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Re: Written Comments for January 28, 2016, Pre-Hearing Conference

Dear State Water Resources Control Board Member Hearing Officers, Counsel and Staff carrying out the California Water Fix Hearing Process:

Introduction

Friends of the River (FOR), Sierra Club California, and Planning and Conservation League are protestants in this California Water Fix State Water Board hearing process. The State Water Board Notice of Petition and Notice of Public Hearing (October 30, 2015) states:

> This notice addresses many of the procedural issues raised in the comment letters. To the extent that [the scope of the hearing and procedural issues] remain unaddressed, hearing participants should bring those issues to the attention of the hearing officers in written correspondence submitted with or following the submittal of notices of intent to appear and prior to the pre—hearing conference. (Notice, p. 15).

This is our written correspondence bringing certain scope and procedural issues to the attention of the hearing officers prior to the January 28, 2016 pre-hearing conference. The next page is our Table of Contents.

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An Adequate Draft (or Subsequent) EIR/EIS must be Prepared and made part of the Hearing Record before Commencing any part of the Evidentiary Hearing

We already raised this issue that an adequate Draft EIR/EIS must be prepared either by petitioners DWR and Reclamation or the State Water Board before commencing Part I of the evidentiary Hearing. We raised this issue in our joint letter to you of November 24, 2015. (Letter, pp. 4-7).[1] This portion of this letter supplements what we have already said. We pointed out that the U.S. Environmental Protection Agency (EPA) in its October 30, 2015 formal review of the Water Fix Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) gave the environmental document a rating of "' 3' (*Inadequate*) which is EPA's failing grade.[2]

We quoted California Environmental Quality Act (CEQA) Guideline section 15088.5 (14 Cal. Code Regs. § 15088.5), and explained that a new Draft EIR would have to be prepared both to develop a range of reasonable alternatives to increase Delta flows by reducing exports and to accurately disclose and analyze water supply, water flow, and water quality degradation issues. The courts have explained the need for an adequate *Draft* environmental document which cannot be cured by subsequent preparation of an adequate *Final* Environmental document:

> Especially given the sensitivity and listed status of the resident salmon species, the County's failure to address loss of Cosumnes River stream flows in the Draft EIR deprived the public . . . of meaningful participation in the CEQA discussion." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447-448 (Internal citations and quotation marks deleted).

As explained in *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052, only when the draft environmental document is circulated do the public and outside agencies have the opportunity to analyze a proposal and submit comment. To evaluate the draft environmental document in conjunction with the final environmental document would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more detailed analysis to the final environmental document that is insulated from public review. (*Id.*). [3]

Here, hedging on important environmental issues while deferring a more detailed analysis to the final environmental document is exactly what petitioners DWR and Reclamation are trying to do. As the EPA explains, it expects that "[P]ending actions by the State Water Resources Control Board" "will supply the missing pieces necessary to determine the environmental impacts of the entire project." (EPA Letter, p. 4; Our prior Letter, p. 4). The EPA concluded that

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[1] Joint Letter on behalf of Friends of the River, California Sportfishing Protection Alliance, Restore the Delta, and Environmental Water Caucus. Our November 24, 2015 Letter is already in your Record and was transmitted as required to the designated representatives for petitioners.

[2] The numerous, severe inadequacies of the Draft EIR are dressed in some detail in the Joint Protest filed by FOR and Sierra Club California on January 4, 2016 at Supplemental sheets, pp. 4-7; additional supplemental sheets, pp. 8-22; 28-31; and 46-50.

[3] *See Gray v. County of Madera* (2008) 167 Cl.App.4th 1099, 1120 ("Given that there was no analysis done on whether the option to build a water system is a feasible mitigation measure, we conclude that the portion of the EIR addressing water concerns should have been recirculated.")

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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; Our prior Letter, p. 5). It must be remembered that: "The fundamental goal of an EIR is to inform decision-makers and the public of any significant adverse effects the project is likely to have on the physical environment." *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.* (2013) 57 Cal.4th 439, 447. "'[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.'" *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88.

Our organizations are parties to Part II of the hearing.[4] In addition to an adequate *Draft* EIR being required before commencing Part I of the hearing, it follows that an adequate *Draft* EIR is required before commencing Part II of the hearing. Since Part II of the hearing is not going to begin until "at least 30 days after the CEQA, ESA, and CESA processes have been completed such that the associated documents for these processes can be included as exhibits in the hearing record" (Notice, p. 2), there is time to prepare an adequate *Draft* EIR, circulate it for public review, and have that included as an exhibit in the hearing record prior to commencing Part II. [5]

Part II of the hearing is declared by the State Water Board to include such issues as effects of the Petition on fish and wildlife; whether changes proposed in the Petition unreasonably affect fish and wildlife or recreational uses of water, or other public trust resources; will proposed changes in points of diversion alter water flows in a manner that unreasonably affects these resources; will proposed changes alter water quality in a manner that unreasonably affects these resources; what Delta flow criteria are appropriate; are the proposed changes requested in the public interest; and should the Final EIR be entered into the administrative record for the Petition. (Notice, p. 12). An adequate *Draft* EIR/EIS would be the starting point to begin to attempt to answer these issues. As formally determined by the EPA and pointed out during the BDCP/Water Fix public comment periods by numerous public agencies and public interest organizations, no such adequate *Draft* EIR/EIS exists.

This extremely prejudicial deficiency of not preparing and circulating an adequate *Draft* EIR for this massive public works project causing numerous significant adverse environmental impacts cannot be cured by a *Final* EIR/EIS and/or its responses to comments. The procedural unfairness to all protestants and the public here is gross. Protestants are being forced to attempt to prove the adverse impacts of the diversions for the Water Tunnels while being deliberately deprived of being able to point to an adequate *Draft* EIR that honestly discloses and assesses the adverse impacts of the diversions on water flows, water quality, fisheries and public health, and that also presents a range of reasonable alternatives to the Tunnels. This is an attempt to shift the burden of environmental full disclosure and reasoned analysis of adverse environmental impacts

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[4] The California Sportfishing Protection Alliance, a party to our November 24, 2015 joint letter, is a protestant and is also a party to Part I of the hearing.

