

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 get 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.1.1 Brief Summary of Temporary Entry Permit (TEP) History

Real estate negotiations to obtain Temporary Entry Permits (TEPs) began in July, 2008. In February 2009, DWR files petitions for court-ordered entry in each affected county. DWR’s Petition for coordination was approved in December, 2009. Venue was assigned to San Joaquin County Superior Court (SJCS). In the summer of 2010, the court found in DWR’s favor regarding DWR’s authority for the project.

In October 2010 SJCS severed environmental survey matters from geotechnical activities, and in February granted an Order for Entry to conduct environmental surveys.

1 Hearings on geotechnical activities began in February, 2011 and an order denying entry for
2 geotechnical activities was entered in April, 2011. DWR requested reconsideration to allow the
3 surveys for locating drill sites and filled appellate petitions in the spring of 2011. In August, 2011 the
4 Third District Court of Appeal stayed the Environmental Order.

5 The Water Commission began its process in July, 2011 with informational briefings regarding the
6 TEPs. Between October 2011 and March 2012, the Commission considered and took action on the
7 Resolutions of Necessity (RONs). DWR returned to the Commission in 2013 for necessary
8 amendments. However, due to continuing optimization efforts the amendment process has not been
9 concluded.

10 **4A.2 Actions Taken by DWR**

11 **4A.2.1 Information Provided to Landowners and Temporary** 12 **Entry Permit Negotiations**

13 **4A.2.1.1 Letters to Landowners**

14 In July 2008, DWR began negotiations with a number of Delta landowners to obtain Temporary
15 Entry Permits (TEPs) that would grant DWR access to properties for the purpose of conducting
16 studies for the environmental review of the BDCP. At that time, DWR sent letters to private
17 landowners within the Delta describing the environmental review process and indicating that there
18 may be a need to access their properties to conduct various studies. The TEPs are permits in which
19 the owner of the described property gives permission to DWR and its officers, employees, agents
20 and contractors, to enter onto the owner's land to conduct various activities. These activities include
21 ground and aerial surveys, Environmental Site Assessments, and engineering, biological,
22 geotechnical, archaeological, floral and faunal studies. The permission granted by the permit is
23 subject to multiple conditions included in the TEP in order to ensure that minimal interruptions or
24 other inconveniences to the landowner occur on the property. Landowners who signed TEPs
25 received compensation.

26 **4A.2.1.2 Landowner Meetings**

27 Beginning in August 2008, landowner meetings were held throughout the Delta to discuss the types
28 of field studies that are needed to support the environmental review process. DWR held landowner
29 meetings in August 2008 in different areas of the Delta: Galt, Lathrop, Antioch,; Walnut Grove, Rio
30 Vista, and Stockton. These landowner meetings were comprised of staff presentations followed by
31 question and answer sessions. Two additional landowner meetings were held in November 2008 in
32 Courtland and Brentwood. DWR conducted these meetings in the same format as the previous
33 landowner meetings, and included staff presentations followed by a question and answer session.

34 During these meetings, DWR informed Delta landowners about the need to access selected private
35 properties so that DWR's staff and consultants could conduct surveys in order to gather information
36 for possible conveyance and mitigation options related to the BDCP. DWR explained that some
37 properties located near potential habitat restoration or potential conveyance areas may be selected
38 for further study in order to improve the accuracy of the studies and that, in such cases, DWR
39 representatives might seek access through the use of a TEP to enter those parcels. DWR also

1 described the need for TEPs and explained the process that DWR would use to obtain them.

2 Requests for TEPs

3 During this time period, DWR sent out the first set of official notices for TEPs to specific Delta
4 landowners in order to obtain permission to enter their property. DWR also made various fact
5 sheets and other information available on the BDCP website, further detailing the project and the
6 process for the TEPs.

7 Despite information presented in public meetings and in discussions with individual landowners,
8 DWR was not able to gain access to a significant number of the properties through the TEP
9 negotiations. In order to avoid delay and to prepare as detailed and EIR/EIS as possible under the
10 circumstances, DWR began the process of gaining access to the Delta properties by court petition,
11 requesting the courts to order the TEPs.

