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11.226.02

August 24, 2018

*via Covered Actions Appeals Portal*  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

**Re: Appeal of California WaterFix Certification of Consistency**

Honorable Council Members:

**I. INTRODUCTION**

On behalf of the North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, and Winnemem Wintu Tribe, we submit the following appeal of the Department of Water Resources's ("DWR's") July 27, 2018 Certification of Consistency for the California WaterFix ("WaterFix"). The WaterFix will have a significant adverse impact on the achievement of the Delta Reform Act's co-equal goal of "protecting, restoring, and enhancing the Delta ecosystem." Water Code § 85054. The Delta Stewardship Council must remand the WaterFix to DWR. Water Code § 85225.25.

**II. GROUNDS FOR APPEAL**

**A. The WaterFix Cannot Be Consistent with an Invalid Delta Plan**

As a preliminary matter, it is impossible for the WaterFix to be consistent with the Delta Plan, as the 2013 Delta Plan was set aside as "invalid" by the Sacramento Superior Court because it violated the Delta Reform Act. Judgment filed October 21, 2016 in *North Coast Rivers Alliance v. Delta Stewardship Council*, JCCP No. 4758 at 2, ¶ 2. The 2013 Delta Plan remains invalid. The Superior Court has never altered its Judgment, and no appellate court has disturbed it. Nor has the Council ever filed a Return to the Court "setting forth what it has done to comply with the [Court's Peremptory] Writ [of Mandate]." *Id.* at 3, ¶ 6. Nor has the Superior Court ever "issue[d] an Order discharging its Peremptory Writ of Mandate." *Id.* Because the 2013 Delta Plan remains invalid and set aside, the Council's purported adoption of "Amendments" to that

invalid 2013 Delta Plan is *ultra vires*.

Fundamental planning principles dictate that the WaterFix cannot be consistent with an invalid plan. *Cf. Resource Defense Fund v. County of Santa Cruz* (1982), 133 Cal.App.3d 800, 806 (in general plan context, lack of valid plan precludes approval that must be consistent with the general plan); *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 348-353 (same); *Save El Toro Assn. v. Days* (1977) 74 Cal.App.3d 64, 74 (same). For this reasons alone, the Delta Stewardship Council should remand WaterFix back to DWR until a valid Delta Plan is adopted.

**B. DWR’s Certification of Consistency is Premature Because WaterFix Continues to Change**

DWR’s Draft Supplemental Environmental Impact Report for the WaterFix was released for public comment on July 17, 2018. The proposed changes to the Project include physical modifications to the Project’s footprint as well as changes related to construction methodologies.<sup>1</sup> Yet even these proposed changes are not set in stone; DWR continues to alter the location and configuration of the Project in response to public comment, as it should.<sup>2</sup>

In addition, it appears that DWR and the Bureau of Reclamation (“Reclamation”) will be renegotiating the coordinated operation agreement through which they jointly operate the State Water Project (“SWP”) and Central Valley Project (“CVP”) as Reclamation served its Notice of Negotiation on DWR on August 17, 2018.<sup>3</sup> Absent the results of this renegotiation, it is unclear how WaterFix will operate and which agencies will be eligible to receive water delivered through its operation.

Until the details of WaterFix’s construction and operations are established, it would be impossible to determine the extent to which WaterFix hinders the co-equal goals of the Delta Reform Act, let alone a lawful Delta Plan. For this reason, the Delta Stewardship Council must remand DWR’s Certification of Consistency as premature.

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<sup>1</sup> See <https://www.californiawaterfix.com/resources/draft-supplemental-environmental-impact-report-environmental-impact-statement-eir-eis/>

<sup>2</sup> See, e.g., DWR’s Responses to Clifton Court L.P. Written Part 2 Cross-Examination Questions, filed August 14, 2018 with the State Water Resources Control Board (“SWRCB”), at 2:6-9 (DWR plans to explore other locations for the proposed Delta Mendota Canal control structure than those proposed in the Supplemental EIR/EIS). This document is available at: [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/2018/20180814\\_dwr\\_response.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2018/20180814_dwr_response.pdf)

<sup>3</sup> Attached as Exhibit 1.

