Friends of the River
1418 20th Street, Suite 100
Sacramento, CA 95811

November 24, 2015

State Water Resources Control Board Members, Chief Counsel and Staff
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814 Via Email

Re: URGENT, California Water Fix Hearing Process and Closed Session with Office of Chief Counsel on December 2, 2015

Dear State Water Resources Control Board Members, Chief Counsel and Staff:

Introduction

Our public interest organizations[1] expect to participate in the State Water Board process pertaining to the Petition for Change in Points of Diversion and Re-Diversion along the lower Sacramento River as part of the California Water Fix Water Tunnels project (Change Petition). Some of our organizations have already submitted letters to the State Water Board pertaining to the Change Petition.

The significance of this Petition goes beyond its official subjects. It addresses "related State Water Board Activities" which include the Tunnels Change Petition's 401 certification

[1] Friends of the River is a nonprofit public interest organization devoted to the protection and restoration of California rivers. Restore the Delta campaigns so that all Californians recognize the Sacramento-San Joaquin Bay Delta as part of California's natural heritage, to make Delta waters fishable, swimmable, drinkable, and farmable, able to support the health of the estuary, San Francisco Bay, and the ocean beyond. California Sportfishing Protection Alliance's purpose is conserving, restoring, and enhancing the state's water quality, wildlife and fishery resources and their aquatic ecosystems and associated riparian habitats. The Environmental Water Caucus (EWC) is a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes.

application to the State Water Board, the Bay Delta Water Quality Control Plan and Implementation process, and the Delta Reform Act's requirement that the State Water Board address Delta Flow Criteria.[2] Our letter addresses not only Change Petition issues, but issues raised by its relationship to these other processes and State Water Board obligations.

Now, the State Water Board has issued notice of a Closed Session with the Office of Chief Counsel for Wednesday, December 2, 2015. The pertinent item is described as:

> The Board will meet in closed session to deliberate on procedural decisions to be reached in the proceeding to consider the joint Petition filed by the California Department of Water Resources and the U.S. Bureau of Reclamation to add three new points of diversion and/or points of rediversion of water to specified water right permits for the State Water Project and the Central Valley Project associated with the California WaterFix Project. This closed session is authorized under Government Code section 11126, subdivision (c)(3). (Posted Notice).

The purpose of this letter is to communicate our position on new developments affecting the procedural decisions to be reached in the preceding to consider the joint Petition, and do so prior to the Closed Session of December 2, 2015.

It is our understanding that the October 30th Notice represents a staff proposal for handling the Change Petition. It necessarily must address in some fashion the relationship of this important Petition in relation to other State Water Board obligations. We understand this matter will be discussed in closed session between Board staff, Board Counsel, and Board members. We provide you this letter in hopes of helping to clarify issues that the staff's above-referenced Notice raises.

The Tunnels Project Change Petition is the most damaging and controversial diversion and rediversion proposal in California history. It is the most expensive water project proposal in California history. The 1970's version of the Water Tunnels, then known as the peripheral canal, was voted down in a statewide referendum in June 1982 by a 2 to 1 margin.

The Tunnels Project would take enormous quantities of water from the Sacramento River upstream along the lower Sacramento River between Clarksburg and Courtland. Its construction would last 14 years, fomenting a permanent construction period on Delta residents, businesses, and farmers that for most small businesses dependent on moving goods and crops through and around the Delta would be a traffic and goods-movement death-knell. As a result of its massive diversions, the freshwater that presently flows through designated critical habitats for now-crashing fish populations in the Sacramento River and sloughs to and through the Bay-Delta before being diverted for export at the south Delta, would no longer even reach the Delta. The loss of these flows would dramatically deplete the freshwater flows badly needed for vulnerable listed species, fisheries, local drinking water supplies and marinas. The benefits of those

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[2] State Water Resources Control Board, *Notice of Petition Requesting Changes in Water Rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project and Notice of Public Hearing and Pre-Hearing Conference to Consider the Above Petition*, issued October 30, 2015, pp. 6-8. Cited hereafter as "October 30th Notice."

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freshwater flows for Delta water flows and water quality, fish, and fish habitat would be lost. The question is not whether the new upstream diversion would be bad for Delta freshwater flows, water quality, and endangered and threatened species of fish and their designated critical habitats. The question instead is how bad will it be.