[5] That Part I of the hearing is currently scheduled to commence April 7, 2016, does not eliminate the requirement to have an adequate Draft EIR before commencing Part I of the hearing. An adequate Draft EIR is necessary as a predicate for the issues to be dealt with by Part I. The duty of the State Water Board is to comply with CEQA even if that requires changing the date for commencing the hearing.

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from the project proponents and government agencies to protestants and the public. This is grossly unfair. This also constitutes failure to proceed in the manner required by CEQA.

To conclude on this point, for the reasons set forth here and in our attached earlier letter of November 24, 2015, a new, adequate, *Draft* EIR/EIS must be prepared and circulated for public review and comment before commencing either Part I or Part II of the hearing.

The Responsible Agency Excuse does not justify the Failure to prepare and circulate the Adequate Draft or Subsequent EIR required by CEQA

The State Water Board issued a service list of participants and pre-hearing conference agenda on January 15, 2016. Under a heading entitled "CEQA Compliance" the Board recites that "As a general rule, a responsible agency must assume that the CEQA document prepared by the lead agency is adequate for use by the responsible agency. (Cal. Code of Regs., tit. 14, § 15096, subd. Subd. (e).)" (Service List, p. 5). The Board goes on to say "Accordingly, the adequacy of DWR's EIR for the Water Fix Project for purposes of CEQA compliance is not a key hearing issue, and the parties should not submit evidence or argument on this issue."

The Board refutes itself because it declares in the Notice that a Part II hearing issue is whether "Parties to the hearing should submit exhibits and testimony responsive to the following issues that will be considered during the hearing" (Notice, p. 11) "Should the Final Environmental Impact Report be entered into the administrative record for the Petition?" (Notice, p. 12). Whether there has been CEQA compliance is thus a key hearing issue as identified by the Board itself.

In fact, this is one of the most critical hearing issues of all and we do submit additional argument on this issue. This issue is never going away and if the Board approves the Petition, the inadequacy of the EIR *and the nullity of all State Water Board proceedings based on the inadequate Draft EIR and any future Final EIR* will be one of if not the, first issues presented to the reviewing court. And, this issue is predominantly one of improper procedure rather than a dispute over the facts. Consequently, judicial review will be de novo. *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 215.

A short answer on this issue is that the State Water Board is not a responsible agency for the change in point of diversion. The Board is the lead agency. No one else can approve the CEQA document for this purpose but the Board. DWR cannot approve the change, nor can the Bureau of Reclamation.

Another short answer is that the Board can refuse to consider the Petition unless and until an adequate Draft or Subsequent EIR has been prepared and circulated for public review and comment.

Even if the Board is a responsible agency rather than the lead agency, CEQA itself provides in Public Resources Code § 21092.1 that:

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> When significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 and consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report.

The comments of the EPA constitute significant new information that constitutes part of the EIR. That information has been added after notice of preparation of the Draft environmental documents was given and prior to certification. Again, the EPA in its formal review required by federal law determined the Draft environmental documents inadequate and explained it is expected that "[P]ending actions by the State Water Resources Control Board" "will supply the missing pieces necessary to determine the environmental impacts of the entire project." (EPA October 30, 2015 Letter, p.4) It would seem impossible for information to be more significant than the EPA's determination that the existing Draft environmental documents are inadequate and that the State Water Board processes are expected to supply the missing pieces of information necessary to determine the environmental impacts of the project. Under Public Resources Code § 21092.1, notice must be given again and the other actions such as providing for a comment period under § 21092 must be afforded.

The Water Fix is a public project. Guideline § 15004[6] establishes requirements that must be met before any lead agency *or responsible agency* grants any approval of a public project subject to CEQA. A public agency "shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance." Guideline §15004(b)(2). A public agency shall not: "Otherwise take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project." Guideline § 15004(b)(2)(B). That is exactly what the State Water Board current schedule is doing. By holding either part or both parts of the evidentiary hearing in the absence of an adequate Draft or Subsequent EIR including a range of reasonable alternatives, the Board is stacking the deck giving impetus to the Water Fix Tunnels while foreclosing alternatives that would ordinarily be part of CEQA review of that public project. The alternatives issue is so important and the absence of any true alternatives, let alone the required range of reasonable alternatives, to the Water Tunnels is so prejudicial that the next section of this letter is devoted to the omission of alternatives in the CEQA process to date.

In addition, CEQA in Public Resources Code § 21166 authorizes, indeed requires, preparation of subsequent EIR's by responsible, as well as lead, agencies if substantial changes are proposed in the project which will require major revisions of the EIR or substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the EIR. Again, the circumstances have changed. The EPA has determined the Draft environmental documents to be inadequate but stated an expectation that the missing pieces of environmental information necessary to determine the environmental impacts of the project will be provided by other processes including the State Water Board process.

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[6] All citations to Guidelines sections are to the CEQA Guidelines codified in Title 14, Cal. Code Regs., §§ 15000 et seq.

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Guideline § 15096(e)(6) provides that even if a responsible agency believes that a *final* EIR is not adequate for use by the responsible agency, the responsible agency may "Prepare a subsequent EIR if permissible under Section 15162; . ." Guideline § 15162(c) provides for preparation of a subsequent EIR "by the public agency which grants the next discretionary approval for the project" if any of the conditions described in § 15162(a) occurs. Here, virtually all of the conditions set forth in § 15162(a) are present. The reviews of the Draft environmental documents by the EPA establish that the project is not even presently defined so that there needs to be revisions addressing significant environmental effects and substantial increase in the severity of previously identified effects. § 15162(a)(1). In addition, substantial changes have occurred with respect to the circumstances under which the project is being undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects and the substantial increase in the severity of previously identified effects. § 15162(a)(2).

The EPA was not alone in its findings. The Delta Independent Science Board Review found "the Current Draft sufficiently incomplete and opaque to deter its evaluation and use by decision-makers, resource managers, scientists, and the broader public." (DISB at 1).

