be analyzed and disclosed. Compliance with Water Quality Control Plan standards (for which there may not be specific compliance points in the north Delta) is inadequate from a CEQA perspective. In addition, farmers irrigate in real time, not over two-week averages. The Draft EIR should assume that farmers will rely on surface water diversions every day of the growing season, and analyze the effects of both short and long term increases in salinity on agricultural productivity and soil health.

Adequate mitigation under CEQA must include enforceable mitigation, or an enforceable performance standard is proposed if formulation of mitigation is deferred. My office worked with DWR staff and others on what became the Agriculture and Land Stewardship ("ALS") Framework during the Bay Delta Conservation Plan process.⁶ This approach was a step toward in the formulation of mitigation for disruptions of agricultural operations and conversion of agricultural lands to non-agricultural uses. Yet the EIR for the CWF referred to the actions identified in the ALS Framework without committing to any specific mitigation. If it will be relied upon to mitigate the project's impacts, the ALS Framework must include enforceable performance standards, not just provide a menu of options to be selected later.

⁶ Available at: <https://water.ca.gov/Programs/California-Water-Plan/Water-Resource-Management-Strategies/Agriculture-and-Land-Stewardship-Framework>.

Biological Effects

The draft EIR must analyze likely impacts on all fisheries resources in the vicinity of the proposed intakes. It would not be adequate for the Draft EIR to only focus on potential impacts to listed fish species. As shown in the table below, which references information in the 2017 Final EIR for the CWF,⁷ there are likely fish in the vicinity of the proposed North Delta Diversions throughout the year. Impacts to those fish, whether they are listed or not, must be disclosed and mitigated. Many of these fish have recreational values, and are also tribal trust species for Native American tribes. In addition, bypass flow criteria and screening standards must be developed to protect all fishery resources, not just listed fish.

Potential Presence of Fish in Vicinity of Proposed North Delta Diversions*				
Species	Listing Status	Presence-Adult	Presence-Juvenile	FEIR/S Reference**
Delta Smelt	ESA: Threatened CESA: Endangered	Dec-May/Jan-May	Sep-Dec	p. 11A-5
Longfin Smelt	CESA: Threatened	Jan-Dec	Jan-Dec	pp. 11A-30 to 32
Central Valley Fall- and Late Fall-run Chinook Salmon	CA Species of Special Concern	June-Dec	Dec-June	pp. 11A-103, 104
Winter Run Chinook	CESA: Endangered ESA: Endangered		Jan-Apr/Sep-Dec	p. 11A-50
Spring Run Chinook	ESA: Threatened CESA: Threatened		Jan-Aug/Nov-Dec	p. 11A-77
Central Valley Steelhead	ESA: Threatened CA Species of Special Concern	June-March	Feb-May	pp. 11A-129-130
Sacramento Splittail	CA Species of Special Concern		Apr-June	p. 11A-146
Green Sturgeon	ESA: Threatened (Southern distinct population) ESA: Species of Special Concern	Jul-Dec	Jan-Dec/Apr-Oct	p. 11A-162

⁷ See SWRCB Water Rights Hearing Exhibits SWRCB-102 and SWRCB-25, pp. 45-46, 52, available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/exhibit102/index.html and https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/swrcb_25.pdf.

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	(Northern distinct population)			
White Sturgeon	Not listed	Feb-Jun		p. 11A-178
Pacific Lamprey	Not listed	Mar-Jun		p. 11A-191
River Lamprey	Not listed	Feb-Jun		p. 11A-199

* Location information limited by locations where presence was sampled.

**Note: Where temporal occurrence tables were provided, months listed here are indicated as high or medium abundance.

Alternatives

LAND and other groups and individuals have suggested many alternatives to the north Delta tunnel concept over the last decade as well as during the last year, in the time since the CWF project was rescinded and a “new” way forward was identified. We expected that there would be a substantive discussion of alternatives prior to release of the NOP. The NOP, however, proposes basically the same project as the failed CWF project, apparently discounting those suggestions without any analysis. The Draft EIR, however, must consider a reasonable range of alternatives that would feasibly attain the identified project objectives. (CEQA Guidelines, § 15126.6.) Should DWR wish to engage in discussions regarding alternatives – both different configurations of conveyance as well as groupings of actions that would preclude the need for new conveyance – LAND is available for those conversations.

* * *

Thank you for considering these comments, and please feel free to contact me with any questions.

Very truly yours,

SOLURI MESERVE

A Law Corporation

By: 
Osha R. Meserve

ORM/mmb