The State Water Resources Control Board has delayed revision of the 1995 Bay-Delta Water Quality Control Plan, managing only a light revision of it in 2006, and a staff-update about it in 2009. The bifurcated review process the Board chose to proceed with in 2009 has contributed to delay when in 2013, the Board issued its Phase 1 Substitute Environmental Document reviewing its proposed revisions to San Joaquin River flow and South Delta salinity objectives, a proposal that was met with resounding criticism, sending the Board back to improve the proposal's modeling and its environmental documentation. It is our understanding that Phase 1 is not due out until "early 2016" at the earliest, according to the State Water Board's web site. A Phase 2 staff "Draft Scientific Basis Report" and range of alternatives for review in this phase's Draft SED for review of the rest of the Bay-Delta plan's scope (including Delta outflow, Sacramento River inflow and other north and western Delta and Suisun Marsh water quality objectives) is not due out until Spring 2016 and a Draft SED is not expected until over a year later.[3]

Having raised Endangered Species Act (ESA) issues, we appreciate that the State Water Board has determined that the second part of the hearing focusing on the potential effects of the Petition on fish and wildlife and recreational uses, "is not planned to commence until after the environmental and endangered species act compliance processes are completed."

To further complicate matters, the subject Notice proposes that the Board process the Phase 2 portion of the Bay Delta Water Quality Control Plan and California WaterFix Change Petition concurrently. We think this is an error and will lead to egregious confusion, poor policy making and inadequately protective permit terms concerning the operation of the Tunnel Project's North Delta intakes and the Head of Old River operable gate. More to the point, we think it will prejudice the setting of water quality objectives and beneficial uses in the Delta by privileging a Change Petition for which the current Water Quality Control Plan does not even recognize as a Delta beneficial (or designated) use under the Porter Cologne Water Quality Control Act and the federal Clean Water Act (CWA). A Change Petition of the scale and consequence of the subject Notice must take a back seat to the completion of the Bay Delta Water Quality Control Plan so that a clear framework based on a transparent public process for completing the Board's new plan is unhindered. In short, Delta water quality policy should come before plumbing decisions.

We do want to alert you that several recent developments require modifications to the State Water Board hearing schedule. First, an *adequate* Draft Environmental Impact Report (EIR)/Environmental Impact Statement (EIS) must be prepared *before* commencing any part of the evidentiary hearing. Second, Phase 2 of the Bay-Delta Plan update must also be completed *before* commencing any part of the evidentiary hearing.

[3] http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/

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An Adequate Draft EIR/EIS must be Prepared Because the Water Fix SDEIS is Inadequate and the EPA Has Determined it to be Inadequate

An *adequate* Draft Environmental Impact Report (EIR)/Environmental Impact Statement (EIS) must be prepared *before* commencing any part of the evidentiary hearing. Such an adequate Draft EIR/EIS does not yet exist. Our organizations submitted comments on the numerous inadequacies of the recirculated Draft EIR/EIS. We have urged on various issues that the project should be withdrawn.

The State Water Board commented on the Water Fix Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) in its comment letter of October 30, 2015. The Board stated:

> The State Water Board has received and is currently processing the water right change petition and the water quality certification for the Cal WaterFix, the current preferred project. *The RDEIR/EIS and Final EIR/EIS will inform these processes.* (Board Letter, p. 1) (emphasis added).

In fact, the RDEIR/SDEIS will *not* inform these processes. On that same date of October 30, 2015, the U.S. Environmental Protection Agency (EPA) issued its letter reviewing the Water Fix SDEIS as required by Section 309 of the Clean Air Act. The EPA has, in that letter, given the SDEIS a rating of "' 3' (*Inadequate*)". (EPA Letter, October 30, 2015, p. 4).[4] That is EPA's failing grade. EPA's *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (10/3/84) explains what that means in section 4(b) of that document entitled "Adequacy of the Impact statement":

> (3) '3' (Inadequate). The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA[National Environmental Policy Act] and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. (p. 4-6).