12 **4A.2.2 Temporary Entry Permit Petition(s)—Environmental** 13 **and Geotechnical Activities**

14 In February 2009, DWR filed petitions (TEP petitions) for Orders Permitting Entry onto multiple
15 properties in the superior courts of the five counties covering the Delta (Contra Costa, Sacramento,
16 San Joaquin, Solano and Yolo counties). The petitions, called “Petitions for Order Permitting Entry
17 and Investigation of Real Property,” sought entry onto the properties for the purposes of conducting
18 studies, surveys, and geotechnical activities in connection with the BDCP.

19 DWR brought each TEP petition under the pre-condemnation entry statutes, Code of Civil Procedure
20 section 1245.010 et seq. (Entry Statutes).¹

21 The first court hearing was in April 2009. In light the number of pending petitions and counties
22 involved, the judge suggested, and counsel agreed, that the matters should be coordinated to avoid
23 different results and to promote judicial economy.

24 On December 23, 2009, the Honorable Alan A. Sumner was assigned as coordination motion judge.
25 Judge Sumner issued an order granting the Petition for Coordination on March 9, 2010. With this
26 order, approximately 150 of the petition actions were coordinated into one proceeding in San
27 Joaquin County Superior Court.

28 On September 3, 2010, DWR filed a “Master Amended Petition for Order Permitting Entry and
29 Investigation of Real Property” (MAP) that consolidated all of the TEPs. In the MAP, DWR requested
30 access to Delta properties for both environmental surveys and geotechnical activities. Specifically,
31 DWR sought entry onto all of the affected properties to conduct biological, botanical, archaeological,
32 environmental, topographical, and geotechnical studies.

33 On October 22, 2010, the San Joaquin County Superior Court severed the environmental activities
34 from the geotechnical activities. The court ordered that the coordinated cases proceed to hearing
35 and that issues involving environmental, mapping, archaeological, and utility activities
36 (Environmental Activities) would be decided first, while geologic and other testing issues

¹ “Subject to requirements of this article, any person authorized to acquire property...may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.” (Code Civ. Proc., § 1245.010.)

1 (Geotechnical Activities) would be severed and determined at a subsequent hearing. (*In Re*
2 *Department of Water Resources Cases, JCCP Action No. 4594, Final ruling for October 22, 2010.*)

3 **4A.2.2.1 Environmental Activities**

4 The MAP filed by DWR came on for hearings for the Environmental Activities portion on December
5 15, 2010. On February 22, 2011, the court issued an Order Permitting Entry and Investigation of
6 Real Property (Other Than Geotechnical and Drilling) (Environmental Survey Order). The
7 Environmental Survey Order authorized DWR to enter certain Delta properties to conduct the
8 Environmental Activities. (*In Re Department of Water Resources Cases, JCCP Action No. 4594,*
9 *February 22, 2011 Order Permitting Entry/Investigation of Real Property (Non-Geologic Activities*
10 *Only).*)

11 In the Environmental Survey Order, the court found that DWR has authority to initiate the petition
12 under Code of Civil Procedure Section 1245.010 because DWR is a “person authorized to acquire
13 property for a particular use by eminent domain.” The court further that DWR is authorized: (1) to
14 investigate the feasibility of alternative types of conveyance systems, the best conveyance alignment
15 location, and the best alternative corridor location with each alternative conveyance alignment
16 location; (2) to investigate the various types of conveyance systems, including surface level canals,
17 surface level pipelines, and buried tunnels; (3) to investigate conveyance alternative locations,
18 including a west alignment, a through delta or dual alignment, and an east alignment; (4) ancillary to
19 the above, to investigate potential impacts of a water conveyance system to, among other things,
20 biological resources, water resources, environmental resources, geology, archaeology and utilities
21 on the subject properties; and (5) to investigate whether a water conveyance system should be
22 constructed in the Delta.

23 The Environmental Survey Order explicitly states that it is limited to activities other than
24 geotechnical and drilling and has an attachment that describes in detail the types of environmental
25 activities that are within the scope of the Environmental Survey Order. See copy attached. The
26 Environmental Survey Order states that the right to enter shall commence on April 1, 2011 and
27 terminate on March 31, 2012.