### **C. Mitigation Measures**

DWR's Certification of Consistency claims that "the mitigation measures proposed in the [WaterFix FEIR]" and the "environmental commitments (ECs), and avoidance and minimization measures (AMMs) set forth in Appendix 3B to the [FEIR]" "are equal to, if not more effective than the applicable mitigation measures identified in the Delta Plan PEIR at reducing impacts to the environment from the construction and operation of the California WaterFix." Certification of Consistency 4. But not only is the Delta Plan inadequate, the FEIR's mitigation measures are also inadequate because they are either too vague or have not yet been formulated. Mitigation measures must be sufficiently specific to enable the public to evaluate and comment upon their adequacy. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794. Allowing agencies to defer formulating mitigation measures until "after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decision making." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 93.

These vague and deferred mitigation measures are inconsistent with the requirements of 23 CCR section 5002(b)(2). For example, the FEIR states that a future consultation process under the Endangered Species Act will ensure that "impacts to critical habitat will be avoided, minimized, and mitigated." Response to Comment RECIRC2836-13. But the public is entitled to review and comment upon the adequacy of the measures that DWR will undertake to avoid impacts to endangered species. Moreover, those mitigation measures may themselves have substantial environmental impacts.

Similarly, the ECs and AMMs are also vague and improperly deferred. For example, EC7 provides no information on how it would restore 251 acres of the riparian natural community (FEIR 12-3426, 12-3428, 3B-178 to 3B-179; DWR Final G P1 (b)(2) (23 CCR Section 5002) Mitigation Measures Consistency Analysis ("Mitigation Measures Analysis") 1-3, 1-5, 1-8, 1-10), and EC3 does not identify what measures will be utilized to protect natural communities (FEIR 12-3426, 12-3445, 3B-177; Mitigation Measures Analysis 1-3, 1-5, 1-8, 1-10). The same is true for all of the ECs identified in the FEIR. FEIR 3B-176 to 3B-185. And the AMMs merely identify future mitigations that might possibly be implemented at a later date. FEIR 3B-82 to 3B-176. For example, AMM27 calls for development of a "plan to evaluate site-specific restoration conditions and include design elements that minimize any conditions that could be conducive to increases of bioavailable selenium in restored areas" (FEIR 3B-84), AMM31 includes the future development of "a plan to avoid or reduce the potential in-air noise impacts" (FEIR 3B-84), and AMM32 calls for development of a plan to address hazardous materials (FEIR 3B-85).

But it does not appear that these vague commitments qualify as enforceable mitigation measures that would satisfy CEQA, absent additional information. Guidelines § 15126.4(a)(2) ("Mitigation measures must be fully enforceable"). Nor have the impacts to be mitigated even been specifically acknowledged to be significant. The FEIR fails to identify and analyze the significance of these and similar impacts, and instead it impermissibly presumes that its claimed

mitigation measures and ECs will obviate these impacts. This deliberate attempt to obscure, and thereby ignore, these severe impacts violates CEQA. *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 658 (failure to discuss significance of impact before proposing a mitigation “subverts the purposes of CEQA by omitting material necessary to informed decision-making and informed public participation”).

Indeed, in some instances the FEIR admits that in the absence of the proposed mitigation measures, ECs, and AMMs, impacts will be significant. FEIR 12-3506 (garter snake) 12-3717 (San Joaquin kit fox and American badger). In order to prevent these significant impacts, all mitigation measures must be clearly enforceable. Guidelines § 15126.4(a)(2). Yet no assurance is provided that they will be, and in light of the abysmal failure of similar facile assurances to prevent ecological harm in the past, this failure is fatal.

The FEIR’s repeated deferral of mitigation formulation evades CEQA’s requirements. DWR’s “requirement that the applicant adopt mitigation measures recommended in a future study is in direct conflict with the guidelines implementing CEQA.” *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306. By improperly deferring the formulation of mitigation measures, DWR violated CEQA. PRC §§ 21100(b)(3); Guidelines §§ 15126(e), 15126.4, 15370; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728.

Because the mitigation measures identified in the FEIR are either too vague or have not yet been formulated, they are inconsistent with the – albeit inadequate – regulatory policy requiring inclusion of “applicable feasible mitigation measures identified in the Delta Plan’s [PEIR] . . . or substitute mitigation measures that . . . are equally or more effective.” 23 CCR § 5002(b)(2).

