



FREEPORT
CLARKSBURG
HOOD
COURTLAND
LOCKE
WALNUT GROVE
RYDE
ISLETON
RIO VISTA
BETHEL ISLAND
KNIGHTSEN

A California Nonprofit Mutual Benefit Corporation
P.O. Box 128, Hood, CA 95639
deltalegacycommunitiesinc@gmail.com

September 17, 2020

Via email

Karla Nemeth, Director
Department of Water Resources
1416 9th Street
Sacramento, CA 95814

Keely Martin Bosler, Director
Department of Finance
State Capitol
Sacramento, CA 95814

Re: Objection to DWR's \$15 million loan to the Delta Conveyance Design and Construction Authority

Dear Director Nemeth and Director Bosler,

Delta Legacy Communities, Inc. supports and advocates for the eleven Delta legacy communities from Freeport to Knightsen, recognized in the Delta Reform Act of 2009 (PRC 32301(f.)) Our Board includes a member from each Delta legacy community.

Delta Legacy Communities, Inc. ("DLC") is writing this letter to formally object to the Department of Water Resources ("DWR") signing Amendment #4 to the Amended and Restated Joint Exercise of Powers Agreement between the Department of Water Resources and the Delta Conveyance Design and Construction Authority ("Amendment #4 to the JEPA.")¹ Amendment

¹ Amendment No. 4 to Amended and Restated Joint Exercise of Powers Agreement

#4 to the JEPA will provide an additional \$15 million the Delta Conveyance Design and Construction Authority (“DCA”) for engineering design, field work, and stakeholder engagement in support of the Delta tunnel project, for a total of \$48.8 million since June of 2019. We urge DWR to delay signing Amendment #4 to the JEPA until the legal issues raised in this letter are fully addressed, and the information requested herein has been provided to all interested parties.

Based on information and belief, DLC asserts that

- (1) The State Water Resources Development System has insufficient available revenues to pay for a \$15 million loan to the Delta Conveyance Design and Construction Authority for the Delta Conveyance project.
- (2) The Department of Water Resources has not complied with applicable laws in approving the DCA’s draft conceptual design for the Delta Conveyance project for further development and permitting.

DLC asserts that it would be an abuse of discretion by DWR to advance funds to the Delta Conveyance Design and Construction Authority under these circumstances, or for the Department of Finance (“DOF”) to approve such an expenditure. DLC is requesting that DWR provide a written response to this letter by September 24, 2020, and not sign Amendment #4 to the JEPA before that date.

DLC is further requesting that the following reporting and transparency requirements be complied with before DWR signs Amendment #4 to the JEPA:

1. The Department of Finance comply with the reporting requirements in Water Code section 12938.2 and notify all interested parties.
2. Pursuant to Water Code sections 11419-11420, DWR provide all annual balance sheets for the Central Valley project for the last 10 years for inspection by interested parties, as well as copies of all contracts signed under the 2018 Joint Exercise of Powers Agreement with the Delta Conveyance Design and Construction Authority and Amendments #1, #2, and #3 to that agreement.
3. DWR publish the last 10 years of financial statements of the State Water Resources Development System on DWR’s website (California Constitution Article I, § 3(b).)

These statutory and constitutional reporting and transparency requirements are explained in more detail below.

I. The Department of Water Resources has insufficient available revenues to pay for a \$15 million loan to the Delta Conveyance Design and Construction Authority.

The Governor’s budget shows appropriations for the Department of Water Resources (“DWR”) under budget code 3860. The detailed budget for DWR shows DWR’s Delta Conveyance

Between the Department of Water Resources, State of California and the Authority. Available at <https://www.dcdca.org/pdf/2020-09-17-DCABoardMeetingPkgVF.pdf>, p. 21-23.

Program under budget code 3240, “State Water Resources Development System.”² The description of budget code 3240 states in part:

The Delta Conveyance Program is charged with improving the Delta ecosystem and ensuring water supply reliability in a safe, timely, and cost-effective manner. This includes implementation of the Delta Conveyance, project specific environmental commitments, and compliance with the Environmental Impact Report and Environmental Impact Statement and other state and federal regulations and permits.

