



## CENTRAL DELTA WATER AGENCY

235 East Weber Avenue • P.O. Box 1461 • Stockton, CA 95201  
Phone 209/465-5883 • Fax 209/465-3956

### DIRECTORS

*George Biagi, Jr.  
Rudy Mussi  
Edward Zuckerman*

### COUNSEL

*Dante John Nomellini  
Dante John Nomellini, Jr.*

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**Via Email to [cwc@water.ca.gov](mailto:cwc@water.ca.gov);**  
**[ssims@water.ca.gov](mailto:ssims@water.ca.gov); and**  
**[rballant@water.ca.gov](mailto:rballant@water.ca.gov)**

California Water Commission  
1416 Ninth Street  
P.O. Box 942836  
Sacramento, CA 94236-0001

Re: California Water Commission Meeting October 19, 2011, Agenda Items 11-35—Resolutions of Necessity.

Dear Chairperson Saracino and Commission Members:

The Central Delta Water Agency (“CDWA”) is hereby memorializing some of the concerns it raised orally at your September 21, 2011 meeting on this topic and which it plans to raise at the October 19, 2011 meeting should it be afforded the opportunity to do so.

An outline of these concerns is as follows:

- Resolutions of Necessity at this Time are Premature.
  - At this Time No One Knows Where DWR Will Ultimately Perform its Geotechnical Activities, Not Even DWR.
  - Further CEQA Analysis is Required.
  - It Still Remains a Mystery as to Precisely What Activities DWR Wants Permission to Perform.
  - DWR Has Failed to Demonstrate that the “Project” is Authorized and Funded.
  - DWR’s Activities Constitute Unreasonable Search and Seizures that Require At Least Administrative Search Warrants Which DWR has Not Yet Obtained.
- Some Specific Requested Modifications to the Draft Resolution of Necessity.
  - The Duration of the Temporary or Permanent Easements Needs to be Adjusted to Sync with the Mitigated Negative Declaration.
  - The Description of Activities in the Proposed Easement Needs to be Considerably More Specific.

- If Permanent Easements are Somehow Allowed, the Nature of Those Easements Needs to be Fully Described.
- DWR Should Be Required to Hold the Landowners Harmless From Any Hazardous Wastes Discoveries.
- DWR Should be Required to Test Drinking Water Wells Before and After its Activities at the Request of the Landowner.

1. **Resolutions of Necessity at this Time are Premature.**

There are numerous reasons why it would be premature, and fundamentally unfair, not to mention unconstitutional, for the Water Commission to issue any Resolutions of Necessity at its October 19, 2011 meeting. Some of those reasons are discussed below.

a. **At this Time No One Knows Where DWR Will Ultimately Perform its Geotechnical Activities, Not Even DWR.**

One of the central findings the Water Commission must make to issue a Resolution of Necessity is the determination that “[t]he property described in the resolution is necessary for the proposed project.” (Code Civ. Proc., § 1245.230, subd. (c)(3).) At this time, the Water Commission cannot make that determination. The reason is simple: no one knows whether the property is necessary for the proposed project, not even DWR.

The eminent domain procedures contemplate the need to conduct so-called “precondemnation” surveys wherein property can be evaluated in order to determine what part of the property, if any, is “necessary” and must be condemned.<sup>1</sup>

DWR’s submittals for the October 19, 2011, in particular it’s “Geotechnical Clearance Process and Protocols” and “Environmental Clearance Protocols,” make it crystal clear that DWR *still needs to conduct various “precondemnation” surveys* before it can determine where any particular CPT or drill hole can and must occur.

For example, as DWR explains in section “4” of its “Geotechnical Clearance Process and Protocols,” the CPT and drill hole sites set forth in the proposed Resolutions of Necessity are merely tentative sites that can and will be moved as necessary:

“A survey checklist and consultation with landowner will be used to verify access to the drilling location and safety issues such as utilities, underground and

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<sup>1</sup> See Code of Civil Procedure section 1245.010 which provides: “Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain 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.”

overhead, access conditions, cultural locations, potential problems, and about the daily traffic (farm equipment, public access, easement access etc.). *Modifications to the exploration location may be required based on the survey. The new location will require the same survey. If a suitable site cannot be found, drilling cannot occur at this site.*

*If there are environmental or cultural issues with the location of the potential boring, then modifications to the location are made in the field during the survey. Once all survey staff (and landowner where required) has agreed upon a location (this is also based on the geotechnical site survey), then the survey for the boring location is completed. The exploration area must be marked for USA clearances. An alternative drill location near the primary location will be planned in case USA determines that there are utilities close to the primary exploration location. The alternative location should be within the area marked for USA clearances.”*

DWR is jumping the gun by seeking Resolutions of Necessity for sites that it undisputedly has not yet determined are feasible much less necessary. Before DWR burdens the Water Commission and landowners with Resolutions of Necessity and threats of condemnation it must first conduct the various surveys necessary to determine whether the CPT and drill holes can and will be conducted.