#### **D. Best Available Science**

The WaterFix is inconsistent with the deficient Delta Plan policies requiring best available science. DWR’s claim that it used the best available scientific data is simply wrong. Certification of Consistency 5. Rather, DWR’s analysis of the Project’s environmental impacts is far too vague to permit informed public review, defers too much analysis to later, project-specific environmental reviews, fails to fully discuss the presence and impact of invasive species; and ignores potential effects on all of its source watersheds and the threatened salmon and other species that depend on them.

The FEIR impermissibly defers all specific analysis of the environmental impacts of implementing the Project even though those implementation measures are foreseeable and, indeed, an indispensable part of the Project itself. Just because the FEIR purports to tier its environmental analysis does not excuse DWR from utilizing the best available data to analyze the Project. 23 CCR § 5002(b)(3). Therefore, DWR must not defer analysis of significant environmental effects if that analysis can, as here, feasibly be undertaken for the implementing

actions in question. *EPIC v. California Dept. Of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 502-03.

Indeed, the California WaterFix Certification of Consistency: Best Available Science Analysis (“Best Available Science Analysis”) admits that “some analytical tools used in the [FEIR] may have been updated since the time these analyses began.” DWR Final G P1 Consistency Analysis: Best Available Science 2-1.

For example, the FEIR uses outdated assumptions about the amount of sea level rise that climate change will cause. Best Available Science Analysis 9-2. Sea levels are now projected to rise by *at least double* the amount the EIR assumes. But DWR claims that the information used, while out of date, “remains *reasonably* current.” *Id.* But “reasonably current” does not constitute the “best available data.” In fact, data that is only “reasonably current” because new data has been developed, is anything but the best available. This failure to use the best available science violates the already deficient Delta Plan.

Furthermore, the FEIR claims that the water quality objective is exceeded only because the modeling uses “a solution that is a simplified version of the very complex decision processes” that happen when there is not enough water to go around. FEIR 14-125. This is nonsensical. The model used must be representative of the actual process in order to understand the impacts. Without an accurate model, DWR fails to use the best available science.

## **E. Adaptive Management**

DWR claims that the Project-wide Adaptive Management Program is consistent with the – albeit inadequate – Delta Plan policies because it “documents access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.” Certification of Consistency 5. But this claim is refuted by the facts.

DWR admits that “[m]onitoring to determine the effectiveness of implemented management measures is crucial to the adaptive management of a system.” DWR Final G P1 Consistency Analysis: California WaterFix Project-Wide Adaptive Management Program (“Adaptive Management Analysis”) 7. And it further admits that nearly all of the mitigation measures and ECs identified for the Adaptive Management Plan will be subject to uncertainty around the monitoring that is required and the efficiency of that monitoring. Adaptive Management Analysis, Attachment 1, 2-90.

Because multiple federal agencies with very limited resources, including NMFS, USFWS, and Reclamation, will be tasked with monitoring and adapting the proposed Adaptive Management Plan measures, there is a significant risk to the environment and a likelihood that the Project will be inconsistent with the Delta Plan policies. Adaptive Management Analysis 4-2 to 4-3. These federal agencies have testified about their significantly limited resources in appearances before the SWRCB. Further, it is unclear whether federal policies will support the

goals of the Delta Reform Act. Therefore, any real time management that requires federal analysis, personnel or infrastructure cannot be depended upon for real time decisionmaking.

Further, any adaptive management that relies upon a super majority or consensus of multiple stakeholders, including stakeholders with competing and conflicting priorities will be left unable to approve vital decisions to protect vulnerable species in real time. For these reasons, WaterFix's Adaptive Management Plan will not further the co-equal goal of "protecting, restoring, and enhancing the Delta ecosystem." Water Code § 85054.

## **F. Reduced Reliance on the Delta**

As a preliminary matter, the Delta Stewardship Council's policies for reducing reliance on the Delta are clearly not sufficient to satisfy the Delta Reform Act. *See* Water Code § 85021. All the same, DWR's interpretation of the Delta Plan offends the Delta Reform Act's purpose even more.