The Governor’s budget shows the following funds under 3240 State Water Resources Development System:³

0502 California Water Resources Development Bond Fund

0507 Central Valley Water Project Revenue Fund

0995 Reimbursements

3210 Davis-Dolwig Account, California Water Resources Development Bond Fund.

The Governor’s budget cites the following statutes as authority for appropriations for Section 3240: Water Code §§ 11100-12017, §§ 12899-12899.11, §§ 12930-12944.⁴

But as explained below, the only fund listed under the State Water Resources Development System that would have sufficient available revenues to pay for Delta Conveyance planning and permitting is 0995 Reimbursements. The Department of Water Resources has not signed an agreement with State Water Project contractors for reimbursement of Delta Conveyance implementation and permitting costs, so there are no reimbursements available for DWR to loan to the Delta Conveyance Design and Construction Authority.

A. The California Water Resources Development Bond Fund does not have sufficient revenues to pay for DWR’s Delta Conveyance Program.

The California Water Resources Development Bond Fund was created by the California Water Resources Bond Act, also known as the Burns-Porter Act. (Wat. Code §§ 12930 et. seq.) Revenues deposited in the California Water Resources Development Bond Fund (Wat. Code § 12935) are subject to the pledge and priority provisions of the Burns-Porter Act (Wat. Code § 12937(b)):

All revenues derived from the sale, delivery or use of water or power, and all other income or revenue, derived by the State, from the State Water Resources Development System shall be deposited in a special account or accounts in the California Water

² Governor’s 2020-2021 budget, Detail for Natural Resources 3860 – Department of Water Resources. Available at <http://www.ebudget.ca.gov/2020-21/pdf/GovernorsBudget/3000/3860.pdf>, p. 4.

³ Ibid, p. 5.

⁴ Ibid, p. 2.

Resources Development Bond Fund and shall be accounted for and used annually only for the following purposes and in the following order, to wit:

1. The payment of the reasonable costs of the annual maintenance and operation of the State Water Resources Development System and the replacement of any parts thereof.
2. The annual payment of the principal of and interest on the bonds issued pursuant to this chapter.
3. Transfer to the California Water Fund as reimbursement for funds utilized from said fund for construction of the State Water Resources Development System.
4. Any surplus revenues in each year not required for the purpose specified in the foregoing subparagraphs (1), (2) and (3) of this subdivision (b) of Section 12937 and not required to be transferred to the General Fund pursuant to subparagraph (a) of this Section 12937, shall, during the time any of the bonds authorized herein are outstanding, be deposited in a special account in the California Water Resources Development Bond Fund and are hereby appropriated for use and shall be available for expenditure by the department for acquisition and construction of the State Water Resources Development System as described in Section 12931 hereof.”

Water Code section 12938.2 further mandates that

The Department of Finance shall identify in the annual Governor's Budget the proposed revenues and expenditures for the four purposes identified in subdivision (b) of Section 12937. The data shall be organized on a fiscal year basis and shall include (1) an estimate of total revenues for the four purposes by revenue source, and (2) a detailed statement of expenditures for the past, current, and future fiscal years.

The Department of Finance has not complied with Water Code § 12938.2 for the 2020-21 Governor's budget. We request that the Department of Finance do so before DWR signs Amendment #4 to the JEPA and notify all interested parties.

But given the condition of the State Water Project dams, including Oroville Dam and the state share of San Luis Dam, all revenues from the State Water Project must go first to the payment of “maintenance and operation” of the existing State Water Project facilities, and “replacement of the parts thereof.” There are no “surplus revenues” available for the planning, design and permitting of new facilities under Priority 4 of Water Code section 12937(b).

In addition to risking lives, the maintenance issues with State Water Project dams and reservoirs subject state taxpayers to enormous economic risks. Risk Management Associates, a risk assessment company in San Jose, simulated the Oroville Dam inundation area, and estimated that there was \$21.8 billion in damageable property. Dam inundation is only covered by flood insurance. Most urban properties are protected by certified levees, and do not have flood insurance. Under the Paterno decision,⁵ the State of California could be liable for inverse condemnation of properties flooded by dam failure.

