

SILVER & WRIGHT LLP

Attorneys at Law

IRVINE

SACRAMENTO

INLAND EMPIRE

James D. Maynard

March 16, 2015

jmaynard@silverwrightlaw.com

1501 28th Street

Sacramento, CA 95816

Phone: (916) 733-3510

Fax: (916) 733-3512

VIA EMAIL & U.S. MAIL

California Department of Water Resources (DWR)

C/O Mr. Jacob McQuirk

Supervising Engineer, Bay Delta Office

P.O. Box 942836

Sacramento, California 94236

dwredbcomments@water.ca.gov

RE: EMERGENCY DROUGHT BARRIERS PROJECT, INITIAL STUDY/MITIGATED NEGATIVE DECLARATION ("IS/MND") – STATE LAW REQUIRES THAT AN ENVIRONMENTAL IMPACT REPORT ("EIR") BE PREPARED

Dear Mr. McQuirk:

I write on behalf of the Bethel Island Municipal Improvement District ("the District" or "BIMID"). Thank you for providing the District with an opportunity to comment on the Initial Study/Mitigated Negative Declaration ("IS/MND") for the Emergency Drought Barriers Project (the Project).

As you are aware, Bethel Island is immediately upstream from the proposed False River Barrier, and is one of the eight western islands crucial to preventing saltwater intrusion into the Delta, the main stem of the Sacramento River, and the main stem of the San Joaquin River. Should the False River Barrier cause, rather than prevent, saltwater intrusion into the Delta, the consequences would be felt statewide, particularly in the Delta and in Southern California which relies on the export of water from the Delta to provide water to vast numbers of Southern California residents. DWR has not sufficiently analyzed existing baseline conditions to ensure that the False River Barrier will actually prevent, rather than cause, additional saltwater intrusion.

Additionally, should installation of the False River Barrier cause a breach in one of the District's levees, the environmental impacts would be massive as Bethel Island has a relatively large population when compared with other Delta islands and reclamation districts. The inundation of Bethel Island would release large amounts of toxic contaminants into the Western and Central Delta.

Similarly, given that the Iron House Sanitary District conducts almost all of its sewage treatment operation on Jersey Island, if installation of the proposed False River barrier, including the proposed sheet and king piles, negatively impacts the levees on Jersey Island, Bethel Island's sanitary sewer

system would be unusable and the waters of the Western and Central Delta would experience a spill of raw or partially treated sewage that would greatly impact Delta water quality, both locally in the Delta and in the water exported to Southern California. "Toilet to Tap" would take on a new meaning for the residents of Southern California.

The following are the District's specific comments on the IS/MND. In reviewing the voluminous but ultimately deficient IS/MND, which attempts to describe the environmental impacts of emergency drought barriers in the Delta but which lacks appropriate analyses of basic issues such as flow velocity, water quality, and potential impacts on adjacent and upstream levee systems, the District is concerned about the technical and factual accuracy of the various analyses presented in the document.

The District **does not** support the proposed project and believes that there are a number of substantive legal provisions mandating that DWR prepare an Environmental Impact Report ("EIR") rather than a Negative Declaration to properly analyze the environmental impacts associated with the Project. Although the Governor's drought proclamation purports to waive CEQA for water supply related projects, there is some question as to whether the Executive Branch can unilaterally set aside an Act of the Legislature.

A. Global Comments

A.1 - The District reminds DWR that the proposed Project could have substantial statewide environmental impacts that include causing, rather than preventing the intrusion of saltwater into the Delta and ultimately to the water export pumps in the South Delta that supply freshwater to Southern California.

If the False River Barrier causes changed water flow patterns and the increased velocity of those flows erode and degrade levees that protect Bethel Island which, as with the Jersey and Bradford Island levees, rest on peat soil and will be severely impacted by the changes caused by the False River Barrier (specifically through increased flows in Fisherman's Cut which flows directly into Horseshoe Bend, a part of the Bethel Island levee which is already at risk of failure), the impact of such a disaster will cause the loss of life and property on islands throughout the Western and Central Delta and will cause urban decay and associated economic impacts throughout Southern California because of the lack of quality freshwater imports from Northern California. (See Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184.) Given these issues, the District contends that DWR is legally required to address these and other potential impacts in an Environmental Impact Report rather than an IS/MND.