DWR argues that it need not show that the WaterFix will reduce reliance on the Delta. In so arguing, it construes Delta Plan Policy WR P1 to apply "only to a new water export, water transfer, or in-Delta water use project" and not to "a change in a point of diversion." DWR Final WR P1 Consistency Analysis: Reduce Reliance on the Delta through Improved Regional Water Self-Reliance ( ("Reduced Reliance Analysis") 2-1; *see also* 3-1. This interpretation cannot stand, as a *reduction* in Delta reliance can never be achieved without changes to existing reliance on the same. DWR's interpretation turns the intent of the Delta Reform Act to address the Delta ecosystem's continued and worsening crisis on its head. *See, e.g.* Water Code §§ 85001(a), 85020, 85021. This interpretation ignores the Delta Reform Act's co-equal goal of "protecting, restoring, and enhancing the Delta ecosystem" because it would provide no mechanism to implement any ecosystem enhancements that require additional flow. Water Code § 58054. Thus, the mandate of reduced reliance on the Delta must be read to apply to this Project.

### **1. Fundamentally, the WaterFix Is Designed to Benefit Water Suppliers That Have Failed to Adequately Reduce Their Reliance upon the Delta**

DWR claims that "the need for California WaterFix was not significantly caused by one or more water suppliers that will receive water from the project failing to adequately reduce reliance on Delta exports to meet California's future water supply needs." Reduced Reliance Analysis 2-2. Instead, DWR claims that the need for the WaterFix is caused by "increasing regulatory restrictions" on the existing use of water flowing through the Delta, as well as infrastructure failure, subsidence, seismic risks, and sea level rise. Reduced Reliance Analysis 3-2 (capitalization altered). But DWR's justifications for the WaterFix are overlook the root of the issue.

The rivers that supply the CVP and SWP are over appropriated, and the continued

operations of the SWP and CVP have been disastrous for the fish populations impacted by these diversions. Due to excessive diversions of water for consumptive use, many species of fish endemic to the Delta have already gone extinct, including the Sacramento perch, formerly one of the most abundant fishes of the Delta, which disappeared in the 1970s. Just 12 indigenous species remain, and these are in grave danger. Since the SWP and CVP began operation, the Sacramento River winter and spring run Chinook salmon, Central Valley steelhead, North American green sturgeon and Delta smelt have been driven perilously close to extirpation.

Over a quarter century ago, Congress recognized that the CVP was harming fish populations and through the Central Valley Project Improvement Act mandated that Reclamation take these impacts into account in operating the CVP. Yet not enough has changed, and fish populations continue to suffer. It is these dire conditions that lead to the “regulatory restrictions” that have impacted the ability of the SWP and CVP to operate pumps to export water. Thus, fundamentally, the impacts on fish can be tied back to the operations of the CVP and SWP – the agencies with primary responsibility for WaterFix. Instead of doing more to alter demand to restore fish populations, DWR proposes to completely re-plumb the Delta so that water users can continue to rely upon Delta water at unsustainable levels.

The instream water needs of fish and wildlife *should* be met by reducing reliance upon the Delta. Were there sufficient political will by the Delta’s water management agencies to reduce harmful diversions and increase water use efficiencies, fish populations would not be at the brink of extinction while water users waste water.

## **2. Recipients of CVP and SWP Water Have Not Sufficiently Improved Regional Self-Reliance**

DWR claims that “water suppliers in regions of the state served with water conveyed through California WaterFix have taken significant steps to reduce reliance by improving regional self-reliance.” Reduced Reliance Analysis 2-2. Yet the data that DWR cites show that urban water contractors are forecasting *increases* in Delta supplies to meet future water needs due to WaterFix. Reduced Reliance Analysis 3-39 (Table WR P1-1). Alameda County Flood Control & Water Conservation District, Zone 7 forecasts 8,000 additional acre feet (AF) of water from the SWP, Santa Clara Valley Water District forecasts an increase in CVP water of 4,300 due to WaterFix, Cochella Valley Water District is forecast to increase demands by 7,400 and it is “unclear whether this increase would be met with SWP supplies.” *Id.* Metropolitan Water District (“Met”) forecasts an increase of 11,000 AF of SWP water due to WaterFix, and Mojave Water Agency forecasts an increase in 2,480 AF of SWP water due to WaterFix. Reduced Reliance Analysis 3-40 (Table WR P1-1). *Increasing* reliance upon the Delta for future water needs is antithetical to the Delta Plan and the co-equal goals of the Delta Reform Act.

