

**GROUNDS AND DETAILED STATEMENT OF FACTS FOR FRIENDS OF THE  
RIVER et al's, APPEAL OF DEPARTMENT OF WATER RESOURCES'  
CERTIFICATION OF CONSISTENCY OF CALIFORNIA WATERFIX PROJECT  
WITH THE DELTA PLAN**

**Certification ID: C20185**

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**e) The specific grounds for appeal**

- 1) There is no Valid Delta Plan for the Covered Action to be Consistent With**
- 2) There is no Conveyance Policy in the Delta Plan for the Covered Conveyance Acton to be Consistent With**
- 3) The Covered Action is not consistent with policy G P1, Certifications of consistency must include detailed findings that address specific requirements**
- 4) The Covered Action is not consistent with policy G P1(b)(2), requiring including applicable feasible mitigation measures**
- 5) The Covered Action is not consistent with policy G P1(b)(3), requiring use of best available science**
- 6) The Covered Action is not consistent with policy G P1, assuring continued implementation of adaptive management**
- 7) The Covered Action is not consistent with policy WR P1, Reduce Reliance on the Delta through Improved Regional Water Self-Reliance.**
- 8) The Covered Action is not consistent with policy WR P2, Transparency in Water Contracting**
- 9) The Covered Action is not consistent with policy ER P1, Delta Flow Objectives**
- 10) The Covered Action is not consistent with policy ER P2, Restore Habitat at Appropriate Elevations**

- 11) **The Covered Action is not consistent with policy ER P3, Protect Opportunities to Restore Habitat**
- 12) **The Covered Action is not consistent with Recommendation WR R12b(1)(a)**
- 13) **The Covered Action is not consistent with Recommendation ER R1, Update Delta Flow Objectives**
- 14) **The covered action is not consistent with Recommendation WQ R1, Protect Beneficial Uses**
- 15) **The Covered Action is not consistent with Recommendation WQ R2, Identify Covered Action Impacts**
- 16) **No Finding of Consistency can be Made Because there has been Failure to Comply with the California Environmental Quality Act (CEQA), Public Resources Code § 21000 et seq.**
- 17) **No Finding of Consistency can be Made because there has been Failure to Comply with the Delta Reform Act, Water Code § 85000 et seq.**
- 18) **Incorporation by Reference of Detailed Statements of Facts, Exhibits and Evidence submitted by Other Appellants**

**f) Detailed statement of facts on which the appeal is based;**

**1) There is no Valid Delta Plan for the Covered Action to be Consistent With**

Friends of the River was among the plaintiffs/petitioners filing actions challenging the validity of the Delta Plan adopted by the DSC in 2013. Petitioners obtained a Judgment from the Superior Court, County of Sacramento, Judicial Council Coordination Proceeding No. 4758, Dept. 31, Judge Michael Kenny, on November 23, 2016, Granting Peremptory Writ of Mandate against the DSC. Paragraph 6 of the 2016 Judgment provides:

A Peremptory Writ of Mandate (“Writ”) shall issue from the Court to Respondent [DSC], ordering Respondent to vacate and set aside the Delta Plan and any applicable regulations and revise the Delta Plan and any applicable regulations to: (a) include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoration of more natural flows, and increased water supply reliability, in compliance with the Delta Reform Act; (b) provide a flow policy that includes “quantified or otherwise measurable targets;” and (c) comply with the Delta Reform Act section 85304 requirement that the plan “promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals.” Nothing in the Writ shall limit or control the discretion legally vested in Respondent. (A copy of the Judgment is attached.)

Paragraph 7 of the Writ commanded the DSC “to make and file an Initial Return within 120 days after issuance of the Writ, setting forth what it has done to comply with the Writ, and

such further Return as the Court may direct.” The DSC has not complied with the Judgment and Writ and never filed the required return to the Writ. The DSC instead filed a notice of appeal. The DSC’s appeal is presently pending in the Third District Court of Appeal, *Delta Stewardship Council Cases*, No. C082944.

The Delta Plan is invalid as determined by a final judgment of the Superior Court, County of Sacramento. The DSC must remand the matter to DWR because there is not a valid Delta Plan by which to determine whether a covered action is consistent with a valid Delta Plan.

**2) There is no Conveyance Policy in the Delta Plan for the Covered Conveyance Acton to be Consistent With**

The Covered Action described in the filed Certification of Consistency, is “conveyance facilities, operations. . .” (Certification of Consistency, second paragraph, p.3.) There is no conveyance policy in the Delta Plan. “For this reason [the ongoing BDCP process], the Delta Plan does not include any regulatory policies regarding conveyance.” (Appendix A, Delta Stewardship Council’s Role Regarding Conveyance, p. A-2, Delta Plan, 2013.) Likewise, the Delta Plan Environmental Impact Report (EIR)(2013) did *not* evaluate the potential environmental consequences of conveyance options. The Final EIR on the Delta Plan stated:

the proposed Delta Plan does *not* make any recommendations regarding conveyance at this time because the Council has determined that the BDCP agencies are in the best position to complete the planning process, including defining acceptable ranges of exports and through-Delta flows. *Accordingly, the PEIR does not evaluate the potential environmental consequences of various BDCP options that DWR may be considering.* (FEIR, p. 3-15, May 2013) (Emphasis added).

Consequently, it is not possible for the DSC to determine whether the Covered Action is consistent with the Delta Plan because the Plan contains no policies regarding conveyance.

Presumably, DWR and DSC staff will contend that the Covered Action has become consistent because of the Delta Plan Amendments adopted in April 2018. Recommendation WR R12a(1), Promote Options for New and Improved infrastructure Related to Water Conveyance, calls for DWR and Reclamation to “pursue a dual-conveyance option” including “new intakes and facility improvements for both isolated, below-ground conveyance and through-Delta conveyance of State Water Project (SWP) and Central Valley Project (CVP) water supplies from the Sacramento River to the South Delta, . . .” (Delta Plan, ch. 3, p. 126.)

Four new actions were filed on or about May 25, 2018 in the Superior Court, County of Sacramento, alleging that the Program EIR (PEIR) for the Delta Plan Amendments adopted by the DSC on April 26, 2018, failed to comply with CEQA and also that the Plan Amendments failed to comply with the Delta Reform Act and the 2016 Judgment. As shown in detail in Section 16 below, what the Delta Plan Amendments on conveyance really show is the bad faith end run on CEQA’s accurate project description and environmental full disclosure requirements by DSC’s repeated false representations that accommodating the Water Fix Tunnels project was not the object of the conveyance amendments.

In addition, even after the Delta Plan Amendments, the Delta Plan still does not include any policies or regulations regarding conveyance. The Delta Plan as amended in 2018 states with respect to conveyance that “No policies with regulatory effect are included in this section. See Appendix A, The Delta Stewardship Council’s Role Regarding Conveyance.” (Delta Plan, ch. 3, p. 126.)