The EPA says they expect the missing information will be "supplied as later regulatory processes proceed." (EPA Letter, p. 4). "[P]ending actions by the State Water Resources Control Board" is one of the future processes that the EPA expects "will supply the missing pieces necessary to determine the environmental impacts of the entire project." (*Id.*). The EPA findings about missing information are consistent with the State Water Board's October 30, 2015 comment letter including; "there is a large degree of uncertainty regarding the exact effects of the project due to a number of factors." (Board Letter, p. 2).

[4] A copy of the October 30, 2015 EPA letter is attached.

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The EPA concluded that deferral of water flow management decisions means "that any attempt to describe the environmental impacts of the project is necessarily incomplete." (EPA Letter, p. 2). The EPA also found that the information in the SDEIS:

> predicts a loss of valuable aquatic habitat for many fish species in the Delta and upstream tributaries due to the combined effects of the Water Fix project, CVP/SWP exports, climate change, and increased water diversions upstream of the Delta in the Sacramento River Basin. These species have experienced sharp population declines in the last decade and showed record low abundance over the last five years. (EPA Letter, p. 3).

The EPA is not the only agency concerned about loss of valuable aquatic habitat. The California Department of Fish and Wildlife noted many adverse impacts of reduced flows from Water Fix operation on fish species in its RDEIR/SDEIS comments of October 29, 2015, and Supplemental Document of October 30, 2015.[5]

Moreover, the EPA explained that "the Water Fix project does not propose additional flows in the Delta, nor does it propose significant habitat restoration (See EcoRestore above)."(EPA Letter, p.3). And, "Water quality and aquatic life analyses in the SDEIS show that the proposed project may cause or contribute to violations of state water quality standards and significant degradation of waters of the U.S. . ." (EPA Letter, p. 4).

Thus, beyond our own findings of inadequate documentation, the EPA has also found the RDEIR/SDEIS inadequate.[6] In addition, the October 30, 2015 EPA letter does not say that the EPA's prior concerns have been addressed. So, all of those concerns still apply.[7] Critical omissions include the failure to develop the required reasonable range of alternatives. As just one example, "CVP/SWP [Central Valley Project/State Water Project] operations scenarios that propose additional outflow, such as BDCP Alternatives 7 and 8 from the DEIS, could provide substantially more water for resident and migratory fish and provide benefits to aquatic life; however, these were not evaluated as alternatives in the SDEIS." (EPA Letter, p. 3). Because of the failure to complete the ESA required consultations, the reasonable and prudent alternatives required under the ESA have not been identified, let alone adopted. "When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest 'reasonable and prudent alternatives [RPA].' *Id.*" *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075, 1085 (9th Cir. 2015).

There has also been complete failure to identify, let alone adopt, the Least Environmentally Damaging Practicable Alternative (LEDPA) required by Clean Water Act (CWA) § 404(b)(1). "A proposed action is not the LEDPA simply because a federal agency is a

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[5] A copy of the CDFW Letter is furnished separately today to the Board's Chief Counsel to keep from sending a number of attachments to all Board Members and Staff.

[6] There are many reasons why the RDEIR/SDEIS is inadequate. To keep this initial alert short, at this time we simply reference the EPA Letter.

[7] A copy of the August 26, 2014 EPA letter setting forth those many prior concerns is furnished separately today to the Board's Chief Counsel.

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partner and chooses that proposed action as its preferred alternative." (EPA Letter, August 27, 2014, Corrections and Additional Editorial Recommendations, p. 1). Finally, the State Water Board in its RDEIR/SDEIS comment letter of October 30, 2015, reminded that its prior request for a scenario that would increase Delta outflows without impacting cold water pools be evaluated was not developed into an alternative. (Board Letter, p. 2).

The result is that, in addition to there not being an adequate informational basis at this time for any portion of the evidentiary hearing yet to commence, there has been a complete failure to present for public and decision-maker evaluation the required reasonable range of alternatives. The absence of reasonable and prudent alternatives under the ESA and Least Environmentally Damaging Practicable Alternative under the CWA graphically demonstrate that the Change Petition is not ready for commencement of any part of the evidentiary hearing.