DWR also states that agricultural water suppliers have *reduced* their reliance on Delta water. Reduced Reliance Analysis 2-2. But, as DWR admits, these suppliers have not been

required to quantify their local water supply projects or their water use efficiency. *Id.* Instead, DWR evaluated whether some of these agricultural water suppliers – SWP contractors – are measuring the water they deliver, whether they are using volume-based pricing, and whether they have implemented any of the conditionally required efficient water management practices. Reduced Reliance Analysis 3-45 to 3-48. But none of these factors can show any *reduced* reliance on the Delta without a quantitative measurement. DWR states that “their efficient water management” should demonstrate such a reduction - but none of the factors cited are sufficient to demonstrate improved water efficiency. *Id.* And for CVP contractors, DWR provides even less information, and instead relies on Reclamation’s compliance with the SECURE Water Act without any data demonstrating how such compliance reduces reliance on the Delta. Reduced Reliance Analysis 3-48 to 3-49.

DWR also relies upon future compliance with new legislation, Assembly Bill 1668 and Senate Bill 606 (signed into law on May 31, 2018), which mandate additional water conservation and efficiency, to assure the Delta Stewardship Council that the SWP and CVP contractors will reduce their reliance upon the Delta more than projected. Reduced Reliance Analysis 3-49 to 3-50. But until these new laws are implemented, it is premature to assume that they will be the panacea that DWR claims.

### **3. Metropolitan’s Funding Commitment Is Evidence That Met Intends to Maintain or Increase Reliance upon the Delta to Meet Future Water Needs**

DWR argues that Met’s vote to increase funding for the WaterFix for up to 64.6% of the total project cost (projected at up to \$10.6 billion) does not mean that Met will gain additional water for its outlay – at this time. Reduced Reliance Analysis 3-51 to 3-52. Logic dictates, however, that Met will expect to receive a benefit from its decision to make such a substantial investment in WaterFix. Indeed, Met’s staff report for its July 10, 2018 meeting indicates that Met expects a 405 to 455 TAF per year improvement in water supply reliability from WaterFix – and that it anticipates that SWP contractors could receive an additional 150 TAF per year in SWP supply if CVP contractors do not participate in WaterFix.<sup>4</sup> This conclusion is not speculative. Reclamation continues to push for changes to the coordinated operation agreement, and the CVP contractors continue to be unwilling to pay for WaterFix. Thus Met’s projections are a reasonable forecast of future conditions that illustrate Met’s motivation for funding the WaterFix – it wants more water from the Delta.

The WaterFix removes water from the Delta ecosystem before it can flow through the Delta, and provides this water to water suppliers that have not adequately reduced their reliance upon the Delta for current or future water needs. It does not constitute a “*fundamental reorganization* of the state’s management of Delta watershed resources.” Water Code §

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<sup>4</sup> This staff report is available at: [http://www.mwdh2o.com/DocSvcsPubs/WaterFix/assets/board\\_letter\\_item\\_8-6.pdf](http://www.mwdh2o.com/DocSvcsPubs/WaterFix/assets/board_letter_item_8-6.pdf), and is cited by DWR. *See* Reduced Reliance Analysis 3-51.



85001(a) (emphasis added). Instead, it perpetuates the broken system and fails to protect the wildlife that depend on Delta flows for survival. This is inconsistent with the co-equal goals. The Delta Stewardship Council must remand WaterFix back to DWR.

## **G. Delta Flow Objectives**

As DWR concedes, at this time the SWRCB has not issued final revised Delta flow criteria. ER P1 (23 CCR Section 5005) Delta Flow Objectives (“Delta Flow Objectives Analysis”) 1 n. 1. DWR cites to its legal obligations to comply with applicable water quality plans to claim that WaterFix will be consistent with any flow objectives incorporated into the Delta Plan. Delta Flow Objectives Analysis 1.

But this reliance upon compliance is misplaced. For example, as Reclamation made clear in a February 15, 2017 letter to the SWRCB, *it* is unwilling to take responsibility for compliance with April/May San Joaquin river flow objectives in D-1641 through releases at New Melones.<sup>5</sup> DWR claims that the failure to comply with these south Delta standards is “due to factors outside the control of the SWP/CVP” but this overlooks Reclamation’s willful decision to fight the standard.