Here are a few examples of adverse environmental impacts of the Water Fix as set forth in the California Department of Fish and Wildlife October 30, 2015 Supplemental Document comments on the Water Fix REDIR/SDEIS. The new diversion "could substantially reduce suitable spawning habitat and substantially reduce the number of Winter-run as a result of egg mortality" with respect to the endangered Winter-run Chinook salmon. Moreover "there would be reductions in flow and increased temperatures in the Sacramento River that could lead to biologically meaningful reductions in juvenile migration conditions, thereby reducing survival relative to Existing Conditions." Similarly, "there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality and overall reduced habitat conditions for spawning spring-run and egg incubation, as compared to Existing Conditions." The Water Fix "could substantially reduce rearing habitat and substantially reduce the number of spring-run Chinook salmon as a result of fry and juvenile mortality." With the Water Fix, "there would be moderate to substantial flow reductions and substantial increases in temperatures and temperature exceedances above thresholds in the Sacramento, Feather, and American Rivers, which would interfere with fall-/late fall -run Chinook salmon spawning and egg incubation. There would be cold water pool availability reductions in the Feather, American, and Stanislaus Rivers, as well as temperature increases in the Feather and American Rivers that would lead to biologically meaningful increases in egg mortality and overall reduced habitat conditions for spawning steelhead and egg incubation as compared to Existing Conditions." With the diversion change, there would be flow reductions in five watershed Rivers "and temperature increases in the Sacramento, Feather, American, and Stanislaus Rivers that would lead to reductions in quantity and quality of fry and juvenile steelhead rearing habitat relative to Existing Conditions." The difference between Existing Conditions and the Water Fix "could substantially reduce suitable spawning habitat and substantially reduce the number of green sturgeon as a result of elevated exceedances above temperature thresholds." Under the Water Fix, "there would be frequent small to large reductions

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in flows in the Sacramento and Feather Rivers upstream of the Delta that would reduce the ability of all three life stages of green sturgeon to migrate successfully."

The CDFW is an expert agency on these impacts. Its findings also constitute significant new information requiring preparation and circulation of an adequate Draft or Subsequent EIR.

Instead of doing what is required by law and what is expected by the EPA, the State Water Board has declared in its January 15, 2016, Service List, an attempt to avoid CEQA and the changed circumstances by asserting a responsible agency excuse. There is no legitimate excuse here. If the State Water Board does not prepare or require the preparation of an adequate *Draft* EIR before commencing any part of the evidentiary hearing, the Board must prepare or require the preparation and circulation of an adequate *Subsequent* EIR prior to commencing any part of the evidentiary hearing.

Here, there is no Final EIR. Consequently, there appears to be no limit whatsoever on the ability of the State Water Board to prepare or require the preparation of an adequate Draft or Subsequent EIR. There is no responsible agency excuse to hide behind here.

The Board must Develop, Circulate, and Consider the Required Range of Reasonable Alternatives before Commencing the Evidentiary Hearing

This subject of alternatives is discussed at some length here because of the extreme prejudice protestants face in attempting to participate in either Part of the evidentiary hearing in the absence of a reasonable range of alternatives. Protestants are placed in the position of having to oppose the Petition without the benefit of having a public agency identified reasonable alternative they can support that would improve rather than worsen water conditions in the Delta.

"The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. "The core of an EIR is the mitigation and alternatives sections." *Id.* State policy declared by the Legislature in CEQA is that: "Environmental impact reports omit unnecessary descriptions of projects and emphasize feasible mitigation measures and feasible alternatives to projects." Public Resources Code § 21003(c). Instead of emphasizing alternatives to the Water Fix, protestants and the public are supposed to wade through 48,000 pages of draft environmental documents that do not include any, let alone the required range of, reasonable alternatives to the Water Tunnels project.

Development of alternatives increasing flows through the Delta has always been a direct and obvious first step to complying with California's public trust doctrine protecting Delta water quantity and quality. Instead of complying with the Delta Reform Act (DRA), the Endangered Species Act (ESA), the Clean Water Act (CWA) and applying the public trust doctrine, all of the so-called BDCP/Water Fix alternatives involve new conveyance as opposed to consideration of any through-Delta conveyance alternatives reducing exports.

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The alternatives section (Chapter 3) of the Draft EIR/EIS and the ESA-required Alternatives to Take section (Chapter 9) of the BDCP Draft Plan failed to include even one alternative that would increase water flows through the San Francisco Bay-Delta by reducing exports, let alone the NEPA, CEQA, and ESA required range of reasonable alternatives. Instead, all BDCP alternatives including new RDEIR/SDEIS alternatives 4 modified, 4A, 2D and 5A would do the opposite of increasing flows, by reducing flows through the Delta by way of new upstream diversion of enormous quantities of water for the proposed Water Tunnels. These intentional violations of law require going back to the drawing board to prepare a new Draft EIR/EIS that would include a range of real alternatives, instead of just replicating the same conveyance project dressed up in different outfits. To be clear, 14 of the so-called 15 "alternatives" in the Draft EIR/EIS, 10 of the so-called 11 "take alternatives" in the Draft Plan (Chapter 9) and the 4 "alternatives" in the new RDEIR/SDEIS are all peas out of the same pod. They would create different variants of new upstream conveyance to divert enormous quantities of freshwater away from the lower Sacramento River, sloughs, and San Francisco Bay-Delta for export south.

The direct and obvious way to increase flows through the Delta is to take less water out. The broad policy alternatives that should be highlighted by the State Water Board are to: 1) reduce existing export levels and thereby increase Delta flows; 2) maintain existing export levels and Delta flows; and 3) further reduce Delta flows by establishing a massive new diversion, the Delta Water Tunnels, upstream from the Delta.[7]

Reclamation and DWR have ignored our repeated calls over the past several years to develop and consider alternatives increasing freshwater flows though the Delta by reducing exports. They do so to stack the deck making it easier for them to adopt the Water Tunnels alternative because they do not consider any alternatives other than new, upstream conveyance. So now, the Board must do what DWR and Reclamation have refused to do. The violations of CEQA here include the presentation of only one alternative—the Water Fix Water Tunnels that are the focus of the Change Petition. There is no lawful basis to present that sole alternative, because of the failure to prepare an adequate *Draft* EIR/EIS. As EPA has determined:

> The decision by the State of California and Reclamation to defer these decisions means that the impacts of the WaterFix 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. Once those decisions, described below, are concluded, the evaluation of possible impacts and consideration of alternatives can be completed. (EPA Letter, at p. 2, October 30, 2015).

