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August 27, 2018

Randy Fiorini  
Chair of the Delta Stewardship Council  
980 Ninth Street  
Suite 1500  
Sacramento, CA 95814

Re: Appeal of Department of Water Resources' Certification of Consistency for California WaterFix

Dear Chair Fiorini:

This appeal of the Department of Water Resources' (DWR) Certification of Consistency for the California WaterFix project (Project) is submitted to the Delta Stewardship Council (DSC) on behalf of the City of Stockton (Stockton). Stockton's appeal is based on expert evidence demonstrating that the Project is inconsistent with Delta Plan<sup>1</sup> policies, recommendations, and performance measures and as such the Project will significantly impact the achievement of the statutorily prescribed coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. For the reasons set forth herein, DSC should reject DWR's consistency determination.

## **I. Requirements for Appeal**

### **a. Appellant's name and address:**

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<sup>1</sup> Delta Stewardship Council, The Delta Plan (2013, as amended 2018 [Delta Plan]) Delta Plan Policies and Recommendations.

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b. Name and address of the party whose proposal is the subject of the appeal:

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c. Description of the covered action that is the subject of the state or local public agency certification:

California WaterFix (see section II below).

d. Specific grounds for the appeal:

See section III below.

e. Detailed statement of facts on which the appeal is based:

See section III below.

## **II. Description of the Covered Action**

As summarized by DWR in its Certification of Consistency, the Project makes physical and operational changes to the State Water Project (SWP) system in the Delta to restore water supplies of the SWP and Central Valley Project (CVP) south of the Delta, which involves the construction of new north Delta intake structures. With the addition of the north Delta facilities, the Project will operate in dual conveyance in conjunction with existing State and federal south Delta pumping facilities. According to DWR, the Project establishes a preference for north Delta diversions most of the year, removing a substantial portion of Sacramento River flow through intakes on the east bank of the Sacramento River, between Clarksburg and Courtland, depending on largely undefined operations that are subject to adaptive management. Sacramento River water would be conveyed through massive twin

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tunnels to pumping plants in the south Delta, where the SWP and CVP operate. Although DWR has characterized the Project as diverting up to 9,000 cubic feet per second (cfs) of flow, in the water right change proceeding currently pending before the State Water Resources Control Board (SWRCB) (Water Right Change Proceeding),<sup>2</sup> it has requested approval for the Project to operate within a range of “boundary” conditions up to 15,000 cfs, which represents the maximum capacity of the proposed “twin tunnels.” Notwithstanding the fact that the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) and Delta Plan policy is to *reduce* reliance on the Delta, and it is well recognized that SWP contract allocations far exceed available water supplies,<sup>3</sup> DWR also based its approval of the Project on an objective of delivering *full* SWP contract deliveries. (California WaterFix, California Environmental Quality Act [CEQA] Findings of Fact and Statement of Overriding Considerations, July 2017, p. 31.)<sup>4</sup> Notably, the Project contains no limitations on South Delta pumping by either the SWP or CVP, nor any limitations that would prevent it from maximizing deliveries from both the north and south Delta if endangered fish lose their protection, or become extinct. The lack of pumping limitations combined with increased pumping at existing or new CVP facilities (as recently directed by the Trump administration) are clear proof that DWR and Reclamation are doubling down on their reliance on Delta water supplies.

### III. Grounds for Appeal

Under the Delta Reform Act, a state agency that proposes a project within the boundaries of the Delta that will significantly impact the achievement of the statutorily-established coequal goals must attest to the project’s consistency with the coequal goals and each of the regulatory polices contained in the Delta Plan before proceeding to implement the proposed project. (Wat. Code, §§ 85054, 85057.5, 85225; Cal. Code Regs., tit. 23, § 5002, subd. (b)(1).) Relevant to this certification are the priority recommendations contained in the Delta Plan, which, although non-regulatory, identify actions “essential to achieving the coequal goals.” (Delta Plan, p. ES-17.) Also relevant are Delta Plan performance measures. (Delta Plan, Appendix E: Performance Measures for the Delta Plan, as amended Apr. 26, 2018.)

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<sup>2</sup> Hearing on the Matter of California DWR and United States Bureau of Reclamation (Reclamation) for a Change in Point of Diversion for California WaterFix.

<sup>3</sup> Historical annual SWP deliveries for agriculture and municipal & industrial (M&I) uses have not exceeded 2.9 million acre feet (AF) (and in recent drought years have been well under 1 million AF), whereas existing SWP contracts provide for delivery of nearly 4.1 million AF in Table A water alone. Whether contract deliveries are “restored” to historic high levels or made to full contract amounts, meeting the Project objective would represent a significant increase in reliance on the Delta. (See <https://water.ca.gov/LegacyFiles/swpao/docs/bulletins/bulletin132/Bulletin132-16.pdf>, [as of Aug. 27, 2018] showing history of SWP deliveries.)

<sup>4</sup> Available at:

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/swrcb\\_staff/findings\\_of\\_fact\\_and\\_soc.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/swrcb_staff/findings_of_fact_and_soc.pdf) [as of Aug. 27, 2018].

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State or local agencies are required to submit to the DSC detailed findings and the record upon which their consistency determination is based. (Wat. Code, § 85225; Delta Plan, Ch.2: The Delta Plan, p. 32.) The Delta Reform Act provides for the review of the submitted Certification of Consistency by permitting any person who claims the proposed project is inconsistent with the Delta Plan, and, therefore, will have a significant adverse impact on one or both of the coequal goals, to file an appeal with DSC. (Wat. Code, § 85225.10, subd. (a).) These findings and the record will provide the basis for DSC decision making. DSC must remand the matter to the agency for reconsideration if the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25.)

