The following comments were received by Agencies
**CENTRAL VALLEY FLOOD PROTECTION BOARD**

**FACSIMILE COVER SHEET**

3310 El Camino Ave., Rm. LL40
SACRAMENTO, CA 95821
(916) 574-0609 FAX: (916) 574-0682
PERMITS: (916) 574-0685 FAX: (916) 574-0682

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<th>DATE: July 23, 2009</th>
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To: Michelle Beachley
California Department of Water Resources
Division of Environmental Services
3500 Industrial Blvd
West Sacramento, CA 95691

FAX NUMBER: Fax: 916.376-9668

PHONE NUMBER:

FROM:

NAME: James Herota
Staff Environmental Scientist
Telephone: (916) 574-0651
FAX No.: (916) 574-1766

COMMENTS: Please accept the enclosed public comment for:

State Clearinghouse (SCH) Number: 2009062099
Engineering Geotechnical Activities in Water for Information Purposes
Mitigated Negative Declaration

Original to Follow YES ☑ NO ☐

*Note: If you have not received all the facsimile pages, please contact me at the telephone number listed above.*
July 23, 2008

Michelle Beachley
California Department of Water Resources
Division of Environmental Services
3500 Industrial Blvd
West Sacramento, CA 95691

Dear Ms. Beachley:

State Clearinghouse (SCH) Number: 2009062099
Engineering Geotechnical Activities in Water for Information Purposes
Mitigated Negative Declaration

Staff for the Department of Water Resources has reviewed the subject document and provides the following comments:

The proposed project is located within the jurisdiction of the Central Valley Flood Protection Board (Formerly known as The Redarmation Board). The Board is required to enforce standards for the construction, maintenance and protection of adopted flood control plans that will protect public lands from floods. The jurisdiction of the Board includes the Central Valley, including all tributaries and distributaries of the Sacramento River and the San Joaquin River, and designated floodways (Title 23 California Code of Regulations (CCR), Section 2).

A Board permit is required prior to starting the work within the Board’s jurisdiction for the following:

- The placement, construction, reconstruction, removal, or abandonment of any landscaping, culvert, bridge, conduit, fence, projection, fill, embankment, building, structure, obstruction, encroachment, excavation, the planting, or removal of vegetation, and any repair or maintenance that involves cutting into the levee (CCR Section 8);
- Existing structures that predate permitting or where it is necessary to establish the conditions normally imposed by permitting. The circumstances include those where responsibility for the encroachment has not been clearly established or ownership and use have been revised (CCR Section 8);
- A vegetation plan including, but not limited to the site, vegetation type (i.e. common and scientific name), number, planting spacing and irrigation method that will be within each project area (CCR Section 131).

The permit application and Title 23 CCR can be found on the Central Valley Flood Protection Board’s website at http://www.cvfdb.ca.gov. Contact your local, federal and state agencies, as other permits may apply.
July 23, 2009
Michelle Beachley
Page 2 of 2

If you have any questions please contact me at (916) 574-0651 or by email jherota@water.ca.gov.

Sincerely,

James Herota
Staff Environmental Scientist
Floodway Protection Section
Division of Flood Management

CC:
Governor's Office of Planning and Research
State Clearinghouse
1400 Tenth Street, Room 121
Sacramento, CA 95814

Jeremy Arrich, Chief
Flood Project Integrity and Inspection Branch
3310 El Camino Ave., Rm. LL30
Sacramento, CA 95821
ENVIRONMENTAL AND GEOTECHNICAL WELLS AND SOIL BORINGS

Introduction
This handout is intended as a general guideline for processing permits for environmental and geotechnical wells and soil borings. This includes, but is not limited to, cone penetrometers, inclinometers, piezometers, extraction wells, recovery wells, monitoring wells, temporary wells, hydropneumatic soil borings and soil borings drilled for geotechnical purposes (whether or not groundwater is encountered). It is not intended as a substitute for familiarity with applicable laws and regulations.

Well Permits
A permit is required to construct or destroy an environmental or geotechnical well or soil boring. Each well or boring requires a separate permit. Permit applications are available from Contra Costa Environmental Health. Permits are non-transferable and valid for six months.

Well Drillers
Contra Costa County requires that any well work be performed by a licensed well contractor (C-57 licensed) who has proof of Worker's Compensation Insurance and a $5,000 performance bond on file with the Environmental Health office.

Permit Processing
1. Well permit applications should be filled out as completely as possible to facilitate permit processing. The applications should include proposed well construction, a detailed map or plot plan and be accompanied with the appropriate permit fees. The information provided will be used to determine the suitability of the well site(s) and proposed method of work. If necessary, a site visit may be conducted to verify that the well locations are acceptable. The map or plot plan should indicate distances between the proposed wells/borings from structures and/or known or potential sources of contamination.

2. Applications for well destructions should include a copy of the Well Completion Report for the well construction, if available.

Construction and Destruction
Once the permit has been issued the authorized work can begin. A copy of the approved permit and map should be kept at the job site for reference.
Upon the setting of the well, Contra Costa Environmental Health will inspect the installation of the annular seal. Generally, annular seal depths should be a minimum of 10 feet to 50 feet, depending on the depth of the well. The seal material must be cement or concrete in accordance with Bulletin 74-81, or an approved bentonite that is specifically formulated as an annular sealing material and mixed to the manufacturer's specifications. If bentonite is used, the final two feet must be an approved cement or concrete mixture. Contact this office for a list of approved materials.

The seal material must be trembled when using bentonite or sealing annular spaces or cavities 30 feet or greater in depth or in the presence of water. The placement of sealing material for borings, hydraulic sampling, cone peneirometer testing and well destructions will be inspected. For well destructions the top fifty (50) feet of casing must first be removed.

The geologist and/or the well contractor are responsible for contacting Contra Costa Environmental Health to schedule inspection appointments. The greater the advance notice the more likely a mutually convenient appointment time can be arranged. 24 hours notice with confirmation verbally or in writing with the respective specialist is necessary to schedule field inspections.

Final Approval
After Contra Costa Environmental Health has approved the installation of an annular seal or the destruction of a well, a Well Completion Report (DWR form 188) signed by the responsible geologist or well driller must be submitted to this office. A boring log is required for borings, hydraulic sampling and cone peneirometer testing.

Upon satisfactory inspection of work and approval of the reports, final approval of the wells/borings will be granted.
Hello -

can you confirm that the deadline for public comment on the BDCP geo technical drilling is now August 9 and not June 26 please?
	hank you,

Pat

Patricia A. Clark  
District Director, City Council #7  
Councilman Robbie Waters  
(916) 808-7338  
pclark@cityofsacramento.org

National Night Out  
Tuesday, August 4, 2009
Agency-4

From: Jack Hanna, East Contra Costa Planning Commission
Sent: Friday 7/31/2009 7:48 AM
Subject: Bay Delta Conservation Plan

Bethel Island is not aware, nor has it been exposed to the critical information about this project.

I heard about the presentation through governmental contacts, only after the Brentwood meeting had passed.

Bethel Island has several unique opportunities for notice. They have not been used.

Residents Must be exposed to this information and be allowed to comment.

We are the people who live on this alignment that has not been published

You cannot proceed without the reasonable exposure of the residents of Bethel Island and their opportunity to provide reasonable input for necessary mitigations to their immediate environment.