Alternatives Increasing Delta Flows must be Developed and Considered

[7] Though the Delta Water Tunnels alternative is a broad policy alternative, the Tunnels alternative is infeasible in terms of being actually adopted because it is not permissible under the ESA, Clean Water Act, Delta Reform Act and the public trust doctrine. Consequently, Alternative 4, DWR's original preferred alternative, and new Alternative 4A, Reclamation and DWR's new preferred alternative, are not actually feasible. As the RDEIR/SDEIS admits, " Many commenters argued that because the proposed project would lead to significant, unavoidable water quality effects, DWR could not obtain various approvals needed for the project to succeed (e.g., approval by the State Water Resources Control Board of new points of diversion for North Delta intakes)." (RDEIR/SDEIS ES-2).

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Even if the State Water Board is "only" a responsible, agency, Guideline § 15096(g)(2) mandates that:

> When an EIR has been prepared for a project, the Responsible Agency shall not approve the project as proposed if the agency finds any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment. . .

The way under CEQA for the State Water Board to find such feasible alternative measures is to prepare an adequate Draft or Subsequent EIR that includes the required range of reasonable alternatives. There are such alternatives. CEQA requires their development and consideration. Some are obvious. Some alternatives have already been identified in previous comments and are identified yet again in this letter.

The BDCP/Water Fix omission of alternatives reducing exports to increase flows is deliberate. A claimed purpose of the BDCP is "Reducing the adverse effects on certain listed [fish] species due to diverting water." (BDCP Draft EIR/EIS Executive Summary, p. ES-10). "[H]igher water exports" are among the factors the RDEIR/SDEIS admits "have stressed the natural system and led to a decline in ecological productivity." (RDEIR/SDEIS 1-10). "There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta." (Draft EIR/EIS ES-10; RDEIR/SDEIS ES-6). The new RDEIR/SDEIS admits that "the Delta is in a state of crisis" and that "Several threatened and endangered fish species . . . have recently experienced the lowest population numbers in their recorded history." (RDEIR/SDEIS ES-1). Alternatives reducing exports are the obvious direct response to claimed BDCP purposes of "reducing the adverse effects on certain listed [fish] species due to diverting water" and "to improve the conditions for threatened and endangered fish species within the Delta." The way to increase Delta flows is to take less water out.

Either the Board or Reclamation and DWR must develop and consider a range of reasonable alternatives that would increase flows by reducing exports in order to satisfy federal and California law. The Delta Reform Act establishes that "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." Cal. Water Code § 85021 (emphasis added). The Act also mandates that the BDCP include a comprehensive review and analysis of "A reasonable range of flow criteria, rates of diversion, and other operational criteria . . . necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses." Cal. Water Code § 85320(b)(2)(A). And, the Act requires: "A reasonable range of Delta conveyance alternatives, including through-Delta," as well as new dual or isolated conveyance alternatives. Cal. Water Code § 85320(b)(2)(B). In addition, the Act mandates that "The long-standing constitutional 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." Cal. Water Code § 85023.

The failure of the Draft Water Fix environmental documents to include through-Delta alternatives reducing exports violates the Delta Reform Act as well as CEQA. As we said in our November 24, 2015 joint letter, the change of the BDCP into the Water Fix and the dropping of

the Habitat Conservation Plan and National Community Conservation Plan means that the Water Fix has no force of law behind it. (Letter, pp. 8-9).

On November 18, 2013, FOR submitted a comment letter in the BDCP process urging those carrying out the BDCP to review the "Responsible Exports Plan," an update of the previous "Reduced Exports Plan" proposed by the (Environmental Water Caucus) EWC:

> as an alternative to the preferred tunnel project. This Plan calls for reducing exports from the Delta, implementing stringent conservation measures but no new upstream conveyance. This Plan additionally prioritizes the need for a water availability analysis and protection of public trust resources rather than a mere continuation of the status quo that has led the Delta into these dire circumstances. Only that alternative is consistent with the EPA statements indicating that more outflow is needed to protect aquatic resources and fish populations. The EWC Responsible Exports Plan is feasible and accomplishes project objectives and therefore should be fully analyzed in a Draft EIS/EIR. (FOR November 18, 2013 comment letter at p. 3).[8]

All of the so-called project alternatives set forth in the Draft Plan, Draft EIR/EIS, and new RDEIR/SDEIS create a capacity to divert more water from the Delta far upstream from the present diversion, which will undoubtedly decimate Delta-reliant species already on the brink of extinction, including, chinook salmon, steelhead, Green Sturgeon and Delta smelt. The differences among the alternatives are slight. "The 15 action alternatives are variations of conservation plans that differ primarily in the location of intake structures and conveyance alignment, design, diversion capacities (ranging from 3,000 to 15,000 cfs), and operational scenarios of water conveyance facilities that would be implemented under CM1." (Draft EIR/EIS, ES p. 26).

We yet again request development of a range of reasonable alternatives increasing Delta flows and reducing exports. The Board must take this opportunity as part of preparing a new, legally sufficient, Draft or Subsequent EIR that incorporates actions previously called for by the Responsible Exports Plan (attached to our previous comment letters and also posted at http://www.ewccalifornia.org/reports/responsibleexportsplanmay2013.pdf). These actions include: reducing exports to no more than 3,000,000 acre-feet in all years in keeping with State Water Board Delta flow criteria (for inflow as well as outflow); water efficiency and demand reduction programs including urban and agricultural water conservation, recycling, storm water recapture and reuse; reinforced levees above PL 84-99 standards; installation of improved fish screens at existing Delta pumps; elimination of irrigation water applied on up to 1.3 million acres of drainage-impaired farmlands south of the Bay-Delta; return the Kern Water Bank to State control; restore Article 18 urban preference; restore the original intent of Article 21 surplus water in SWP contracts; conduct feasibility study for Tulare Basin water storage; provide fish passage above and below Central Valley rim dams for species of concern; and retain cold water for fish

[8] Previous calls for development of a range of reasonable alternatives include the National Academy of Sciences, Report in Brief at p. 2, May 5, 2011; Co-Facilitators of the Environmental Water Caucus (EWC) April 16, 2012; EWC providing EWC's "Reduced Exports Plan" alternative in December 2012 and February 20, 2013; FOR and joint comment letters January 14, May 21, May 28, and September 4, 2014; EWC June 11, 2014 comment letter; joint July 22, 2015 comment letter.