⁵ *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 87 Cal.Rptr.2d 754.

It would be an abuse of discretion for the Department of Water Resources to designate or use funds in the California Water Resources Development Bond Fund for the Delta Conveyance Program, or for the Department of Finance to approve such use.

B. The Central Valley Project Revenue Fund does not have sufficient revenues to pay for DWR's Delta Conveyance Program.

The Central Valley Project Revenue Fund is managed under the Central Valley Project Act (Wat. Code §§ 11100 et. seq.) Under the Central Valley Project Act, DWR is required to collect sufficient revenue to “so as to at all times provide revenue which will afford sufficient funds to pay all costs of operation and maintenance of the works authorized by this part, together with necessary repairs and replacements thereto,” as well as the interest and principle on the CVP revenue bonds. (Wat. Code § 11455.)

The sections of the California Aqueduct from “a reservoir near Los Banos in Merced County” south were constructed under the Central Valley Project Act, as were associated facilities for “generation and transmission of electrical energy.” The State Water Project contracts describe these facilities as the “Project Transportation Facilities.”⁶

DWR collects funds to pay for operation and maintenance of the Project Transportation Facilities through the Transportation Charge in the State Water Project contracts.⁷ DWR's Delta Conveyance Project is not part of the Project Transportation Facilities in the State Water Project Contracts, as defined in Section 1(i.) Revenues from the Transportation Charge are also currently insufficient to pay for repairs for subsidence on the California Aqueduct,⁸ and DWR has asked for taxpayers to pay the cost.⁹

There are thus insufficient revenues from the Central Valley Project Revenue Fund to pay for DWR's Delta Conveyance Program, because revenues are collected solely for Project Transportation Facilities, and the revenues are currently insufficient to meet the requirements of Water Code section 11455.

DLC asserts that it would be an abuse of discretion for the Department of Water Resources to designate or use funds from the Central Valley Project Revenue Fund for the Delta Conveyance Program under these circumstances. DLC further requests that the Department of Water Resources cease and desist from attempts to use taxpayer funds to pay for maintenance, repairs or replacement of the California Aqueduct, in knowing and willful violation of Water Code section 11455.

⁶ State Water Project contracts, Section 1 (i).

⁷ State Water Project contracts, Section 23.

⁸ California Department of Water Resources, California Aqueduct Subsidence Study, June 2017. Available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Engineering-And-Construction/Files/Subsidence/Aqueduct_Subsidence_Study-Accessibility_Compatibility.pdf.

⁹ Senator Diane Feinstein, Restoration of Essential Conveyance Act, S. 3811. Available at <https://www.congress.gov/116/bills/s3811/BILLS-116s3811is.pdf>.

DLC further requests that DWR comply with mandated accounting and transparency provisions of the Central Valley Project Act. The Central Valley Project Act (Wat. Code § 11419) requires that

The department shall keep full and complete accounts concerning all matters and things relating to the project and annually shall prepare balance sheet and income and profit and loss statements showing the financial condition of the project.

The Central Valley Project Act (Wat. Code § 11420) further requires that

All books and papers pertaining to matters provided for in this part shall at all reasonable times be open to the inspection of any party interested or any citizen of the State.

DLC requests that DWR provide all annual balance sheets for the Central Valley project for the last 5 years for inspection by interested parties, as well as copies of all contracts signed under the Joint Exercise of Powers Agreement with the Delta Conveyance Design and Construction Authority and Amendments #1, #2, and #3 of that agreement, before DWR signs Amendment #4 to the JEPA.

C. The Davis-Dolwig Account should not be used to pay general costs of DWR's Delta Conveyance Program.

The Davis-Dolwig Account of the California Water Resources Development Bond Fund is managed under the Davis-Dolwig Act (Wat. Code §§ 11910 et. seq.)

DWR should not redirect any part of the \$7.5 million appropriated annually by the legislature for “costs of State Water Resources Development System, as described in Section 12931, facility operations, maintenance, and capital costs attributable to recreation and fish and wildlife enhancement as provided for in Section 11914.” (Wat Code § 11913.1(c).)