As detailed below, DWR's Certification of Consistency is not supported by substantial evidence; the Project is inconsistent with the policies, recommendations, and performance standards contained in the Delta Plan and thus will have a significant adverse impact on the achievement of the Delta Reform Act coequal goals.

**A. The Certification of Consistency Is Improper and Must Be Rejected Because DWR Has Not Completed the CEQA Process for the Project**

The Delta Plan provides that “[t]he certification of consistency should not be submitted to the Council until the covered action has been fully described and the impacts associated with the covered action have been identified; this *coincides with the completion of the CEQA process.*” (Delta Plan, Ch. 2: The Delta Plan, p. 51, emphasis added.) DWR recently proposed major changes to the Project that are the subject of a Draft Supplemental Environmental Impact Report (DSEIR) that was released for public review on July 17, 2018, the same day that DWR made available its draft determination that the Project is consistent with the Delta Plan. The public review period for the DSEIR does not end until September 17, 2018. The changes to the Project as it was approved in July 2017 will result in new and substantially more significant environmental impacts that the DSEIR entirely fails to acknowledge or mitigate, as required by CEQA and the Delta Plan.

For example, because DWR was unable to secure approval of a Clean Water Act section 404 permit for the Project's tunnel spoils disposal sites, it has proposed to move one of the sites to the north of Bouldin Island, immediately across Potato Slough from the Tower Park Marina Resort (Marina), the largest recreational facility within the Delta, whose owners have made significant investments to provide visitor serving uses consistent with the Delta Plan's vision for Delta recreation and tourism. DWR nonetheless chose to relocate its massive tunnel spoils disposal site in close proximity and plain view of the Marina, in violation of Delta Plan policy DP P2, Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats. (Cal. Code Regs., tit. 23, § 5011.) The DSEIR falsely claims this major change to the approved Project will not have a significant impact on the Marina, claiming that views of the tunnel spoils site will be blocked by existing levees. Evidence submitted to the SWRCB, as part of the ongoing Water Right Change Petition proceeding for

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the Project, demonstrates that the DSEIR's statement that the levees will block views from the Marina from the tunnel spoils dump is incorrect; the dump site is plainly visible from the Marina.<sup>5</sup> This change also will result in significant impacts to odor as well as recreation.

In addition to violating Delta Plan Policy DP P2, DWR's unilateral decision to relocate the massive tunnel spoils dump site immediately across from the Marina also violates DWR's own so-called "environmental commitment," regarding tunnel spoils disposal sites. This "commitment" is a promise purportedly incorporated into the Project design and upon which DWR relied in certifying the Final EIR and approving the Project, which requires that DWR consult with local land owners in siting tunnel spoils disposal sites to avoid significant impacts to Delta residents and land uses. (Final EIR Appendix 3B, Environmental Commitment 3.23: Disposal and Reuse of Spoils, Reusable Tunnel Material (RTM), and Dredged Material, July 2017, p. 3B-51.)<sup>6</sup> That DWR cannot be trusted to comply with its adopted mitigation so soon after Project approval, with numerous discretionary approvals and the requirement for a Delta Plan consistency determination pending, raises substantial concerns about DWR's willingness and ability to comply with the numerous mitigation measures and other commitments it holds out in support of its consistency determination.

These significant errors in the DSEIR will require recirculation of the DSEIR and revision of the Project to avoid or substantially lessen these significant impacts. Because the DSEIR is only a draft, it is foreseeable that concerns raised in the public comment period might result in additional changes, such as again relocating the Bouldin Island tunnel spoil dump site to avoid impacts to the Marina that could directly impact other land uses in the Delta, including Stockton's Drinking Water Treatment and Supply Project on adjacent Empire Tract. For example, the characteristics of the tunnel spoils are not known, and contaminated seepage from the tunnel spoil disposal, or from levee failure, or barge operations to and from the spoils site could have a significant adverse impacts to water quality at Stockton's drinking water intake, which is just downstream from Bouldin Island via Little Connection Slough. Whether and how DWR decides to address these impacts will not be known until the pending CEQA process is complete. Only at that time, with an adequate certified SEIR, will DSC have sufficient information to determine whether the Project, as revised, is consistent with the Delta Plan. In accordance with the Delta Plan, DSC should reject the Certification of Consistency and refuse to accept any consistency determination for the Project until the SEIR is certified.

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<sup>5</sup> See Protestant Save the California Delta Alliance et al. Written Testimony of Bill Wells, July 13, 2018, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/STCDA%20et%20al/part2rebuttal/scda\\_308.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/STCDA%20et%20al/part2rebuttal/scda_308.pdf) [as of Aug. 27, 2018]; see also Save the California Delta Alliance et al Exhibits 306, 309-328

<sup>6</sup> Available at: [http://files.californiawaterfix.com/2018\\_07-16\\_Public\\_Draft\\_WEB/3\\_Appendices/App\\_03B\\_Env\\_Commitments\\_Draft\\_SEIR-EIS.pdf](http://files.californiawaterfix.com/2018_07-16_Public_Draft_WEB/3_Appendices/App_03B_Env_Commitments_Draft_SEIR-EIS.pdf). [as of Aug. 27, 2018].