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in reservoirs. We also request that the range of reasonable alternatives include reducing exports both more and less than the 3,000,000 acre feet limit called for by this alternative.

EWC's new *A Sustainable Water Plan for California* (May 2015) is an updated alternative to the BDCP/Water Fix Delta Tunnels. The features of the new plan are similar in pertinent part to the previous Responsible Exports Plan recommendations and features set forth above. The new plan is at http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf. A copy of *A Sustainable Water Plan for California* is also attached hereto. We request that the Board include this alternative among the required range of reasonable alternatives to be developed and circulated for public review and comment in either a new Draft or Subsequent EIR prior to commencement of any Part of the evidentiary hearing.

Sustainable Water Plan Alternatives could vary by how much time is allotted to phase in export reductions over time. For instance, they could range from 10 to 40 years, which would comparatively span the same range of timelines provided for Tunnels construction.

This point at this time is a procedural matter. The procedural point is that such alternatives must be developed, circulated for public comment and considered by the Board, regardless of what alternative is eventually approved.

The RDEIR/SDEIS admits the existence of paper water, "quantities totaling several times the average annual unimpaired flows in the Delta watershed could be available to users based on the face value of water permits already issued." (RDEIR/SDEIS 1-11). The Water Fix agencies misuse the Delta Reform Act's definition of the coequal goals: "' Coequal goals' means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem . . ." Cal. Water Code § 85054. Providing "a more reliable water supply" means real water actually available, not paper water, and reflecting water available for export while meeting the needs for Delta water quantity, quality, freshwater flows, fisheries, public trust obligations, the ESA, the Clean Water Act, and senior water rights holders. It does not mean moving the exporters who are junior water rights holders-- including 1.3 million acres of drainage impaired lands-- to the front of the line ahead of everyone and everything else. It also does not mean putting the exporters in the front of the line during a lengthy extreme drought, crashing fish populations, and reductions in water use being made by millions of Californians.

The estimated $15 billion cost of the Water Tunnels--which in reality will amount to $30 billion or more including capital cost (and costs normally being greater than when under estimated by self-interested project consultants)--represents an "opportunity cost." The enormous sums spent on the Water Tunnels would be opportunity lost to making modern water quality and quantity improvements including recycling, conservation, and technical improvements such as drip -irrigation. In other words, the sums spent on outdated concepts – the Water Tunnels--would be lost to effective modern measures actually increasing water availability. The only true benefit cost study prepared on the Water Tunnels concluded that the costs are 2 to 3 times higher than the benefits. Dr. Jeffrey Michael, *Benefit-Cost Analysis of Delta Water Conveyance Tunnels* (Eberhardt School of Business, University of the Pacific, July 12, 2012). Now that the project has dropped the features of habitat conservation while keeping only the Water Tunnels the exporters would not have the benefit of 50 year permits and virtually guaranteed water deliveries. That change, in addition to worsening the adverse environmental impacts of the Water Tunnels, also increases the already negative cost benefit ratio.

The Board must develop and Evaluate Alternatives that will Increase Delta Flows in order to comply with CEQA

Instead of sharply defining the issues and providing a clear basis for choice among alternatives, the BDC/Water Fix consultants have now produced 48,000 pages of conclusory Water Tunnels advocacy.

The failure to include a range of reasonable alternatives violates CEQA. An EIR must "describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." 14 Code Cal. Regs., (CEQA Guidelines) § 15126.6(a). "[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." § 15126.6(b). A new Draft or Subsequent EIR and recirculation is required by CEQA Guidelines section 15088.5(a)(3) because *A Sustainable Water Plan for California* alternative and other alternatives that would reduce rather than increase exports have not been previously analyzed but must be analyzed as part of a range of reasonable alternatives. Moreover, there has been complete failure to identify and make the required findings of infeasible as to environmentally superior alternatives.[9]

The RDEIR/SDEIS concedes that the project would have a number of significant and unavoidable adverse environmental impacts. (RDEIR/SDEIS Table ES-9, ES-41 through ES-105; Appendix A, Ch. 31, Table 31-1, 31-3 through 31-8). When the project would have significant adverse environmental effects, agencies are "required to consider project alternatives that might eliminate or reduce the project's significant adverse environmental effects." *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal.App.4th 859, 873 (2003). Instead of complying with CEQA by considering such alternatives, the lead agencies have refused to do so. So, the Board must do or require the doing of what the Water Fix agencies have not done.

It is obvious that alternatives not including new upstream conveyance while increasing Delta flows by reducing exports would avoid or reduce the significant adverse impacts of taking substantial freshwater flows away from the Delta for the Water Fix Tunnels. A city violated CEQA when the draft and final EIR's failed to consider feasible alternatives that would have reduced the significant impact of the project on the City's water supply. *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1300-1305. "By failing to mention, discuss, or analyze any feasible alternatives, the draft EIR and the final EIR failed to satisfy the informational purpose of CEQA, which included providing [responsible agency]

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[9] Before an agency "may approve a project with a significant environmental impact, it is required to make findings identifying … the specific … considerations that make infeasible the environmentally superior alternatives …" *Flanders Found. v. City of Carmel-by-the-Sea,* 202 Cal.App.4th 603, 620-21 (2006).

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LAFCO with relevant information." 213 Cal.App.4th at 1305. The CEQA documents here likewise fail to satisfy the informational purpose of CEQA.

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS, Chapter 9 of the BDCP plan and the RDEIR/SDEIS have led to NEPA and CEQA documents "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." 14 Code Cal. Regs § 15088.5(4).

