

**Summary of Survey Data Collection Efforts by
Department of Water Resources to Obtain Information
Regarding Baseline Conditions in Areas That Could Be
Affected by BDCP**

1
2
3
4
5

**Summary of Survey Data Collection Efforts by
Department of Water Resources to Obtain Information
Regarding Baseline Conditions in Areas That Could Be
Affected by BDCP**

4A.1 Introduction

Under CEQA and NEPA, state and federal lead agencies are required to undertake a certain amount of original research and analysis in order to obtain the information required to prepare legally sufficient environmental impact reports (EIRs) and environmental impact statements (EISs). Although there is no bright line rule articulating precisely how much effort is required, the applicable general principle is that lead agencies must undertake thorough investigations in light of what is reasonably feasible under the circumstances facing a particular proposed “project” or “major federal action.”

The environmental review process for the Bay Delta Conservation Plan (BDCP) requires the California Department of Water Resources (DWR), as the CEQA Lead Agency, to conduct various studies and analyses in the Sacramento-San Joaquin Delta. To support the preparation of a thorough and accurate environmental review document, DWR, through its staff and consultants, have been researching existing information and conducting field studies throughout the Delta region to gather environmental and geotechnical data. DWR is using existing information when available, but where this information is insufficient or unavailable, DWR has attempted to gain access to certain private properties in order to conduct further studies and to gather additional relevant information.

DWR has taken actions to obtain access to land in the Delta for the purpose of gathering information to be used in environmental review. DWR, however, has not been able to access a substantial number of the private properties that would yield relevant information. The problem repeatedly faced by DWR in such efforts has been the unwillingness of private property owners to allow entry onto their properties. Many landowners have gone to court to prohibit access. This appendix describes the actions taken by DWR to gain access to properties within the Delta as needed to fulfill the requirements of CEQA and NEPA and federal permits (i.e., Sections 408 and 404(b)) for the BDCP.

4A.2 Actions Taken by DWR

4A.2.1 Information Provided to Landowners and Temporary Entry Permit Negotiations

4A.2.1.1 Letters to Landowners

In July 2008, DWR began contacting landowners and attempted negotiations with a number of Delta landowners to obtain Temporary Entry Permits (TEPs) that would grant DWR access to properties for the purpose of conducting surveys/studies for the environmental review of the BDCP. At that time, DWR sent letters to private landowners within the Delta describing the environmental review process and indicating that there may be a need to access their properties to conduct various surveys/studies. The TEPs grants permission to DWR to enter onto the owner's land to conduct various activities including ground and aerial surveys, Environmental Site Assessments, and engineering, biological, geotechnical, archaeological, floral and faunal studies. The permission granted by the permit is subject to multiple conditions to ensure that minimal interruptions or other inconveniences are minimized or eliminated. Landowners who signed TEPs received compensation.

4A.2.1.2 Landowner Meetings

Beginning in August 2008, eight (8) landowner meetings were held throughout the Delta to discuss the various types of field surveys/studies that were needed to support the environmental review process. These meetings were held in Galt, Lathrop, Antioch, Walnut Grove, Rio Vista, and Stockton. The agenda for the consisted of staff presentations followed by question and answer sessions. At the public's request, two additional meetings were held in November 2008 in Courtland and Brentwood.

During the meetings, DWR informed Delta landowners about the need to access selected private properties so that DWR's staff and consultants could conduct the necessary surveys/studies in order to gather information for potential conveyance and mitigation options related to the BDCP.

After the meetings, the requests for TEPs were sent to specific Delta landowners to obtain permission to enter their property. DWR also made various fact sheets and other information available on the BDCP website, further detailing the project and the process for the TEPs.

Despite information presented in public meetings and in discussions with individual landowners, DWR was not able to gain access to a significant number of the properties. To avoid delays in the preparation of the EIR/S, DWR began the process of gaining access to those selected properties via the court ordered entry process.

4A.2.2 Temporary Entry Permit Petition(s)—Environmental and Geotechnical Activities

Real estate negotiations to obtain Temporary Entry Permits (TEPs) began in July 2008. In February 2009, DWR filed Petitions for Orders Permitting Entry in Superior Court to gain entry onto multiple properties located in five counties (Contra Costa, Sacramento, San Joaquin, Solano and Yolo counties).