Jack Hanna
East Contra Costa Planning Commission
Bethel Island resident
From: Vicki Brennan  
Sent: Tuesday 8/4/2009 9:37 AM  
Subject: Comments  

Attached are comments from the Sacramento Area Sewer District regarding the Mitigated Negative Declaration for the Bay Delta Conservation Plan In-Water Geotechnical Drilling. Please contact me if you have questions or desire more information. 

Vicki Brennan  
Secretary to Stan Dean  
Director of Policy and Planning  
Sanitation Districts Agency  
10545 Armstrong Avenue, Suite 101  
Mather, CA 95655  
916-876-6034  
fax 916 876 6160
August 4, 2009

Attention: Michelle Beacitley
Division of Environmental Services
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001

Subject: Mitigated Negative Declaration for the Bay Delta Conservation Plan
In-Water Geotechnical Drilling

Dear Ms. Beacitley:

The Sacramento Area Sewer District (SASD) appreciates the opportunity to offer
comments on the Mitigated Negative Declaration for the Bay Delta Conservation Plan
(BDCP) In-Water Geotechnical Drilling (Mitigated Negative Declaration).

The Mitigated Negative Declaration identifies 16 boring locations within the Delta,
two of which are on the Sacramento River near Walnut Grove. While it appears that
none of the proposed boring locations will directly impact SASD facilities, the Project
Location section of the Mitigated Negative Declaration gives the Department of Water
Resources the authority to add boring locations as needed. SASD has a six-inch
pressurized sewer pipeline crossing under the river at Walnut Grove, near boring
locations DCR-DH-11 and 12. SASD requests that proper Underground Service Alert
protocol for pressurized pipes be followed at all times to help minimize the potential
direct impacts to SASD facilities.

All personnel involved in the geotechnical boring operations should be made aware of
our facilities and care should be taken to avoid causing damages. Damage to our
facilities can be caused by many facets of the boring operation, including drilling
operations, vibrations, soil movement, barge anchoring mechanisms, drilling, etc.

If you have any questions, please contact me at (916) 876-6387.

Sincerely,

Roy Carlson, Senior Civil Engineer

cc: Mary Snyder, District Engineer
    Christoph Dobson, Director of SASD Operations
    Rosemary Clark, SASD Engineering Manager
    James P. Morris, SASD Maintenance and Operations Superintendent
From: Vicki Brennan  
Sent: Wednesday 8/5/2009 10:36 AM  
Subject: Bay Delta Conservation Plan In-Water Geotechnical Drilling SRCSD Comment Letter  

Attached is a letter from the Sacramento County Regional Sanitation District regarding the Mitigated Negative Declaration for the Bay Delta Conservation Plan In-Water Geotechnical Drilling. Please contact me if you have any questions or require more information.

Thank you!

Vicki Brennan  
Secretary to Stan Dean  
Director of Policy and Planning  
Sanitation Districts Agency  
10545 Armstrong Avenue, Suite 101  
Mather, CA 95655  
916-876-6034  
fax 916 876 6160
August 4, 2009

Attention: Michelle Beachley
Department of Water Resources
Division of Environmental Services
P.O. Box 947836
Sacramento, CA 94236-6001

Subject: Mitigated Negative Declaration for the Bay Delta Conservation Plan In-Water Geotechnical Drilling

Dear Ms. Beachley:

The Sacramento Regional County Sanitation District (SRCSD) appreciates the opportunity to offer comments on the Mitigated Negative Declaration for the Bay Delta Conservation Plan (BDCP) In-Water Geotechnical Drilling (Mitigated Negative Declaration). The BDCP is of particular interest to SRCSD due to its potential for causing adverse impacts on SRCSD's facilities and operations.

SRCSD provides wastewater collection and treatment services to 1.3 million residents of the greater Sacramento area. SRCSD designed and operates its treatment system in accordance with its National Pollutant Discharge Elimination System (NPDES) permit, issued by the State of California, providing protection of beneficial uses of the Sacramento River and Sacramento-San Joaquin Delta. We are very concerned with sustainability of the Delta and believe that any changes to the hydrology of the Delta must carefully evaluate environmental impacts of those changes to ensure a healthy ecosystem.

The Mitigated Negative Declaration identifies 16 boring locations within the Delta, eight of which are on the Sacramento River north of Walnut Grove. While it appears that none of the proposed boring locations will directly impact SRCSD facilities, the Project Location section of the Mitigated Negative Declaration gives the Department of Water Resources the authority to add boring locations as needed. SRCSD requests that proper Underground Service Alert protocol for pressurized pipelines be followed at all times to help minimize the potential direct impacts to SRCSD facilities. We have several facilities in the proposed geotechnical boring area, including:

1. Location DCR-DH-01 and DCR-DH-02: This area has dual 66-inch South River Crossing sewer force mains, the South River Pump Station power supply lines (SMUD), and the 120-inch Sacramento Regional Wastewater Treatment Plant (SRWTP) diffuser pipe.
All personnel involved in the geotechnical boring operations should be made aware of our facilities and care should be taken to avoid causing damages. Damage to our facilities can be caused by many facets of the boring operation, including drilling operations, vibrations, soil movement, barge anchoring mechanisms, drilling, etc.

SRCSD submitted comments on the BDCP “Notice of Preparation (NOP) and Revised NOP—Environmental Impact Report and Environmental Impact Statement for the Bay Delta Conservation Plan” on October 23, 2008 and May 14, 2009 and the comments therein are still relevant. We would like to reiterate that the BDCP and the proposed water conveyance facilities have the potential to cause adverse impacts to SRCSD facilities and operations, and all impacts must be fully mitigated.

SRCSD appreciates the opportunity to provide these comments on the Mitigated Negative Declaration for the Bay Delta Conservation Plan In-Water Geotechnical Drilling. If you have any questions, please contact me at (916) 875-9101.

Sincerely,

Stan R. Dean
Director of Policy and Planning Department

cc: Mary Snyder, District Engineer, SRCSD
    Prabhakar Somavarpu, Director of Operations, SRCSD
Agency-7

Phone call received from Misty Kaltreider
Solano County Resource Management
July 6, 2009; 1:45 pm

Misty wanted to know why we didn’t notify location jurisdictions such as the counties as to our mitigated Negative Declaration. If contractors are doing work they usually notify location jurisdictions.

Each county has a well ordinance and requires a 48-hour notice of physical work. Permit fee is exempt for state agencies.

Their office received NOI (notice of Intent) from general update from County and are following work DWR is doing out in the Delta.

Only one of the drill locations is in the Solano County and DWR’s provisions look good for water quality protection.
27 July 2009

Michelle Beachley
3500 Industrial Blvd.
West Sacramento, CA 95691

WATER QUALITY CERTIFICATION, ENGINEERING GEOTECHNICAL ACTIVITIES IN WATER, (WDID#5A34CR00456) SACRAMENTO COUNTY

On May 11, 2007, the State Water Resources Control Board certified the U.S. Army Corps of Engineers (ACOE) Nationwide Permit #6 (NWP), subject to the Conditions and the Notification Requirements described in their certification. The Department of Water Resources notified the Regional Water Board on 3 June 2008 with the required information in accordance with the certification. The project consists of in-water geotechnical boring in the Sacramento-San Joaquin Delta to obtain geotechnical information for conceptual intake structures and tunnels for current alignment options of the water conveyance facilities associated with the Bay Delta Conservation Plan. The Department of Water Resources meets the conditions of certification and may proceed with the project.