Expert Federal and California Agencies have also Found the Current BDCP Alternatives Analysis Deficient

On August 26, 2014, the U.S. Environmental Protection Agency (EPA) issued its 40-page review of the Draft BDCP EIS finding in BDCP's case that:

> operating any of the proposed conveyance facilities . . . would contribute to increased and persistent violations of water quality standards in the Delta, set under the Clean Water Act, measured by electrical conductivity (EC) and chloride concentrations. We recommend that the Supplemental Draft EIS include one or more alternatives that would, instead, facilitate attainment of all water quality standards in the Delta. Specifically, we recommend that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedances of water quality objectives, and that would address the need for water availability and greater freshwater flow through the Delta. Such an alternative should result in a decrease in the state and federal water projects' contributions to the exceedance of any water quality objectives in the Delta. (*Id.*, p.2).

EPA further stated that "Data and other information provided in the Draft EIS indicate that all CM1 [Tunnels project] alternatives may contribute to declining populations of Delta smelt, Longfin smelt, green stu rgeon, and winter -run, spring -run, fall -run and late -fall run Chinook salmon." (p. 10). "We recommend that the Supplemental Draft EIS consider measures to insure freshwater flow that can meet the needs of those [declining fish] populations and ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance." (*Id.*). "Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta." (*Id.* p. 3).

EPA explained that: "Other reasonable alternatives could be developed by incorporating a suite of measures, including water conservation, levee maintenance, and decreased reliance on the Delta. Such alternatives would be consistent with the purpose and need for the project, as well as with the California Bay -Delta Memorandum of Understanding amon g federal agencies and the Delta Reform Act of 2009." (*Id.* at p. 13). EPA noted that "The 'Portfolio Approach' developed by a diverse set of stakeholders is one attempt to place Delta water management into the larger context of facilities investments and integrated operations." (*Id.,* p. 13 fn. 20).[10]

[10] The BDCP agencies had unlawfully dismissed consideration of the Portfolio Approach in a Draft EIR/EIS appendix claiming "Although there is much merit in this Portfolio-Based Proposal" such things as water recycling and conservation to improve water supply reliability in areas that use water diverted from the Delta are "beyond the

On July 29, 2014, the State Water Board issued its 38 page review of the Draft BDCP EIS/EIR. The Board declared that the "environmental documentation prepared for the project must disclose the significant effects of the proposed project and identify a reasonable range of interim and long-term alternatives that would reduce or avoid the potential significant environmental effects." (Letter, comment 9 pp. 11-12). Further, "The justification for this limited range of Delta outflow scenarios is not clear given that there is significant information supporting the need for more Delta outflow for the protection of aquatic resources and the substantial uncertainty that other conservation measures will be effective in reducing the need for Delta outflow. For this reason a broader range of Delta outflows should be considered for the preferred project." (*Id.* comment 10 p. 12).

On July 16, 2014, the U.S. Army Corps of Engineers found that: "the EIS/EIR is not sufficient at this time in meeting the Corps' needs under the National Environmental Policy Act (NEPA) . . . in particular with regard to the incomplete description of the proposed actions, alternatives analysis . . . and impacts to waters of the United States and navigable waters, as well as the avoidance and minimization of, and compensatory mitigation for, impacts to waters of the United States." (Letter p. 1). Additional Corps comments include the absence in the EIR/EIS of "an acceptable alternatives analysis" (comment 4), no showing on which alternative may contain the Least Environmentally Damaging Practicable Alternative (LEDPA) for section 404, Clean Water Act purposes (Comment 5), "the document needs a clear explanation of a reasonable range of alternatives and a comparison of such, including a concise description of the environmental consequences of each" (comment 19), and "new conveyance was not a part of the preferred alternative for CalFed. Does this EIS/EIR describe why the reasons for rejecting new conveyance in CalFed are no longer valid?" (Comment 22).

In conclusion, Reclamation and DWR in their RDEIR/SDEIS have ignored what the EPA, State Water Board and Army Corps have had to say, just as they have ignored the National Academy of Sciences, EWC and FOR over the past four years. If the Board proceeds to evidentiary hearing, it must prepare and issue a new Draft EIR or Subsequent EIR that includes the required range of reasonable alternatives or require DWR to do so, for public review and comment and decision-maker review.

The Bay-Delta Plan Update must be Completed Before Commencing the Evidentiary Hearing and Before making a Decision on the Water Quality Certification

As we pointed out in our earlier letter of November 24, 2015, the State Water Board proposes to review the Petition while conducting Phase 2 of the Bay-Delta Plan update concurrently. (Notice, p. 7). Likewise, the State Water Board has asserted that the decision on the application for water quality certification will not be based on future changes that may result from the plan update and that the Board is not required to know changes to flow and water quality objectives resulting from the update "in order to process the change petition." (State Water Board Fact Sheet, p. 4).

This portion of this letter supplements what we have already said. We explained in our November 24, 2015 Letter that the Plan must be updated before commencing the evidentiary

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scope of the BDCP." (Draft EIR/EIS appendix 3A at p. 81). Such things most definitely are within the scope of the State Water Board Change Petition proceeding.

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hearing on the change petition and before reaching a decision on the application for water quality certification. (November 24, 2015 Letter, pp. 8-12). Combined with the absence of the CEQA required range of reasonable alternatives discussed above, the Board is attempting to proceed in the absence of information on impacts and water quality standards essential to understanding the impacts of the Water Fix on the Delta.

The EPA review of the Water Fix environmental documents concluded that there will be:

> 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; Our prior Letter, p. 5).

The EPA explained that "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; Our prior Letter, pp. 9-10). 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 establishes that the Delta is already in violation of water quality standards, and that the proposed Water Fix would contribute to worsening the violations. It is also established that the environmental impacts of the Water Fix on the Delta and the watershed have not so far been subjected to adequate environmental analysis.

The process proposed now appears calculated to put the cart before the horse by creating as much momentum as possible for the Water Fix. And doing so before rather than after determining what water flows are needed for the Delta and whether it is time to begin increasing rather than reducing through-Delta flows. The California Supreme Court has determined that CEQA's "informational demands may not be met, in this context, simply by providing that future development will not proceed if the anticipated water supply fails to materialize." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432. "[T]he future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze to the extent reasonably possible, the impacts of providing water to the entire proposed project." *Vineyard Area Citizens,* 40 Cal.4th at 431.