28 In response to the Environmental Survey Order, certain landowners filed a Petition for Writ of
29 Mandamus on April 1, 2011, seeking relief at the California Court of Appeal, Third Appellate District.
30 The petitioners requested a stay of the Environmental Survey Order directed at DWR. (*Carolyn*
31 *Nichols Revocable Living Trust, etc., et al. v. The Superior Court of San Joaquin County, Case Number*
32 *C067765, and Property Reserve, Inc. v. The Superior Court of San Joaquin County, Case Number*
33 *C067758.*)

34 On April 28, 2011, the Court of Appeal issued an order summarily denying the Petition for Writ.

35 The landowners then turned to the California Supreme Court for relief. On May 6, 2011, the
36 landowners filed a petition seeking Supreme Court review of the Court of Appeal’s summary denial
37 of writ relief.

38 On July 13, 2011, the Supreme Court granted the petition for review. In doing so, the Supreme Court
39 directed the Court of Appeal to vacate its order denying the landowner’s writ, and returned the
40 matter to the San Joaquin Superior Court for further action. On August 18, 2011 the Court of Appeal,
41 Third Appellate District, issued an order staying the Environmental Survey Order pending further
42 order of the court. This stay order has prevented DWR from entering the properties in the Delta for

1 the tests and studies that are included under the Environmental Activities portion of the petition
2 request.

3 These matters remain pending in the Third District Court of Appeal.

4 The Environmental Survey Order granted by the court on February 22, 2011, expired on March 31,
5 2012. DWR has not been able to gain access to the properties since the effective date of the stay.

6 **4A.2.2.2 Geotechnical Activities**

7 The Superior Court conducted hearings on the geotechnical and drilling issues (Geotechnical
8 Activities) in February, March, and April 2011.

9 On April 8, 2011, the court issued an order denying DWR entry for Geotechnical Activities. (*In Re:*
10 *Department of Water Resources Cases; Coordinated Action: JCCP 4594; Opinion and Final Order*
11 *Denying Petition for Entry for Geotechnical Activities. April 8, 2011.*)

12 In its decision denying DWR entry, the court recognized that the evidence supported the conclusion
13 that DWR needs to do cone penetration tests (CPT) and core drilling in order to determine the best
14 feasible alternative for a water conveyance facility. The court also said that the evidence supported
15 the conclusion that a water conveyance project is a matter of public interest and that DWR is
16 authorized to investigate the project because it was seriously considering the acquisition of the
17 properties identified for the purposes of the project.

18 The court held, however, that the pre-condemnation statutes did not authorize DWR to proceed by
19 manner of petition for entry. The court noted that DWR could acquire the right to proceed by
20 contract with the property owner, acquire an easement for drilling in an eminent domain action
21 under section 1240.110, or use the “quick take” provisions of the code for this purpose under
22 section 1255.410.²

23 The order ruled that the State’s entries could only be obtained through eminent domain actions. (*In*
24 *Re: Department of Water Resources Cases; Coordinated Action: JCCP 4594; Opinion and Final Order*
25 *Denying Petition for Entry for Geotechnical Activities. April 8, 2011.*)

26 On October 27, 2011, DWR filed an appeal to the Court of Appeal, Third Appellate District seeking an
27 order directing the trial court to enter a new order granting the State’s entry petition. Shortly
28 thereafter, a cross-appeal was filed by Respondents (Janice G. Adams, et.al.)

29 On December 1, 2011, Respondents/Cross-Appellants (Janice G. Adams, et al.) filed a brief that
30 responded to DWR’s appeal and requested affirmance of the trial court’s April 8, 2011, order
31 denying DWR entry for Geotechnical Activities. They also requested that the February 22, 2011
32 Environmental Survey Order be reversed.

33 These matters remain pending in the Third District Court of Appeal.

² Under California's “quick-take” eminent domain procedure, a public entity filing a condemnation action may seek immediate possession of the property to be condemned upon depositing with the court the probable compensation for the property. Any opposition must be filed within 30 days. (Code Civ. Proc. § 1255.410.)