At the present time, no one, not even DWR can assert in good faith that any of the particular CPT and drill hole sites in the Resolutions of Necessity are “necessary for the proposed project.” The reality is that, after the appropriate surveys are performed, the sites in those resolutions may very well be entirely unnecessary. Indeed, DWR has already changed the locations of several of them after further discussions with various landowners.

If DWR cannot obtain voluntary permission from the landowners to perform the various surveys it needs to perform in order to verify that any particular site is feasible and ultimately necessary, then as noted above, the Code of Civil Procedure provides the precise mechanism for DWR to obtain a court order to authorize such (“precondemnation”) surveys.<sup>2</sup>

**b. Further CEQA Analysis is Required.**

It is undisputed that the Water Commission is a “responsible agency” for CEQA purposes. As CEQA Guidelines section 15096, subdivision (a), explains:

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<sup>2</sup> That is in fact exactly what DWR is doing for other parcels, but strangely not for the instant parcels. (See excerpt from DWR’s “Petition for Order Permitting Entry and Investigation of Real Property . . . ,” filed in Sacramento Superior Court on July 29, 2011, attached hereto as Exhibit “A.”)

“A responsible agency complies with CEQA by considering the EIR or negative declaration prepared by the lead agency *and by reaching its own conclusions on whether and how to approve the project involved.*”

(Emphasis added.)

One of the major conclusions the Water Commission must make is whether any subsequent or supplemental CEQA analysis is required prior to its approval of the project. In this case, it is clear that such analysis is indeed required.

When DWR prepared its Mitigation Negative Declaration for the Geotechnical Activities, the closest it came to the proposed CPT and drill hole sites was many *miles* away. The best DWR claimed it could do was place some tiny dots on a very zoomed-out aerial map. (A copy of that map is attached hereto as Exhibit “B.”)

In response to the CDWA’s comment on that Mitigated Negative Declaration “that the level of detail regarding the proposed exploration sites is unacceptable,” DWR responded as follows:

“At this time, alternatives and actions are still being considered by the parties developing the BDCP *and it is unnecessary and speculative for DWR to include additional details as to the nature and location of any proposed intake structure and tunnels* for alternative options of any water conveyance facilities associated with the BDCP. DWR has not defined specific locations because (1) DWR does not have access to Temporary Entrance Permits (TEPs) for all properties within the project, and (2) locations are estimated to allow DWR to move those locations that have potential to have significant impacts on the environment. DWR has included a map in its Initial Study (Figure 1) of the proposed exploration area and has further outlined the over-water locations under ‘Project Activities.’”

While precise locations were deemed “unnecessary and speculative” at the time of the Mitigated Negative Declaration, i.e., last September (2010), DWR now has those locations defined with a high degree of precision. Accordingly, the Water Commission, “in reaching its own conclusions on whether and how to approve the project involved” cannot rely on that information being unnecessary or speculative, since, at this stage, the precise locations are necessary for the Resolution of Necessity findings and also readily available.

At a minimum, the precise locations for the geotechnical activities constitute “new information of substantial importance” within the meaning of CEQA Guidelines section 15162, subdivision (a)(3), thereby requiring subsequent or supplemental CEQA analysis. Section 15162, subdivision (a)(3), provides:

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“New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.”

Essentially all of the foregoing subsections are applicable to the availability of new information that pinpoints the proposed locations of the geotechnical activity sites. Now, for the first time, the entire range of potential environmental impacts from those locations can be meaningfully and accurately assessed and specific mitigation measures to address such impacts, which would be deemed speculative and, hence, infeasible, when no specific location was provided, are now potentially feasible.