**3) The Covered Action is not consistent with policy G P1, Certifications of consistency must include detailed findings that address specific requirements**

The Delta Plan and the regulations require that a covered action must include detailed findings that address specific requirements. (Delta Plan, ch. 2, Policy G P1(b), p. 53; Regulations, Art. 2, § 5002(b).) DWR’s Certification of Consistency and attachments are filled with speculation and argument, rather than the substantial evidence required by law.

**4) The Covered Action is not consistent with policy G P1(b)(2), requiring including applicable feasible mitigation measures**

The Delta Plan and the regulations require that a Covered Action include applicable feasible mitigation measures. (Delta Plan, ch. 2, p. 53, Policy G P1 (b)(2); Regulations, Art. 2, § 5002(b)(2).)

With climate change fueling more severe and prolonged droughts, it is only a matter of time before the Tunnels would be used to take every last drop of water they can, just as Interior Secretary Zinke is doing right now. According to an August 21, 2018 Sacramento Bee article, the Secretary “last week sent a memo to underlings demanding a plan within 15 days aimed at ‘maximizing water supply deliveries’ to irrigation districts south of the Sacramento-San Joaquin Delta.” Also, “Zinke’s memo said the Trump administration would take a broader array of ‘legislative and litigation measures’ in order to deliver more water south.” (Sacramento Bee, August 20, 2018.) With the ability to divert 15,000 cubic feet per second, the Tunnels would have the capacity to divert the typical summer flow of the entire Sacramento River—our state’s largest river. This would be the end of the San Francisco Bay- Delta because of the loss of necessary freshwater flows.

Congress has joined in the war against California State law and environmental protection. A rider in the Interior Appropriations bill that would exempt the Water Tunnels project from Federal or State judicial review “under any Federal or State law” passed the House of Representatives. The House Appropriations Committee also added another rider, one that would exempt the Central Valley Project (CVP) and the State Water Project (SWP) from judicial review. Copies of the July 31, 2018 letter from California Attorney General Xavier Becerra and the July 17, 2018 letter from California Natural Resources Agency Secretary John Laird opposing and explaining the riders are attached.

In addition, on December 16, 2016, Public Law 114-322 including §4001 et seq pertaining to California water was signed into law. Maximizing water exports from the Delta is now the cornerstone of the new law on federal water policy. As a result, there needs to be a new Draft EIR/EIS prepared and circulated for public review and comment disclosing and assessing the impacts of maximizing water exports as a reasonably foreseeable consequence of approving and developing the Delta Water Tunnels.

The political landscape has changed. The federal government now claims it can override California environmental protection laws and Water Board water allocations and protections. The federal goal is to maximize water exports from the Delta. In this new political climate, the mitigation measures are meaningless. Moreover, the U.S. Bureau of Reclamation, even though the Covered Action is a joint project, is not even a party to the Certification of Consistency. In this context, there are no mitigation measures that can be guaranteed to be implemented and effective. The federal government is claiming the right to maximize water export deliveries. Consequently, the Covered Action fails to include applicable feasible mitigation measures. The courts will not approve or defer to agency findings that “conditioning” measures will be effective that “are not supported by substantial evidence or defy common sense.” *Gray v County of Madera*, 167 Cal.App.4<sup>th</sup> 1099, 1116-7 (finding mitigation measures ineffective).

**5) The Covered Action is not consistent with policy G P1(b)(3), requiring use of best available science**

The Delta Plan and the regulations require that a Covered Action document use of best available science. (Delta Plan, ch. 2, p. 53, Policy G P1(b)(3); Regulations § 5002(b)(3).) DWR’s Certification of Consistency and attachments are filled with speculation and argument, rather than the substantial evidence required by law. Moreover, as shown in Section 9 below, DWR’s Certification fails to even address, let alone be based upon, the flow criteria developed by the State Water Resources Control Board in August 2010.

**6) The Covered Action is not consistent with policy G P1, assuring continued implementation of adaptive management**

The Delta Plan and the regulations require that a Covered Action include adequate provisions to assure continued implementation of adaptive management with respect to ecosystem restoration and water management covered actions. (Delta Plan, ch. 2, p. 53-4, Policy G P1(b)(4); Regulations, Art. 2, § 5002(b)(4).)

For the same reasons set forth in Section 4 above with respect to mitigation measures, the Covered Action fails to include adequate provisions to assure continued implementation of adaptive management. The federal government is now claiming the authority to maximize water export deliveries. The federal agency proponent of the Water Fix project— the Bureau of Reclamation-- is not even a party to the Consistency Certification. Consequently, adaptive management does not exist here because there is nothing binding the Bureau to comply with adaptive management.

**7) The Covered Action is not consistent with policy WR P1, Reduce Reliance on the Delta through Improved Regional Water Self-Reliance.**

The Delta Plan and the regulations require that a covered action, “in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies contained in Article 3 implicated by the covered action”. (Delta Plan, ch. 2, p. 53; Regulations, Art. 2, § 5002(b)(1).)

Reducing reliance on the Delta is imperative. “The reality is that the State and federal systems have never been able to reliably deliver the full contract amounts.” (Delta Plan, ch. 3, p. 91.) The Delta is already in crisis. (*Id.* p. 65.)

Despite recent restoration efforts and investments, aquatic species continue to decline (Moyle et al. 2010, NMFS 2014). The species also remain highly vulnerable to changing hydrologic conditions such as warmer water temperatures, longer water residence time, increased water clarity, and reduced flow. Further, significant uncertainty exists regarding the effects of projected climate on the hydrology of the Delta watershed and its ecological health. (*Id.* p. 92.)

The Delta Plan in Chapter 3, *A More Reliable Water Supply for California*, sets forth policy WR P1, Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. (Delta Plan ch. 3, p. 122: Regulations, Art. 3, § 5003.) Spending billions of dollars and 20 years to construct enormous new conveyance facilities to export significant quantities of freshwater flows before rather than after flowing through the Delta would increase rather than reduce reliance on the Delta. DWR attempts to evade the policy by seeking to interpret it as applying only to new water exports. (Certification of Consistency, p. 5.) DWR also claims the Covered Action is consistent with the coequal goals themselves if it is infeasible to certify for consistency with the policy. (Certification of Consistency, p. 6.) That defies the facts and common sense. One of the two coequal goals is “protecting, restoring, and enhancing the Delta ecosystem.” Water Code § 85054. When all responsible scientists are calling for increasing through-Delta flows and reducing exports to protect and restore the Delta Ecosystem, creation of a new conveyance system to massively reduce through-Delta flows is not consistent with those goals.