The IS/MND also fails to adequately analyze potential economic impacts to the Bethel Island community which is a **historical legacy community** in the Delta and a community that relies heavily on boating and other water related recreational activities. (Id.; 14 Cal. Code Regs. §

15064.5; Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection (2008) 43 Cal.4th 936,949.)

The installation of the False River Barrier will cause a precipitous decline in those activities and a concomitant decline in the number of visitors to Bethel Island and the Delta precisely in those months during which DWR proposes to install the barriers. Historically, Bethel Island has always been a boating community relying on easy access to the waters of the East Bay and the return boat traffic from such excursions. Installation of the False River Barrier extends travel to the East Bay waters from Bethel Island by approximately 15 miles. Extending such trips undercuts the District's economy and property values and will lead to urban decay for both Bethel Island and Discovery Bay residents who now routinely utilize False River to access the East Bay.

- A.2 - The IS/MND does not describe, with sufficient specificity; various project components that are an integral part of the proposed project. "An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143.) For example, the IS/MND assumes that various improvements will be constructed, as part of the project, related to mitigating the impacts of the proposed barriers, but does not describe the nature of those improvements.

Moreover, a CEQA document "should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences." (14 Cal Code Regs., § 15151; see also Kings County Farm Bureau v. District of Hanford (1990) 221 Cal.App.3d 692, 712.) Here, the IS/MND improperly defers analysis of cumulative environmental impacts under CEQA because it fails to address the State's other planning efforts involving the Delta which, when taken as a whole, are certain to have serious cumulative impacts on the Delta estuary system.

- A.3 - The IS/MND does not consider potentially feasible alternatives. The issue of feasibility arises at two different points in the alternatives analysis; first in the assessment of alternatives in the CEQA analysis, and second, during the agency's later consideration of whether to approve a project. For inclusion in a CEQA document, the standard is whether the alternative is potentially feasible. By contrast, at the project approval stage, the decision-maker evaluates whether the alternatives are actually feasible.

- A.4 - CEQA does not authorize a lead agency to defer the consideration of environmental impacts or to defer the selection of mitigation measures to a later date or to rely on other governmental agencies to study and evaluate mitigation measures at a later time. The IS/MND improperly fails to consider or defers the analysis of and selection of appropriate mitigation measures for hydrology and water quality, air quality, biological resources, cultural resources,

geology and soils, greenhouse gases, land use and planning, population and housing, public services, recreation, transportation and traffic, and utilities and service systems.

A.5 - CEQA requires a lead agency to investigate the potential environmental impacts of a project. DWR has failed to gather adequate and relevant baseline data related to water flow pattern and velocity changes and has failed to adequately survey the state of existing levees close to the False River barrier including hydrographic and underwater levee surveys – in other words there is an absence of evidence to support the conclusions of the IS/MND and the proposed mitigation measures. (Sundstrom v. County of Mendocino (1988) 202 Cal.App.3rd 296, 311).

A.6 - DWR has failed to demonstrate that an EIR is not required as there are numerous fair arguments, all on the basis of substantial evidence, as demonstrated herein, and in light of the entire record as set forth in the IS/MND and in multiple comments regarding the issues raised by Delta landowners and public officials made at various public meetings over the course of the last year. For instance, the Bethel Island District Manager and the Bethel Island Board of Directors have repeatedly requested that studies be done on potential changes in water heights, flow velocities, flow patterns, and impacts on the District's levees but DWR staff has repeatedly and pointedly ignored such requests. (Pub. Res. Code. §§ 21080(d), 21082.2(d); 14 Cal. Code Regs., § 150654(f); *See also, e.g., No Oil v. City of Lost Angeles* (1974) 13 Cal.3d988, 1001.) DWR has not appropriately established existing baseline conditions as required by CEQA.