**B. Substantial Questions and Uncertainty Regarding CVP Operations and Federal Participation in the Project Prevent a Finding that the Project Is Consistent with the Delta Plan at this Time**

The Project as approved by DWR assumes and, due to operating assumptions that formed the basis for the Project EIR's analysis, requires the participation of Reclamation as operator and water right holder of the federal CVP. DWR and Reclamation repeatedly have emphasized that the Project serves both the CVP and SWP, and operational decisions by both DWR and Reclamation will determine the ultimate impact of the Project on the Delta, its natural resources, and its residents. However, Reclamation has not committed to participate in the Project, and most CVP contractors have not agreed to fund it. Failure to deliver CVP supplies through the Project will significantly change the environmental impacts and asserted benefits of the Project. Moreover, on August 17, 2018, Reclamation served notice to the State of its intent to renegotiate the Coordinated Operations Agreement (COA) for the projects, which governs how water is exported from the Delta. (See August 17, 2018 letter from David Murillo, Reclamation, to Karla Nemeth, Director of DWR.) These negotiations are expected to take at least 12 months and could take up to 24 months, with no guarantee as to the outcome. (*Ibid.*) On the same day, the Secretary of the Interior directed federal officials, including Reclamation, to develop no later than September 1, 2018, a "plan of action" as well as "legislative and litigation measures" to "maximize water supply deliveries" and "infrastructure improvements" necessary to independently operate the CVP. (See August 17, 2018 Memorandum from the Secretary of the Interior to Solicitor et al., citing "unacceptable restrictions" by the State of California on CVP operations.)

There is no mechanism in the Delta Plan or implementing regulations for DSC to revisit DWR's consistency determination if the Project operation and impacts, and cumulative impacts, change substantially due to actions by Reclamation or its sister agencies. The substantial uncertainty regarding Project implementation, and substantial questions regarding impacts that would result if the Project serves only the SWP, or if federal agencies significantly increase CVP pumping and loosen or waive protections for listed species, fatally undermine the evidence and argument cited by DWR in support of its assertions about Project consistency with the Delta Plan and coequal goals. Lacking an assured compliance mechanism to ensure that the CVP portion of the Project is consistent with the Delta Plan, DSC must at this time reject DWR's determination that the Project is consistent with the Delta Plan and coequal goals. At a minimum, Reclamation's failure to commit to participating in the Project, its stated intent to operate CVP facilities in a manner not evaluated as part of the Project's EIR (and likely inconsistent with EIR assumptions), and renegotiate the COA, as well as the Secretary of Interior's expressed intent to assert federal preemption to avoid or operate outside of State regulatory requirements each provide an independent basis upon which DSC should reject DWR's Certification of Consistency as premature and unsupported by substantial evidence.

**C. The Project Is Inconsistent with Numerous Delta Plan Policies, Recommendations and Performance Measures**

**1. Mitigation Measures (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2))**

The Project is not consistent with Delta Plan Policy G P1 (b)(2) because the Project does not include any mitigation measures that would clearly mitigate impacts to Stockton. The Delta Plan's Program EIR identifies standard mitigation measures not specific to the Project; compliance with these mitigation measures would not address the potential impacts to Stockton that would result from construction and operation of the Project. Nor does the Project include substitute mitigation measures that are equally or more effective at mitigating impacts to Stockton. (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2).) The Delta Plan's Program EIR identifies standard mitigation measures not specific to the Project; compliance with these mitigation measures would not address the potential impacts to Stockton that would result from construction and operation of the Project. (Delta Programmatic Environmental Impact Report, Vol 1, p. 2B-2 – 2B-3.) As presented in expert testimony submitted by Stockton in the Water Right Change Proceeding, modeling demonstrates that unmitigated impacts of the Project will result in a substantial decrease in the volume of higher quality Sacramento River water at Stockton's intake in the north Delta, while the volume of more saline and lower quality San Joaquin River water is expected to increase. (Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (Mar. 23, 2017) p. 7; Water Right Change Proceeding, Sur-Rebuttal Testimony of Robert Granberg on behalf of City of Stockton (June 9, 2017) p. 2.) This change will substantially degrade the water quality that flows past Stockton's drinking water intake and wastewater discharge locations by increasing concentrations of chloride and other water quality constituents to levels that render the water unusable for the City's M&I uses under its existing treatment technology and below the quality of water Stockton's residents and businesses expect. (*Ibid.*)

Relative to existing conditions and the No Action Alternative defined by DWR, the Project increases the time during which Stockton will not be able to use its drinking water intake in the Delta by 87 percent and 48 percent, respectively. (Water Right Change Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018), p. 3.) Moreover, chloride concentrations that exceed 110 mg/L in the City's source water increase chlorides in its wastewater discharge, presenting a risk of non-compliance with its National Pollutant Discharge Elimination System (NPDES) permit (No. CA0079138). (Water Right Change Proceeding, Sur-Rebuttal Testimony of Robert Granberg on behalf of City of Stockton (June 9, 2017) pp. 4-5; Water Right Change Proceeding, Part Two Testimony of Robert Granberg, P.E. on behalf of City of Stockton (Nov. 29, 2017) pp. 2-4; Water Right Change Proceeding, Part Two Testimony of Mel C. Lytle, Ph.D. on behalf of City of Stockton (Nov. 29, 2018) pp. 2-3, 7.) DWR has adopted no mitigation measures to

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address these serious impacts that go to the heart of the Delta Reform Act's concern that water exports from the Delta not injure Delta water quality or water supplies.