The Central Valley Project Act provides that certain units may be constructed, maintained, and operated by DWR “separate and apart” from other units (Wat. Code § 11260, quoted in *Warne v. Harkness* (1963) 60 Cal.2d 579, 583.) Redirecting funding provided by the legislature for fish and wildlife enhancements for existing State Water Resources Development System facilities does not keep construction of DWR's Delta Conveyance “separate and apart” from funding for the existing State Water Project facilities.

Given that Delta smelt are on the brink of extinction, any redirection of appropriations from the general fund for fish and wildlife enhancements for existing State Water Resources Development System facilities would be an egregious abuse of discretion by the Department of Water Resources.

The Davis-Dolwig Act does mandate that “[t]here shall be incorporated in the planning and construction of each project those features (including, but not limited to, additional storage capacity) that the department, after giving full consideration to any recommendations which may be made by the Department of Fish and Game, the Department of Parks and Recreation, any federal agency, and any local governmental agency with jurisdiction over the area involved, determines necessary or desirable for the preservation of fish and wildlife, and

necessary or desirable to permit, on a year-round basis, full utilization of the project for the enhancement of fish and wildlife and for recreational purposes..” (Wat Code § 11910.)

But to date, DWR has not requested any recommendations from the state Departments of Fish and Wildlife or Parks and Recreation pursuant to this section, nor from federal or local governmental agencies.

DLC asserts that, with respect to the Delta Conveyance project design, any funds from the Davis-Dolwig Account must be spent solely for the statutory purposes in the Davis-Dolwig Act (Wat. Code section 11914.) DLC requests that DWR provide detailed accounting of any funds proposed to be expended from the Davis-Dolwig Account to all interested parties, prior to signing Amendment #4 to the JEPA.

D. DWR should not redirect general fund appropriations or general obligation bond proceeds to the Delta Conveyance project.

The Governor’s 2020-21 budget does not show any other budget allocations for Delta Conveyance planning and engineering design.

Given the dire situation of the state budget, it would be an egregious abuse of discretion for the Department of Water Resources to redirect general funds appropriated by the legislature for other purposes to the Delta Conveyance project. It would also be contrary to the intent of the legislature that the water contractors pay for the “costs of the environmental review, planning, design, construction, and mitigation ... required for the construction, operation, and maintenance of any new Delta water conveyance facility.” (Wat. Code § 85059(a).)

DLC objects to DWR’s use of any general fund appropriations or general obligation bond proceeds for the Delta Conveyance project, without explicit appropriation by the legislature.

E. DWR should publish the last 10 years of State Water Resources Development System financial statements on DWR’s website.

DWR has previously published copies of the last 10 years of State Water Resources Development System Financial Statements on DWR’s website. But attempts to access those statements leads to the following error¹⁰:

404 - File or directory not found.

The resource you are looking for might have been removed, had its name changed, or is temporarily unavailable.

DWR’s web page on “Financials” states only, “[t]he 2017-2018 enacted budget is available upon request.”¹¹

¹⁰ <https://water.ca.gov/LegacyFiles/publications/financials/docs/SWRDS%20FS%202016%20Final.pdf>. Accessed on September 17, 2020.

¹¹ <https://water.ca.gov/About/Financials>. Accessed on September 17, 2020.

DLC asserts that DWR's removal of SWRDS financial statements from DWR's website is a violation of transparency requirements in the California Constitution. Article 1, section 3(b)(1) of the California Constitution mandates that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

DLC requests that DWR publish the last 10 years of financial statements of the State Water Resources Development System on DWR's website, and notify all interested parties, prior to approval of Amendment #4 to the JEPA.

II. The Department of Water Resources has not complied with applicable laws in approving the draft conceptual design for the Delta Conveyance project for further development and permitting.