In addition, unless and until an adequate Draft EIS/EIR is prepared there is no basis whatsoever for processing or issuing a water quality certification for the Water Fix project. The Staff proposal to process the application for water quality certification pursuant to §401 of the Clean Water Act (CWA) (Notice of Petition, p. 6), like the Petition itself, must await preparation and circulation of an adequate Draft EIR/EIS.

The California Environmental Quality Act (CEQA) Guidelines require that:

> 'Significant new information' *requiring recirculation* include, for example, a disclosure showing that:
> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
> (2) . . .
> (3) A *feasible project alternative* or mitigation measure considerably different from others previously analyzed *would clearly lessen the significant environmental impacts* of the project, *but the project's proponents decline to adopt it.*
> (4) The draft EIR was *so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.* 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4)(emphasis added).[8]

Again, the RDEIR/SDEIS is inadequate. Under CEQA, unless the change Petition is dropped, a new Draft EIR/EIS sufficient to provide for meaningful public review and comment must be prepared and circulated to provide an adequate informational basis and a range of reasonable alternatives for the evidentiary hearing.

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[8] The NEPA Regulations require that: "The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is *so inadequate as to preclude meaningful analysis,* the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action." 40 C.F.R. § 1502.9(a), emphasis added. As is the case under CEQA, under NEPA, unless the change Petition is dropped, a new Draft EIR/EIS sufficient to provide an adequate basis for the evidentiary hearing must be prepared and circulated.

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This foundational deficiency is not something that can be fixed by an adequate Final EIR/EIS. The development and circulation for public review and comment of an *adequate Draft* EIR/EIS is indispensable to meaningful public review of environmental impacts and informed evaluation of a range of reasonable alternatives *before*, rather than *after*, a government decision adopting an alternative is made.

In addition, there has been a total failure to date by DWR and Reclamation to demonstrate affirmatively that the State has taken the public trust into account during the course of designating the Water Fix to be the "preferred alternative." The State *must* conduct a public trust analysis. *E.g., San Francisco Baykeeper, Inc. v. California State Lands Commission,* __Cal.Rptr.3d__, 2015 WL 7271956 (4th Dist. Ct. App., No. A142449, November 18, 2015). Beyond the general applicability of the public trust doctrine to applications to take significant water flows away from the Delta, there is also the specific requirement in the Delta Reform Act that the "principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta."[9]

The fact that more time and more work are necessary before the Water Fix can be lawfully reviewed is not the fault of the law, the EPA, the State Water Board, or Water Tunnels opponents. Reclamation delayed nine years before commencing the ESA consultation process. Reclamation and DWR could have prepared an adequate Draft EIR/EIS. Reclamation and DWR could have developed a reasonable range of alternatives to increase Delta flows by reducing exports that might have served as the basis for a habitat conservation and national community conservation plan. Reclamation could have obtained reasonable and prudent alternatives (RPA) pursuant to the ESA and could have developed the Least Environmentally Damaging Practicable Alternative (LEDPA) pursuant to the CWA. Reclamation and DWR have failed to do what the law requires.

Unless Reclamation and DWR prepare an adequate Draft EIR/EIS, the State Water Board will have to do that prior to commencing Part 1 of the hearing. Part 1 is focused on "the potential effects of the Petition on agricultural, municipal and industrial users of water and conditions that should be placed on the approval of the Petition to protect those users." (State Water Board combined notice). Part 1 of the hearing is presently scheduled to commence April 7, 2016. That will need to be changed to allow the time necessary to prepare an adequate Draft EIR/EIS. This is because legal users, like other citizens, need an *adequate Draft* EIR/EIS on the Change Petition for the hearing to be conducted using as complete and accurate an evidentiary record as possible with proper due diligence by all parties involved. Presently, the RDEIR/SDEIS cannot accurately disclose water supply, water flow or water quality degradation issues that are essential to Change Petition review of the potential for injury to other legal users of water. Moreover, the present RDEIR/SDEIS fails to acknowledge in its baseline that unimpaired flows in the Central Valley watershed of the Bay Delta Estuary are over appropriated by water rights claimants in average years by over fivefold. Likewise, any consideration of a water quality certification under §401 of the CWA also requires preparation of an adequate Draft EIR/EIS.

[9] Water Code § 85023.