In clear contravention of its mandatory duties under CEQA, DWR did not consult with Stockton regarding Stockton's concerns over the Project as required prior to completing any of the draft or final CEQA-mandated environmental review documents. (Pub. Resources Code, § 21104.) The failure to conduct this mandatory consultation was prejudicial to Stockton, because it resulted in an environmental analysis of the Project that wholly failed to address the specific water quality impacts to Stockton's drinking water supply, that summarily dismissed Stockton's voiced concerns about impacts to its water supply, and that ignored the effect of water quality changes on the City's ability to use water diverted at its San Joaquin River intake. (Water Right Change Proceeding, Exponent Report on the Effects of the California WaterFix Project on the City of Stockton, (Mar. 22, 2017), p. 16; Water Right Change Proceeding, Part Two Testimony of Mel C. Lytle, Ph.D. on behalf of City of Stockton (Nov. 29, 2018) pp. 2-3.) DWR neither responded to Stockton's comments, addressed its concerns, resolved substantial questions about Stockton's water supply, nor proposed mitigation sufficient to address WaterFix's impacts to Stockton's water supply and wastewater treatment plant. (Water Right Change Proceeding, Sur-Rebuttal Testimony of Robert Granberg on behalf of City of Stockton (June 9, 2017); Water Right Change Proceeding, Testimony of Robert Granberg on behalf of City of Stockton (Aug. 30, 2016), p. 10.)

For the reasons described in section D.2 below, DWR's belated attempt to shore up the fatal flaw in the Project EIR with a report produced months after the release of the Final EIR, failed to accurately or adequately characterize potential impacts to Stockton, due to misleading and inappropriate methodology designed to mask the Project's impacts to Stockton. Furthermore, DWR never produced any evidence that evaluates or considers the effect of degraded water quality conditions caused by the Project on Stockton's ability to meet discharge limitations contained in its NPDES permit and corresponding treatment requirements. (Water Right Change Proceeding, Part Two Testimony of Robert Granberg, P.E. on behalf of City of Stockton (Nov. 29, 2017) p. 3.) Had DWR consulted with Stockton, it would have learned why and how the substantial changes in water quality that will occur at Stockton's intake will render the water supply unusable at times, resulting in significant, unmitigated impacts to Stockton's water quality. (Water Right Change Proceeding, Exponent Report on the Effects of the California WaterFix Project on the City of Stockton (Mar. 22, 2017), pp. 3, 16; Water Right Change Proceeding, Part Two Testimony of Mel C. Lytle, Ph.D. on behalf of City of Stockton (Nov. 29, 2018) pp. 7-8.)

DWR's failure to adopt mitigation for these significant impacts will increase the cost of treating Stockton's source water, increase the cost of treating the wastewater, or cause Stockton forgo diversion of surface water within its permitted rights—instead, seeking a replacement supply purchased at retail prices, or revert to groundwater pumping, thus

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subverting one of primary purposes in acquiring Stockton's surface water right and investing hundreds of millions of dollars to construct its intake and treatment system. (Water Right Change Proceeding, Part Two Testimony of Robert Granberg, P.E. on behalf of City of Stockton (Nov. 29, 2017) p. 4; Water Right Change Proceeding, Sur-Rebuttal Testimony of Robert Granberg on behalf of City of Stockton (June 9, 2017) p. 5.) The cost of any of these options will be borne by the businesses and over 300,000 residents of Stockton—a significant population of which fall into economically disadvantaged groups with limited financial capability to absorb additional water rate increases. (Water Right Change Proceeding, Sur-Rebuttal Testimony of Robert Granberg on behalf of City of Stockton (June 9, 2017) p. 5; Water Right Change Proceeding, Part Two Testimony of Robert Granberg, P.E. on behalf of City of Stockton (Nov. 29, 2017) p. 7; Water Right Change Proceeding, Part Two Testimony of C. Mel Lytle, Ph.D. on behalf of City of Stockton (Nov. 29, 2017) pp. 3-7.)

DWR's failure to even consider feasible mitigation measures to address impacts to Stockton is indefensible, first and foremost, as a violation of state law and policy. In addition to requirements under CEQA and the Delta Plan, the Project's unmitigated degradation of water quality is in direct conflict with the State's longstanding policy, as stated in SWRCB Resolution No. 68-16, requiring that any changes to water quality are consistent with the maximum benefit to the people of California and will not unreasonably affect present beneficial use of such water. (SWRCB Res. No. 68-16 (Oct. 28, 1968).) The evidence submitted to DWR in the Water Right Change Proceeding and with this appeal demonstrate how the Project will unreasonably affect Stockton's present beneficial use of its Delta water supply. Secondly, DWR has proven that it is feasible to mitigate the Project's significant impact to M&I water suppliers from increased chloride and other water quality constituents through its agreement to adopt, implement, and fund an alternative water supply for the Contra Costa Water District (CCWD), which objected to the Project's EIR/environmental impact study (EIS) and filed a protest to the Water Right Change Petition based on asserted significant water quality and water supply impacts to CCWD and its customers. (Agreement for Mitigation of Impacts to Contra Costa Water District from Construction and Operation of Bay Delta Conservation Plan/California WaterFix (Mar. 24, 2016).) To Stockton's detriment, DWR has selectively chosen to acknowledge and address known water supply impacts resulting from the Project, treating Stockton's 300,000 residents as second-class citizens.

DWR's failure to mitigate for the Project's significant water quality impacts to Stockton will have a significant adverse impact on the achievement of the coequal goal of providing a more reliable water supply for California. (Wat. Code, § 85054.) Achievement of this goal requires "promoting, improving, investing in, and implementing projects and programs that improve the resiliency of the state's water systems," as well as increasing efficiency and improving groundwater management. (Cal. Code Regs., tit. 23, § 5001, subd. (h)(1)(A).) Additionally, achievement of the coequal goal requires a reduction in reliance on the Delta watershed for reasonable and beneficial uses, and improvement in regional self-reliance, "consistent with existing water rights and the State's area-of-origin

statutes,” by implementing local and regional projects that, in part, enhance regional coordination of local and regional water supply development efforts. (*Id.* at § 5001, subd. (h)(1)(B).) Having failed to mitigate the Project’s significant impacts on Stockton’s M&I water supply that will occur from diverting water out of the basin of origin, DWR cannot in good faith argue, and substantial evidence does not support, a finding that Project is consistency with this coequal goal.