"Decision-makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" (*Id.*). And, "speculative sources and unrealistic allocations ('paper water') are insufficient bases for decision-making under CEQA." *Vineyard Area Citizens,* 40 Cal.4th at 432.

Application of these straightforward rules is clearer and more direct here than in the case of a land use project where future water use by future occupants is but a consequence of approving the project. Here, the direct and immediate purpose of the Water Fix is to take enormous quantities of water upstream from the already imperiled Delta. The flows taken for the Water Tunnels that presently provide benefits for Delta water supply, water quality, fisheries and fish habitat before being diverted at the south end of the Delta, would instead be diverted away from the lower Sacramento River and Delta. The benefits of those flows would be lost to the Delta. "The ultimate question under CEQA, moreover, is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project." *Vineyard Area Citizens,* 40 Cal.4th at 434 (emphasis in original).

It is difficult to grasp the enormity of the procedural unfairness here. The Board has ex party rules in place surrounding the Tunnels Petition process. The Board has precluded persons for making comments to the Board at the public forum on January 5, 2016, about the relationship between the Tunnels Petition and the Bay-Delta WQCP update process. The public is forced into the ridiculous position, as they were on January 19, 2016, of requesting the Board to accelerate the Plan update process without being able to add that the update needs to happen before the Petition is processed. That is like telling someone they can advocate for peace but they cannot include discussion of their opposition to the particular war that their government is planning on launching. It is irrational to carry out the WQCP process without allowing discussion of the relationship of the Water Fix Petition to the Plan update. This is all the more reason to not only have the Plan update go forward, but to have the evidentiary hearings on the Tunnels Petition suspended to allow for a rational Plan update process.

The first step in a lawful, rational decision-making process is to carry out and complete the update of Phase 2 of the Bay-Delta Plan. Then and only then, would it be appropriate to consider the Petition.

The Hearing Issues Must be Modified

The State Water Board has set out the proposed scope and content of the proposed "key hearing issues" in the Notice. (Notice, p. 12).

The Designated Issues Must Comply with the Endangered Species Act and CESA

The issues stated in the Notice include "whether changes proposed in the petition unreasonably affect fish and wildlife . . . or other public trust resources "; "will the proposed changes in points of diversion alter water flows in a manner that unreasonably affects fish, wildlife, . ." "will the proposed changes in points of diversion affect water quality in a manner that unreasonably affects fish, wildlife, . ." (Notice, p. 12).

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The statement of these issues appears calculated to grant extensive discretion to the State Water Board to determine whether taking away the enormous freshwater flows carried off by the Water Fix Tunnels would "unreasonably" affect fish and their habitat. That is not the test for *listed* fish species under the Endangered Species Act (ESA). Petitioner Reclamation is a federal agency. It is subject to ESA standards and prohibitions.

Fish species present in the areas of the Sacramento River, sloughs, and Delta that would be affected by the taking away of freshwater from their habitat include Sacramento Winter-Run Chinook Salmon, Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt. The first of these species is listed under the ESA as an endangered species. The other four species are listed under the ESA as threatened species. The reaches of the Sacramento River, sloughs, and Delta that would lose significant freshwater flows by operation of the Water Fix Tunnels are designated critical habitats for each of these listed fish species.[11] Pursuant to the commands of Section 7 of the ESA, each Federal agency "shall. . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . ." 16 U.S.C. § 1536(a)(2). In the words of the courts, "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).

Consequently, the word "unreasonably" needs to be deleted with respect to *listed* fish species. And, the following key hearing issues need to be added to comply with the ESA:

Are the proposed changes in points of diversion likely to jeopardize the continued existence of any endangered or threatened species?

Will the proposed changes in points of diversion result in the destruction or adverse modification of the critical habitat for any endangered or threatened species?

If the answer determined through the evidentiary hearing process to either of the above issues is yes, Reclamation may not lawfully carry out the Water Fix project under the ESA. The State Water Board may not lawfully issue any changes to existing water rights permits or issue a new water right to support the project if the project is prohibited by the ESA. It would most certainly not be in the public interest to approve a project that a petitioner cannot lawfully carry out.

The Designated Issues must Comply with the Clean Water Act

The EPA has determined that the information in the project draft environmental documents "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; Our

[11] These ESA issues are dealt with in more detail in additional supplemental sheets to our joint Protest filed January 4, 2016, at pp. 22-32.

prior Letter, p. 5). As pointed out in the preceding subsection of this Letter, the Board proposed key hearing issues as to water flows and water quality are qualified by requiring that the proposed changes amount to "unreasonably" affecting these resources. That is not the test under the Clean Water Act (CWA). [12] To summarize, the Water Fix Tunnels project will violate water quality standards and the State cannot issue a CWA § 401 certification for the project. To receive a §401 certification, it must be shown that the entire project can be built and operated so as to meet all water quality standards. Meeting the water quality standards would include meeting beneficial uses designed to protect endangered and threatened Delta species and ecosystems. The Water Fix Tunnels will reduce flows and result in poor water quality for a number of constituents, including boron, bromide, chloride, electrical conductivity, nitrate, organic carbon, some pesticides, mercury, and selenium. The Delta is already impaired for many of the constituents that would increase under the Water Fix Tunnels. The Water Quality certification issue must be determined by the full Board or in the evidentiary hearing process. This critical issue may not be delegated and may not be processed separately as is proposed in the Notice. (Notice, p. 6).

Consequently, the following key hearing issues need to be added to comply with the CWA:

Will the changes proposed in the Petition meet all water quality standards including beneficial uses designed to protect endangered and threatened Delta species and ecosystems?

Will the changes proposed in the Petition degrade Delta waters and/or other waters affected by the proposed changes, and if so, how and to what extent?

Also under the CWA, a project proponent must demonstrate that the project is the Least Environmentally Damaging Practicable Alternative (LEDPA). Thus another key hearing issue must be added to carry out the CWA:

Is the Water Fix Tunnels project the Least Environmentally Damaging Practicable Alternative?

The Designated Issues must implement the policies of the State of California declared in the Delta Reform Act

The Delta Reform Act (Water Code § 85021) provides that:

> 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. . . .