Further, DWR touts a 98.5% compliance rate with D-1641 (by combining all compliance years and locations). Delta Flow Objectives Analysis 7. Yet the data underlying that rate reveal that in drought conditions, Temporary Urgency Change Petitions and Orders relaxed the standards applicable to the SWP and CVP’s compliance.

As final Delta Flow Objectives have not yet been set, there is no way to know whether WaterFix can operate while attaining those objectives. The Delta Stewardship Council should remand WaterFix to DWR until such time that final Delta Flow Objectives are set.

## **H. Habitat Restoration at Appropriate Elevations**

As DWR admits, “[s]pecific locations for implementing the Environmental Commitments and the necessary property interests may not have been identified at this time, let alone acquired, and therefore it is not possible to document the elevation being proposed for each specific habitat restoration site.” Certification of Consistency 7. Until such time that DWR can identify the locations of habitat restoration activities, any consistency determination would be premature. Further, as discussed above, the Delta Stewardship Council cannot rely upon DWR’s insufficient mitigation measures and environmental commitments. DWR cannot show that WaterFix’s purported habitat restoration activities will satisfy the co-equal goal of “protecting, restoring, and

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<sup>5</sup> February 15, 2017 Letter from Reclamation to SWRCB, available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/tucp/docs/woodley\\_ltr02152017.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/woodley_ltr02152017.pdf)

enhancing the Delta ecosystem.” Water Code § 85054.

## **I. Protect Opportunities to Restore Habitat**

WaterFix will create permanent changes to priority habitat restoration areas (“PHRA”) identified in the Delta Plan. DWR argues that the permanent loss of PHRA is acceptable because the permanent features “are sited at the edge,” “represent a small acreage impact . . . in comparison to the overall size of the PHRA” and “do not result in a significant adverse impact.” ER P3 (23 CCR Section 5007) – Protect Opportunities to Restore Habitat (“Loss of Habitat Restoration Opportunity Analysis”) 1. And DWR does not consider the temporary loss of habitat significant because it claims it will eventually be restored. *Id.*

But DWR overlooks potentially significant adverse consequences of WaterFix on PHRA. Some of the temporary uses of PHRA include the creation of a concrete batch plant and a fuel station, which will be used during construction. These so-called temporary uses will remain in place for the duration of construction, over many years. Further the concrete batch plant and adjacent fuel station have the potential to contaminate the habitat on which they are constructed. These contamination risks arise because various construction materials will be stockpiled at the concrete batch plant, and “[b]ulk fuel would be stored at fuel stations and potentially pose the risk of vehicle fueling spills and leakage from above-ground storage tanks at fuel stations.” FEIR 24-45. The FEIR relies upon the formulation of future plans to prevent spills, or to minimize the impact of spills entering the watershed. FEIR 24-45 to 24-48. But these provisions do not address the impact of spills on PHRA. Because WaterFix has both temporary and permanent impacts on PHRA, it conflicts with the co-equal goal of “protecting, restoring, and enhancing the Delta ecosystem.” Water Code § 85054. The Delta Stewardship Council must remand WaterFix back to DWR.

## **J. Avoid Introductions of and Habitat for Invasive Nonnative Species**

DWR’s planned use of barges and construction equipment in the Delta to construct WaterFix makes it likely that WaterFix construction would introduce or disperse invasive aquatic and terrestrial species. DWR’s planned mitigation for aquatic weed impacts is to fund the Department of Boating and Waterways’ application of glyphosate on weeds in the Delta. ER P5 (23 CCR Section 5009) – Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species 5. But glyphosate is a known carcinogen and desiccant that is harmful to humans and wildlife. Even if a non-toxic alternative existed, this post-introduction mitigation is insufficient to address the potential impact of aquatic weeds. Further, as discussed above in Section C, DWR’s reliance upon the mitigation measures and environmental commitments made in connection with its CEQA approvals is misplaced. For these reasons, WaterFix conflicts with the co-equal goal of “protecting, restoring, and enhancing the Delta ecosystem.” Water Code § 85054. The Delta Stewardship Council must remand WaterFix back to DWR.