B. Section 3.2 – Agriculture and Forestry Resources

B.1 - Finding No. 3 states that the Project will have “less-than-significant” impact on Agriculture and Forestry Resources with the adoption and implementation of the mitigation measures proposed in the initial study. If the installation of the barriers changes the water quality in the Delta through increased saltwater intrusion or through the introduction of contaminants such as raw sewage or various chemicals routinely used in urbanized areas, agricultural water users throughout the Delta but specifically on Bethel Island, will be unable to use water to which landowners hold pre-1914 or riparian rights to irrigate crops and pastures or to provide water to livestock. No mitigation measures are proposed to mitigate these impacts and the limited modeling done to date does not provide an adequate baseline so impacts can be measured.

C. Section 3.3 – Air Quality

C.1 - Finding No. 3 states that the Project will have “less-than-significant” impact on Air Quality with the adoption and implementation of the mitigation measures proposed in the initial study. This finding completely ignores the fact that boats and other watercraft, many with 2-stroke or diesel engines will be forced to travel 15 additional miles in a round-trip from Bethel

Island, Discovery Bay or any other upstream harbor to take a route that does not involve passage through False River but uses Fisherman's Cut to traverse the waters of the Delta to the East Bay.

D. Section 3.4 – Biological Resources

- D.1 - Finding No. 3 states that the Project will have "less-than-significant" impact on Biological Resources with the adoption and implementation of the mitigation measures proposed in the initial study. This finding ignores the dire condition of the Delta in the current drought and the extent to which DWR is overpromising (and has historically overpromised) water deliveries to Southern California have caused severe declines in local fish populations and in migratory fish populations. The proposed Project has the potential to further eradicate both the Delta smelt and the migratory salmon through the Delta.
- D.2 - Proposed mitigation measures BIO-1 and BIO-3 are not mitigation measures at all but instead improperly defer mitigation to a later date. CEQA does not authorize a lead agency to defer the selection of mitigation to a later date or to rely on other governmental agencies to study and evaluate mitigation measures later. The IS/MND improperly defers the selection of mitigation measures in the area of Biological Resources until the start of, and during, construction. Additionally, although the Project proposes culverts at the two barriers in the North Delta, inexplicably no culvert is proposed in the False River Barrier. Finally, DWR acknowledges that installation of the barriers will lead to increased predation on Chinook and Steelhead salmonids and no mitigation measure is proposed to mitigate this impact.
- D.3 - Similarly, MM BIO-6 improperly defers a mitigation measure as DWR will "develop" a water quality plan at some point in the future. There is no evidence that DWR considered the feasibility or infeasibility of various mitigation measures or that DWR considered alternatives to the proposed and deferred mitigation measures. (Pub. Res. Code § 21081; 14 Cal. Code Regs., § 15091.)

E. Section 3.5 – Cultural Resources

- E.1 - Finding No. 3 states that the Project will have "less-than-significant" impact on Cultural Resources with the adoption and implementation of the mitigation measures proposed in the initial study despite the fact that Bethel Island is a historic Delta Legacy Community and the Project as proposed has the potential to inundate the District through levee breaches caused by the installation of the False River Barrier.
- E.2 - Although Bethel Island is a historic Delta Legacy Community the IS/MND completely fails to account for impacts to Bethel Island caused by the installation of the False River Barrier. Bethel Island is at the center of the Delta and will be most impacted by changes to historic flow patterns caused by the drought barriers. Bethel Island is likely, therefore, to experience

levee failure caused by high water not just in the winter months but, with the installation of the barriers, the District's levees will be under added pressure during the summer months as well. Additional months of high water conditions will increase seepage through the levees and will not provide the levees with sufficient time to dry out and stabilize before the next high water/flood season arrives and will impede imperative regular levee maintenance on the levee during this critical period. If the barriers are installed in consecutive years, this increases the chance of levee failure as the longer the District's levees are under such pressure and, not able to be properly maintained the greater the chance of catastrophic levee failure.

F. Section 3.6 – Geology and Soils

- F.1 - Finding No. 2 states that the Project will have "less-than-significant" impact on geology and soils. As described in comment E.2, this finding is simply incorrect. Given that Bethel Island's levees, like those on Bradford and Jersey Islands rest on peat, the increased water pressure is likely to increase seepage and require the District to increase dewatering operations, which in turn will have an impact on the District's residents and budget.