Moreover, the Mitigated Negative Declaration identified the following and potentially significant impacts that required mitigation measures to bring them to a level of insignificance:

“[The project would h]ave a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the CDFG, FWS, or NMFS[.]” (MND, p. 32.)

“[The project would i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites [.]” (MND, p. 32.)

“[T]he project ha[s] the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a

fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory []." (MND, p. 102.)

When the Water Commission considers the Mitigated Negative Declaration and "reach[es] its own conclusions on whether and how to approve the project involved," it must comply with its paramount CEQA duty in Public Resources Code section 21002.1, subdivision (b), which provides:

"Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so."

Since it is now feasible to meaningfully examine the potential environmental impacts associated with the pinpointed geotechnical site locations and access roads, etc., the Water Commission must perform that analysis to enable it to meaningfully mitigate or avoid any such impacts "whenever it is feasible to do so." DWR's prior defense that site-specific mitigation measures are "unnecessary" and "too speculative" to develop has no place in the instant setting.

For these reasons, the Water Commission must refrain from approving any Resolutions of Necessity until it has duly performed the foregoing subsequent or supplemental site-specific analysis.

**c. It Still Remains a Mystery as to Precisely What Activities DWR Wants Permission to Perform.**

While DWR has provided additional information in terms of its various protocols for its preconstruction and geotechnical activities, that information is entirely too general. DWR assured participants as well as the Judge in the "Temporary Entry Proceedings" that it had protocols which spelled out in detail exactly what would occur on the properties, including matters such as the following:

- precisely what DWR would be testing the extracted soils for that it sends to the laboratories;
- what steps DWR would take to secure the drill holes from potential artesian conditions when it leaves the drill holes open and unsealed overnight and over the weekends;
- precisely how DWR will so-called "seal" the drills holes when it is finished;
- the manner in which DWR will initiate the first 15 feet or so of a boring via a hand auger to avoid damaging underground utilities, etc.

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DWR agreed at the September 17, 2011 Water Commission meeting that there indeed “should not be any mystery” as far as what DWR will be doing on the landowners’ property. Unfortunately, based on DWR’s submission of information thus far, there is still considerable mystery and uncertainty.

The same is true with the environmental protocols. In DWR’s so-called “Environmental Clearance Protocols” DWR simply makes very general statements such as the following:

“An Environmental Scientist will conduct environmental field surveys at the geotechnical exploration locations as well as ingress and egress from those locations.” (p. 1)

“Each geotechnical location exploration location will be subject to intensive field survey before geotechnical activities begin in order to avoid any potential archaeological or cultural resources.” (p. 2.)

The important question which continues to be a complete mystery is, “What do those ‘environmental’ and ‘intensive’ archaeological and cultural ‘field surveys’ entail?”

While this lack of detail is unacceptable on many fronts, including fundamental fairness, it is also legally inadequate in the instant context where the Water Commission must make the following findings to support the issuance of Resolution of Necessity:

“(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the proposed project.” (Code Civ. Proc., § 1245.230, subd. (c).)

All of those findings require a clear understanding of precisely what DWR allegedly needs the easements to perform. Unfortunately, such a understanding remains entirely lacking at this stage.

Accordingly, the Water Commission should require DWR to provide as much detail as possible on precisely what it allegedly needs to perform including in particular all of the available protocols it will be following including the precise protocols it will be following for each of the specific environmental, archaeological, cultural and any other surveys (e.g., exactly what will those surveys entail, how many people, what types of equipment and or vehicles, where will the people be traveling or walking, will they be able to perform them without leaving the four corners of condemned easements, will they be taking soil or vegetation or species samples, etc.?).

As a final example of the unfair lack of disclosure of what DWR will be doing on the property if it obtains Resolutions of Necessity is DWR's reference to a "Phase 1 site assessment" which DWR contends will be performed on the properties. On page 2 of its "Environmental Clearance Protocols" DWR states:

"Phase 1 site assessment, which may include a records search and aerial mapping review, will be conducted to identify pre-existing site conditions on the property. This may include a property search through Assessor Parcel Maps, discussions with the Agricultural Commissioner and property owners, and a survey of the property from close proximity to the property from public roads."