**K. Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats**

DWR claims that WaterFix has, “to the extent feasible, been ‘sited to avoid or reduce conflicts’ with land uses in the Delta.” DP P2 (23 CCR Section 5011) Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats (“Land Use Analysis”) 1. Yet DWR’s analysis concedes that constructing the WaterFix would create conflicts with local land use plans. *See, e.g.*, FEIR Figure 13-0 (Alternative 4 has significant and unavoidable adverse impacts due to conflicts with existing land uses); Land Use Analysis 6-7. Because WaterFix creates significant, unavoidable land use conflicts, DWR’s claim of consistency fails.

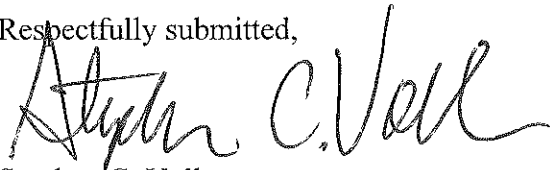
**L. Prioritization of State Investments in Delta Levees and Risk Reduction**

WaterFix, as DWR concedes, is not a flood risk management project. Certification of Consistency 9-10. Instead WaterFix is a \$16 billion boondoggle that continues to divert agency resources away from other projects that could improve Delta levees and reduce infrastructure risks. It meets none of the priorities that the Delta Stewardship Council has identified in its insufficient Delta Plan; and cannot be considered consistent with the goals identified therein.

**III. CONCLUSION**

For the reasons stated above, the WaterFix is not consistent with the Delta Stewardship Council’s invalid Delta Plan nor is it consistent with the co-equal goals of the Delta Reform Act. The Delta Stewardship Council must remand the Certification of Consistency back to DWR.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephan C. Volker". The signature is fluid and cursive, with the first name "Stephan" and last name "Volker" clearly distinguishable.

Stephan C. Volker

Attorney for North Coast Rivers Alliance, et al.

Attachment:

Exhibit 1: August 17, 2018 Letter from Reclamation to DWR *Notice of Negotiation — Coordinated Operation Agreement (COA)*

# EXHIBIT

## 1



# United States Department of the Interior

BUREAU OF RECLAMATION  
Mid-Pacific Regional Office  
2800 Cottage Way  
Sacramento, California 95825-1898

**AUG 17 2018**

IN REPLY REFER TO:

MP-100  
WTR 4.00

Ms. Karla Nemeth  
Director  
Department of Water Resources  
1416 Ninth Street, Room 1115-1  
Sacramento, CA 95814

Subject: Notice of Negotiation – Coordinated Operation Agreement (COA)

Dear Director Nemeth:

Since June 1, 2016, the Mid-Pacific Region of the Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) for the State of California have been conducting a mutual review of the 1986 COA as prescribed in Article 14(a) of that Agreement, for the purpose of determining if revisions to COA are warranted. This process was initiated following a series of preliminary meetings dating back to August 2015.

There have been numerous meetings over the past two years, which have included Central Valley Project (CVP) and State Water Project (SWP) contractors. This has included considerable productive discussion and sharing of information and data through which we have learned a great deal about our respective operations as they have evolved over the years. At this point, we have concluded the Article 14(a) review process. Unfortunately, we have been unable to mutually agree on revisions to COA for maintaining conformity with the objectives and principles embodied in the 1986 COA and underlying technical studies.

Absent mutual agreement on revisions needed to COA, Reclamation respectfully makes this Notice of Negotiations in accordance with Article 14(b)(2). I am designating Mr. Federico Barajas as the Lead Negotiator for Reclamation and request DWR identify their Lead Negotiator. It is suggested the respective leads immediately form their negotiating teams and proceed with negotiations within the next 30 calendar days in order to allow for satisfactory conclusion of an agreement within twelve months of the date of this letter, per COA. We are hopeful an agreement can be achieved within the twelve-month period; however, in the event that does not occur, Reclamation will work with DWR to follow the procedure outlined in Article 14(b)(2) to assemble an Advisory Board which shall "report its unanimous recommendations to both parties at a date not later than 24 months from the date of" this Notice of Negotiation.

Sincerely,

David G. Murillo  
Regional Director