The Delta Plan demonstrates that the Covered Action is both premature and inconsistent with the Plan. Recommendation WR R12b(1)(a) (Delta Plan, ch. 3, p. 127) as amended in April 2018 states that in selecting new Delta infrastructure for conveying water from the Sacramento River to the south Delta, “project proponents should analyze and evaluate a range of alternatives including, but not limited to the following:”

- (a) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy applicable requirements of State and federal fish and wildlife agencies and the State Water Resources Control Board, and other operational requirements and flows necessary for protecting, restoring, and enhancing the Delta ecosystem under a reasonable range of hydrologic conditions (as described under WR R12h, below). This includes identifying water available for export and other beneficial uses, consistent with water quality requirements of the State Water Resources Control Board.

None of that has been done. There has not been identification of water available for export and other beneficial uses. As the Delta Plan states, “. . . California does not have a clear understanding of its water demands, the amount of water available to meet those demands, how water is being managed, and how that management can be improved to achieve the coequal goals for the Delta.” (Delta Plan, ch. 3, p. 120, 134.)

Finally, for the same reasons set forth in Section 4 above with respect to mitigation measures, the Covered Action fails to include adequate provisions to reduce reliance on the Delta. The federal government is now claiming the authority to maximize water export deliveries and the federal agency proponent of the Water Fix project— the Bureau of Reclamation-- is not

even a party to the Consistency Certification. Consequently, it is crystal clear now that the Covered Action would increase, not reduce, reliance on the Delta for water exports.

**8) The Covered Action is not consistent with policy WR P2, Transparency in Water Contracting**

The Delta Plan and the regulations require that the contracting process for water from the State Water Project and/or the Central Valley Project must be done in a publicly transparent manner. (Delta Plan, ch. 3, policy WR P2, p. 135; Regulations, Art. 3, § 5004.)

**8a) *Inconsistency with Transparency in Water Contracting WR P2 (23CCR Section 5004)***

The Department of Water Resources (“DWR”) consistency analysis fails to show that the Project is consistent with Water Code section 85057.5(a) (3) and section 500(j)(1)(E). DWR’s consistency document (“WRP2”) is both procedurally and substantively flawed for failing to accurately reflect both existing and necessary state and federal contracts required for the Project operations, SWP and CVP operations and how these contracting processes for water from the State Water Project (SWP) and/or federal Central Valley Project (CVP) are and/or will be conducted in a transparent manner.

**8b) *DWR’s Analysis Does Not Address the Current Project***

DWR’s consistency analysis suggests with regard to water from the State Water Project the contracts to “*amend a water supply or water transfer contract*” meet specified guidelines for transparency and public participation.<sup>1</sup> Simply put the assertion is not true. The various SWP water contracts for the Project have not been completed. Further existing SWP water contract constraints do not include the Project.<sup>2</sup> The state and federal contract to operate the Project consistent with the state and federal coordinated operations agreement is being challenged by the Bureau of Reclamation.<sup>3</sup> The analysis is silent on a critical contract necessary for the operation of the Project water diversion and power generation. Federal contracts and a license for power generation pursuant to the Federal Power Act have expired leaving operations of the Project up

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<sup>1</sup> WR P2 (23 CCR Section 5004) Pg 1

<sup>2</sup> See the current SWP Contract requirement in Article 1(hh) limiting water facilities to those that were in existence prior to January 1, 1987 pg 32-33  
[http://www.mwdh2o.com/PDF\\_Who\\_We\\_Are\\_Proposed\\_Property\\_Tax\\_Rates/Consolidated%20Contract%20through%20Amendment%20No.%2028.pdf.pdf](http://www.mwdh2o.com/PDF_Who_We_Are_Proposed_Property_Tax_Rates/Consolidated%20Contract%20through%20Amendment%20No.%2028.pdf.pdf)

<sup>3</sup> U.S. Bureau of Reclamation served notice to Karla Nemeth DWR Director Notice of Negotiation- Coordinated Operation Agreement (COA) Aug. 17, 2018

in the air regarding diversion of water for power generation.<sup>4</sup> Further the public is left in the dark with little or no transparency regarding the so called, 'Master Agreement'<sup>5</sup> between Metropolitan Water District of Southern California and the Department of Water Resources for roughly 33% of the Project capacity.

**8c) *DWR Argues If Transparency and Public Participation Rules Cannot Be Met, then DSC Can Proceed by Bureaucratic Fiat***

Without analysis DWR simply asserts that if there is a compliance failure with WR P2 (23 CCR 5004) then the DSC can deem consistency with all relevant regulatory policies to be infeasible (23CCR 502(b)(1) and find the Project consistent with the "coequal goals themselves."<sup>6</sup>

DWR's argument that there is a path to circumvent state and federal public participation and transparency policies rules and regulations by asserting they do not apply by bureaucratic fiat does not meet its burden because it failed to actually provide any analysis or evidence establishing the infeasibility of adhering to the "publicly transparent manner" that section 5004(a) requires of the contracting process. The evidence needed is simply missing. Section 5002(b)(1) requires "a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals," and makes that determination subject to review on appeal. Further the analysis appears to accept as an article of faith that consistency of the Project with the coequal goals has been already "demonstrated" in the Final EIR/EIS.<sup>7</sup> That certainly is not the case as it relates to DWR's tunnel-driven end run around existing SWP water contract limitations. Environmental review of the SWP contract amendments is not completed,<sup>8</sup> and DWR failed to analyze the environmental,

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<sup>4</sup> See FERC filings and letters for DWR's Oroville License 2100 <https://www.ferc.gov/industries/hydropower/safety/projects/oroville.asp> & Oroville Chamber of Commerce license challenge <https://www.orovillechamber.com/wp-content/uploads/2017/07/FERC-Letter-FINAL-6.27.17.pdf>

<sup>5</sup> See Metropolitan Water District of Southern California WaterFix Workshop March 27,2018 [http://mwdh2o.granicus.com/MediaPlayer.php?view\\_id=12&clip\\_id=6670](http://mwdh2o.granicus.com/MediaPlayer.php?view_id=12&clip_id=6670).

<sup>6</sup> WR P2 (23 CCR Section 5004) pg 1 footnote 1.