4A.2.3 Eminent Domain Proceedings

While the environmental and geotechnical matters are pending in the Third District Court of Appeal and in order to avoid further delay, DWR is seeking to undertake geotechnical studies through the eminent domain process

The eminent domain process involves obtaining resolutions of necessity from the California Water Commission (Commission). On July 20, 2011, DWR presented information to the Commission regarding the Commission's role in the eminent domain process, DWR's land acquisition process prior to seeking a Resolution of Necessity (Resolution), and the proposed geotechnical activities on the acquired land. The Commission was apprised of the legal principles involved, DWR's authority related to eminent domain, DWR's process for seeking Temporary Entry Permits to properties, and the court ruling that resulted in DWR's decision to seek Resolutions for certain properties.

The authority of DWR to obtain property by eminent domain and the role of the Commission in the eminent domain process are set out by statute.³ The operative statutes grant DWR the authority to condemn property through eminent domain and require the Commission to adopt a Resolution before DWR can begin the eminent domain proceedings.

The procedures adopted by the Commission set out the requirements for adopting Resolutions, which includes a 21 day notification period followed by a two-meeting, two-step process. During the first meeting, the Commission considers reports prepared by staff and also takes public comment. Each staff report contains all of the information necessary for the Commission to make a decision on a Resolution. The reports contain information about the overall project and about the individual property at issue. They also include an explanation about the contemplated activities on the property and a thorough explanation of DWR's legal authority to obtain the property through eminent domain. In the second meeting, the Commission decides whether or not to adopt the Resolution.

At the September 21, 2011 meeting, the Commission considered staff reports for each Resolution for each of the properties whose owners the Commission had previously notified. DWR provided the Commission with a description of each property, including the location, the proposed property rights to be acquired, the number and types of drill sites, and a summary of any landowner negotiations. The Commission took public comments on the subject. No final action was taken on any Resolution at this meeting. At the October 19, 2011 meeting, staff provided another update on the Resolution process, including all of the activities taken by DWR related to the properties in Yolo, Sacramento, and Solano Counties. Staff provided the Commission with a copy of the Temporary

³ "A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article." (Code Civ. Proc., § 1245.220.) "As used in this article, 'governing body' means: (h) In the case of a taking by the Department of Water Resources, the California Water Commission." (Code Civ. Proc., § 1245.210.)

"For the purpose of constructing, maintaining, and operating the project and for the purpose of providing and substituting new facilities for facilities to be taken or destroyed, the department may acquire for and in the name of the state, by gift, exchange, purchase, or eminent domain proceedings, within or without the state, any and all water, water rights, rights-of-way, easements, land, electric power, power resources and facilities, and property or appurtenances thereto of every kind and description and any appurtenances to any such property as the department determines to be required and necessary for the proper construction, maintenance, and operation of the project and for effectuating the purposes and objects to be accomplished by the construction, maintenance, and operation of the project, and for providing and substituting new facilities for facilities taken or destroyed." (Cal. Water Code, § 11575.)

1 Entry Permit, the proposed drilling schedule (which takes into account factors such as weather and
2 the timing of the pear harvest), DWR's Environmental Clearance Protocols, the San Joaquin Superior
3 Court Ruling leading to the need for eminent domain, photos of sites along Highway 160 showing
4 DWR's inability to drill in the right of way for the road, and a letter sent to all land owners describing
5 both how any hazardous waste would be handled and DWR's willingness to quit-claim the
6 permanent easements back to landowners after drilling was finished.

7 The Commission postponed any action on the nine RONS until the next meeting.

8 At the Commission meeting on November 16, 2011 the Commission took public comment regarding
9 the Resolutions that it had initially considered at previous meetings, and then adopted twenty-one
10 (21) Resolutions. (A settlement was reached on one proposed RON and it was therefore removed
11 from the agenda.)

12 At its January 18, 2012 meeting, the Commission considered Resolutions for properties in
13 Sacramento and Solano Counties, adopting one Resolution; and heard initial consideration of
14 evidence for Resolutions for twenty-five (25) properties in Contra Costa, Sacramento, and San
15 Joaquin Counties. The Commission adopted seventeen (17) additional Resolutions at its February
16 15, 2012 meeting, and three additional Resolutions at its March 21, 2012 meeting.