Greg K. Vaughn
Senior Engineer
Stormwater / Certification Section
California Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Dr. #200

cc: U.S. Army Corps of Engineers, Sacramento
Dave Smith, Wetlands Section Chief (WTR-8), U.S. E.P.A., Region 9, San Francisco
U.S. Fish & Wildlife Service, Sacramento
Bill Orme, 401 Certification and Wetlands Unit Chief, SWRCB, Sacramento
Jeff Drongesen, Department of Fish and Game, Sacramento
August 10, 2009

Via email at mbrooke@water.ca.gov

Michelle Beachley
Department of Water Resources
Division of Environmental Services
P.O. Box 942836
Sacramento, California 94236-0001

RE: Notice of Intent To Adopt A Mitigated Negative Declaration For The Bay Delta Conservation Plan In-water Geotechnical Drilling

Dear Ms. Beachley:

The San Joaquin Farm Bureau Federation represents over 4,000 farming and ranching families throughout San Joaquin County, many of which are adjacent to the waterways of the Delta. We are writing to express our serious concerns on the proposed In-water Geotechnical Drilling project.

As a matter of fact, we are quite concerned over the hasty review period that was provided to allow the public full review of the 116 page report given the Notice of Intent was dated July 21, 2009. From this date, the public should have been provided with 30 days to allow sufficient time for a thorough review.

Secondly, this project is yet another example of the Bay Delta Conservation Plan creating fragmentation of the California's Environmental Quality Act (CEQA) that requires a full study and a range of alternatives is studied for a proposed project. Under CEQA, "[t]he project means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ." (Guideline, § 15378, subd. (a), emphasis added.) As the court explains in Oehrsens Arroyo v Board of Supervisors (1986) 182 Cal.App.3d 1145, at page 1171:

A public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole. "The requirements of CEQA, "cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." [Citation]" [Citation].
Agency-9 continued

This piecemeal approach further implicates the Department of Water Resources in strong-arming its way, by way of the Bay Delta Conservation Planning process, to a predetermined conclusion that a peripheral canal, or tunnel is an adequate solution when CEQA has not been fully enforced to make those findings.

We are also concerned with the cavalier approach the Department of Water Resources is taking in approving Geotechnical drilling without allowing public input to be considered.

We are hopeful that the Department of Water Resources will consider our concerns and contact us in writing with any further clarifications on this matter.

Sincerely,

[Signature]

Katie Patterson
Program Director
Subject: In-water Geotechnical Drilling Project by DWR

I understand you are the contact person for this project. Would you please advise what is the bigger project this is associated with.

Diane Jones
Public Land Manager
State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, California  95825
916-574-1843
jonesd@slc.ca.gov
Michelle Beachley
Department of Water Resources
Division of Environmental Services
3500 Industrial Blvd.
West Sacramento, CA 95691

Subject: Mitigated Negative Declaration for Engineering Geotechnical Activities in Water by the Department of Water Resources

Dear Ms. Beachley:

Staff of the California State Lands Commission (CSLC) has reviewed the Mitigated Negative Declaration (MND) for the above referenced proposed project. Under the California Environmental Quality Act (CEQA), the Department of Water Resources is the Lead Agency and the CSLC is a Responsible and/or Trustee Agency for any and all projects that could directly or indirectly affect sovereign and school lands, their accompanying Public Trust resources or uses, and the public easement in navigable waters. Based on this review, we offer the following comments.

As general background, the State acquired sovereign ownership of all tidelands and submerged lands and beds of navigable waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all the people of the State for statewide Public Trust purposes of waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation and open space. The State owns sovereign fee title to tide and submerged lands landward to the mean high tide line (MHTL) as they existed in nature, prior to fill or artificial accretions. On navigable non-tidal waterways, the State holds fee ownership of the bed landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, as they last naturally existed. The State’s sovereign interests are under the jurisdiction of the CSLC.

The in-water geotechnical borings are proposed to be located in the Sacramento River in the following locations. Between Clarksburg and the Pocket area of
Sacramento, the Sacramento River near Walnut Grove, Steamboat Slough near its confluence with the Sacramento River, Dutch slough near its confluence with Taylor Slough, Columbia Cut near its confluence with Middle River, Potato Slough, the San Joaquin River off Venice Island, the north Fork of the Mokelumne River between Tyler Island and Staten Island, and the San Joaquin River near Fourteen Mile Slough. These locations involve State-owned sovereign lands and a lease from the Commission may be required. Please contact Diane Jones at (916) 574-1843 or by e-mail at jonesd@slc.ca.gov for information concerning the Commission’s leasing requirements.

CLSC staff will use this MND as part of the CEQA analysis required to issue a lease for the borings. Staff has reviewed this document and has no comments at this time. If you have any questions concerning the environmental review, please contact Sarah Mongano at (916) 574-1889 or by e-mail at mongano@slc.ca.gov.

Sincerely,

[Signature]

Marina Brand, Assistant Chief
Division of Environmental Planning
and Management

cc: Office of Planning and Research
Diane Jones, CSLC
Sarah Mongano, CSLC
Via email: mbeachle@water.ca.gov

Michelle D. Beachley
Staff Environmental Scientist
Department of Water Resources
Division of Environmental Services
P.O. Box 942836
Sacramento, California 94236-0001

Re: Comments on Proposed Mitigated Negative Declaration and Draft Initial Study for the BDCP Engineering Geotechnical Activities in Water

Dear Ms. Beachley:

This firm represents the Stone Lakes Wildlife Refuge Association ("SLNWRA") and this letter provides SLNWRA comments on the Proposed Mitigated Negative Declaration and Draft Initial Study for the BDCP Engineering Geotechnical Activities in Water.

SLNWRA's primary concern with the proposed project is that it is a necessary component of the BDCP, and that review of the project should not be separated from review of the BDCP. The BDCP includes a new canal that would create major new diversions just south of Sacramento, creating massive social and environmental impacts. Because the proposed project is a required precursor to the BDCP and the canal, review of the project discussed in the MND cannot properly be separated from review of the overall BDCP project. (See, e.g., CEQA Guidelines, § 15376; see also Pub. Resources Code section 21065 (project includes a "reasonably foreseeable indirect physical change" caused by a particular action); Santiago County Water District v. County of Orange (1981) 118 Cal.App.3d 818, 829; Burbank-Glendale-Pasadena Airport Authority v. Hensler (1991) 233 Cal.App.3d 577, 592 (piecemealing is prohibited to ensure "that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences").)
SLNWRA has already submitted comments on the Notice of Preparation issued in conjunction with preparation of the EIR/EIS for the BDCP. These comments, dated May 14, 2009, more fully explain SLNWRA’s concerns with the overall BDCP project. (Attached as Exhibit A and incorporated by reference into this comment letter.) Because the Project is a precursor to the overall BDCP project, these concerns apply equally to the Project.