- F.2 - The IS/MND also states that the "levees on Bradford and Jersey Islands, adjacent to the proposed West False River barrier, have been strengthened in recent years and have sufficient freeboard for anticipated flood elevations" but ignores Bethel Island's levees which are immediately upstream of the False River Barrier and which will experience the same anticipated flood conditions. At a minimum, DWR must ensure that hydrographic and underwater surveys of the Bethel Island levees are completed as part of an Environmental Impact Report so that Geology and Soils, and any impacts thereto, can be properly assessed. It is likely that, should such a report be completed, feasible mitigation measures would include the strengthening of the Bethel Island levees as was done on both Bradford and Jersey Islands.

G. Section 3.7 – Greenhouse Gas Emissions

- G.1 - Finding No. 3 states that the Project will have "less-than-significant" impact on Greenhouse Gas Emissions ("GHG") with the adoption and implementation of the mitigation measures proposed in the initial study. Should Bethel Island or Jersey Island be inundated and both salinity and the contaminants discussed in Section H, below, intrude into the Central and South Delta, the water supply for most of California would be impacted. While the GHG impacts during construction may be negligible, the effect of having to import water via tanker truck, tanker trains, or boats will have a significant environmental impact should saltwater / contaminant intrusion into the South Delta be caused by, rather than ameliorated by, the barriers because of the inundation of Jersey or Bethel Island.

H. Section 3.8 – Hazards and Hazardous Materials

- H.1 - Finding No. 2 states that the Project will have “less-than-significant” impact on hazards and hazardous materials. Should the levees that are on mostly peat foundations, especially those on Jersey and Bethel Islands, be breached and the islands inundated, raw or partially treated sewage would immediately contaminate the Western, Central and South Delta.
- H.2 - Similarly, because Bethel Island has not flooded since 1926 and is the most heavily urbanized island in the Delta, the amount of contaminants should the Bethel Island levees breach would also seriously contaminate Delta waters and immediately exceed State and Federal water quality limits for various constituents such as benzenes, phenols, arsenic, chromium, selenium, mercury, toluene, trichlorofluoromethane, trihalomethanes, bromates, and other constituents of concern to both State and Federal regulatory agencies because they impact human health.
- H.3 - A vitally important question that needs to be answered is, does DWR have contingency plans in place should either the Jersey or Bethel levees breach due to any of the factors listed in the District’s comments such as but not limited to increased year-round water pressure on the levees, changed flow patterns and increased velocity, and thus inundate either island.

I. Section 3.9 – Hydrology and Water Quality (Water Supply)

- I.1 - Finding No. 3 states that the Project will have “less-than-significant” impact on Hydrology and Water Quality with the adoption and implementation of the mitigation measures proposed in the Initial Study. Given that the whole purpose of the barriers is to alter hydrology and water quality conditions, it defies logic that installation of the barriers will have a “less-than-significant” impact on hydrology or water quality, especially given the deferral of mitigation measures in the Biology section of the IS/MND related to turbidity and salinity.
- I.2 - The project description states, on pages 2-1 and 2-2 that for any proposed “barrier or combination of barriers, improvement in salinity at the export locations was evaluated, and if the improvement was less than 5 percent, the barrier(s) were not considered a viable alternative and other barriers and combinations of barriers became the focus.” The project description goes on to state that based on that analysis (not presented in the IS/MND) that two possible combinations of barriers were chosen and that the current configuration, which includes a False River barrier, was chosen. There is no discussion, however, of how that decision was made and no discussion of the feasibility of each combination. Again, this fails to comply with CEQA’s mandate that the feasibility or infeasibility of each alternative be analyzed.
- I.3 - Additionally, there is increased risk of levee overtopping on Bethel Island and adjacent islands if any one of the eight Western islands is inundated due to increased wave action and

wind fetch. How does DWR intend to mitigate this risk as the inundation of any one of the eight Western islands is likely to greatly increase salinity throughout the Delta?