While DWR states that that assessment "may include," it is not at all clear what else "may be included." For example, in DWR's Temporary Entry Permits, DWR elaborates in more detail what such an assessment "may *also*" include. The following is how DWR describes such an assessment in those permits:

"The purpose of the Phase 1 Environmental Site Assessment is to evaluate the study area for potential environmental hazards or degradation caused by the release of hazardous materials. The study area can consist of all parcels and adjacent properties within and outside the study area, including access roads and staging areas. This investigation will include the review of historic land use and land title records, federal and state regulatory agency environmental databases, consultation with local environmental health officials, and communication with the current land owners or operators.

Phase 1 Environmental Site Assessment will include entering the Property to perform site reconnaissance in accordance with the American Society of Testing Materials (ASTM), Standard Practice for Environmental Site Assessment; Phase 1 Environmental Site Assessment Process Designation 1527-05 and newly adopted federal regulations pursuant to 40 Code of Federal Regulation, Part 312 – Standards and Practices for all Appropriate Inquires. Site assessment will include the use of a 3/4 ton pickup or a kayak or canoe where appropriate, and will include walking the Property, making visual observations, and documenting visual observations and recording locations of "recognized environmental conditions" using GPS, digital photography, and tape measures. Should it be determined that the collection of samples are necessary, a hand-auger, three (3) inches in diameter will be used to auger to a maximum soil depth of fifteen (15) feet. A shovel will be used for surface work and replacement of soil extracted from the collection of samples. Any disturbance of property soils will be minor and will be returned to pre-survey conditions to the best extent possible. Whenever possible, a predetermined sampling location will be identified prior to taking samples.

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Site visits will occur only during daylight hours, most likely between the hours of 8:00 a.m. to 7:00 p.m. and will require from one (1) to three (3) staff persons on site. Visits may last up to a day and a half in duration. If the Property is large in size, multiple visits may be required, but no more than five (5) site visits will be required for Phase 1 Environmental Site Assessment activities.”

(TEP, pp. 5-6.)

Needless to say that is quite a mouthful. Again, it absolutely should not be, but very much is, a mystery as to what exactly DWR is seeking permission from the Water Commission to perform. And that lack of clarity is as unfair as it is unlawful and unconstitutional.

**d. DWR Has Failed to Demonstrate that the “Project” is Authorized and Funded.**

When DWR is unable to purchase property through voluntary agreement with the landowner, Water Code section 11580 allows DWR to exercise the power of eminent domain only “if the project for which the property is being acquired has been authorized and funds are available therefor.” That same requirement is also set forth in the nearly identical provision of Water Code section 250 which provides: “The department shall not commence any such proceeding in eminent domain unless the project for which the property is being acquired has been authorized and funds are available therefor.”

DWR seemingly contends that the “project” which must be authorized and funded is the Geotechnical Study itself. However, DWR has not cited to anything in the Water Code nor elsewhere in the legislative history of section 11580 or 250, or otherwise, that would in any manner suggest that the “project” the Legislature was referring to was a “study” to decide whether to develop a “project.”

For example, section 11580 is located in Division 6, Part 3 of the Water Code entitled, the “Central Valley Project Act.” For the purposes of that part, the term “project” means “Central Valley Project.” (Wat. Code, § 11104.) Accordingly, when the Legislature requires that a “project” be authorized and funded before the commencement of eminent domain proceedings it appears, at a minimum, reasonable to infer that what the Legislature was contemplating was the need to condemn property for some type of physical facility or other feature that could be deemed a part of the Central Valley Project. To equate “project” with a “study to decide whether to build a project” is a stretch that has no basis nor support in the law.

Eminent Domain is a draconian power that the Legislature went out of its way with respect to DWR to constrain. Since the construction of the various intakes, forebays, canals, tunnels, etc. which DWR is conducting the instant studies to perform have clearly not been authorized by the Legislature nor funded, DWR’s attempt to utilize condemnation in connection with those studies is contrary to law. DWR has already conducted numerous borings by way of

voluntary permission of various landowners. DWR should have more than enough information at this point to meaningfully evaluate the feasibility of such facilities.

In the event the word “project” in sections 11580 and 250 could somehow be deemed to include non-physical facilities or components of the Central Valley Project, the question remains what is the “project” at issue herein? DWR’s attempt to define the “geotechnical” portion of the development of the Bay Delta Conservation Plan (BDCP) as the “project” further misses the mark because doing so involves yet another unwarranted departure from what the Legislature could be fairly deemed to have meant by its use of the word “project.” If we can legally go down this road, then, at a minimum, the “project” must not be anything less than the *entire* development of the BDCP. To split up that development into the geotechnical portion, the non-geotechnical portion, the public outreach portion, the habitat development portion, etc., is simply unreasonable.