SLNWRA respectfully requests that the Department of Water Resources refrain from any further actions on the proposed project until the comprehensive environmental review already underway for the BDCP is complete.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: Osha R. Meserve

ORM/mre
Enclosures

cc: Senator Lois Wolk, 5th District
Bart McDermott, Refuge Manager, SLNWR, Bart_McDermott@fws.gov
Rob Burness, Watershed Chair, Stone Lakes NWR Association, rmburness@comcast.net
July 22, 2009

Via email: mbeachle@water.ca.gov

Ms. Michelle D. Beachley
Staff Environmental Scientist
Department of Water Resources
Division of Environmental Services
P.O. Box 942836
Sacramento, California 94236-0001

Re: Comments on Proposed Mitigated Negative Declaration and Draft Initial Study for the BDCP Engineering Geotechnical Activities in Water

Dear Ms. Beachley:

This firm represents Reclamation District 999 ("District"), which is within the Clarksburg District of the Delta with respect to the development of the Bay Delta Conservation Plan ("BDCP") and related projects. This letter provides the District’s comments on the Proposed Mitigated Negative Declaration and Draft Initial Study ("MND") for the BDCP Engineering Geotechnical Activities in Water ("Project") pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et. seq. ("CEQA")). As explained below, the MND is deficient in a number of fundamental respects, and the Department of Water Resources ("DWR") has thus far failed to proceed in the manner required by law. (See Pub. Resources Code, §§ 21168, 21168.5.)

Segmentation of the Project from Review of the Overall BDCP is Impermissible

The District’s primary concern with the Project is that it is a necessary component of the BDCP, which although still under development, includes a new conveyance facility ("canal") and major new diversions for State Water Project ("SWP") and Central Valley Project ("CVP") water just south of Sacramento. The design, location and very existence of major components of the BDCP rely on the results of the Project; in other words, the Project has no independent utility and but for the BDCP, DWR would not proceed with the Project. (See Del Mar Terrace Conservancy, Inc. v. City Council of the City of San
SOLURI MESERVE
A Law Corporation

1822 21st Street, Suite 202
Sacramento, California 95811
916.455.7300 (telephone)
916.244.7300 (facsimile)
www.semilawyers.com

July 22, 2009

Via email: mbeachle@water.ca.gov

Ms. Michelle D. Beachley
Staff Environmental Scientist
Department of Water Resources
Division of Environmental Services
P.O. Box 942836
Sacramento, California 94236-0001

Re: Comments on Proposed Mitigated Negative Declaration and Draft Initial Study for the BDCP Engineering Geotechnical Activities in Water

Dear Ms. Beachley:

This firm represents Reclamation District 999 (“District”), which is within the Clarksburg District of the Delta with respect to the development of the Bay Delta Conservation Plan (“BDCP”) and related projects. This letter provides the District’s comments on the Proposed Mitigated Negative Declaration and Draft Initial Study (“MND”) for the BDCP Engineering Geotechnical Activities in Water (“Project”) pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et. seq. (“CEQA”)). As explained below, the MND is deficient in a number of fundamental respects, and the Department of Water Resources (“DWR”) has thus far failed to proceed in the manner required by law. (See Pub. Resources Code, §§ 21168, 21168.5.)

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proposed engineering geotechnical activities must be analyzed within, not separate from, the BDCP EIR/EIS that is already underway.

The District has already submitted comments on two Notices of Preparation issued in conjunction with preparation of the EIR/EIS for the BDCP. These comments, dated April 30, 2008, May 26, 2008, and May 14, 2009, more fully explain the District’s concerns with the overall BDCP project. (Attached as Exhibit A and incorporated by reference into this comment letter.) Because the Project is a precursor to the overall BDCP project, these concerns apply equally to the Project.

**The Project Description is Unclear and Uncertain**

CEQA requires a clear and sufficiently comprehensive description of the proposed project in order to allow meaningful public and agency review. (County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 193; see Discussion following CEQA Guidelines, § 15124.) In addition to lacking detail regarding the relationship of the Project to the overall BDCP, the MND fails to identify all of the locations where the drilling will occur, stating that there may be up to 4 more borings at undisclosed locations. This lack of certainty with respect to the location of the Project makes it impossible to conduct a complete analysis of potential impacts. Indeed, there are virtually no site-specific considerations identified in the MND at all.

**Significant Impacts May Result from the Project, Making a MND Inappropriate**

The Project has the potential to result in several potentially significant impacts, which are discussed in the Technical Report prepared by the District’s expert. (See Exhibit B.) Potentially significant impacts overlooked by the MND include, but are not limited to, impacts associated with: hydrology, hazardous materials, air quality, noise and water quality. Moreover, the mitigation provided for the impacts that are identified is inadequate. The few mitigation measures that are provided lack the detail and enforceability necessary to adequate mitigation. (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).) For instance, it is DWR’s proposed ability to move locations at will in order to reduce impacts “to a less than a significant level” is not an enforceable performance standard-based mitigation measure.
Moreover, as indicated in the District’s expert’s comments, reliance on a Nationwide Permit is not permissible. The MND is therefore deficient for failing to identify an appropriate basis for permitting of the activities that are necessary to the Project.

Conclusion

The Project cannot be analyzed in isolation from the overall BDCP project because it is an integral part of the BDCP. Moreover, substantial evidence in the record supports a “fair argument” that significant impacts may occur, making an EIR necessary. (Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal.App.4th 885, 900, citing Stanislaus Audubon Soc’y v. County of Stanislaus (1995) 33 Cal.App.4th 144, 150.) Thus, the Project can only be properly analyzed in an EIR, and that EIR must be the EIR/EIS already under preparation for the BDCP. The District therefore requests that DWR delay the engineering and geotechnical evaluations discussed in the MND at least until the BDCP EIR is certified and all other necessary entitlements have been obtained.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: Osha R. Meserve

ORM/mre
Enclosures

cc: Robert Webber, Manager, Reclamation District 999
Moreover, as indicated in the District’s expert’s comments, reliance on a Nationwide Permit is not permissible. The MND is therefore deficient for failing to identify an appropriate basis for permitting of the activities that are necessary to the Project.

Conclusion

The Project cannot be analyzed in isolation from the overall BDCP project because it is an integral part of the BDCP. Moreover, substantial evidence in the record supports a “fair argument” that significant impacts may occur, making an EIR necessary. (Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal.App.4th 885, 900, citing Stanislaus Audubon Soc’y v. County of Stanislaus (1995) 33 Cal.App.4th 144, 150.) Thus, the Project can only be properly analyzed in an EIR, and that EIR must be the EIR/EIS already under preparation for the BDCP. The District therefore requests that DWR delay the engineering and geotechnical evaluations discussed in the MND at least until the BDCP EIR is certified and all other necessary entitlements have been obtained.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: Osha R. Meserve

ORM/mre
Enclosures

cc: Robert Webber, Manager, Reclamation District 999
Via Email at Mbeachle@water.ca.gov

Attn: Michelle Beachley
Department of Water Resources
Division of Environmental Services
P.O. Box 942836
Sacramento, CA 94236-0001

Re: Comments on the Draft Initial Study and Mitigated Negative Declaration for “Bay Delta Conservation Plan, Engineering Geotechnical Activities in Water.”

Dear Ms. Beachley:

1. **Unlawful Piecemealing/Segmentation.**

   While there are numerous flaws associated with DWR’s handling and processing of the above-referenced Mitigated Negative Declaration (MND) and draft Initial Study (IS), DWR’s subjecting of the so-called “Engineering Geotechnical Activities” project to CEQA suffers from a fundamental and overarching problem that infects and undermines the entirety of that MND and IS. The problem is the unlawful “piecemealing” or “segmentation” (hereinafter referred jointly as “piecemealing”) of the “project.”