- I.4 - Should salinity be increased by the project rather than decreased as is intended how will DWR account for losses in agricultural productivity as described in the District's comment B.1.?
- I.5 - There is no articulated plan as to how DWR will handle the loss of pumping capacity by landowners in the Delta, the City of Antioch, the Contra Costa County Water District, and potentially the State Water Project and the Central Valley Project. Has DWR done any contingency planning to account for the possible intrusion of saltwater into the Central and South Delta?

J. Section 3.10 – Land Use and Planning

- J.1 - Finding No. 2 states that the Project will have "less-than-significant" impact on Land Use and Planning. Given the District's comments in Sections B, I, and K, it again defies logic that the Project will have a less-than-significant impact on Land Use and Planning both within the Delta and for all of those California residents who depend on the Delta for water supply.

K. Section 3.13 – Population and Housing

- K.1 - Finding No. 1 states that the Project will have "no effects" on population and housing which is clearly erroneous given that the installation of the False River Barrier will dramatically impact property values on Bethel Island. Bethel Island is currently in the process of entitling and creating a CFD for a new development of approximately 560 single family dwellings, the Delta Coves Project. If the Drought Barrier Project is implemented and prospective homeowners are unable to access the East Bay and Western Delta through False River, these homes will be less desirable and the development may fail. Additionally, the Project will likely cause failure of the District's levee system causing approximately 2,500 residents to be displaced and approximately 1,600 homes to be lost as the island is inundated.
- K.2 - The inundation of Bethel Island is not mere conjecture as the IS/MND "suggest(s) that the maximum tidal velocities in Fisherman's Cut would increase from 0.4-0.5 feet per second with no barriers to about 2.0-2.3 feet per second with the barriers." This statement illustrates two deficiencies in the IS/MND. The first is that DWR's modeling is quite limited as they are simulations, and are not based on actual flow measurements. Secondly, this increase represents a flow velocity increase through Fisherman's Cut of four to five times the velocity of existing flows. Similar impacts are to be expected through Dutch Slough and Taylor Slough. Existing waterside infrastructure throughout Bethel Island was not designed for such velocities.

L. Section 3.14 – Recreation

- L.1 - Finding No. 2 states that the Project will have “less-than-significant” impact on Recreation. As previously stated Bethel Island and its economy relies on recreational water users as indicated by the large number of marinas on the island and the large number of Bethel Island residents who own boats or other watercraft. The False River Barrier will pose an inordinate navigational risk to boaters and greatly increases the risk of boating traffic and accidents. Additionally, False River is approximately 1/5 of a mile wide whereas Fisherman’s Cut is approximately 1/10 of a mile wide which also increases the likelihood of boating accidents.
- L.2 - Given the certainty of increased water velocity through Dutch Slough, Taylor Slough, Sandmound Slough and Fisherman’s Cut once the False River Barrier is installed, it is likely that much of the waterside infrastructure around Bethel Island will be damaged or will break free causing additional navigational hazards to recreational boaters.

M. Section 3.17 – Utilities and Service Systems

- M.1 - Finding No. 3 states that the Project will have “less-than-significant” impact on Utilities and Service Systems with the adoption and implementation of the mitigation measures proposed in the initial study. Given that the inundation of Bethel Island would render its sewage, electrical and water systems inoperable, there is no evidence that the Project would have a less-than-significant effect on the District’s utilities. There are also many gas wells on the Island that would be impacted by a breach in the District’s levee system caused by increased velocity, especially when that increased velocity flows down Fisherman’s Cut and into Horseshoe Bend, probably the weakest section of the levee that protects the residents’ life, safety and property from inundation by flooding.

N. Other DWR Findings

- N.1 - Finding No. 4 states that the project would not have the potential to substantially 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; substantially reduce the number or restrict the range of an endangered, rare, or threatened species; or eliminate important examples of the major periods of California history or prehistory. This Finding is not supported by substantial evidence given the already precipitous decline in the Delta’s environment due to the cumulative impacts of increased water exports and drought on various Delta species, some of which are critically endangered.