Therefore, even if the “project” could be narrowly defined as “the development of the BDCP,” thus far, DWR has come nowhere close to meaningfully demonstrating that such development has been duly authorized by the Legislature and is fully funded. With respect to the funding requirement, DWR’s provision of numerous funding agreements in support of the Water Commission’s October 19, 2011 hearing simply makes one scratch one’s head. A quick review of those agreements reveals that most if not all of them seemingly expire in 2011. For example, one of the agreements provides:

“This Agreement will . . . remain in effect until the DHCCP Planning Phase is completed *or until December 31, 2011, whichever comes first*, unless extended by written amendment.”

(See the 2009 Agreement with Alameda County Water District, p. 5, emphasis added.) Has that, and all other similar agreements, been so amended beyond December 31, 2011? DWR’s submittal does not appear to provide that answer.

Before any Resolutions of Necessity are issued, DWR must connect the various dots and make it clear to the landowners, the public and most importantly the Water Commission, that the “project” is indeed duly authorized and fully funded. Thus far, it has entirely failed to do so.

Lastly, even if the definition of “project” could be further distorted to only include the geotechnical studies described in the Mitigated Negative Declaration and, hence, can exclude any other geotechnical studies or non-geotechnical studies in support of the development of the BDCP, DWR has still failed to connect the dots and demonstrate that such a project is both authorized and funded. Once again, with respect to the funding requirement, providing copies of funding agreements documents that expire in December 31, 2011, and otherwise entirely failing to explain the anticipated budget for the “project” and how those soon to be expiring agreements somehow adequately cover that budget, fall far short of making that demonstration.

e. **DWR's Activities Constitute Unreasonable Search and Seizures that Require At Least Administrative Search Warrants Which DWR has Not Yet Obtained.**

DWR's invasive CPT's and drill holes, including the seizure and removal of soils from the various sites, constitutes an unreasonable search and seizure that requires an administrative, if not a criminal, search warrant.

In the Temporary Entry Permit proceedings, the Court addressed this issue in its November 19, 2010 minute order. There the Court noted the "open fields" concept with respect to the Fourth Amendment of the United States Constitution, and the decision of the United States Supreme Court, in Olive v. United States (1984) 466 U.S. 170, at 176, which held that "open fields" were not protected by the Fourth Amendment since a person does not have a reasonable expectation of privacy in an open field. Testing below the surface, however, goes far beyond what is visible in an open field, and infringes into a protected area in which there is indeed a reasonable expectation of privacy and a reasonable expectation that the government will not enter upon, drill, and test soils beneath the property, and seize the soils obtained in such drilling.

Similarly, Article I, section 13 of the California Constitution provides protection "which may on occasion afford 'a broader security against unreasonable searches and seizures than that required by the United States Constitution [citation]. . . .' [citation]." Betchart v. Department of Fish and Game (1984) 158 Cal.App.3d 1104, 1107. In Betchart, the Court quoted from People v. Bradley (1969) 1 Cal.3d 80, 84, noting that under California law a warrantless search is subjected to a balancing test: "whether the person has established a reasonable expectation of privacy, and if so, whether that expectation has been violated by unreasonable governmental intrusion [citation]." Here, the property owners most certainly have a reasonable expectation of privacy in what lies below the surface of their open fields, just as they do in their homes and buildings, and, as discussed below, DWR's intrusion below the surface is unreasonable and unlawful in the absence of at least a duly acquired administrative search warrant.

The Court in the Temporary Entry Permit proceeding already admonished DWR against such intrusions, stating the following in its November 19, 2010 Minute Order:

"However, the court finds that Fourth Amendment considerations and the nature of minimal intrusion [contemplated by the "precondemnation entry procedures"] strongly suggest that the court would include in any order a prohibition against the State entering into any inhabited residence or within 50 to 100 feet of such a residence, and a prohibition against entering any closed structure on the premises unless prior written approval of the owner and/or possessor is obtained. *The court is also for similar reason dubious about a survey of "toxic" materials since it is specifically directed at finding material that might subject the owner to criminal or civil prosecution or might impose a stigma on the property.*" (Emphasis added.)