Delta Reform Act policies include (Water Code § 85020 (c):

[12] These CWA issues are dealt with in more detail in additional supplemental sheets to our joint Protest filed January 4, 2016, at pp. 32-45.

Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.

Consequently, key hearing issues should be added to carry out the declared policy of the State of California:

Will the Water Fix Tunnels reduce reliance on the Delta in meeting California's future water supply needs?

Will the Water Fix Tunnels restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem?

The Designated Issues must include Consideration of Upstream impacts of the Project

Again, the EPA has determined that the information in the draft environmental documents:

> 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; Our prior Letter p. 5)(emphasis added).

The Board needs to be careful for the proceeding to have sufficient scope. That scope is beyond the Delta proper. For example, the change in point of diversion creates reasonably foreseeable operational changes to the status of Delta tributary reservoirs and their cold-water pools.

As should be obvious to the Board, pumping constraints in the Delta "bottleneck" tend to result in less releases from north-of-Delta reservoirs to meet export demands: That is at least Trinity, Shasta, Oroville, New Bullards, and Folsom Dams. Reduced releases usually result in higher reservoirs, larger cold-water pools, colder releases, better conditions for fish, and increased reliability to "area of origin" contractors and water rights holders.

The federal courts have ruled that the state's watershed protection statutes, which sometimes are naively purported to protect areas and counties of origin from excessive export deliveries, do not apply to Reclamation's allocation decisions between similar south-of-Delta and north-of-Delta contractors. In the courts' judgement, however, geographic/operational realities do. The same legal principles might be expected to apply to SWP contractor allocations.

The point-of-diversion changes geographic realities. This has not gone unnoticed. An explicit objective of the BDCP was to enable delivery of full export contracts and increased reliability of deliveries that are now sometimes constrained by the geographic and operational circumstances of the location of the export pumps. In practice, the Cal Water Fix must have a

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similar objective in order to make the project economically attractive to CVP and SWP contractors.

Any analysis of point of diversion changes will have to encompass alternatives that adopt water-rights changes to export permit holders that protect public trust resources affected by these reservoir operations. However, the existing Cal Water Fix environmental documents do not examine alternatives to ensure that export operations with eased Delta conveyance do not result in adverse effects to public trust resources or disturb state priorities for beneficial uses of water.

Demonstration of the necessity of Board responsibilities need look no farther than its orders to state and federal water contractors during the recent drought actions where the Board attempted to limit releases from CVP and SWP reservoirs to avoid hopefully unnecessary adverse impacts to cold-water pool fisheries and the daylighting of municipal water supply intakes.

Finally, it has also not gone unnoticed that the change in point of diversion makes the acquisition of new north-of-Delta supplies (new dams and reservoirs) more financially and operationally attractive. Thus, the cumulative impacts of easing the Delta bottlenecks will include political pressure to undo legal protections for rivers protected by the California and National Wild & Scenic Rivers Acts. As the Board may recall, the first major political effort to build conveyance around the Delta was linked to a buttressing of reliability of such protections. The Cal Water Fix does not do that.

It is Not Possible to "Condition" Reality

The Notice raises issues of "conditions" on project approval including with respect to Part I, "what specific conditions, if any, should the State Water Board include in any approval of the Petition to avoid injury to these uses?" (Notice, p. 11). With respect to Part II the Board asks what conditions, if any, should be included "in any approval of the Petition to avoid unreasonable effects to fish, wildlife, or recreational uses?" (Notice, p. 12). The Board also asks what conditions if any should be included in any approval of the Petition "to ensure that the changes are in the public interest?" (Notice, p. 12).

It is not possible to "condition" reality. The Water Tunnels would cost many billions of dollars to construct. Their capacity is about equal to the normal entire summer flow of the Sacramento River at the diversion point. The only logical decision is whether or not to approve the diversion change. Approving the diversion change subject to conditioning it on not damaging Delta water quality or fish habitat would be an absurdity. It is not possible to operate the Tunnels by taking away large quantities of freshwater that presently flow through the Delta before being diverted without reducing freshwater flows through the Delta, worsening Delta water quality and quantity and damaging fish and fish habitat.

Just as the courts do not approve what public agencies do if they defy common sense, neither should the State Water Board. In *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-7, the court said: "Although Respondent's contend that we should defer to the Board's findings that the mitigation measures are effective, we decline to do so where the

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Board's findings are not supported by substantial evidence or defy common sense. Law is not required to abandon common sense. Here, our commonsense informs us that the mitigation measures will not effectively replace the water that could be lost by the neighboring landowners."

What is before the Board is yes or no on the massive Water Tunnels. As we pointed out early on in this letter, no reasonable range of alternatives required by CEQA exists in the Water Fix environmental documents. The decision before the Board then, is yes or no as to approving the Water Tunnels. It defies common sense to contend that the Tunnels can be "conditioned" or "mitigated" to avoid damaging Delta water flows, water quality, and fisheries.

Conclusion

There is not the adequate informational basis required by law at this time on which to commence an evidentiary hearing. No adequate Draft or Subsequent EIR/EIS has been prepared for public review and comment. The CEQA required range of reasonable alternatives does not exist in the Water Fix Draft environmental documents. 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. These deficiencies are unacceptable. Extinction is forever.

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
/s/Ron Stork
Policy Director
Friends of the River

/s/Kyle Jones
Policy Advocate
Sierra Club California

/s/Jonas Minton
Senior Water Policy Advisor
Planning and Conservation League

Attachment: *A Sustainable Water Plan for California* (EWC May 2015)
cc (Addressees: via Email):
Felicia Marcus, Chair, SWRCB, Hearing Officer
Tam M. Doduc, Member, SWRCB, Hearing Officer
James Mizell, for petitioner DWR
Amy Aufdemberg, Department of Interior for petitioner Reclamation
Tom Howard, Executive Director, SWRCB
Michael Lauffer, Chief Counsel, SWRCB
Dana Heinrich, Staff Attorney IV, SWRCB
Diane Riddle, Environmental Program Manager, SWRCB
Michael Patrick George, Delta Watermaster
All Party Representatives on SWRCB January 15, 2016 Service List

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