<sup>7</sup> WR P2 (23 CCR Section 5004) Pg 1 footnote 1

<sup>8</sup> <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf> DWR incorrectly asserts that the "proposed project is separate and independent from the California WaterFix project," DEIR at 6-3, which causes DWR to impermissibly piecemeal the impacts of extending the contracts from the impacts of California WaterFix ("WaterFix"). Third, DWR and the SWP Contractors have recognized that multiple additional modifications to the SWP contracts will be necessary in order to implement WaterFix, whose modifications have been impermissibly excluded from this project and its impact analysis. Pg 2. PCL et. al. to DWR comments on SWP Contract Extension DEIR.

fiscal and policy risks to the SWP as a whole from any SWP contract changes in the FEIR of the Project.<sup>9</sup>

**8d) DWR argues no CVP Contract Amendments Are Part of the Project thus WR P2 is not applicable<sup>10</sup>**

Once again, the assertion that no federal CVP contract amendments are part of the Project is simply incorrect. DWR provides no evidence or analysis to support this assertion. DWR and the Bureau of Reclamation operate the SWP and CVP projects pursuant to a federal contract agreement the Coordinated Operations Agreement<sup>11</sup> pursuant to the Long-Term CVP and SWP Operations Criteria and Plan.<sup>12</sup> Further recent documents highlight how this federal-state contract is likely to have undisclosed consequences on the operation of the Project. Both Reclamation and some federal contractors have urged revisions.

On July 27, 2018, the Delta Finance Authority in a letter to EPA outlined the problem with this federal state contract: *"Currently there is only one contractual arrangement that might affect operation of WaterFix. Several agreements have been under negotiation during the planning phase to address issues raised by entities that are not participating in WaterFix, and it is likely some lawsuits will be resolved through settlement agreements...The Coordinated Operations Agreement (COA) (Attachment 28) was executed in November 1986 between DWR and the United States of America through Reclamation for the coordinated operation of the SWP and CVP... By its terms, the COA allows for the reanalysis of the obligations of the SWP and the CVP and that reanalysis could positively or negatively affect operations of Water Fix."*<sup>13</sup> On August 17, 2018, USBR Regional Director David Murillo served notice to DWR regarding the need to revise this contract.

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<sup>9</sup> <https://mavensnotebook.com/wp-content/uploads/2018/07/RBM-Letter-Re-SWP-contract-extension-hg.pdf>  
Despite reaching a non-binding "agreement in principle" (AIP) with most, but not all, of the SWP contractors in 2014, and releasing a 2016 Draft EIR, DWR has neither reached consensus on binding contract terms nor completed environmental review....DWR has not released a Final EIR or responses to comments, despite major criticisms before DWR closed public comment on the Draft EIR in October 2016, and lacks consensus on complete and final amendment....Piecemealing of Proposed Contract Terms: Oversight of the proposed contract extension must include integrated consideration of all DWR's proposed SWP amendments, including additional pending WaterFix SWP amendments lacking an EIR. Pg 2.

<sup>10</sup> WR P2 (23 CCR Section 5004) Pg 3

<sup>11</sup> Public Law 99-546 [https://www.usbr.gov/mp/cvp/docs/pl\\_99-546.pdf](https://www.usbr.gov/mp/cvp/docs/pl_99-546.pdf)

<sup>12</sup> [https://www.usbr.gov/mp/cvo/OCAP/sep08\\_docs/FrontMatter.pdf](https://www.usbr.gov/mp/cvo/OCAP/sep08_docs/FrontMatter.pdf) & [https://www.usbr.gov/mp/cvo/OCAP/OCAP\\_BA\\_6\\_30\\_04.pdf](https://www.usbr.gov/mp/cvo/OCAP/OCAP_BA_6_30_04.pdf) & [http://www.westcoast.fisheries.noaa.gov/central\\_valley/water\\_operations/ocap.html](http://www.westcoast.fisheries.noaa.gov/central_valley/water_operations/ocap.html)

<sup>13</sup> Delta Conveyance Finance Authority (Finance Authority) July 27, 2018 letter to EPA Andrew Wheeler, Letter of Interest for Water Infrastructure Finance and Innovation Act (WI FIA) program <http://www.restorethedelta.org/wp-content/uploads/JPA.pdf> pg 23.

There are numerous other instances where either federal CVP contractors or SWP Contractors have raised concerns about the impacts of the Project on the federal-state contract obligations on the operations of the Project. For example, on March 1, 2016 Contra Costa Water District joined by 13 other federal contractors raised objections as to how the Project would impact the coordinated operations contract agreement, existing CVP contractors and the operations of the CVP, *..We have consistently requested that Reclamation commit to a fundamental premise that the project will not result in unmitigated redirected impacts to the water supplies or water quality of CVP contractors who do not benefit from the project.... Furthermore, an Operations Plan for the WaterFix is necessary to define how CVP and SWP will coordinate operations and share available capacity of the new facilities, which will determine the relative water supply benefits between the CVP and SWP. The Operations Plan should also clarify operational criteria for the WaterFix facilities as well as for existing facilities.*<sup>14</sup> On March 27, 2018, in a Board Workshop Metropolitan Water District's General Manager, Mr. Kightlinger also highlighted impacts as to how the Project would be integrated with the existing COA contract obligations, *"We foresee a world of trouble trying to make a coordinated operations agreement. If one set of contractors are entirely pumping from the South Delta and one set of contractors are having dual conveyance both south and north, and making the COA, the Consolidated Operating Agreement, effective and working, we think, we think we'd just be, it become a real nightmare."*<sup>15</sup>

In conclusion, DWR assertion of transparency in water contracting suggests that Delta Plan Policy WR P2 (23 CCR Section 5004), Transparency in Water Contracting is not applicable to the Project because contract amendments are a separate process outside the scope of the Project. In fact, the contract amendments both federal and state are integral to the project and the operations. Vague reference to statute, rules and regulation is insufficient to insure consistency with public participation requirements. Further, the segmentation and virtual maze of contract negotiations and administrative actions without public disclosure prevents the public from effectively participating in the suggested public participation processes. These impacts are not idle speculation and include fiscal impacts, water supply impacts and biological impacts.

#### **9) The Covered Action is not consistent with policy ER P1, Delta Flow Objectives**

The Delta Plan and the Regulations require that “The State Water Resources Control Board’s [Water Board] Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan.” (Delta Plan, ch. 4, p. 148; Regulations, Art. 3, § 5005.)

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<sup>14</sup> CCWD et al March 1, 2016 letter to David Murillo USBR Regional Director Re California WaterFix Cost Repayment Proposal Request pg 2.

<sup>15</sup> Metropolitan Water District of Southern California WaterFix Workshop March 27, 2018 [http://mwdh2o.granicus.com/MediaPlayer.php?view\\_id=12&clip\\_id=6670](http://mwdh2o.granicus.com/MediaPlayer.php?view_id=12&clip_id=6670).

