

<Central Delta Water Agency>

September 15, 2003

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**Via e-mail [delores@water.ca.gov](mailto:delores@water.ca.gov)  
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Ms. Delores Brown, Chief  
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Department of Water Resources  
3251 "S" Street  
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Re: Central Delta Water Agency's Comments on the Draft Environmental Impact Statement (EIS)/Environmental Impact Report (EIR) - Environmental Water Account; State Clearinghouse #1996032083

Dear Ladies and Gentlemen:

The DEIS/EIR fails to properly analyze the true impact of the EWA in that it is assumed that the State Water Project could not be obligated to mitigate project damages to fish or additionally to preserve fish and wildlife at water project contractor expense without the EWA.

The impacts on water quality and flow including flushing flows in and through the Delta should be delineated. Agricultural beneficial uses in the Delta are dependent upon historically available water quality which is substantially better than the Agricultural Beneficial Use Objectives contained in the SWRCB 1995 Water Quality Control Plan. Agriculture requires year-around consideration even though many of the objectives provide limits only for the April 15-August 15 period. The months of principal concern are March through September. Although diminished in effectiveness by high rates of export pumping, spring flows flush the Delta pool extending the availability of good quality beyond the period of historically available natural surface flow.

Although somewhat difficult to analyze, the impact on Delta inflow due to changes in groundwater levels and the related channel losses and accretions should be considered.

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Projects which bank water during high river flow periods and subsequently release water so as to add inflow to the Delta during the late spring and summer can provide a physical solution balance for the loss of flushing. The detail of the operating constraints will determine the extent of the impacts.

Due to the difficulty in accurately monitoring the unconfined groundwater basins in the Sacramento Valley, the opportunity for abuse or error is high.

Groundwater substitution should not be confused with groundwater banking which adds real yield to the system.

We are particularly concerned about transfers of “paper water.” Use of water which has not currently been put to use will create a new demand on the system. Water transfers should be limited to that water which is made available as the result of a decrease in net consumptive use of surface water without a substitution from groundwater. Even with such transfers, the effects on river flow to the point of original diversion and on return flows must be carefully evaluated. The river flow to the point of original diversion could be important for maintenance of flow, temperature, and dissolved oxygen for fish. Return flow could be similarly needed for fish but is clearly needed for downstream agricultural and M & I users.

To the extent the subject water is to be exported from the Delta, the effects on water levels, water quality, channel water depths and channel flow must be considered. Additionally, the impacts resulting from the exported water should also be considered. Exports to the lands on the west side of the San Joaquin could result in increased degradation of the San Joaquin River and/or destruction of the farmability of undrained lands.

The DEIS/EIR failed to address California Water Code Sections 1392 and 1629 which prohibit profiteering from appropriative rights issued by the SWRCB in transfers to public entities.

In the case of Goodman v. County of Riverside (1993) 140 Cal.App. 3d 900, the court found that the State Water Resources Development System (SWP) was to be completely self supporting and contractors are required to repay the cost of the entire project (Id. at p. 908.) If all or part of mitigation of fish and wildlife damage caused by the SWP was shifted to the taxpayers the project would not be self-supporting and the entire cost would not be borne by the contractors.

Water Code section 12937 “(b) 1” makes it clear that the revenues from the sale, delivery or use of the water or power, and all other income and revenue should be used only for and in the following order:

- “1. The payment of the reasonable costs of the annual maintenance and operation of the State Water Resources Development System and the replacement of any parts

thereof.”

The EWA costs which are not for enhancement certainly fall within this category.

The contractors’ responsibility for the broader obligation of preservation of fish and wildlife as required by Water Code sections 11900 et seq. is also based on the provision in Water Code section 12931 which in part provides:

“ . . . Any facilities hereto or hereafter authorized as a part of the Central Valley Project or facilities which are acquired or constructed as a part of the State Water Resources Development System with funds made available hereunder shall be acquired, constructed, operated, and maintained pursuant to the provisions of the code governing the Central Valley Project, as said provisions may now or hereafter be amended.”

The code governing the Central Valley Project includes Water Code sections 11900 et seq. and, thus, the project to be entirely paid by the contractors includes preservation of fish and wildlife. (See also Goodman v. County of Riverside, *supra*, 140 Cal.App. 3d 900, 909-910.)