**2. Best Available Science (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3))**

The Project is not consistent with Delta Plan Policy G P1 (b)(2) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)), which requires that DWR document use of best available science. “Best available science” is defined as the best scientific information and data for informing management and policy decisions, and must meet established guidelines and criteria, which include a good experimental design and clear documentation of methodology, with the ultimate goal fostering improved understanding and decision making. (Cal. Code Regs., tit. 23, § 5001, subd. (f).) The Delta Independent Science Board (Science Board), a group of independent professional scientists tasked with detailed review of DWR’s EIR for scientific accuracy and suitability, concluded that DWR failed to provide the public and decision makers with sufficient information to make an informed decision based on the structure, organization, and content of the Project’s EIR/EIS.

The Science Board found the Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS) “sufficiently incomplete and opaque to deter its evaluation and use by decision makers, resource managers, scientists and the broader public.” (Delta Independent Science Board, letter to Randy Fiorini regarding review of environmental documents for California WaterFix, Sept. 30, 2015, p. 1.) The Science Board cited fundamental flaws in the RDEIR/SDEIS including, but not limited to, “overall incompleteness through deferral of content to the Final EIR/EIS . . . specific incompleteness in treatment of adaptive management, habitat restoration, levees and long-term effects; and inadequacies in presentation.” (*Id.* at p. 4.) In light of these defects, the Science Board concluded that the RDEIR/SDEIS “fails to adequately inform weighty decisions about public policies.” (*Ibid.*) DWR’s failure to resolve the RDEIR/SDEIS’s fundamental flaws led the Science Board to conclude that the Final EIR/EIS (FEIR/EIS) “resembles its predecessor in failing to communicate clearly the principal findings and uncertainties of an enormous report.” (Delta Independent Science Board, letter to Randy Fiorini regarding review of the FEIR/EIS for California WaterFix, June 16, 2017, p. 4.) Specifically, the Science Board concluded that broad categories of content were missing from the FEIR/EIS, such as the necessary “evaluation of environmental effects of water use south of the Delta.” (*Id.* at p. 1.)

Also missing from the RDEIR/EIS and version of the FEIR/EIS made available to the public before Project approval was any analysis of the Project’s water quality impacts at a

location representative of existing conditions at Stockton's intake. In its final approval documents, DWR included a report purporting to analyze Project impacts at Stockton's intake (which DWR prepared as rebuttal testimony in the Water Right Change Proceeding), but that study did not reflect the use of best available science because it: (1) failed to evaluate the range of impacts that will occur under the Project as it would actually operate, or against the appropriate baseline, thus dramatically understating the frequency and magnitude of significant impacts; (2) failed to use an appropriate methodology for calculating and presenting impacts that effectively illustrate day-to-day changes in water quality and, instead, buried the changes by using long-term monthly average data which masks the actual water quality and water use impacts to Stockton; (3) failed to adequately address potential for increases in *Microcystis* blooms, which pose a risk to humans and wildlife; and (4) failed to account for the means by which Stockton operates drinking water and wastewater treatment plants in conducting its analysis. (Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (Mar. 23, 2017) pp. 3-13; Water Right Change Proceeding, Exponent Report on the Effects of the California WaterFix Project on behalf of City of Stockton (Mar. 22, 2017) pp. 21-42; Water Right Change Proceeding, Sur-Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (June 9, 2017) pp. 3-4.; Water Right Change Proceeding, Exponent Technical Response to Petitioners' Rebuttal Testimony in the WaterFix Proceedings, June 9, 2017, pp. 1-38; Water Right Change Proceeding, Part Two Testimony of Robert Granberg, P.E. on behalf of City of Stockton (Nov. 29, 2017); City of Stockton, Regional Wastewater Control Facility, Attachment F – Fact Sheet, 2014; Water Right Change Proceeding, Part Two Testimony of C. Mel Lytle, Ph.D. on behalf of City of Stockton (Nov. 29, 2017).) These flaws in scientific methodology resulted in an insufficient analysis of Project impacts on Stockton's water supply by omitting information regarding and discussion of Project-related increases in a wide range of water quality constituents, including chloride, bromide, nitrate, pesticides, and increased temperature, as well as the increased potential for occurrence of toxic blooms of *Microcystis*. (*Ibid.*) For example, DWR's analysis of channel velocities uses maximum velocities and absolute values, which are largely unrelated to residence time in the Delta tidal system, affecting the accuracy of DWR's analysis of cyanobacteria blooms, and particularly *Microcystis* blooms. (Water Right Change Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018), pp. 4-5.) As presented in evidence by Stockton, DWR should have used tidally- or daily-averaged velocity, which are better surrogate for residence time because they account for the "sloshing" nature of flows within the Delta; using this approach, residence times are expected to be higher under Project conditions, which in turn increase the likelihood of cyanobacteria blooms, because longer residence times mean less flushing from the Delta.

California Code of Regulations, title 23, section 5001, subdivision (h) requires the achievement of the coequal goals "in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place," which may be achieved, in part, by encouraging recreation and reducing risks to people,

property, and other interest in the Delta. DWR's failure to use the best available science, combined with the failure to include and document the best available science in its consistency determination and record, resulted in gaps in scientific information necessary to provide a comprehensive and informative scientific analysis of the Project's impacts to the Delta and Stockton in particular.<sup>7</sup> The lack of analysis of a range of water quality constituents and the resulting potential for increased occurrence for toxic blooms of *Microcystis* is notably absent from DWR's analysis; threats to recreational opportunities and the health of humans and wildlife that come into contact with the degraded Delta water resulting from the Project are, therefore, overlooked due to flawed scientific methodology. (See Water Right Change Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018), pp. 4-5.)