17 On March 21, 2012, the Commission approved clarifying language regarding quit-claim language
18 and hazardous materials testing for the TEPs. Environmental documentation and information
19 regarding the required findings to support the RONS was received from DWR and reviewed by the
20 Commission. The Commission also approved RONS for properties in Contra Costa and Sacramento
21 counties.

22 **4A.2.4 Environmental Review for Geotechnical Activities**

23 Under CEQA, DWR must conduct separate environmental review for any geotechnical studies,
24 conducted in support of the EIR/EIS for the BDCP, that involve disturbance of the environment. As of
25 September 23, 2011, DWR had completed all of the necessary environmental review and complied
26 with all of the requirements imposed by state and federal agencies for the geotechnical activities
27 that are subject to such requirements. Like the TEPs, DWR's separate environmental review for the
28 geotechnical activities has also been challenged in court.

29 For the environmental review of the geotechnical activities, DWR prepared an Initial Study (IS) and
30 a Mitigated Negative Declaration (MND). DWR made copies of a draft IS/MND available on June 15,
31 2010, initiating a 30-day review period. DWR made minor changes to the draft IS/MND and filed a
32 draft Supplemental Draft IS/MND with the State Clearinghouse on June 30, 2010, thereby initiating
33 an additional 30-day review period. On July 1, 2010, DWR released a Notice of Intent to Adopt a
34 Supplemental Mitigated Negative Declaration (NOI) for the geotechnical testing (Geotechnical
35 Engineering Studies for the Bay Delta Conservation Plan and/or for Preliminary Engineering Studies
36 for the Delta Habitat Conservation and Conveyance Program). The public comment period was open
37 from June 15, 2010 to July 31, 2010.

38 At the end of the public comment period for the draft IS/MND on July 31, 2010, DWR had received a
39 total of eight letters and one oral comment addressing the Draft IS/MND. DWR prepared written
40 responses to comments. These responses corrected, clarified, and amplified text, as appropriate. The
41 changes did not alter the conclusions of the draft Supplemental IS/MND.

1 The Supplemental IS/MND covers the engineering geotechnical studies for the BDCP and/or
2 preliminary engineering studies for the Delta Habitat Conservation and Conveyance Program
3 (DHCCP). As described in the IS/MND, the geotechnical activities that are subject to environmental
4 review are intended to provide information necessary for making decisions about location,
5 alignment, design, and costs of conveyance alternatives, for evaluating the feasibility of the
6 alternatives, and for identifying possible development constraints.

7 The geotechnical activities were scheduled in the period between August 1, 2010, and December 31,
8 2012. The purpose of the activities is to investigate the engineering properties of Delta soils along
9 various conveyance alignments, including auxiliary structures, and proposed intakes and forebays
10 for the alignment alternatives. These are the same geotechnical activities that DWR is seeking
11 property rights to be able to conduct.

12 The geotechnical testing project includes approximately 80 overwater geotechnical borings in the
13 Delta waterways. The drilling is conducted with a rotary drilling rig mounted on a shallow-draft
14 barge or ship. The borings range in depth from between 100 and 300 feet below the river bottom
15 and include 50 borings in the Sacramento River for possible intake structures for water conveyance
16 facilities, 20 borings where a planned pipeline/tunnel option alignment would cross 12 major
17 waterways, and five to 12 borings to obtain conceptual information for docking facilities.

18 Overwater drilling was planned from August 1, 2010, to December 31, 2012. The drilling is
19 conducted with a rotary drilling rig mounted on a shallow draft barge or ship anchored to the
20 bottom of the channel to prevent drifting during the drilling. The drill apparatus consists of a
21 conductor casing, 6-8 inches in diameter, through which the drilling rods, samplers, and other
22 equipment pass. A heavy plastic sleeve is placed over the conductor casing.

23 The borings are drilled and sampled using a mud rotary method in which bentonite clay is added to
24 the boring to allow removal of cuttings and to stabilize boring. Soil samples are collected within the
25 conductor casings. Drilling fluid, consisting of circulating water mixed with bentonite clay, passes
26 down the center of the drill rod to the cutting face and returns to the drilled hole with suspended
27 cuttings while confined by the borehole walls, conductor casing, and a recirculation tank at the top
28 of the hole on the barge deck. The cuttings settle out in the tank and are transferred to storage
29 drums.