The Central Valley Project Act requires that DWR design any works that will be constructed under the Act. (Wat. Code § 11551.) Most importantly, in siting facilities, DWR must comply with Delta Plan Policy DP P2, "Respect Local Land Use in Siting Water or Flood Facilities or Restoring Habitats." Delta Plan Policy DP P2 requires DWR to "avoid or reduce conflicts with existing or future land use" in siting water facilities, including the Delta Conveyance project facilities. Delta Plan Policy DP P2 also mandates that DWR consider comments by local agencies and the Delta Protection Commission on how to "avoid or reduce conflicts with existing or planned future land uses ... when feasible."

DLC hereby incorporates in full DLC's June 29, 2020 letter to the Secretary of Natural Resources regarding DWR's compliance with Delta Plan Policy DP P2, and DLCS's September 11, 2020 letter to the Department of Water Resources regarding DWR's compliance with due process in implementation of Delta Plan Policy DP P2.

DWR has also solicited written comments on the proposed Delta Conveyance facility sites under the CEQA Notice of Preparation. DWR's Environmental Manager for the Delta Conveyance, Carrie Buckman, has stated that DWR will be considering the written comments by local agencies and the Delta Protection Commission on the proposed alternative sites as the Environmental Impact Report is prepared. DWR clearly will not have sufficient information to evaluate the DCA's draft conceptual designs for further development or revision until the CEQA process is considerably more advanced. DWR's Environmental Impact Report must not be a post-hoc rationalization for decisions that have already been made.

It is thus wholly premature for DWR to pay for further engineering development of the draft Central and Eastern Corridor designs produced by the DCA. Yet the DCA's September 2020 engineering schedule¹² shows development of a "Building Information Model," which is a 3D

¹² Delta Conveyance Design and Construction Authority, September 17, 2020 Board Meeting Packet, Agenda Item 7c, Section 7, Program Initiation Schedule, p. 41. Available at <https://www.dcdca.org/pdf/2020-09-17-DCABoardMeetingPkgVF.pdf>.

virtual model of a project with detailed specifications for project construction.¹³ For this reason, DLC objects to DWR signing Amendment #4 to the JEPA.

Thank you for your consideration of our objections and associated requests, and we look forward to your written response by September 24, 2020.

Sincerely,

/s/ Dan Whaley

Dan Whaley, Chair
Delta Legacy Communities, Inc.

/s/ Dave Stirling

Dave Stirling, Vice Chair
Delta Legacy Communities, Inc.

cc:

Ken Bogdan, Senior Staff Counsel, Office of Chief Counsel, Department of Water Resources

Carrie Buckman, Environmental Program Manager for Delta Conveyance, Department of Water Resources

Kathryn Mallon, Executive Director, Delta Conveyance Design and Construction Authority
Delta Conveyance Design and Construction Authority Board

Governor Gavin Newsom

The Honorable Wade Crowfoot, Secretary of Natural Resources

Thomas Gibson, Deputy Secretary and Special Counsel for Water, Natural Resources Agency

Senator Bill Dodd

Senator Kathleen Galgiani

Senator Richard Pan, MD

Assemblymember Jim Frazier, Jr.

Assemblymember Susan Eggman Talamantes

Assemblymember James Gallagher

Congressmember John Garamendi

¹³ See, for example, AutoDesk, Designing and Building Better With BIM. Available at <https://www.autodesk.com/solutions/bim>.

Congressmember Jerry McNerney
Don Nottoli, Sacramento County Supervisor
Delta Counties Coalition
Ryan Hernandez, Manager, Contra Costa County Water District
Mark Gilkey, General Manager, Tulare Lake Basin Water Storage District
Scott Sills, General Manager, Empire-Westside Irrigation District
Anthea Hansen, General Manager, Oak Flat Water District
Doug Verboon, Chairman, County of Kings
Osha Meserve, Local Agencies of the North Delta Counsel
Dante Nomellini, Sr., Central Delta Water Agency Counsel
John Herrick, South Delta Water Agency Counsel
Kelley Taber, Somach Simmons and Dunn
Michael Brodsky, Save the California Delta Alliance
Michael Jackson, California Sportfishing Protection Alliance Counsel
Glen Spain, Pacific Coast Federation of Fishermen's Association Counsel
Doug Obegi, Natural Resources Defense Council Counsel