**3. Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance (Cal. Code Regs., tit. 23, § 5003)**

The Project is not consistent with Delta Plan Policy WR P1 (Cal. Code Regs., tit. 23, § 5003) limiting exports, transfers, and uses in the Delta. DWR incorrectly concludes that Delta Plan Policy WR P1 does not apply to the Project, because it is not applying for any new water rights, but merely seeking an amendment to its existing water rights. That interpretation ignores the plain language of the policy and creates a loophole in compliance that is not supported by statute or any additional guidance provided by DSC. California Code of Regulations, title 23, section 5003, subdivision (c)(2) states that projects that reduce reliance could include improvements in water efficiency, advanced water technologies, and water supply and storage projects. DWR's summary of the covered action for purposes of its Certification of Consistency similarly states, in pertinent part, that Project makes "physical and operational improvements . . . necessary to restore and protect . . . water supplies . . ." Moreover, Water Code section 85021 states – without limitation to any particular type of project – that it is the policy of California to reduce reliance on the Delta and improve regional self-reliance for water, in part, through improved regional coordination of local and regional water supply efforts. (See also Delta Stewardship Council, The Delta Plan (2013) Delta Plan Policies and Recommendations, WR R3, p. ES-19.)

DWR's own modeling shows that, as a result of changes to the Project – changes included in its final Project approval, but never disclosed to the public during the Project's CEQA process – that its adoption of the "CWF H3+" operational scenario will result in total exports from the Delta that are greater for CWF H3+ than all other operational scenarios disclosed in the Project EIR or in the first phase of the Water Right Change Proceeding.<sup>8</sup>

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<sup>7</sup> See all testimony submitted on behalf of City of Stockton, cited below and attached.

<sup>8</sup> During Part 1 of the Water Right Change Proceedings, DWR presented so-called "boundary" scenarios "to provide a broad range of operational criteria anticipated to occur within the adaptive management process" (Water Right Change Proceeding, Testimony of Gwendolyn Buchholz on behalf of DWR (Nov. 28, 2017) p. 9:4-5.) In Part 2 of the proceeding, DWR acknowledged that "Due to adaptive management, the CWF H3+

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Expert evidence presented in the Water Right Change Proceeding shows that DWR misled both the public and SWRCB with regard the extent of exports under the Project, burying key information in an EIR appendix and in long-term monthly average data that masked the timing and extent of Project changes. Contrary to DWR's representations, the total volume of water exported under the approved Project (scenario CWF H3+) exceeds the volume exported in the boundary scenarios represented to be the outside limit of Project operations in 28 of 192 months (15% of the simulation period). The volume of water exported under scenario CWF H3+ exceeds the volume exported under the No Action and existing conditions scenarios in 8 of 192 months (4% of the simulation period). This evidence shows that, contrary to DWR's claims, the operations of its approved Project (CWF H3+ ) are not within the boundary scenarios; for a significant portion of the simulation period, the amount of water exported under the approved Project exceeds the amount of water exported under all the simulated scenarios, including Boundary 1, Boundary 2, H3, H4, as well as the No Action and existing conditions scenarios. (Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen in Support of Protest of the City of Antioch, Phase 2 (July 12, 2018) pp.10-12;<sup>9</sup> see also Water Right Change Proceeding, North Delta Diversions and South Delta Export Totals.<sup>10</sup>)

Finally, DWR ignores its own Project objectives to "Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts . . . ." (California WaterFix CEQA Findings of Fact and Statement of Overriding Considerations, July 2017, p. 31.) This objective makes clear the intent of the Project to increase exports, which is plainly inconsistent with reducing reliance on the Delta. Therefore, DWR's interpretation that the policy does not apply is untenable given the plain language of DSC regulations and statewide policy.

DWR argues that the Project is nevertheless consistent with the coequal goals "because it furthers the coequal goals in a manner that preserves the Delta as an evolving place." Rather, the Project will dramatically change how water flows through the Delta and the operation of SWP and CVP, thereby diminishing both the quantity and quality of water for in-Delta users. (Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (Mar. 23, 2017) pp. 1-13; Water Right Change

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operations could be refined in the future . . . and any outcome is anticipated to be within the range of alternatives analyzed in the EIR/EIS and within Boundary 1 and Boundary 2, as presented in Part 1 of the State Water Board hearings." (*Id.* at p. 9:12-17.) DWR presented the SWRCB with figures depicting Scenario CWF H3+ as falling between the boundary scenarios and the operating scenarios previously described in the DEIR/RDEIR as representing the proposed project (H3 and H4) in terms of Delta outflow requirements. (*Id.* at Figure 2.)

<sup>9</sup> Available at:

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/Antioch/part2rebuttal/Antioch-600.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/Antioch/part2rebuttal/Antioch-600.pdf) [as of Aug. 7, 2018].

<sup>10</sup> Available at:

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/Antioch/part2rebuttal/Antioch-602.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/Antioch/part2rebuttal/Antioch-602.pdf) [as of Aug. 7, 2018].

Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018) pp. 2-5.) As noted, the Project purpose is to increase deliveries up to full contract amounts for SWP and CVP. (California WaterFix CEQA Findings of Fact and Statement of Overriding Considerations, July 2017, p. 31.) The resulting changes in the amount of water flowing through the Delta, and associated water quality impacts, will make Stockton's water supply less reliable, and threaten public health of Stockton residents and recreational users within the Delta, as well as existing and future economic development within Stockton. The Delta Plan Policy WR P1 intends to directly address these concerns by mandating *protection* of a reliable water supply for the state, not just the Project proponents, and *enhancement* of the Delta ecosystem. However, the Project's inconsistencies with Delta Plan Policy WR P1 and other Delta Plan policies are sufficiently serious that it hinders, rather than furthers the coequal goals.