As stated in Los Angeles Chemical Co. v. Superior Court (1990) 226 6 Cal. App. 3d 703, quoting from Michigan v. Clifford (1984) 464 U.S. 287, 291-292:

“ “[A]dministrative searches generally require warrants. [Citations] . . . Except in certain carefully defined classes of cases, the nonconsensual entry and search of property are governed by the warrant requirement of the Fourth and Fourteenth Amendments.’ [Citations omitted].

‘If a warrant is necessary, the object of the search determines the type of warrant required. *If the primary object is [for administrative purpose], an administrative warrant will suffice. . . . [para.]* If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched (*Id., at p. 294, fn. omitted.*)’ ” (Italics added).

At the very least, a search and a seizure is being conducted for an administrative purpose, and an administrative warrant is required in accordance with Code of Civil Procedure section 1822.50, et seq. That warrant must be obtained from a judge and “issued upon cause, unless some other provision of state or federal law makes another standard applicable.” (Code Civ. Proc., § 1822.51.) As Code of Civil Procedure section 1822.52 explains:

“Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle.”

Since DWR has not yet obtained an administrative warrant it remains to be seen whether it can successfully do so. Until it does, it is premature for the Water Commission to pass any Resolutions of Necessity which authorize DWR’s requested activities. If a judge refuses to grant DWR permission to perform its activities then by definition those activities are not necessary and, hence, cannot be the lawful subject of Resolutions of Necessity.

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2. **Some Specific Requested Modifications to the Draft Resolution of Necessity.**

In the event DWR and the Water Commission take the time to properly address the forgoing matters, and it comes time to properly consider the issuance of Resolutions of Necessity, there are several modifications to the draft Resolutions of Necessity which should be implemented. Some of the major ones are discussed below.

a. **The Duration of the Temporary or Permanent Easements Needs to be Adjusted to Sync with the Mitigated Negative Declaration.**

The Resolution of Necessity should make it clear that the temporary and so-called “permanent” easements must expire and terminate on December 31, 2012 because that is as far as DWR’s Mitigated Negative Declaration covered for these activities.

In this regard see the following excerpts from the Mitigated Negative Declaration:

“The Department of Water Resources is planning to conduct overwater and land geotechnical borings, perform cone penetration tests (CPT) and dig approximately 30 small test pits in order to test soils in the Sacramento-San Joaquin Delta between August 1, 2010 and December 31, 2012.” (p. 2, emphasis added.)

“The Department of Water Resources (DWR) plans to do further geotechnical information gathering in the Delta. The work includes overwater and land geotechnical borings, cone penetration tests (CPT) and small test pits in order to investigate soils in the Sacramento-San Joaquin Delta between 2010 and 2012.” (p. ii., emphasis added.)

b. **The Description of Activities in the Proposed Easement Needs to be Considerably More Specific.**

The Draft easement states that DWR may perform “any other operations necessary and appurtenant to the drilling . . . .” That is far too broad and unspecific. As discussed above, it is currently a mystery as to precisely what DWR intends to do on the property. However, once that is clarified, the easements should make reference to a detailed description of those activities and perhaps include that list as an exhibit or else incorporate it by reference. In no event should DWR be allowed to condemn open-ended, broad and unspecific easements. It can only condemn what is constitutionally “necessary.”

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**c. If Permanent Easements are Somehow Allowed, the Nature of Those Easements Needs to be Fully Described.**

While it makes no sense how the Water Commission could reasonably and legally determine that a permanent easement “is necessary for the proposed project” (Code Civ. Proc., § 1245.230, subd. (c)(3)) when DWR has clearly indicated that a permanent easement is *not* necessary for the proposed project, and when the Judge in the Temporary Entry Permit litigation clearly did *not* require DWR to condemn anything it does not need, to the extent the Water Commission nevertheless insists on condemning a permanent easement, the nature of that permanent easement should be clearly and fully described.

The Draft Resolution of Necessity (“RON”) current reads as follows:

“A permanent non-exclusive easement for drilling purposes, over, upon, under and through the following parcel . . . .”

That description is woefully inadequate and leaves way too much to be desired. DWR should be required to explain precisely what that easement can be used for and what the landowner can or cannot do within the boundaries of that easement. For example, some of the questions DWR must clarify are the following:

- Does the easement include the permanent right for DWR to access the easement? Or does DWR’s right to access the easement entirely terminate after the accompanying temporary easements terminate?
- Can the landowner do whatever it wants within that easement after the temporary easements expire? For example, can the landowner build over the top of it, dig within the easement, entirely remove the bentonite “seal,” etc.?
- Similarly, and in other words, after the temporary easements expire, what, if anything, can DWR do within the permanent easement and what if anything can the landowner *not* do within that easement?