DWR has altered the project so that it does not comply with D-1641. In the Water Board hearing on DWR's petition to add the proposed new points of diversion on the Sacramento River for the proposed intakes for the Water Fix Tunnels, the Water Board's hearing officers ruled on March 27, 2018, and ruled further on July 16, 2018, that DWR needed to provide an updated summary of operating criteria. DWR responded to these two rulings by producing Exhibit DWR-1143 Second Revision, which it served on hearing parties on July 19, 2018. (Available at: [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/petitioners\\_exhibit/dwr/dwr-1143rev2.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/petitioners_exhibit/dwr/dwr-1143rev2.pdf). Copy attached.) In the last row of the table at page 7 of Exhibit DWR-1143 Second Revision, with respect to "CWF Adopted Project Criteria" Parameter (Copy attached.) "Export to inflow ratio," DWR stated:

The D-1641 export/inflow (E/I) ratio calculation was largely designed to protect fish from south Delta entrainment. For the PA, Reclamation and DWR propose that the NDD be excluded from the E/I ratio calculation. In other words, Sacramento River inflow is defined as flows downstream of the NDD and only south Delta exports are included for the export component of the criteria.

The Covered Action will not comply with D-1641. Instead, DWR has simply removed the Covered Action from the D-1641 export to inflow ratio. Consequently, the Covered Action does not comply with policy ER P1.

Exhibit DWR-1143 Second Revision also demonstrates that the flow criteria of the Covered Action are so open-ended, undefined and speculative that it is impossible to determine what the flow criteria of will be, let alone whether those flow Criteria with Policy ER P1. Footnote 29 at page 4 states that the "initial range" of south Delta operations criteria "will be defined through further discussion," and further states "the 3-day averaging period may be modified through future discussion." Footnote 31 at page 4 states in part: "The Wilkins Slough trigger will be reviewed through future discussion, which will be informed by the Adaptive Management Program, including real time monitoring."

Footnote 38 states at page 6 states:

If best available science resulting from collaborative scientific research program shows that Longfin Smelt abundance can be maintained in the absence of spring outflow, and DFW concurs, an alternative operation for spring outflow could be developed to follow flow constraints established under D-1641. Any changes in the PA will be implemented consistent with the CWF AMP, including coordination with USFWS and NMFS

Exhibit DWR-1143 Second Revision Table 3.3-2 at pages 8-11 provides "Proposed North Delta Diversion Bypass Flow Requirements." At page 8 in the gray-highlighted section of the table, DWR states: "These parameters define the criteria for modeling purposes and provide the real-time operational criteria levels as operations move between and among the levels. Actual operations will be based on real-time monitoring of hydrologic conditions and fish presence/movement as described in Section 3.3.3.1, *North Delta Diversions*."

Section 3.3.3.1 as cited refers to a section in Chapter 3 of the final Biological Assessment for California WaterFix, available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/petitioners\\_exhibit/dwr/part2/dwr1142/](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/petitioners_exhibit/dwr/part2/dwr1142/), which states at pages 3-120 and 3-121:

The specific criteria for transitioning between and among pulse protection and post-pulse bypass flow operations will be based on real-time fish monitoring and hydrologic/behavioral cues upstream of and in the Delta that will be studied as part of the PA's Collaborative Science and Adaptive Management Plan (Section 3.4.6). Based on the outcome of the studies listed in Section 3.4.6, information about appropriate triggers, off-ramps, and other RTO management of NDD operations will be integrated into the operations of the PA. The RTOs will be used to support the successful migration of salmonids past the NDD and through the Delta, in combination with other operational components of the PA47.

The following operational framework serves as an example that is based on the recommended NDD RTO process (Marcinkevage and Kundargi 2016). A 5-agency technical team co-chaired by NMFS and CDFW will incorporate results from ongoing monitoring and studies to revise specific fish triggers and may further refine the RTO process based on the amount of time it takes to make the RTO change in pumping rates and a science plan developed through the collaborative science process and finalized through the adaptive management process prior to commencement of actual operations of the north Delta facilities.

In sum, the primary flow elements of the Covered Action, south Delta flow criteria, Sacramento River at Wilkins Slough flow requirements, Delta outflow requirements, and North Delta Diversion bypass flow requirements are all preliminary at this time and subject to revision under adaptive management, real time operations, or other future actions. These flow requirements are thus speculative and undefined, and there is no basis to determine whether or not the flows of the Covered Action are consistent with existing Bay Delta Water Quality Control Plan flow objectives.

There are additional reasons why the Covered Action does not comply with policy ER P1. The Delta Reform Act in Water Code § 85086(c)(1) required the Water Board "For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan", to, "pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." The Water Board developed the flow criteria on August 3, 2010. The Covered Action does not comply with policy ER P1 because DWR has not shown that the Water Fix project satisfies the Water Board's flow criteria.

The Water Board is updating the Bay-Delta Plan. The Covered Action cannot be evaluated for consistency with the updated Bay-Delta Plan. DWR also claims the Covered Action is consistent with the coequal goals themselves if it is infeasible to certify for consistency with the policy. (Certification of Consistency: ER P1, fn. 1, p. 1.) That defies the facts and common sense. One of the two coequal goals is "protecting, restoring, and enhancing the Delta ecosystem." Water Code § 85054. That coequal goal could only be even arguably met by complying with the flow criteria developed by the Water Board in August 2010. In the alternative, the DSC must await the updating of the Bay-Delta Plan. It is premature to attempt to determine consistency with the flow objectives when the flow objectives are in the process of being updated to be more stringent in order to protect the Delta.

The Delta Plan itself demonstrates that it is premature to attempt to determine that this massive project that features reducing flows through the lower Sacramento River and the Delta is consistent with the coequal goal of "protecting, restoring, and enhancing the Delta ecosystem."

Recommendation ER R1, Update Delta Flow Objectives, states “Development, implementation, and enforcement of new and updated flow objectives for the Delta and high-priority tributaries are key to the achievement of the coequal goals.” (Delta Plan, ch. 4, p. 148.) The Covered Action is inconsistent with Recommendation ER R1, as well as Recommendation WR R12(b)(1)(a), discussed in Section 7 above on reducing reliance on the Delta.

There is an additional reason why the Covered Action is not consistent with the Delta Flow Objectives Policy, as was shown in Section 4 above with respect to the Delta Plan Policies on mitigation measures. With climate change fueling more severe and prolonged droughts, it is only a matter of time before the Tunnels would be used to take every last drop of water they can, just as Interior Secretary Ryan Zinke is doing right now. On August 17, 2018, Secretary Zinke sent a memo to his staff with the Subject “California Water Infrastructure” that states:

Within 15 days, the Assistant Secretary - Water and Science, the Assistant Secretary for Fish and Wildlife and Parks, and the Solicitor shall jointly develop and provide to the Office of the Deputy Secretary an initial plan of action that must contain options for:

- o maximizing water supply deliveries; ...
- o resolving issues with the State of California regarding the Coordinated Operations Agreement, the California Water Fix, and the potential enhancement of Shasta Dam;
- o preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people;

The memo is posted on the website of California Congressman Jeff Denham at:

[https://denham.house.gov/uploadedfiles/8.17.18\\_doi\\_memo\\_on\\_california\\_water\\_infrastructure.pdf](https://denham.house.gov/uploadedfiles/8.17.18_doi_memo_on_california_water_infrastructure.pdf).