When the export pumping is reduced to reduce adverse impacts to fish and the EWA is used to pay the cost of such reduction, the EWA is simply a method of paying the cost to mitigate the export project damage. Such cost is clearly the obligation of the project and in turn the project contractors. The DEIS/EIR fails to address the need for reimbursement from the SWP contractors and does not discuss whether or not it is more economical to simply reduce deliveries rather than pay \$460.00 per acre foot or thereabouts for replacement water sometimes from the same contractor who would have had his delivery reduced.

(Please also see “Supplemental Comments on the DEIS/EIR for the EWA” attached hereto and incorporated herewith.)

Yours very truly,

DANTE JOHN NOMELLINI  
Manager and Co-Counsel of the  
Central Delta Water Agency

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## “Supplemental Comments on the DEIS/EIR for the EWA”

### 1. The DEIS/EIR Fails to Adequately Address the EWA Actions’ Impacts on Surface and Subsurface Return Flows to the River Systems.<sup>1</sup>

The charts on pages 5-89 thru 5-91 of the DEIS/EIR show increases in flows in the Merced and San Joaquin rivers of over 200 cfs in the months of October and November yet they show no decrease in river flows in other months. The requisite facts and analysis to support such a conclusion appear to be absent.

On page 6-10 of the ASIP is states:

“EWA acquisition of Merced ID water via groundwater substitution would decrease Merced River summer flows and increase Merced River fall flows relative to the basis of comparison. Merced ID would hold the EWA transfer water in Lake McClure until the fall, when it would release the water downstream. This pattern would decrease flows downstream of New Exchequer Dam in the summer by a maximum of 70 cfs, but only for the short distance between New Exchequer Dam and Lake McSwain (the typical diversion point). EWA agency acquisition of Merced ID water via groundwater substitution would increase Merced River flows in fall relative to the basis of comparison as the water is released from Lake McClure. EWA agencies would monitor the releases to ensure that adverse effects do not occur, and institute changes to quantities of water released through adaptive management processes to avoid or minimize any adverse effect.”

While this entire matter should be more fully explained in the DEIS/EIR itself, from this passage it appears that the reason there are no decreases in flows (in the charts on pages 5-89 thru 5-91 of the DEIS/EIR) in months other than October and November as a result of the over 200 cfs increases in releases during both October and November are due to the assumption that the only losses to the river in months other than October and November will occur *upstream* of Lake McSwain, and *not* downstream of that point. If that is indeed the conclusion the DEIS/EIR is making, the facts and analysis necessary for the public and the decision makers to independently arrive at that conclusion are again entirely lacking.

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<sup>1</sup> While the following analysis focuses on the proposed groundwater substitution within the Merced Irrigation District, an analysis of the EWA’s impacts on surface and subsurface return flows must be conducted with respect to all proposed EWA actions and in all affected river systems.

Threshold information necessary to come to such conclusion would include a detailed evaluation of the surface and subsurface return flows (i.e., “accretions”) to the river which would occur both with and without the groundwater substitutions. It appears the DEIS/EIR preparers have assumed (without adequate supporting facts and analysis) that return flows will be identical with and without the groundwater substitution. Again, the mandatory facts and analysis to support such a conclusion are not set forth.

One of the many issues to explore in such an evaluation would include the following: “Will the use of groundwater reduce the amount of subsurface accretions to the river that would otherwise occur if surface water would be used?” E.g., if the location where groundwater substitution was utilized was a “gaining stream,” i.e., an area where the groundwater typically feeds the surface flow, then such a reduction would be expected.

To get a meaningful and informed handle on the matter of surface and surface return flows with and without the groundwater substitution, the evaluation must naturally specify the precise area and timing when the farmer would have used the surface water in the absence of the groundwater substitution. To the extent such information is not currently known, then for the purposes of this DEIS/EIR worst case scenarios can and should be evaluated. The evaluation would thereafter need to be supplemented by site-specific CEQA analysis when such information finally becomes available.

Another related concern in addition to the *quantity* of return flows with and without the groundwater substitution is the *quality* of the return flows with and without the groundwater substitution. To the extent there will in fact be return flows to the Merced and/or San Joaquin rivers from groundwater substitution, the *quality* of those should be compared to the quality of the return flows from the use of surface water. Thus far, there appears to be no such analysis.

Ultimately, the with and without groundwater substitution return flow analysis must further analyze the effects which impacts on the quantity and quality of return flows resulting from the groundwater substitution will have on the quantity and quality in the lower San Joaquin River (which serves the landowners and water users within the Central Delta Water Agency). In particular, the impacts on the Vernalis Salinity Standard (“VSS”). To the extent releases from New Melones are relied on to mitigate any adverse impacts to the VSS, such releases should be clearly disclosed and quantified so that the decision makers (and the public) can assess the new demands which the groundwater substitution will place on the already severely over-committed New Melones Reservoir.