#### 4. Delta Flow Objectives (Cal. Code Regs., tit. 23, § 5005)

The Project is not consistent with Delta Plan Policy ER P1 (Cal. Code Regs., tit. 23, § 5005) establishing Delta flow objectives. DWR has asserted that its "proven record" of complying with SWRCB's Water Rights Decision 1641 (D-1641) flow objectives amount to the Project's consistency with the Delta Plan policy. Notably, DWR is proposing that the SWRCB modify the D-1641 requirements as they apply to the Project by moving the compliance point for measuring the export to inflow ratio upstream of the new points of diversion and excluding all water diverted through the new points of diversion from the export term, thereby effectively eliminating export limits. Moreover, not all the proposed Project operations scenarios will be operated to meet D-1641 criteria. (See Water Right Change Proceeding, Exponent Report on the Effects of the California WaterFix Project on behalf of City of Stockton (Mar. 22, 2017) p. 35; Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (Mar. 23, 2017) p. 1-13.) The Boundary 1 scenario, for example, "represents an operational scenario with most of the existing regulatory constraints . . . but does not include additional spring Delta outflow, additional OMR flows, existing I/E ratio, and the existing Fall X2 flow requirement imposed in the existing BiOp for Delta Smelt." (*Ibid.*, citing Water Right Change Proceeding, Testimony of Jennifer Pierre on behalf of DWR (May 3, 2016) p. 13, lines 18-21.) Regardless, there are no D-1641 water quality compliance criteria for M&I uses that apply at or near Stockton's intake, and substantial evidence shows that there will be significant water quality impacts from substantial water quality degradation at Stockton's intake regardless of whether DWR can meet D-1641 water quality objectives, due to chloride increases that exceed Stockton's usability threshold of 110 mg/L that will render its source water unusable at times. (Water Right Change Proceeding, Exponent Report on the Effects of the California WaterFix Project on behalf of City of Stockton (Mar. 22, 2017) p. 35; Water Right Change Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018) pp. 2-5.) DWR's historical compliance with Delta Flow Objectives is immaterial in light of

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substantial evidence that the Project will substantially degrade the quality of Stockton's water supply.

DWR cannot show that failure to comply with this policy leaves the Project consistent with the coequal goals. By rendering Stockton's water supply unusable for a significant portion of the time, the Project reduces the reliability of water supply for 300,000 residents of the Delta and fails to protect, restore, and enhance the Delta ecosystem as it pertains to water resources.

**5. The Project Is Inconsistent with, and Will Prevent Achievement of, Applicable Delta Plan Performance Measures**

In its 2016 ruling invalidating the Delta Plan, the Sacramento County Superior Court focused on the overarching importance to meeting the coequal goals of quantified or otherwise measurable targets to reduced Delta reliance, and mandated that the Delta Plan be revised to include such measures. The Delta Plan was revised to include numeric performance criteria addressing, among other things, Delta exports. The Project as approved contains no measures to ensure that it will comply with key performance measures in the Delta Plan.

Relevant to Stockton, Chapter 6, Improve Water Quality to Protect Human Health and the Environment, Strategy 6.4, requires reduced spatial coverage of freshwater harmful algal blooms in waterbodies in the Delta. As documented in Stockton's evidence supporting this appeal, and by other protesting parties in the Water Right Change Proceeding, the Project is likely to prevent attainment of this performance measure by increasing residence times and temperatures in the Delta, which will increase the frequency and extent of harmful algal blooms. (Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (Mar. 23, 2017); Water Right Change Proceeding, Sur-Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (June 9, 2017); Water Right Change Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018).)

Further, Delta Plan outcome performance measures for Chapter 3, More Reliable Water Supply for California, requires a decrease in Delta exports during critically dry years, and an increase in Delta exports during wet years, with an *overall average decrease* in Delta exports. (E-3, citing strategy 3.3 (Improved Conveyance and Expanded Storage).) As demonstrated by expert testimony submitted in the Water Right Change Proceeding, the Project fails to consistently increase exports in wetter months and increases exports above existing levels in drier months when Delta outflows are very low and the Delta ecosystem is most vulnerable. (See Water Right Change Proceeding, Part 2 Rebuttal Testimony of

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Dr. Richard A. Denton, Ph.D., P.E. Submitted on Behalf of Contra Costa County, Contra Costa County Water Agency and Solano County (July 11, 2018). <sup>11)</sup>

As the most significant source of water exported from the Delta, the Project, with its combined CVP and SWP operations, will determine whether the performance objectives will be met. Substantial evidence demonstrates that the Project as approved by DWR will fail to meet those performance measures. Because substantial evidence demonstrates the Project cannot meet the mandatory performance measures contained in the Delta Plan, DSC must reject DWR's determination that the Project is consistent with the Delta Plan and find instead that the Project will have a significant adverse impact on the achievement of one or both of the coequal goals

The Project also will hinder attainment of Delta Plan performance measures designed to protect and promote recreational use in the Delta. Chapter 5, Encourage Recreation and Tourism, contains a performance measure (Strategy 5.4) that requires state agencies to work the local agencies to "protect and enhance visitor serving businesses." As discussed above, and in the evidence presented by others, far from working with local agencies to protect and enhance visitor serving businesses, DWR has proposed a Project that will have devastating effects on visitor serving businesses such as the Marina. DWR's flawed scientific approach to designing and implementing the Project works contrary to these performance measures as well as to the coequal goals and to the Delta Plan policies.