The Coordinated Operations Agreement (COA) is an agreement between DWR and the Bureau of Reclamation that defines how they share the responsibility for meeting many of the regulatory requirements in the Delta. (The COA is included as Exhibit gcid-1 in the WaterFix hearing, and is available at:

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/petitioners\\_exhibit/glenn/gcid\\_1.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/petitioners_exhibit/glenn/gcid_1.pdf)). The COA is included as a modeling assumption for both the No Action Alternative and Covered Action. (See *ER P1 (23 CCR Section 5005) – Delta Flow Objectives*, at page 14 and page 21 [COA not listed as different in modeling Covered Action], available at:

[https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105), drop-down section ERP1). The division of responsibility for meeting SWP and CVP project obligations in the Delta has recently been challenged by a number of Bureau of Reclamation actions and documents. On February 4, 2017, the Bureau of Reclamation sent a letter to the Executive Director of the State Water Resources Control Board stating that it would not comply with the Vernalis flow requirements on the San Joaquin River. (WaterFix hearing Exhibit SJTA-203). On July 27, 2018, the day DWR filed its consistency certification with the Stewardship Council, the Bureau of Reclamation sent a letter to the State Water Resources Control Board stating at page 3: “The Secretary of the Interior May Determine that SWRCB

Water Quality Standards Are Not Consistent with the Congressional Directives for the CVP and New Melones Project.” The letter threatens potential legal action against the Board. *Id.* (See Exhibit NRDC-204, available at:

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/NRDC\\_TBI\\_DOW/part2/NRDC-204.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/NRDC_TBI_DOW/part2/NRDC-204.pdf)). On August 17, 2018, the Bureau of Reclamation sent a letter to Karla Nemeth, Director of DWR, initiating formal negotiations regarding the COA pursuant COA Article 14(b)(2). (Copy attached.)

The Bureau of Reclamation has stated in official documents that it will not comply with certain present Bay-Delta water quality objectives, and has taken actions of non-compliance with the existing San Joaquin River flow objective. The Bureau of Reclamation has also stated that it may not comply with future Bay-Delta water quality objectives and other Bay-Delta regulatory requirements, and has initiated actions in support of potential future non-compliance. Compliance with D-1641 is fundamental to the Covered Action. The COA is an assumption in the modeling for the Covered Action and is essential to the means by which DWR and the Bureau of Reclamation have represented they will comply with Delta flow objectives. A consistency determination for California WaterFix cannot be made until the Bureau of Reclamation issues a Record of Decision for WaterFix affirming its compliance with the existing Bay-Delta Water Quality Control Plan and any future Bay-Delta Water Quality Control Plan, and until the Bureau of Reclamation and DWR resolve their coordinated operations.

Congress has joined in the war against California State law and environmental protection. A rider in the Interior Appropriations bill that would exempt the Water Tunnels project from Federal or State judicial review “under any Federal or State law” passed the House of Representatives. The House Appropriations Committee also added another rider, one that would exempt the Central Valley Project (CVP) and the State Water Project (SWP) from judicial review. The political landscape has changed. The federal government now claims it can override California environmental protection laws and Water Board water allocations and protections. The new federal policy is to maximize water exports from the Delta. This new federal policy is directly opposed to Policy WR P1/23 CCR Section 5003 to reduce reliance on the Delta for water supply

The Bureau of Reclamation is not even a party to the Consistency Certification. In this climate, the Delta Flow Objectives Policy can only be carried out by finding the Covered Action to be inconsistent with the Delta Plan so that it cannot be constructed and operated. Otherwise, a superhighway will be created depriving the Delta of necessary freshwater flows.

#### **10) The Covered Action is not consistent with policy ER P2, Restore Habitat at Appropriate Elevations**

The Delta Plan and Regulations require habitat restoration. (Delta Plan, ch. 4, p. 149; Regulations, Art. 3, §5006. The habitat for fish including the endangered and threatened fish species is the water they live in, migrate in and spawn. The very purpose of the Covered Action is to reduce the freshwater flows through the lower Sacramento River and Delta by taking those

flows away from the river and transporting them through underground tunnels to the pumps in the south Delta. That will do the opposite of restoring the habitat for the fish. That will instead degrade their habitat.

**11) The Covered Action is not consistent with policy ER P3, Protect Opportunities to Restore Habitat**

The Delta Plan and Regulations require the protection of opportunities to restore habitat. (Delta Plan, ch. 4, p. 149; Regulations, Art. 3, § 5007). Reducing freshwater flows through the Delta will cause significant adverse impacts to the opportunity to restore habitat. The Covered Action is not consistent with this policy.

**12) The Covered Action is not consistent with Recommendation WR R12b(1)(a)**

Recommendation WR R12b(1)(a) (Delta Plan, ch. 3, p. 127) was discussed in Section 7 above. The Covered Action is inconsistent with this recommendation because DWR has not analyzed and evaluated a range of alternatives and has not identified water available for export and other beneficial uses. This is explained in detail in Section 16 below regarding CEQA violations.

**13) The Covered Action is not consistent with Recommendation ER R1, Update Delta Flow Objectives**

Recommendation ER R1 (Delta Plan, ch. 4, p. 148.) was discussed in Section 9 above. The recommendation is that “Development, implementation, and enforcement of new and updated flow objectives for the Delta and high-priority tributaries are key to the achievement of the coequal goals.” The Covered Action is not consistent with that recommendation. The Water Fix Tunnels would establish the capacity to drastically reduce freshwater flows through the Delta before the development, implementation, and enforcement of new and updated flow objectives.

**14) The covered action is not consistent with Recommendation WQ R1, Protect Beneficial Uses**

The Delta Plan recommends, “Water quality in the Delta should be maintained at a level that supports, enhances, and protects beneficial uses identified in the applicable State Water Resources Control Board or regional water quality control board water quality control plans.” (Delta Plan, ch. 6, p. 230.) The Delta Plan recognizes that “Today, salinity in the Delta is dominated by the effects of the upstream water diversions and use of the Delta to convey flows to Central and Southern California.” (*Id.* p. 231.)

The massive reductions in freshwater flows through the Delta by instead running the flows through underground tunnels will degrade water quality instead of enhancing and protecting beneficial uses. The Covered Action is not consistent with the recommendation to maintain water quality in the Delta.

**15) The Covered Action is not consistent with Recommendation WQ R2, Identify Covered Action Impacts**

The Delta Plan recommends, “Covered actions should identify any significant impacts to water quality.” (Delta Plan, ch. 6, p. 230.) The Covered Action fails to identify the significant

impacts of the project to water quality, for the reasons set forth in Section 16a1 below regarding CEQA violations.