   Under CEQA “[p]roject’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .” (Guidelines, § 15378, subd. (a), emphasis added.) As the court explains in *Grinda Assn v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, at page 1171:

   A public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole. “The requirements of CEQA, ‘cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial.’” [Citation.]” [Citation].

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Here DWR has unlawfully piecemalled the project on at least three (3) different levels all of which are squarely contrary to CEQA.

**a. Unlawful Separation of the In-Water Drilling Component from the Overall Bay Delta Conservation Plan.**

The true underlying project at issue is the development and implementation of a Bay Delta Conservation Plan (BDCP). To the extent the development of that plan requires engineering geo-technical activities such as the instant in-water drillings, which DWR alleges it does in its MND [see e.g., MND, p. 1], then that drilling is undeniably part of “the whole of an action” at issue, i.e., part of the development and implementation of a BDCP. CEQA makes it clear that “all phases of project planning, implementation, and operation must be considered in the initial study of the project.” (Guidelines, § 15063, subd. (a)(1), emphasis added.) The “development” or “planning” phase of the BDCP, and all activities included as part of that phase, must therefore be considered along with all of the other phases and all of the other activities associated with those phases.

DWR’s instant attempt to separate the in-water drilling from the rest of the phases and activities associated with the BDCP and assess its environmental impacts in isolation of those phases and activities is precisely the type of piecemalling that is squarely prohibited under CEQA.

The fact that DWR may believes it needs various information to develop the BDCP and to prepare an comprehensive EIR for the BDCP does not mean it can extract various information gathering activities from the BDCP as a whole and treat those activities in isolation from the rest of the BDCP project. Instead, DWR must follow one of the procedures which CEQA provides to address the situation, such as the instant one, where the development phase of the project includes activities that have the potential to result in direct or indirect physical changes to the environment. Those procedures include the use of a “staged,” “programmatic,” or “master” EIR. (See Guidelines, §§ 15167, 15168 & 15175, respectively.)

Those special types of EIRs are precisely designed to avoid the unlawful piecemalling which is taking place with the BDCP. The hallmark of those types of EIRs is that they start out broad and then allow for subsequent “tiering off” that broad EIR to focus on more site specific activities. Here, DWR is doing the exact opposite by starting out with an environmental document that focuses on very site specific activities, i.e., the in-water drilling, which does not and cannot tier off any broader EIR for the BDCP because there is no such broader EIR.

DWR must accordingly halt all activities associated with the development of the BDCP, including the instant in-water drilling, which have the potential to result in one or more individual or cumulative direct, or reasonably foreseeable indirect, physical changes in the environment. Such activities must first be thoroughly discussed and analyzed as a whole in a broad based EIR for the BDCP prior to being carried out.
b. Unlawful Separation of the In-Water Drilling Component of the BDCP “Field Studies” With the Other Components of the BDCP “Field Studies.”

On top of the above-described piecemealing, there is another level of unlawful piecemealing that is taking place. The instant in-water drilling is but one of many activities that make up the so-called BDCP “Field Studies.” These Field Studies are presumably intended to gather data for the development of the BDCP as well as the EIR for the BDCP. In addition to the instant in-water drilling activities, these Field Studies also include landside drilling activities, as well as an entire host of other landside activities including the following:

(1) geodetic aerial and ground mapping and surveying;
(2) geologic activities including electrical resistivity measurements, geologic test pits, and drill exploration;
(3) utilities surveys;
(4) cultural resource studies including archaeological surveys and architectural and historic resource evaluations;
(5) botanical surveys;
(6) fisheries studies including recreational, fisheries and hydrologic surveys;
(7) wildlife surveys including vernal pool, reptilian, amphibian, avian and mammal surveys;
(8) "after-survey" biological monitoring by a permitted biologist; and
(9) a "Phase I Environmental Site Assessment" to evaluate the study area for potential environmental hazards or degradation caused by the release of hazardous materials.

These landside Field Study activities are set forth in detail in DWR’s proposed orders it has filed in its lawsuits against landowners wherein it is seeking court permission to perform these activities against the landowners’ will. (A copy of such an order is attached hereto as “Attachment B”.)

Assuming arguendo DWR can separate the Field Study activities from the other phases and activities associated with the development and implementation of the BDCP and assess the environmental impacts of the Field Study activities in isolation of those other phases and activities, the question becomes whether DWR can further dissect the Field Study activities and examine various Field Study activities in isolation of all of the other Field Study activities. For the same reasons discussed above, the answer is a resounding “no.”

Extracting the instant in-water drilling from the landside drilling and other Field Study activities would once again constitute the precise type of “subdivid[ing] a single project into smaller individual sub-projects” and “chopping up proposed projects into bite-size pieces which” which is squarely prohibited by CEQA. (Orinda Assn v. Board of Supervisors (1986) 182 Cal.App.3d 1145, 1171.)
As DWR is aware, on March 25, 2009, DWR filed a Notice of Exemption for the landside drilling (not all of the contemplated landside drilling, but a substantial portion of it). (A copy of that Notice of Exemption is attached hereto as “Attachment C.”) That notice of exemption is unlawful because it too is based on separating various components of the Field Studies and analyzing those components in isolation from the other components of the Field Studies.

Yet another example of the unlawful piecemealing of the Field Study activities is the filing of a Notice of Exemption by the Department of Parks and Recreation for the performance of the landside Field Study activities discussed above on the "Delta Meadows Property and Stone Lakes Property." (A copy of that Notice of Exemption is attached hereto as “Attachment D.”) Once again, it is unlawful to consider any piece of the Field Studies, here the activities related those the above-referenced properties, in isolation from all of the Field Study activities taking place on the hundreds of other properties within the BDCP planning area.

For these reasons, even assuming DWR can isolate the Field Studies from the overall development and implementation of the BDCP (which it cannot), DWR is still in violation of CEQA since it is unlawfully piecemealing the Field Studies themselves.

c. Unlawful Separation of the In-Water Drilling Activities with Other In-Water Drilling Activities.

Assuming further that the Field Studies can be extracted and isolated from the BDCP as a whole, and assuming the in-water drilling can be extracted and isolated from the Field Studies as a whole, it is not at all clear that the instant in-water drilling constitute the entirety of the in-water drilling that will be pursued in connection with the development or implementation of the BDCP. For example, DWR's map of proposed isolated canal alignments dated March 15, 2009 (a copy of which is attached hereto as "Attachment E"), shows canal alignments that cross various rivers and sloughs where DWR is not currently proposing to conduct in-water drilling as part of the instant activities. To the extent it is reasonably foreseeable that DWR may conduct additional in-water drilling in the future in connection with the development and/or implementation of the BDCP, then such additional drilling must be examined within the context of the instant environmental review of the other drilling sites. The failure to do so would constitute yet another level of prohibited piecemealing as well as a violation of the principles regarding the scope of required analysis of future activities set forth in Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, at pages 393-399.

2. The Notice of Intent for the Project is Legally Inadequate and Must be Reissued.

Assuming arguendo the above threshold and overarching issues can be overcome, there are numerous other deficiencies in DWR’s CEQA review of the instant in-water drilling activities including the ones discussed below.
a. **Public Comment Period**

CEQA Guidelines section 15072 provides:

(a) A lead agency **shall provide a notice of intent** to adopt a negative declaration or mitigated negative declaration to the public, responsible agencies, trustee agencies, and the county clerk of each county within which the proposed project is located, sufficiently prior to adoption by the lead agency of the negative declaration or mitigated negative declaration to allow the public and agencies the review period provided under Section 15105.