30 Soil samples are obtained using standard penetration tests (SPTs) in sandy and clay soils. SPTs are
31 performed in short durations of a few minutes per test by dropping a 140 pound automatic hammer
32 on the drill string to drive a sampler about 1.5 feet. Shelby tube and piston samples are collected by
33 pushing on the drill string with the weight of the drill rig. Upon completion of the sampling, the
34 borings are grouted, and the conductor casing is pulled out of the channel bottom to complete the
35 boring operation.

36 The land geotechnical studies included in the geotechnical testing project consist of drilling
37 boreholes and performing cone penetration tests to estimate the nature and sequence of subsurface
38 soil strata, groundwater conditions, and physical and mechanical properties of the soil. The land
39 geotechnical studies also include excavation of approximately 30 shallow test pits to measure soil
40 load bearing capacity, physical properties of sediments, locations of the groundwater table, and
41 other geotechnical and geotechnical parameters. Temporary test walls may be installed at some
42 sites to investigate soil permeability and to allow sampling of dissolved gases in the groundwater.

1 Drilling was planned to take place on disturbed soils on properties in the Delta that are accessible by
2 established roads or paths. After each site is investigated, the boring, cone penetration tests (CPTs),
3 and/or well holes are back-filled with cement-bentonite grout in accordance with California
4 regulations and industry standards; test pits will be backfilled with the excavated material on the
5 same day as they are dug.

6 The Supplemental IS/MND assessed the geotechnical testing project's potential effects pursuant to
7 CEQA requirements and it determined that the project would not have a significant effect on the
8 environment. The Supplemental IS/MND concluded that the anticipated effects are minor in scope
9 and short-term in duration, and that the implementation of specified conservation measures and
10 best management practices would avoid, minimize, and mitigate impacts to environmentally
11 sensitive resources to less than significant levels.

12 On September 23, 2010, following the notice and public comment period on the draft Supplemental
13 IS/MND, DWR adopted the MND, approved the geotechnical exploratory drilling activities, and filed
14 a Notice of Determination (NOD). The NOD provided a description of the project and explained that
15 DWR is planning to conduct overwater and land geotechnical borings, perform CPTs, dig
16 approximately 30 small test pits in order to test soils in the Sacramento-San Joaquin Delta, and
17 investigate the engineering properties of the soils within a narrow corridor transecting the Delta.
18 The NOD also explained that the purpose of the project is to gather necessary geotechnical
19 information to support the preparation of a draft EIR/EIS for the proposed BDCP, and to provide
20 information for preliminary engineering design for the Delta Habitat Conservation and Conveyance
21 Program.

22 On October 25, 2010, Petitioners (Central Delta Water Agency, South Delta Water Agency, RC Farms
23 Inc., and Reclamation District 999) challenged the adequacy of the MND prepared and adopted by
24 DWR. (See Sacramento County Superior Court Case No. 34-2010-80000698.)

25 On November 2, 2011, Judge Lloyd G. Connelly issued a decision rejecting Petitioners' arguments on
26 several grounds. First, the court rejected the claim that DWR was "piecemealing" by failing to treat
27 the geotechnical studies as part of the later BDCP project. He reasoned that the studies do not
28 themselves involve any planning or development of a water conveyance and will not become a part
29 or component of any conveyance planned, developed, or implemented by the BDCP. The court also
30 held that a water conveyance facility under the BDCP cannot be characterized as a reasonably
31 foreseeable consequence of the geotechnical studies. The court therefore held that the geotechnical
32 studies were correctly analyzed independently of the BDCP or any other non-geotechnical field
33 studies.

34 Second, the court held that an MND was the proper environmental document to be filed under CEQA
35 and that DWR was not required to complete an EIR. Reviewing the evidence cited by Petitioners, the
36 court concluded that they did not raise a "fair argument" that the geotechnical testing project may
37 have significant effects on the environment.