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The Water Fix has no Force of Law Behind it

There is no rational reason for the State Water Board to begin an evidentiary hearing on the Water Fix at this time. The Water Fix is not a federally authorized project. Congress has not enacted legislation authorizing development and construction of the Water Tunnels. And, because of a recent change to the BDCP/Water Fix the Water Fix no longer has any recognition in State law.

As explained by the EPA, "In April 2015, Reclamation and DWR announced fundamental changes to the proposed project and changed its name from BDCP to the California Water Fix . . . The proposed federal action has changed from implementing a Habitat Conservation Plan under Section 10 of the ESA to modifying operations of the federal Central Valley Project (CVP) in order to accommodate new water conveyance infrastructure." (EPA Letter, pp. 1-2).

This was no mere name change. Until about April 2015, the claim being made in BDCP documents had been that while there would be adverse impacts from Water Tunnels operations, some of that would be mitigated by the provision of wetland restoration. As just one example of dropping conservation features to protect the Delta, the "65,000 acres of tidal wetland restoration" has been chopped down to "59 acres." (RDEIR)/SDEIS) p. ES-17).

The Delta Plan, developed by the Delta Stewardship Council, is, under the Delta Reform Act, to be "the comprehensive, long-term management plan for the Delta . . ." Water Code § 85059. If the BDCP had been kept going and been approved as a habitat conservation plan under the ESA and approved as a national community conservation plan under the CESA, its incorporation by the Delta Stewardship Council into the Delta Plan would have been mandatory under § 85320(e) of the Delta Reform Act if certain conditions were met. But because Reclamation and DWR dropped the habitat conservation plan and national community conservation plan, incorporation of the Water Fix into the Delta Plan is not mandatory. Moreover, the Water Fix has no recognition whatsoever under the Delta Reform Act. The Act definition is: "'Bay Delta Conservation Plan' or 'BDCP' means a multi-species conservation plan." Water Code § 85053. The Water Fix is not a multi-species conservation plan. The Water Fix, no longer being a habitat conservation or national community conservation plan, has no force of State law behind it.

The Water Fix, involving construction of massive new conveyance facilities to take water away from the Delta before it even reaches the Delta is contrary to State policy as declared by the Legislature. "The policy of the State of California is to *reduce reliance on the Delta* in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Water Code § 85021. (emphasis added). Also, the Delta is to be restored, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem. Water Code § 85020(c). [10]

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[10] In addition, the Water Fix is not even eligible for state funding because it fails to meet the requirements of § 85320(b) of the Delta Reform Act. Because of the absence of an adequate Draft EIR/EIS, there has not been the compliance with CEQA required by § 85320(b)(2). Nor has there been the comprehensive review and analysis of: a reasonable range of " flows necessary for recovering the Delta ecosystem and restoring fisheries . . . which will

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Again, all of what is required by the Delta Reform Act is lacking. The Draft environmental documents prepared for the Water Fix have been determined to be *inadequate* by the EPA. Beyond that, since the Water Fix is not a habitat conservation or national community conservation plan, its incorporation into the governing Delta Plan is not mandatory so that the Water Fix has no force of law behind it.

The order of Proceeding puts the cart before the horse by proposing to review the subject Petition and Phase 2 of the Bay-Delta Plan Update concurrently rather than completing the Plan Update first

The State Water Board still proposes to review the Petition while conducting Phase 2 of the Bay-Delta Plan update concurrently, rather than awaiting completion of Phase 2 of the Plan update. (Notice of Petition, p. 7). The Board states:

> The decision on the application for water quality certification will not be based on future changes to water quality requirements that may result from the update to the Bay-Delta plan, but rather it must ensure that existing water quality requirements will be met. Similarly, the State Water Board is not required to know exactly what changes to flow and water quality objectives will result from the update of the Bay-Delta Plan in order to process the change petition. (State Water Board Fact Sheet, p. 4).