If DWR is agreeable to quit-claiming the easement after the temporary easements expire, then that agreement should be inserted into the easement so everyone is aware of such an agreement. Even if DWR ultimately quit-claims the easement after two years, there will still be a cloud over the property during that two years and, thus, the foregoing clarifications will help everyone, including prospective purchasers of the property, understand precisely what that cloud entails and prohibits, etc.

**d. DWR Should Be Required to Hold the Landowners Harmless From Any Hazardous Wastes Discoveries.**

It is nothing short of amazing that DWR can force its way onto a landowner’s land against the landowner’s will, dig up soil from that land, conduct laboratory testing on that soil,

report potential contaminated soil to the authorities, and then simply walk away and leave the landowner with a potential multi-million dollar cleanup liability. Even if all of the foregoing issues regarding the gross prematurity of the activities could be cured, this would still be manifestly unfair and unreasonable.

If these borings are so important to the state and so "necessary" that the draconian process of condemnation is required to obtain them, than at a minimum, the Resolution of Necessity should require DWR to hold the landowner harmless from any hazardous waste liability resulting from any discoveries of such waste in connection with its activities. That is the absolute least DWR could do.

Perhaps such a discovery is extremely rare in DWR's eyes? If so, then DWR should readily assume that liability. The consequences of such a discovery are simply far too devastating to subject the landowner to that liability.

The RON should therefore include a provision such as the following:

"DWR shall agree to indemnify and hold harmless the landowner from any liability arising out of the DWR's operations in connection with the condemned easements, including, but not limited to, any cleanup or other costs associated with the discovery of any hazardous substances in the course of those operations. DWR further agrees to assume responsibility for any damages caused by reason of those operations; and DWR will, at its option, either repair or pay for such damages. For the purposes of this paragraph, the term "hazardous substances" shall mean any substance which at any time shall be listed as "hazardous" or "toxic" in the regulations implementing the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC §§6901, et seq.), or other federal or State law, or any other substance, chemical, material or waste product whose presence, nature or quality is potentially injurious to the public health, safety, welfare, the environment or the property."

e. **DWR Should be Required to Test Drinking Water Wells Before and After its Activities at the Request of the Landowner.**

Another requirement which equity and good conscience would mandate would be a requirement that DWR conduct testing of any nearby domestic wells to ensure and confirm that its operations have not caused any contamination of such wells. Again, if gathering the geotechnical information is so important to DWR to result to condemnation, then requiring DWR to perform some basic groundwater testing at the request of the landowner is the least DWR could do.

///

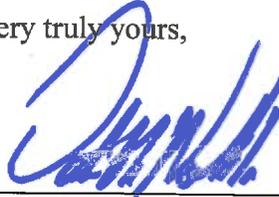
The RON should therefore include a provision such as the following:

At the request of the landowner, DWR shall perform, at DWR's sole expense, up to three (3) uniform, standard drinking well tests for each drinking well located on the landowner's property with the first tests being performed prior to the initiation of the geotechnical activities and the others approximately 2 months and 12 months, respectively, after the completion of those activities, or as otherwise agreed to by the landowner.

3. **Conclusion.**

For the foregoing reasons it is respectfully requested that the Water Commission *not* issue any Resolutions of Necessity at its October 19, 2011 meeting nor at any time prior to correction of the above-described deficiencies.

Very truly yours,



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Dante John Nomellini, Jr.

Enclosures (Exhibits "A" & "B")

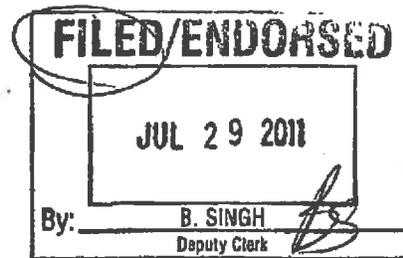
# **Exhibit “A”**

(to Central Delta Water Agency’s Comments re “California Water Commission Meeting October 19, 2011, Agenda Items 11-35–Resolutions of Necessity.”)