(Emphasis added.) Guidelines section 15105, subdivision (b), provides:

(b) . . . . When a proposed negative declaration or mitigated negative declaration is submitted to the State Clearinghouse for review by state agencies [which the instant MND was], the public review period shall not be less than 30 days, unless a shorter period, not less than 20 days, is approved by the State Clearinghouse.

While we are not currently aware of the precise dates when the Notice of Intent for this project was actually “provide[d] . . . to the public, responsible agencies, trustee agencies, and the county clerk[s]” (Guidelines, § 15072, subd. (a)), nor are we aware of **how it was provided pursuant to Guidelines section 15072, subdivision (b) (i.e., via publication in newspapers or otherwise)**, the Notice of Intent is dated July 21, 2009 and, thus, the earliest it could have been provided is July 21, 2009. Since we are unaware of any approval to shorten the public review period by the State Clearinghouse (and the Notice of Intent does not include a statement that it has been shortened which is a mandatory requirement [see Guidelines, § 15072, subd. (g)(2)]), that review period must be at least 30 days. Thirty days from July 21, 2009 is August 20, 2009.¹

Since the Notice of Intent “shall [be] provide[d] . . . to the public [etc.] . . . to allow the public . . . the [30 day] review period” (Guidelines, § 15072, subd. (a) & (b)), that public review period cannot expire until at least 30 days have lapsed from the date the Notice of Intent was so provided. The instant Notice of Intent is therefore defective since the public review period expires on August 10th which is only 20 days after the earliest date that Notice of Intent could have been provided.

¹ The State Clearinghouse, in any event, is prohibited from shortening the public review period to less than 30 days since the public review period must be at least as long as the “State Clearinghouse review period,” and the “State Clearinghouse review period” cannot be shortened to less than 30 days since, among other reasons, the instant project is a “project of statewide, areawide, or regional environmental significance” (Guidelines, 15105, subd. (d)(1)) in light of its five (5) county scope, impacts to “sensitive wildlife habitats,” etc. (See e.g., Guidelines, § 15206, subds. (b)(2) & (b)(5).)
The Notice of Intent must therefore be reissued and a new 30 day public comment period must be provided and must begin after the new Notice of Intent is properly “provide[d]” pursuant to Guidelines section 15072.2

3. DWR Wrongfully Approved the Geotechnical Exploratory Drilling Prior to the Solicitation and Consideration of Public Comments.

Guidelines section 15071, subdivision (c), provides that “[a] negative declaration circulated for public review shall include: (c) A proposed finding that the project will not have a significant effect on the environment.” (Emphasis added.) Guidelines section 15074, subdivision (b), further provides:

Prior to approving a project, the decisionmaking body of the lead agency shall consider the proposed negative declaration or mitigated negative declaration together with any comments received during the public review process. The decisionmaking body shall adopt the proposed negative declaration or mitigated negative declaration only if it finds on the basis of the whole record before it (including the initial study and any comments received), that there is no substantial evidence that the project will have a significant effect on the environment and that the negative declaration or mitigated negative declaration reflects the lead agency’s independent judgment and analysis.

(Emphasis added.)

DWR failed to proceed in the manner required by law by approving the project and making the finding that the project will not have a significant effect on the environment prior to the initiation of the public comment period and prior to consideration of the public’s input. The Notice of Intent for the project was dated July 21, 2009 and the comment period allegedly began

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2 To the extent the “state agency review period” or “State Clearinghouse review period” for this project is 45 days in light of the extension to August 10th (which appears to be the case), then per Guidelines section 15105, subdivision (c), the “public review period shall [also] be at least [45 days].”

3 Again, while we are not privy to the mechanisms which DWR provided notice to the public and others pursuant to Guidelines section 15072 (e.g., via publication in newspapers or direct mailing, etc.), in light of the fact that the Notice of Intent was dated July 21, 2009 and the public review period abruptly ends 20 days after that (on August 10th), even if the public review period was somehow properly reduced to 20 days, it would have been a significant practical challenge to legally “provide” that notice in advance of those 20 days (e.g., if publication in newspapers was utilized it would have had to have been published on the same day it was issued, i.e., on July 21st, which is quite unlikely.) Accordingly, we are informed and believe, and hereby contend, there has been proper compliance with even a 20 day public review period.
on June 26, 2009, however, on June 24, 2009, DWR prematurely made the following findings and determinations on page “x” of the so-called “proposed” Mitigated Negative Declaration:

... DWR has independently reviewed and analyzed the Initial Study/Mitigated Negative Declaration for the proposed project and finds that this study reflects the independent judgment of DWR. As the lead agency for the project, DWR further finds that the project mitigation and conservation measures will be implemented as stated in the Mitigated Negative Declaration. With implementation of these mitigation and conservation measures, the proposed project as modified would have no significant effect on the environment.

I hereby approve these project activities for geotechnical exploratory drilling.
[Signed by Barbara McDonnell, Chief of DWR’s division of Environmental Services]

That is an inexcusable and prejudicial error. It is not only squarely contrary to the Guidelines (and parallel statutes) but, more importantly, it thwarts one of the core components of the CEQA process—public review. As the Court explains in Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection (2008) 44 Cal.4th 459, at page 486:

"Public review is essential to CEQA. The purpose of requiring public review is "...to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." ..." [P]ublic review and comment ... ensures that appropriate alternatives and mitigation measures are considered, and permits input from agencies with expertise in [the matters at issue]. [Citation.] Thus public review provides the dual purpose of bolstering the public’s confidence in the agency’s decision and providing the agency with information from a variety of experts and sources." [Citation.]

Having approved the project prior to the solicitation and consideration of the public’s (or responsible and trustee agencies’) input, there has been no “bolstering [of] the public’s confidence in [DWR’s] decision ...” Instead, there is a substantial increase in apprehension that DWR “has [not], in fact, analyzed and considered the ecological implications of its action ...” DWR’s actions show that DWR has already made up its mind and give the impression that comments by the public or other agencies are not relevant to its determinations.

To correct this fundamental and prejudicial error, DWR must resubmit a true “proposed” mitigated negative declaration as required by CEQA and attempt to instill some public confidence that DWR will indeed consider public and other agency comments in good faith before it makes the required CEQA findings and approves the project.
4. Failure to Consult With Responsible Agencies.

Guidelines section 15063, subdivision (g), provides:

Consultation. As soon as a lead agency has determined that an initial study will be required for the project, the lead agency shall consult informally with all responsible agencies and all trustee agencies responsible for resources affected by the project to obtain the recommendations of those agencies as to whether an EIR or a negative declaration should be prepared. . . .

"For the purposes of CEQA, the term ‘responsible agency’ includes all public agencies other than the lead agency which have discretionary approval power over the project." (Guidelines, § 15381.)

a. Failure to Consult with Reclamation Districts.

The numerous local reclamation districts with levee systems in the vicinity of the proposed drilling sites constitute ‘responsible agencies’ for purposes of CEQA. Reclamation districts are local public agencies governed by Water Code section 50000 et seq. Water Code section 50652 provides that “[t]he board [of trustees of reclamation districts] shall exercise general supervision and complete control over the construction, maintenance and operation of the reclamation works, and generally over the affairs of the district. ‘Reclamation works’ means such public works and equipment as are necessary for the unwatering, watering, or irrigation of district lands and other district operations.” (Wat. Code, § 50013.)