From a planning standpoint, we disagree that this is a wise approach to either policy planning or Change Petition evaluation and permitting. The Staff Notice fails to disclose *how* it intends to process both at the same time and fails to justify in law this claim and explain why it would be a good idea to run the processes concurrently. What is the Board's authority for not having to know exactly what changes to flow and water quality objectives are needed for the Change Petition? In our view, the presumed virtues of the 1995 Water Quality Control Plan and its implementation vehicle, Water Rights Decision D-1641, are in tatters with the Board's recent treatment of its objectives during the 2014 and 2015 temporary urgency change petitions filed by the state and federal water project operators. Further confirmation of the inadequacy of existing water quality policy is that under this Plan and D-1641, Delta smelt and winter-run Chinook salmon are closer than ever to extinction, and other listed and candidate species (such as longfin smelt) are not far behind if present trends continue.

As set forth above, it is necessary to prepare an adequate Draft EIR/EIS before reviewing the Petition. In addition, the EPA pointed out in its October 30, 2015 RDEIR/SDEIS review letter that:

> The Delta is listed as impaired for several water quality parameters under Section 303(d) of the CWA [Clean Water Act]. EPA is working closely with the State Water Board to

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identify the remaining water available for export and other beneficial uses" required by § 85320(b)(2)(A); "A reasonable range of Delta conveyance alternatives, including through-Delta . . ." required by § 85320(b)(2)(B); "The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities . . ." required by § 85320(b)(2)(C); "the potential effects on migratory fish and aquatic resources" required by § 85320(b)(2)(D); or "The potential effects of each Delta conveyance alternative on Delta water quality." § 85320(b)(2)(G).

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> ensure that the revised standards are sufficient to address impaired water quality conditions in the Delta and reverse the declines in the fish species. (EPA Letter, p.4).

The EPA also pointed out that the new water intake and conveyance infrastructure would require authorization under CWA § 404. "Water quality and aquatic life analyses in the SDEIS show that the proposed project may cause or contribute to violations of state water quality standards and significant degradation of waters of the U.S. . ." (EPA Letter, p. 4). Moreover,

> the most essential decision for achieving the desired balance between water reliability and restoration of the Bay Delta ecosystem is how freshwater flows through the Delta will be managed. This key decision is not described in the SDEIS and is, instead, deferred to future regulatory processes administered by the State of California in consultation with federal resource and regulatory agencies. The decision by the State of California and Reclamation to defer these decisions means that the impacts of the Water Fix project on the Delta ecosystem cannot be fully evaluated at this time, and that any attempt to describe the environmental impacts of the project is necessarily incomplete. (EPA Letter, p. 2).

The EPA letter established that the Delta is already in violation of water quality standards, and that the proposed Water Fix would contribute to worsening the violations.[11] It is also established that the impacts of the Water Fix on the Delta lack an adequate informational basis for analysis. The State Water Board indicates it will not be governed by the report it developed in 2010 as required by the Delta Reform Act, Water Code § 85000 et seq., developing flow criteria for the Delta. The State Water Board distances itself from its own report calling it "narrowly focused on the flows needed in the Delta ecosystem if fishery protection was the sole purpose for which its waters were put to beneficial use . .." (Notice of Petition, p. 8). Regardless of whether fishery protection is normally the sole purpose, the undisputed facts are that the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA, 16 U.S.C. § 1531 *et seq.* Likewise, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA. The reaches of the Sacramento River, sloughs, and the Delta that would lose significant quantities of freshwater flows through operation of the Water Tunnels are designated critical habitats for each of these five listed and endangered fish species. "ESA section 7 prohibits a federal agency from taking any action that is 'likely to jeopardize the continued existence' of any listed or threatened species or 'result in the destruction or adverse modification' of those species' critical habitat." *San Luis & Delta-Mendota Water Auth. v. Locke,* 776 F.3d 971, 987 (9th Cir. 2015). So whatever might be the situation under other circumstances, the presence here of listed fish species and designated critical habitat does, under the ESA, elevate fishery protection to the top of the list.

At the same time as the State Water Board distances itself from its own 2010 report, the Board plans to commence review of the Petition, without having updated the Plan. *This is putting the cart before the horse*. It is necessary in any type of rational planning process for water quality policy in Phase 2 to be completed before a large-scale adjustment to flows and water quality is

[11] See also the Environmental Water Caucus comment letter in this regard, pp. 51-95, accessible at http://ewccalifornia.org//reports/comments-rdeir-dseis-10-30-2015.pdf.