**16) No Finding of Consistency can be Made Because there has been Failure to Comply with the California Environmental Quality Act (CEQA)**

CEQA compliance is required but has not been accomplished by either DWR or the DSC.

“The San Francisco Bay Delta watershed covers more than 75,000 square miles and includes the largest estuary on the West coasts of North and South America. It also contains the only inland Delta in the world.” (EPA website). Most people who have thought about it recognize that the Delta needs more freshwater flowing through it, not less. Presently, water for export is diverted from the south Delta. As a result, Delta public health, agriculture, water quantity, water quality and fisheries benefit by the fact that freshwater flows through the Delta before being diverted. This is called “through-Delta conveyance.” However, the approved Water Fix Tunnels would worsen the existing crisis in the Delta by diverting massive quantities of freshwater upstream, from the north Delta. The new diversion from the north Delta along with the continued diversion from the south Delta is called “dual conveyance.” The flows diverted upstream would no longer provide any benefits by first flowing through the already impaired Delta.

A profound deficiency is the continued failure by both DWR and the DSC to consider reasonable alternatives required by both CEQA and the Delta Reform Act. The absent reasonable alternatives include increasing freshwater flows through the Delta by reducing exports.

***16a) DWR has failed to Prepare a legally sufficient EIR for the covered action, the WaterFix Project***

On October 30, 2015, the EPA gave the Supplemental Draft EIS for the BDCP/California Water Fix (CEQ# 20150196) its failing grade of “3” (*Inadequate*)” (p. 4).<sup>16</sup> EPA review was required by Section 309 of the Clean Air Act. EPA’s *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (10/3/84) explains what its failing grade means in section 4(b) of that document entitled “Adequacy of the Impact statement.”

(3) ‘3’ (*Inadequate*). The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the

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<sup>16</sup> October 30, 2015 letter from Jared Blumenfeld, EPA Region IX Administrator to David Murillo, Regional Director, Reclamation, Mid-Pacific Region.

draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. (p. 4-6).

The EPA is an executive department of the United States and its review Letter was an official act of the executive department of the United States. We attach a copy of EPA's October 30, 2015 Letter. There has not been a new Draft EIR/EIS prepared and circulated for public review and comment containing the missing information and analyses.

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

The EPA concluded that deferral of water flow management 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. Once those decisions, described below, are concluded, the evaluation of possible impacts and consideration of alternatives can be completed. (EPA Letter, p. 2).

The State Water Board, however, consistently refused to perform any additional environmental review under CEQA with respect to the Petition for change in points of diversion to accommodate the proposed Delta Water Tunnels. Instead, the State Water board announced its intention to do nothing further in this regard in its Ruling of February 11, 2016:

#### CEQA Compliance

In our January 15, 2016 letter regarding the issues to be discussed at the pre-hearing conference, we explained that the State Water Board's role as a responsible agency under CEQA is limited, and for that reason the adequacy of the CEQA documentation for the WaterFix for purposes of CEQA is not a key hearing issue.<sup>17</sup>

Far from providing "the needed supplemental information to allow a full review of the environmental impacts" expected by EPA (EPA Letter p. 4), the State Water Board refused to even acknowledge or admit that the EPA found the environmental documentation inadequate.

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<sup>17</sup> California Water Fix Project Pre-Hearing Conference Ruling, State Water Board, pp. 8-9, February 11, 2016.

The EPA also noted that the State Water Board:

is in the midst of comprehensively updating water quality standards through the Bay Delta Water Quality Control Plan (Bay Delta WQCP). The updated standards could result in freshwater flow management provisions and corresponding changes to water supply diversions throughout the watershed that have not been analyzed in the SDEIS. The Delta is listed as impaired for several water quality parameters under Section 303(d) of the CWA [Clean Water Act]. EPA is working closely with the State Water Board to ensure that the revised standards are sufficient to address impaired water quality standards in the Delta and reverse the declines in the fish species. The updated standards could result in altered environmental and water supply impacts that have not been analyzed in the SDEIS. (October 30, 2015 EPA Letter, p. 3 – 4).

The State Water Board, however, rejected the many requests to update the Bay-Delta standards before proceeding to consider the Petition to change the points of diversion. (February 11, 2016 Ruling, pp. 4 – 5). Consequently, there were no updated standards upon which to base conclusions in the Final EIR/EIS.

On December 16, 2016, Public Law 114-322 including §4001 et seq pertaining to California water was signed into law. Maximizing water exports from the Delta is now the cornerstone of the new law on federal water policy. This new federal water policy war on California environmental protections for the Delta has worsened as shown by the Interior Secretary actions and legislation passing the House of Representatives in the summer of 2018, discussed in Section 4 above. As a result, there needs to be a new Draft EIR/EIS prepared and circulated for public review and comment disclosing and assessing the impacts of maximizing water exports as a reasonably foreseeable consequence of approving and developing the Delta Water Tunnels.

On January 18, 2017, the EPA issued its review of the FEIS.<sup>18</sup> EPA explained: “To date, none of the regulatory processes mentioned in our SDEIS letter have been completed.” The EPA also concluded that:

. . . the FEIS continues to predict that water quality for municipal, agricultural, and aquatic life beneficial uses will be degraded and exceeds standards as the western Delta becomes more saline. Significantly, the FEIS’ conclusions regarding impacts to aquatic life remain unchanged from those in the SDEIS, predicting substantial declines in quantity and quality of aquatic habitat for 15 of 18 fishes evaluated under Water Fix preferred operations.

In September 2016, the State Water Board determined that under its new flow proposal for the San Joaquin River and its tributaries it would be necessary to “decrease the quantity of

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<sup>18</sup> Letter, Kathleen H. Johnson, Director, Enforcement Division, EPA Region IX to David Murillo, Regional Director, Bureau of Reclamation (January 18, 2017).

surface water available for diversion for other uses compared to the current condition (water supply effect).” (Evaluation of San Joaquin River Flow and Southern Delta Water Quality Objectives and implementation, Executive Summary at (ES) -21). As the Board pointed out: “The Bay-Delta is in ecological crisis. Fish species have not shown signs of recovery since adoption of the 1995 Bay-Delta Plan objectives intended to protect fish and wildlife.” (*Id.* at ES -1).<sup>19</sup>

In October 2017, the Water Board found that: “it is widely recognized that the Bay-Delta ecosystem is in a state of crisis.” (Final Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows, at 1-4). The water management infrastructure including the Central Valley Project (CVP) and State Water Project (SWP) “have been accompanied by significant declines in nearly all species of native fish, as well as other native and non-native species dependent on the aquatic ecosystem. Fish species have continued to experience precipitous declines since last major update and implementation of the Bay-Delta Plan in 1995 that was intended to halt and reverse the aquatic species declines occurring at that time. In the early 2000s, scientists noted a steep and lasting decline in population abundance of several native estuarine fish species that has continued and worsened during the recent drought. Simultaneously, natural production of all runs of Central Valley salmon and steelhead remains near all-time low levels.” (*Id.*). According to the Water Board, the best available science indicates that existing “requirements are insufficient to protect fish and wildlife.” (*Id.* at 1 – 5). There is been no legally sufficient CEQA compliance whatsoever by DWR during development of the Covered Action.