Accordingly, each reclamation district with levees (or any other reclamation works) in the vicinity of the proposed drilling has “discretionary approval power” over such drilling and, hence, constitutes a “responsible agency” for purposes of CEQA.

Seepage under and through levees within the Delta and, hence, through the levees adjacent to the proposed drilling sites, is a well-established phenomenon and concern for local reclamation districts and everyone else who is concerned about the environmental and human impacts from levee failure and flooding.4 As is explained at page 14 of “Analytical Study on Flood Induced Seepage Under River Levees” (a copy of which is enclosed herewith as “Enclosure A”):

“Whenever a levee is subjected to a differential hydrostatic head of water as a result of river stages higher than the surrounding land, seepage enters the pervious substratum through the bed of the river and riverside borrow pits or the riverside top stratum or both, and creates an artesian head and hydraulic gradient

4 See excerpts from DWR’s Delta Atlas attached hereto as “Attachment F,” which describe the low elevations of the lands within the Delta, the various river flood elevations, etc.
in the sand stratum under the levee. This gradient causes a flow of seepage beneath the levee and the development of excess pressures landward thereof. If the hydrostatic pressure in the pervious substratum landward of the levee becomes greater than the submerged weight of the top stratum, the excess pressure will cause heaving of the top blanket, or will cause it to rupture at one or more weak spots with a resulting concentration of seepage flow in the form of sand boils.

"In nature, seepage usually concentrates along the landside toe of the levee, at thin or weak spots in the top stratum, and adjacent to clay-filled swales or channels. Where seepage is concentrated to the extent that turbulent flow is created, the flow will cause erosion in the top stratum and development of a channel down into the underlying silts and fine sands, which frequently exist immediately beneath the top stratum. As the channel increases in size or length, or both, a progressively greater concentration of seepage flows into it with a consequent greater tendency for erosion to progress beneath the levee.

"The amount of seepage and uplift hydrostatic pressure that may develop landward of a levee is related to the river stage, location of seepage entrance, thickness and perviousness of the substratum and of the landside top stratum, underground storage, and geological features. Other factors contributing to the activity of the sand boils caused by seepage and hydrostatic pressure are the degree of seepage concentration and the velocity of flow emerging from the boils."

(Emphasis added.)

Boring holes through the bottom of the river beds (via drilling or otherwise) as proposed in the instant project creates a pathway for the river water to more freely push or flow into the underlying groundwater table thereby increasing the hydraulic head on the groundwater underlying the river which, in turn, exerts increased hydraulic pressure on the nearby levees as the groundwater tries to equalize with the lower groundwater table below and on the landside of the levees.\(^5\) As discussed above, this increased pressure can lead to increased seepage under or through the nearby levees which not only increases the drainage burdens of the reclamation districts but also impairs the integrity of the levee and can, if unnoticed or unchecked, result in the ultimate failure of the levee and the entire host of devastating environmental and human impacts associated therewith.

\(^5\) Such pathways are often referred to as “defects” or “discontinuities” in the soil profile. See for example, the Corps’ publication entitled, “Performance of Levees Underseepage Controls: A Critical Review,” enclosed herewith as “Enclosure B”: “There is considerable evidence that boil occurrence is often related to concentration of seepage at discontinuities and defects in the top [soil] blanket” [see p. 14]; and “[soil] permeability [is] controlled by defects in the top [soil] blanket (cracks, root holes, fenceposts, etc.) rather than properties of intact soil” [see p. 5].
As a result of the seepage phenomenon and the risks of exacerbating that phenomenon by the proposed drillings, it is imperative that DWR consult with, and obtain approval from, the local reclamation districts who have the statutory responsibility to operate and maintain their respective levee and drainage systems.

Accordingly, DWR must include the reclamation districts in the vicinity of the proposed drillings on its list of entities from which DWR must obtain a permit and authorization. And, more importantly at this stage, DWR must restart its CEQA review for this project and (1) perform the mandatory consultation with those districts prior to deciding whether an EIR or negative declaration should be prepared as required by Guidelines section 15063, subdivision (g); and (2) provide those districts with a timely copy of the Notice of Intent and any proposed negative or mitigated negative declaration as required by Guidelines sections 15072, subdivision (a) and 15073, subdivision (c).

i. Access to Levees and Lands to Conduct Swainson Hawk Surveys.

The MND at page 53 states:

Construction activities are anticipated to be conducted following the active nesting season of Swainson’s hawks (March to August 15). However, construction will be restricted to areas more than 1/4 mile from active nests until August 15. A biologist will conduct preconstruction surveys prior to the start of construction to locate all active nest sites within 1/2 mile of construction and staging areas. If necessary, DWR will establish a 1/4-mile buffer zone, marked with identifiable flags, around all known and suspected Swainson’s hawk nests.

(Emphasis added.) With respect to “non-special-status migratory birds and raptors,” the MND further explains at page 53 that “their occupied nests and eggs are protected” by state and federal law and, accordingly, “A qualified biologist will conduct preconstruction surveys to locate all active nest sites within 500 feet of the project area.”

Such surveying would appear to require foot and/or vehicle access over reclamation district levees and perhaps other reclamation facilities (e.g., drainage canals) and, hence, permission from the reclamation districts as well as from any underlying fee landowners and any tenants must be obtained. The incorporation of these mitigation measures is yet another reason why reclamation districts within the vicinity of the project constitute responsible agencies.

b. Failure to Consult with Counties.

The CDWA is informed and believes that the affected Counties also constitute responsible agencies under CEQA that must be afforded the same treatment discussed above for reclamation districts. For example, among other potential permits, CDWA is informed and believes that DWR must obtain permits from the San Joaquin County Environmental Health...
Department to ensure among other things, that the borings do not contaminate, or create opportunities for contamination of the underlying groundwater basins.

c. Failure to Properly Consult with Other Responsible and Trustee Agencies.

Guidelines section 15063, subdivision (g), provides:

Consultation. As soon as a lead agency has determined that an initial study will be required for the project, the lead agency shall consult informally with all responsible agencies and all trustee agencies responsible for resources affected by the project to obtain the recommendations of those agencies as to whether an EIR or a negative declaration should be prepared.

Neither the MDN or IS appear to include a statement that such consultation took place or that such recommendations were obtained. Accordingly, without evidence to the contrary, the CDWA hereby alleges that DWR has failed to properly perform that consultation and obtain those recommendations.

5. Unspecified Drilling Locations.

The project description is not only inadequate on account of the extensive piecemealing discussed above, but also from the failure to describe all of the potential drilling sites. For example, page “i” of the MND states: “Drill locations will be moved as necessary to avoid any identified impacts to environmental resources or to bring impacts to a less than significant level.” Moved where? Moreover, the MND further states the following also at page “i”:

Sixteen sites have been identified; however, DWR may add additional locations as needed, but not to exceed 20 total. If additional drill locations are added, DWR Environmental Scientists will review each site to determine the potential impact to environmental resources.