#### **6. The Project Is Inconsistent with Multiple Delta Plan Recommendations**

DWR's Certification of Consistency ignores Delta Plan recommendations that, according to the Delta Plan, "call out actions essential to achieving the coequal goals." (Delta Plan Executive Summary, p. ES-17.) DWR's determination that the Project, which is inconsistent with and will substantially impede actions identified in the Delta Plan itself as being "essential to achieving the coequal goals," is arbitrary and capricious, and on this additional basis, DSC should reject the Certification of Consistency.

Specifically, the Project is inconsistent with Delta Plan Policy WQ R1, Protect Beneficial Uses, which requires that water quality be maintained at a level that supports, enhances, and protects beneficial uses, including M&I and recreational use. For the reasons described herein, the Project will degrade water quality in a manner and to a degree that fails to support, enhance, or protect beneficial uses. Similarly, the Project is inconsistent with Delta Plan Policy WQ R2, which requires the identification of any significant impacts to water quality. The flawed scientific methodology employed by DWR, as described above,

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<sup>11</sup> Available at:

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/ccc\\_cccwa/part2\\_rebuttal/ccc-sc\\_51.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/ccc_cccwa/part2_rebuttal/ccc-sc_51.pdf) [as of Aug. 7, 2018].

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does not adequately identify the resulting impacts to water quality. The Project also is inconsistent with Delta Plan Policy DP R11, Provide New and Protect Existing Recreation Opportunities. This recommendation calls for protection of existing recreational facilities. For the reasons stated herein and in the record before DWR and the SWRCB in the Water Right Change Proceeding, the Project, with its 15-plus years of construction disruption and permanent operating impacts, fails to protect and will substantially impede opportunities to provide new recreation facilities and opportunities.

Finally, the Project also is inconsistent with Delta Plan Policy FP R3, Identify Funding Gaps, which requires identification of current state and federal funding gaps that are determined to hinder progress toward meeting the coequal goals. The lack of full funding assurances for the Project's \$20 billion-plus construction cost have been widely publicized. DWR has failed to quantify the full costs of Project implementation, including mitigation needed to address currently unmitigated impacts to Stockton and others. No federal funding for the Project has been identified, and federal water supply contractors have refused to make any meaningful financial commitment to the Project.

#### **IV. Conclusion**

The Project's inconsistency with the Delta Plan will have a significant adverse impact on the achievement of one or both of the coequal goals defined in the Delta Reform Act and implemented through the Delta Plan policies. The significant impacts are not addressed by DWR in the Project's certified EIR nor the record submitted with its Certification of Consistency. Stockton has demonstrated with expert evidence that its residents will be irreparably harmed by DWR's failure to approve a Project that complies with the Delta Plan or the Delta Reform Act, and thus DSC should reject the Project Certification of Consistency.

Very truly yours,



Kelley M. Taber

cc: Delta Stewardship Council  
Jessica R. Pearson, Executive Director

Attachments:

Stockton 1 – California WaterFix, CEQA Findings of Fact and Statement of  
Overriding Considerations, July 2017

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Stockton 2 – August 17, 2018 letter from David Murillo, Reclamation, to Karla Nemeth, Director of DWR

Stockton 3 – August 17, 2018 Memorandum from the Secretary of the Interior to Solicitor et al.

Stockton 4 – Water Right Change Proceeding, Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (Mar. 23, 2017)

Stockton 5 – Water Right Change Proceeding, Sur-Rebuttal Testimony of Robert Granberg on behalf of City of Stockton (June 9, 2017)

Stockton 6 – Water Right Change Proceeding, Exponent Report on the Effects of the California WaterFix Project on the City of Stockton (Mar. 22, 2017)

Stockton 7 – Water Right Change Proceeding, Testimony of Robert Granberg on behalf of City of Stockton (Aug. 30, 2016)

Stockton 8 – Water Right Change Proceeding, Part Two Testimony of Robert Granberg, P.E. on behalf of City of Stockton (Nov. 29, 2017)

Stockton 9 – SWRCB Res. No. 68-16 (Oct. 24, 1968)

Stockton 10 – Agreement for Mitigation of Impacts to Contra Costa Water District from Construction and Operation of Bay Delta Conservation Plan/California WaterFix (Mar. 24, 2016)

Stockton 11 – Delta Independent Science Board, letter to Randy Fiorini regarding review of environmental documents for California WaterFix, (Sept. 30, 2015)

Stockton 12 – Delta Independent Science Board, letter to Randy Fiorini regarding review of the FEIR/EIS for California WaterFix, (June 16, 2017)

Stockton 13 – Water Right Change Proceeding, Sur-Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. on behalf of City of Stockton (June 9, 2017)

Stockton 14 – Water Right Change Proceeding, Exponent Technical Response to Petitioners' Rebuttal Testimony in the WaterFix Proceedings, (June 9, 2017)

Stockton 15 – City of Stockton, Regional Wastewater Control Facility, Attachment F – Fact Sheet, 2014

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Stockton 16 – Water Right Change Proceeding, Part Two Testimony of C. Mel Lytle, Ph.D. on behalf of City of Stockton (Nov. 29, 2017)

Stockton 17 – City of Stockton, Municipal Utilities Department, May 2016 Rate Study

Stockton 18 – Water Right Change Proceeding, Part Two Rebuttal Testimony of Susan Paulsen, Ph.D., P.E. (July 12, 2018)

Stockton 19 – Water Right Change Proceeding, Part 2 Rebuttal Testimony of Dr. Richard A. Denton, Ph.D., P.E. Submitted on Behalf of Contra Costa County, Contra Costa County Water Agency and Solano County (July 11, 2018)

KMT:MEC:mb