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introduced to the estuary for consideration in light of newly adopted policies. Analogously this is done all the time in local planning and development project permitting. Phase 2 "involves other changes to the Bay-Delta Plan to protect beneficial uses not addressed in Phase 1, including Delta outflows, Sacramento River flows, export restrictions, DCC gate closure requirements and potential new reverse flow limits for Old and Middle Rivers." (Notice of Petition, p. 7). The State Water Board appears to be attempting to act untethered from governing law. The August 2010 flow criteria that the State Water Board now seeks to distance itself from has the force of law behind it, having been required by Water Code § 85086(c)(1). The Plan update is imperative because the Delta is in crisis violating water quality standards, and the existing standards need to be strengthened to protect Delta water quality.

We note as well that the "appropriate Delta flow criteria" that the Delta Reform Act requires it develops specifically for "a change in point of diversion of the State Water Project...from the southern Delta to a point on the Sacramento River" is ***in addition to*** its consideration of the Delta Flow Criteria report findings the Board approved in August 2010.[12]

The Plan update is necessary to determine whether the Water Fix would even be a lawful, let alone a reasonable, alternative.

The State Water Board must comply with law including the ESA, CEQA, NEPA, the CWA, the Delta Reform Act and the public trust doctrine. But even if that was not the case, there would be no rational reason to put the cart before the horse by conducting an evidentiary hearing without having an adequate Draft EIR/EIS and without having completed the Bay-Delta Plan update.

We presume that the State Water Board wishes to act lawfully. We presume that the State Water Board does not intend to prejudge the issues and hold an evidentiary hearing on the Petition in the absence of the adequate informational basis and reasonable range of alternatives that would be provided by an adequate Draft EIR/EIS and an updated Bay-Delta Plan. We presume that the State Water Board is not attempting to prejudge the issues by approving the Petition and then crafting the Bay-Delta Plan update to "fit the fix."

Again, the fact that more time and more work are necessary before the Petition can be ready for evidentiary hearing is not the fault of the law, the EPA, the State Water Board, or Water Tunnels opponents.

Reclamation and DWR have failed to do what the law requires. The State Water Board now has the opportunity to comply with the law and rational planning by preparing or requiring the preparation of an adequate Draft EIR/EIS and by finishing the Bay-Delta Plan update prior to

[12] The specific "appropriate Delta flow criteria" language is from Water Code Section 85086(c)(2). While Water Code Section 85086(c)(1) states that the flow criteria the board develops under that provision of the Water Code "shall not be predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP," this same section does not limit its informational value from informing the Phase 1 and Phase 2 components of water quality control planning for the Bay-Delta Estuary. These flow criteria have the added virtue of having been developed in reliance on best available science, in compliance with Delta Reform Act policies. It is also unclear what the Water Code means by "predecisional." The notice seems to conflate these two sets of flow criteria.

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commencing any portion of the evidentiary hearing. At present, there is no adequate foundation in place for an evidentiary hearing on the Petition.

Conclusion

Extinction is forever. There is no adequate informational basis at this time on which to commence an evidentiary hearing. No adequate Draft EIR/EIS has been prepared and circulated for public review and comment. The State Water Board distances itself from its own Delta flow criteria developed in 2010 but seeks to commence evidentiary hearing on the Petition before completing its Bay-Delta Plan update. The Water Fix has no force of either federal or State law behind it. There is no legitimate planning reason to proceed in a rush to approve the Petition and then update the Bay-Delta Plan to fit the fix. Finally, there is no lawful basis to proceed with a project that will worsen already existing water quality violations in the Delta or consider a water quality certification in the absence of an adequate Draft EIR/EIS and in the absence of public trust analysis.

If you have any questions, please contact Robert Wright, Senior Counsel, Friends of the River, at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org .

Sincerely,

/s/E. Robert Wright
Senior Counsel
Friends of the River

/s/Barbara Barrigan-Parrilla
Executive Director
Restore the Delta

/s/Bill Jennings
Executive Director
California Sportfishing Protection Alliance

/s/Conner Everts
Co-Facilitator
Environmental Water Caucus

Attachment

cc (Addressees: via Email):

Felicia Marcus, Chair, State Water Resources Control Board (SWRCB)
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