If DWR does not know where the precise location of the sites will be, which it admittedly does not, then DWR must analyze all of the areas where those sites may potentially be located to ensure that it properly addresses the impacts of performing the various activities at those sites before it, or any other responsible agency, authorizes DWR to perform those activities. Thus far, DWR has failed to do so.

Moreover, the MND’s attempt to address the environmental analysis of the additional drilling locations (and potentially any of the initial locations that are relocated) by having “DWR Environmental Scientists . . . review each site to determine the potential impact to environmental resources” entirely outside the CEQA process is obviously unacceptable and contrary to CEQA.
6. **Other Inadequacies with the Project Description.**

The project description is also inadequate because it fails to provide any details as to the nature and location of the “proposed intake structures and tunnels for proposed alignments of the water conveyance facilities associated with Bay Delta Conservation Plan” for which the drilling is apparently intended to obtain information. (MND, p. “i.”) DWR concedes that such structures and tunnels are not only “reasonably foreseeable,” but are, in fact, “proposed.” Even apart from the piecemealing problem, the failure to identify, much less assess the potential environmental impacts from such proposed structures and tunnels, within the context of the instant review of the drilling constitutes a clear violation of the principles regarding the scope of required analysis of future activities set forth in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, at pages 393-399.

The MND at page “iii” states that “excavation of test pits will occur within an active stream channel . . . .” Perhaps that is a typo? If not, the MND fails to adequately discuss, describe or analyze those test pits.

In several places throughout the MND and IS it stated that “Project activities for geotechnical exploratory drilling are minor and short in duration (approximately 1 minute each, 10 to 15 times each day, for approximately 30 days).” (See e.g., MND, p. “i.”). This needs more detailed explanation. For example, precisely what are the “project activities” that only take 1 minute each?

7. **Potentially Significant Impacts.**

a. **Piecemealing.**

The entire impact analysis as well as all of the findings in the IS and MND associated with the impacts and the mitigation thereof are fatally flawed and deficient on account of the unlawful piecemealing of the project as discussed at length above. The instant situation presents a classic example of what one cannot do under CEQA—i.e., extract the proposed drilling from the rest of the whole of the action at issue and make findings that there will not be any significant environmental effects “[i]n part . . . because construction impacts are minor and short term.” (MND, p. iii.)

b. **Cumulative Impacts.**

The unlawful piecemealing also substantially undermines the cumulative impact analysis across the board. To make matters worse, however, the cumulative impact analysis in the IS does not even mention, much less thoroughly describe or analyze, the BDCP or any of the other activities or phases associated with its development and implementation. Thus, even apart from the piecemealing, the cumulative impact analysis is fatally flawed in its own right on account of that omission.
c. **Impacts to Nearby Levees and Drainage Systems.**

The IS is deficient in that it fails to even mention, much less adequately investigate or analyze, the above-described seepage phenomenon and the potential for the instant project to exacerbate that phenomenon and the related impacts on levee integrity and drainage systems.

d. **Plumes.**

While the IS acknowledges the potential for plumes to result from the drilling, grouting, pulling of the casing, etc., the IS does not adequately explain how plumes will be prevented or, if it believes they are inevitable, how large they could be and what the full range of potential environmental impacts is that may result therefrom.

e. **Biological Surveys.**

The MND at page 53 states that "[a] biologist will conduct preconstruction surveys prior to the start of construction to locate all active [Swainson’s Hawk] nest sites within 1/2 mile of construction and staging areas," and that "[a] qualified biologist will conduct preconstruction surveys to locate all active nest sites [of non-special-status migratory birds and raptors] within 500 feet of the project area."

The MND fails to explain why these surveys have not yet been performed. Since the location of any such nest sites will affect the location and timing of the drilling, such surveys should be performed before the circulation of the MND and IS, not after.

8. **NEPA.**

The MND and IS appear to make no reference to NEPA compliance for this project. The federal government is a major player and co-lead agency in the underlying development and implementation of the BDCP of which the instant drilling is an integral part, and various federal agencies must also issue various approvals for the instant drilling. Once again assuming **arguendo** the instant drilling can be piecemealed from the overall BDCP, the federal governments role in the drilling and the sensitive and protected nature of the Delta ecosystem and levee systems, etc. where such drilling will occur are sufficient to mandate NEPA compliance. Without such compliance the instant project cannot lawfully proceed.

9. **Water Commission.**

"There is in the Department of Water Resources the California Water Commission [hereinafter "Water Commission"]. (Wat. Code, § 150.) The Water Commission "consists of nine members who are appointed by the Governor subject to the confirmation of the Senate . . . ," and the membership is intended "to afford representation on the commission of all parts of the
The Water Commission plays a critical role in the workings of DWR, and its broad representation provides essential oversight for the decisions and actions of the director of DWR. 
(See Wat. Code, §120.) Section 161 mandates that the Water Commission "shall confer with, advise, and make recommendations to the director with respect to any matters and subjects under his jurisdiction." (Emphasis added.)

The CDWA is informed and believes that DWR has circumvented that mandatory oversight in connection with the underlying development and implementation of the BDCP, as well as with all of the activities and phases associated therewith, including the instant drilling activities. In the absence of such consultation and oversight, the instant drilling activities are unauthorized and cannot proceed. If such consultation has occurred, the MND and IS should fully disclose and meaningfully describe the nature of that consultation and the Water Commission’s recommendations.

10. **Additional Concerns and Requests for Information.**

Attached hereto as Attachment “A” is a list of additional concerns and requests for information. The MND and IS must be revised to thoroughly address these concerns and to include the requested information. The failure to do so renders the MND and IS legally deficient and omits relevant material necessary for informed decision making and meaningful public participation. After the information is added, the MDN and IS must be recirculated for public and agency review and comment.

11. **Incorporation of Prior Comments on the BDCP Notice of Preparation and Notice of Intent.**

Since, as discussed above in the piecemealing section, the instant drilling activities are an inextricable part of the development and implementation of the BDCP and cannot be legally separated from that development and implementation under CEQA, the CDWA’s prior comments on the Notice of Preparation and Notice of Intent to prepare an EIR/EIS for the BDCP are incorporated herein and enclosed herewith as “Enclosure C” and “Enclosure D.”

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12. The South Delta Water Agency's Joinder in these Comments.

Please be informed that the South Delta Water Agency joins in these comments and they are hereby also being submitted on its behalf.

Thank you for considering these comments and concerns.

Very truly yours,

Dante John Nomellini, Jr.
Attorney for the Central Delta Water Agency

DJR/djr

Attachments:
Attachment A – List of additional concerns and requests for information.
Attachment B – DWR's Amended Proposed Order seeking access to Delta lands to conduct BDCP Field Studies.
Attachment C – DWR's Notice of Exemption for landside BDCP drilling, etc.
Attachment D – The Department of Parks and Recreation’s Notice of Exemption for BDCP Field Studies.
Attachment E – DWR’s March 15, 2009 map entitled “BDCP Concept-Level Conveyance Planning With Proposed Conveyance Options.”
Attachment F – Excerpts from DWR’s Delta Atlas.

Enclosures:
Enclosure A – Copy of “Analytical Study on Flood Induced Seepage Under River Levese.”
Enclosure B – Copy of “Performance of Levee Underseepage Controls; A Critical Review.”
Enclosure C – CDWA’s comments on BDCP NOP and NOI dated May 14, 2009.
Enclosure D – Additional CDWA comments on BDCP NOP and NOI also dated May 14, 2009.