To the extent adverse impacts to the quantity and quality of the lower San Joaquin River (including the VSS) result from the groundwater substitution, feasible mitigation measures and alternatives should be discussed and evaluated to mitigate or avoid those impacts without the use of New Melones water. Releases from the Merced river should be considered as well as contributions from the other tributaries to the San Joaquin River including releases from Friant reservoir.

Moreover, the *cumulative* impacts of the groundwater substitution on the quantity and quality of the lower San Joaquin River must be address in the context of the substantial quantities of water Merced Irrigation District, and other districts, are currently shifting from summer to spring as part of the San Joaquin River Agreement (which implements the VAMP fish experiment). Minor impacts to water quality and quantity could be significant when viewed in light of past, current and future actions, such as the San Joaquin River Agreement, which result in shifts of high quality tributary water from summer to spring and/or fall.

**2. Other Concerns Regarding the DEIS/EIR’s “Analysis” of the Merced and San Joaquin River Systems:**

The water quality analysis of the Merced and San Joaquin rivers at pages 5-89 thru 5-91 of the DEIS/EIR does not appear to analyze the water quality impacts in various year types, e.g., “critical,” “dry,” “below normal,” etc. (like the DEIS/EIR does for other river segments). If true, why was a more detailed analysis of these water year types omitted? The long-term, 72 year average flows clearly do not represent “worst case” scenarios as is the purported intent of the analysis. An analysis in each of the year types should be conducted *and presented in the DEIS/EIR* along with a listing of the worst possible circumstance in each of the year types—i.e., avoid the sole reliance of the presentation on “averages” (which by their very natural mask the “worst case” scenarios).

Also, as referenced above, page 6-10 of the ASIP states:

“EWA acquisition of Merced ID water via groundwater substitution would decrease Merced River summer flows and increase Merced River fall flows relative to the basis of comparison. Merced ID would hold the EWA transfer water in Lake McClure until the fall, when it would release the water downstream. This pattern would decrease flows downstream of New Exchequer Dam in the summer by a maximum of 70 cfs, but only for the short distance between New Exchequer Dam and Lake McSwain (the typical diversion point).”

Where did the “70 cfs” come from? As also referenced above, on pages 5-89 thru 5-91 of the DEIS/EIRs it states that flows in the Merced and San Joaquin rivers will increase over 200 cfs in the months of October and November. Shouldn’t the flow *above* Lake McSwain, correspondingly decrease by 200 cfs, rather than 70 cfs? The discrepancy of these numbers and the facts and analysis to support such a discrepancy must be set forth in the DEIS/EIR.

**3. Alternative Analysis.**

Please explain why there are no alternatives to the “no-uncompensated loss to the exporters” component of the proposed project. The Calfed ROD DEIS/EIR similarly failed to consider any alternatives to this component of the proposed project. It appears the DEIS/EIR has treated the “no-uncompensated” loss as a project “objective,” thereby inappropriately and

artificially limiting the range of potentially feasible alternatives to the project. There should be at least one alternative (and preferably more) to this “no-uncompensated loss” component.

In a similar vein, there are no alternatives to the EWA *as a whole*. Since the Calfed ROD EIS/EIR failed to consider any alternatives to the EWA, the current DEIS/EIR for the EWA must do so. The EWA “as a whole” should be deemed the “proposed project” for CEQA purposes in the current DEIS/EIR. As it stands, there has not been, and will not be, any presentation and evaluation of alternatives to the EWA *as a whole* unless the current DEIS/EIR assumes that task. To approve the EWA in the absence of such a good faith investigation, discussion and analysis of a reasonable range of alternatives to the EWA *as a whole* is contrary to CEQA. The current DEIS/EIR apparently makes the unwarranted assumption that such an investigation, discussion and analysis has already taken place. However, a review of the Calfed ROD EIS/EIR readily indicates that it has not.

Finally, the DEIS/EIR fails to adequately explain why the proposed actions pursuant to the EWA for the protection of fishery resources are not actions that “would be reasonably expected to occur in the foreseeable future if the [EWA] were not approved.” (CEQA Guidelines section 15126.6(e)(2).) Any such actions are required to be part of the mandatory “no project” alternative required by Guidelines section 15126.6(e). Thus far, those actions are assumed to not be reasonably expected to occur in the future, and the facts and analysis necessary to support that finding are not sufficiently set forth.