54

ORIGINAL

1 KAMALA D. HARRIS  
 Attorney General of California  
 2 ALBERTO L. GONZÁLEZ  
 Supervising Deputy Attorney General  
 3 JAMES C. PHILLIPS, State Bar No. 121848  
 Deputy Attorney General  
 4 Telephone: (916) 322-5473  
 Email: James.Phillips@doj.ca.gov  
 5 JOHN M. FESER JR., State Bar No. 209736  
 Deputy Attorney General  
 6 Telephone: (916) 324-5118  
 Email: John.Feser@doj.ca.gov  
 7 1300 I Street, Suite 125  
 P.O. Box 944255  
 8 Sacramento, CA 94244-2550  
 Fax: (916) 322-8288  
 9 *Attorneys for State of California, by and through the  
 Department of Water Resources*



34-2011-00108160

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 COUNTY OF SACRAMENTO

14 **State of California, by and through the**  
**Department of Water Resources,**  
 15  
 16 **Petitioner,**  
 17  
 18 **v.**  
 19 **Christine M. Huttinger, an unmarried**  
**woman, and Does 1 to 10, inclusive,**  
 20 **Respondents.**

Case No.  
**PETITION FOR ORDER PERMITTING**  
**ENTRY AND INVESTIGATION OF**  
**REAL PROPERTY; MEMORANDUM**  
**OF POINTS AND AUTHORITIES**  
 [Code of Civ. Proc., § 1245.010 et seq.]  
 Assessor's Parcel No.: 156-0010-073-0000  
**"NO HEARING REQUESTED"**

22 TO THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO:

23 The State of California, by and through the Department of Water Resources (DWR),  
 24 respectfully petitions for an order permitting entry and investigation of real properties pursuant to  
 25 Code of Civil Procedure sections 1245.010, et seq. (entry petition), and alleges as follows:  
 26  
 27  
 28





1                                   **ATTACHMENT A – PRELIMINARY GEOLOGICAL ACTIVITIES**

2           Pursuant to Code of Civil Procedure sections 1245.010 et seq., the State of California, by  
3 and through the Department of Water Resources (DWR), shall be permitted to conduct the  
4 following activities:

5   **1.   Identification Of The Location Of Soil Borings And Cone Penetrometer Testing Sites**

6           Preliminary geological activities will consist of entry by geologists, environmental  
7 scientists, cultural scientists, appraisers and/or utilities personnel to identify the exact location of  
8 soil borings and cone penetrometer testing (CPT) sites. DWR requires soil borings and CPT to  
9 determine the suitability of the geological conditions of each property being studied for various  
10 alternative alignment locations for a water conveyance project in the Delta, which includes  
11 surface canal and underground pipeline alternatives. DWR requires access to the subject  
12 properties for identification of the exact locations of soil borings and CPT to obtain easements by  
13 eminent domain. DWR must acquire such easements to make soil borings and CPT it needs for  
14 the necessary suitability studies.

15   **2.   Activities Allowed**

16           Activities allowed for identification of soil borings and CPT sites include visual  
17 observations of each parcel, environmental and cultural surveys, consultation with environmental  
18 and cultural scientists, report and consultation with the Underground Service Alert, and  
19 identification of all known underground utilities. Each owner may meet with and accompany  
20 DWR personnel regarding the location of soil boring and CPT sites on his/her/their parcel.

21   **3.   Two Days Per Parcel Allowed**

22           DWR shall be permitted to enter onto a parcel for up to two (2) days to conduct these  
23 preliminary identification activities. One day shall mean 7:00 a.m. to 7:00 p.m. on Monday  
24 through Friday.

25   **4.   Boring And CPT Sites Per Parcel**

26           Attached and incorporated hereto is a chart showing the number of boring and CPT sites  
27 allowed on each parcel and the depths of each soil boring.

28   ///

1 **5. Number Of People Allowed To Enter**

2 Up to four (4) people may enter each parcel per day. Limited, transitory access is permitted  
3 for regulatory personnel from the California Department of Fish and Game, the United States Fish  
4 and Wildlife Service, and personnel from any utilities to identify the locations of utilities.

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# **Exhibit “B”**

(to Central Delta Water Agency’s Comments re “California Water Commission Meeting October 19, 2011, Agenda Items 11-35–Resolutions of Necessity.”)

Figure 1. Proposed Exploration Area Map.