There is substantial evidence, some of which is contained in Environmental Impact Reports prepared by other State agencies and programs such as the Delta Stewardship Commission (“DSC”) and the Bay-Delta Conservation Plan (“BDCP”), that additional changes to Delta flow

patterns caused by the barriers and carried out separately from the State's long-range planning processes, have a strong likelihood of causing certain threatened, endangered, and critically endangered fish and wildlife populations to drop below self-sustaining levels or to be eliminated completely. Finally, given that Bethel Island is a historical legacy community that could be destroyed by inundation caused by the likely impacts of the False River Barrier; it is unlikely, especially given the recent inundation of Jones Tract and the historical inundations of Frank's Tract and Little Frank's Tract, how the installation of these barriers does not threaten the elimination of important examples of a major period in California history, specifically the reclamation of the Delta during the late 1800's and early 1900's.

N.2 - Finding No. 5 states the Project would not have the potential to achieve short-term environmental goals to the disadvantage of long-term environmental goals. Again, it defies logic to believe that the installation of short-term "Emergency" drought barriers, allegedly to address water quality issues and to preserve water exports to Southern California, do not radically disadvantage the State's well-articulated long-term environmental goals such as the protection of the Delta environment, the preservation of threatened, endangered, and critically endangered species, and the preservation of historical Delta legacy communities such as Bethel Island. Again, the IS/MND completely ignores the efforts of other State efforts being carried out concurrently through the DSC and the BDCP.

N.3 - Similarly, Finding No. 6 and Finding No. 7 are not supported by substantial evidence. As articulated herein, the project would have considerable cumulative environmental impacts, especially given the State's other planning processes involving the Delta and long-term water supply planning such as the DSC, the BDCP, the proposed twin-tunnels project *et cetera*. Additionally, should the impact of the Project breach any Delta levees, especially those levees on any of the eight Western islands (the majority of which sit on peat foundations) that have historically prevented saltwater intrusion into the Central Delta and into the main stem of the Sacramento and San Joaquin rivers, it is certain that there will be substantial adverse effects on human beings, both directly through the destruction of homes and possible loss of life, and indirectly through unforeseen impacts on California's statewide water system.

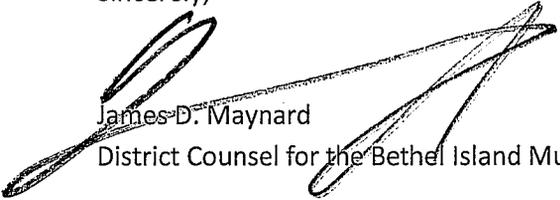
This concludes the District's comments at this time. Given the comments in this letter, the lack of baseline conditions analysis, the lack of alternatives analyses, and other obvious deficiencies in the IS/MND, the District fails to understand how DWR will be able to make an informed decision as to whether to move forward with the Emergency Drought Barriers in any given year. There are no criteria for installation called out in the IS/MND. Similarly, the District fails to understand how DWR can find that there is no substantial evidence that the Project will have a significant effect on the environment, as it must, to validate its decision to prepare an IS/MND rather than an EIR. (14 Cal. Code Regs. 15047.)

The District reserves the right to provide further comment on the Project as it moves forward to ensure it is designed and operated in the best interests of the citizens of Bethel Island. We look forward to

discussing the Project in further detail as DWR works on its legally required Environmental Impact Report and the various baseline analyses required by CEQA, but that have not been performed, evaluated, or analyzed.

The District also looks forward to reviewing an actual mitigation and monitoring program rather than, as described in the IS/MND, an "adaptive management plan" that consists only of weekly calls between the various responsible agencies. The District also looks forward to reviewing a document that contains an explanation of the various alternatives considered, the feasibility of various mitigation alternatives, and an EIR prepared in each year that DWR proposes to install the barriers as conditions change over time and additional environmental review will be required in each year DWR proposes to install such barriers.

Sincerely,



James D. Maynard

District Counsel for the Bethel Island Municipal Improvement District

cc: BIMID Board of Directors & Community
Contra Costa County Board of Supervisors
BIMID District Manager