DWR brought each TEP petition under the pre-condemnation entry statutes, Code of Civil Procedure section 1245.010 et seq. (Entry Statutes), and an order for entry was granted in February 2011 to

1 conduct environmental surveys. An order denying entry for geotechnical activities was entered in
2 April, 2011. Both matters were submitted elevated to the Third District Court of Appeal for review.
3 In August, 2011, the Third District Court of Appeal stayed the Environmental Order. With regard to
4 geotechnical activities, the Court stated that DWR could proceed, but would have to utilize eminent
5 domain proceedings. To that end, DWR contacted the California Water Commission to begin the
6 process of obtaining Resolutions of Necessity (RONs), which is an administrative step in the eminent
7 domain process.

8 **4A.2.3 Environmental Review for Geotechnical Activities**

9 This section describes the geotechnical activities proposed in the MND to support the project
10 planning efforts. Proposed geotechnical activities to support project design and construction are
11 described in Section 2.5 RDEIR/SDEIS.

12 Under CEQA, DWR must prepare a separate environmental review document for any geotechnical
13 studies to determine the level of environmental disturbance due to the proposed geotechnical
14 activities.

15 For the environmental review of the geotechnical activities, DWR prepared an Initial Study (IS) and a
16 Mitigated Negative Declaration (MND). DWR made copies of a draft IS/MND available on June 15,
17 2010, initiating a 30-day review period. DWR made minor changes to the draft IS/MND and filed a
18 draft Supplemental Draft IS/MND with the State Clearinghouse on June 30, 2010, thereby initiating an
19 additional 30-day review period. On July 1, 2010, DWR released a Notice of Intent to Adopt a
20 Supplemental Mitigated Negative Declaration (NOI) for the geotechnical testing (Geotechnical
21 Engineering Studies for the Bay Delta Conservation Plan and/or for Preliminary Engineering Studies
22 for the Delta Habitat Conservation and Conveyance Program).

23 The Supplemental IS/MND assessed the geotechnical activities and concluded that the proposed
24 activities would not have a significant effect on the Environment, although minor impacts were
25 anticipated. This document also determined that due to the short duration, implementation of
26 specified conservation measures and best management practices would avoid, minimize, and
27 mitigate impacts to environmentally sensitive resources to less than significant levels.

28 The court held that the MND was adequate and denied the petition. (Central Delta Water Agency v.
29 California Department of Water Resources – Case No. 34-2010-80000698. Final Ruling, November 2,
30 2011.) No appeal was filed by plaintiffs challenging the MND.

31 **4A.3 Conclusion and Summary**

32 As the preceding discussion shows, DWR has been unable, despite diligent efforts, to gain access to
33 all of the private properties within the Delta necessary to conduct ground surveys, Environmental
34 Site Assessments, engineering, biological, geotechnical, archaeological, floral and faunal studies.
35 DWR has done all that is reasonably feasible under the circumstances to conduct a thorough
36 investigation of the impacts of all of the BDCP alternatives.

37 The State sought entry onto numerous properties pursuant to the Eminent Domain Law's
38 precondemnation entry statutes to conduct environmental and geological studies in order to
39 determine the feasibility of adding water conveyance facilities in the Sacramento-San Joaquin Delta,

1 and to determine the suitability of the alternative routes for the proposed project, a part of the State
2 Water Project. In coordinated proceedings, the trial court issued orders authorizing restricted entry
3 for the environmental testing, but denied entry for the geological studies.

4 The Third District Court of Appeal affirmed the trial court's denial of the geological testing and
5 reversed the trial court's authorization of environmental testing, holding that both sets of proposed
6 activities constituted "takings" under applicable provisions of the California Constitution and thus
7 could not be accomplished without the filing of a full eminent domain action. DWR filed a petition to
8 have the matter heard by the California Supreme Court. The petition was granted and a hearing was
9 held on May 3, 2016. On July 21, 2016, the Supreme Court reversed, holding that Legislature, in
10 drafting the entry statutes, had fashioned a constitutionally permissible approach that balanced the
11 respective interests of the property owner and the public entity. The Supreme Court further
12 remanded the case to the Third District Court of Appeal for further proceedings consistent with its
13 opinion, including potential resolution of additional issues raised by landowners on appeal,
14 including availability of discovery in a precondemnation proceeding and the right of lessees or
15 easement holders to participate in such proceedings. These proceedings are currently pending.