38 Lastly, the court held that the MND was properly noticed and circulated. DWR had distributed a
39 notice dated June 14, 2010, that indicated that DWR intended to adopt the MND for the geotechnical
40 studies project. The notice was sent to the clerks of the five counties where the project would be
41 performed: Sacramento, Contra Costa, Yolo, San Joaquin, and Solano. The notice indicated that a
42 public comment period was open from June 15, 2010, to July 15, 2010. On July 1, 2010, DWR
43 distributed another notice, stating that DWR intended to adopt a supplemental MND for the
44 geotechnical testing project. The notice was sent to the clerks of the five counties where the project

1 was to be performed and indicated that the supplemental MND was proposing minor technical
2 changes to the MND. The notice stated that public comment period was open from July 1, 2010, to
3 July 31, 2010. According to the court, this notice and circulation period was legally appropriate.

4 For all of these reasons, the court held that the MND was adequate and denied the petition. (Central
5 Delta Water Agency v. California Department of Water Resources – Case No. 34-2010-80000698.
6 Final Ruling, November 2, 2011.) No appeal was filed by plaintiffs challenging the MND.

7 During the process described in the IS/MND and Supplemental IS/MND, DWR obtained all of the
8 appropriate permits necessary for the planned geotechnical testing and complied with all of the
9 other requirements imposed by various state and federal agencies. These are described below.

10 On June 15, 2010, DWR filed an application requesting coverage under the State Water Resources
11 Control Board General 401 Water Quality Certification Order of the U.S. Army Corps of Engineers
12 Nationwide Permits. In a letter dated June 21, 2010, the Central Valley Water Board issued its “401
13 certification” for the geotechnical testing project subject to several conditions. This certification was
14 issued under a state Water Resources Control Board General Order.

15 On August 18, 2010, the National Marine Fisheries Service (NMFS) responded to a letter from DWR
16 dated June 25, 2010, that requested the initiation of consultation under section 7 of the Endangered
17 Species Act (ESA) and requested concurrence from the NMFS that the Engineering Geotechnical
18 Boring Studies for the BDCP and/or Preliminary Engineering Studies for the Delta Conservation and
19 Conveyance Program were not likely to adversely affect federally listed species of fish and their
20 habitat. The response letter from NMFS also served as consultation for section 305(b) of the
21 Magnuson-Stevens Fishery Conservation and Management Act (MSA), as well as consultation under
22 the authority of, and in accordance with, the provisions of the Fish and Wildlife Coordination Act of
23 1934, as amended (FWCA).

24 For the ESA section 7 consultation, NMFS stated that the avoidance and minimization measures and
25 best management practices incorporated into the protocol for the project reduced the extent of
26 probable impacts to listed fish and their habitat. Therefore, the NMFS was able to determine that the
27 geotechnical studies were not likely to adversely affect federally listed endangered species of fish
28 and their habitat.

29 DWR also entered into consultation under section 7 of the ESA with the USFWS for other federally
30 listed species that may be impacted by the geotechnical testing project. On September 3, 2010,
31 USFWS wrote a letter stating its opinion that the Engineering Geotechnical Studies for the BDCP and
32 related Preliminary Engineering Studies were not likely to jeopardize the continued existence of any
33 of the federally endangered species or their habitat.

34 The letter included an incidental take statement for the geotechnical testing project as required
35 under section 7 of the ESA, as well as some other measures, terms, and conditions for the project.
36 The letter stated that it concluded the required consultation for the project.

37 DWR obtained the U.S. Army Corps of Engineers permit for the project on September 8, 2010.

38 On September 16, 2010, DWR and DFG entered into a Streambed Alteration Agreement covering the
39 geotechnical testing project.

4A.3 Conclusion

As the preceding discussion shows, DWR has been unable, despite diligent efforts, to gain access to all of the private properties within the Delta on which it would like to conduct ground surveys, Environmental Site Assessments, and engineering, biological, geotechnical, archaeological, floral and faunal studies. Although DWR has been able to conduct some of the geotechnical studies it contemplated originally, it has not been able to conduct all such studies because of the court order issued April 8, 2011. DWR has challenged that court decision and is currently seeking access to land in the Delta for the purpose of conducting the geotechnical activities through the use of eminent domain. In short, DWR has done all that is reasonably feasible under the circumstances to conduct thorough investigation of the impacts of all of the BDCP alternatives.