Under CEQA, recirculation of a new Draft EIR is required when "The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." CEQA Guidelines, § 15088.5(a)(4).

**16a1) *The Refusal of DWR to Disclose Significant Adverse Environmental Impacts on Water Quality, Water Quantity, Fish and fish habitat Rendered the Draft environmental documents useless for informing the Public about Adverse Impacts***

The RDEIR/SDEIS issued in July of 2015 actually claimed there would be no adverse impacts under CEQA or NEPA from the Delta losing all that freshwater flow on water supply or water quality (with almost no exceptions), or on fish and aquatic resources. (RDEIR/SDEIS Table ES-9, pp. ES-41-60; Appendix A, ch. 31, Table 31-1, pp. 31-3 through 31-8). The BDCP/Water Fix Drafts were supposed to be environmental full disclosure documents. It was arbitrary and unreasonable to falsely claim that taking significant quantities of freshwater flows away from the Delta does not have significant adverse environmental impacts on Delta water

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<sup>19</sup> Also in September 2016, The Bay Institute published its report, *San Francisco Bay: The Freshwater-Starved Estuary*. Basically, water taken from the rivers is reducing water flowing from the rivers feeding the estuary so that the estuary--the Sacramento-San Joaquin River Delta, Suisun Marsh, and the bay-- ecosystem is collapsing. (Copy of Report [attached](#)).

supply, water quality, fish, and fish habitat. The freshwater *is* the water supply for the Delta and *is* the habitat for the endangered and threatened species of salmon and other fish.

The sole exceptions to the blanket denial of numerous and obvious adverse environmental impacts on water quality from the operation of the preferred Alternative 4A Water Tunnels were WQ-11 “effects on electrical conductivity concentrations resulting from facilities operations and maintenance,” and WQ-32 “effects on Microcystis Bloom Formation Resulting from Facilities Operations and Maintenance.” (RDEIR/SDEIS Appendix A, ch. 31, Table 31-1, pp. 31-3, 31-4). However, in the Executive Summary, even these two water quality impacts were not admitted to be adverse. (RDEIR/SDEIS Table ES-9, pp. ES-44, 45). Two tiny bits of truth survived in the Appendix but were eliminated from the Executive Summary. In any event, the Draft EIR/EIS and RDEIR/SDEIS were completely worthless in terms of providing truthful information and analyses for informed public and decision-maker review.

Later, there was some truth from Reclamation. Reclamation’s Biological Assessment, issued August 2, 2016, made determinations that the proposed action *is* “likely to adversely affect” a number of endangered or threatened species and their designated critical habitats. The likely to be adversely affected listed species, along with their designated critical habitats, include: Chinook salmon, Sacramento River winter-run ESU; Chinook salmon, Central Valley spring-run ESU; Steelhead, California Central Valley DPS; Green Sturgeon, southern DPS; and Delta Smelt. (BA, California Water Fix, chapter 7, Effects Determination, Table 7-1, p. 7-36). A copy of Chapter 7 of the BA is attached.

This amounts to prejudicial delay in finally admitting some truth. Despite the belated admission of some truth in the BA, the Final EIR/EIS repeats the false denials of adverse effects on the listed fish species and their habitat. (EIR/EIS, table, Executive Summary, pp. ES -67 – 93; Ch. 31, pp. 31 – 9 – 15, Table 31 – 1).

Of course taking away significant freshwater flows from the designated habitats for these endangered and threatened species of fish will adversely affect the species and their designated critical habitats. Here are a few examples of adverse environmental impacts of the Water Fix on fish and fish habitat as set forth in the California Department of Fish and Wildlife October 30, 2015 Supplemental Document comments on the Water Fix 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 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.”

That is simply a longer way of saying that the fish need the freshwater flows and that the denial in the EIR/EIS documents of the adverse impacts of taking yet more water away from their habitat was both false and absurd.

**16a2) *The Draft EIR/EIS and RDEIR/SDEIS were so Inadequate and Conclusory in Nature that Meaningful Public Review and Comment were Precluded requiring preparation and circulation of a New Draft EIR/EIS for Public Review and Comment***

In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 412, 449 (2007), the California Supreme Court determined that “We do not consider this response [similar to the denials of the obvious here] substantial evidence that the loss of stream flows would have no substantial effect on salmon migration. 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 [citation omitted] in the CEQA discussion.’”<sup>20</sup> The Court required recirculation of the Draft EIR. Of course, reductions in freshwater flows would be significant adverse impacts. Yet the Executive Summary falsely concluded in all cases that they are not. (RDEIR/SDEIS Table ES-9, pp. ES-47 through 60, Aqua-NAA-1 through 16, Aqua-1 through 217). Until about April 2015, the claim being made in the Draft EIR/EIS had been that while there would be adverse impacts of Water Tunnels operations on the fish and their habitat, much of that would be mitigated by the provision of wetland restoration. Now however, the “65,000 acres of tidal wetland restoration” has been eviscerated down to “59 acres” (RDEIR/SDEIS p. ES-17) as a result of the project no longer being a Habitat Conservation Plan. Yet impacts previously either determined to be adverse or undetermined are now determined to not be significant or adverse.

The Draft EIR/EIS and RDEIR/SDEIS with their arbitrary, unreasonable, and false denials of numerous, severe adverse environmental impacts resulting from Water Tunnels operations on the Delta were so inadequate as to preclude meaningful analysis. A new Draft and recirculation are required by CEQA and NEPA. 14 Cal.Code Regs § 15088.5(a)(3); 40 C.F.R. § 1502.9(a).

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<sup>20</sup> The Court noted that a “potential substantial impact on endangered, rare or threatened species is per se significant.” 40 Cal.4<sup>th</sup> at 449 citing Guidelines section 14 Cal. Code Regs §15065(a).

DWR has failed to comply with CEQA in approving the BDCP/WaterFix Project.

**16a3) DWR continues to refuse to consider the required range of reasonable alternatives required by CEQA and the Delta Reform Act**

“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*, 52 Cal.3d 553, 564 (1990). “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, the public is supposed to wade through 90,000 pages of environmental documents that do not include any, let alone the required range of, reasonable alternatives to the Water Tunnels project.

The direct and obvious way to increase flows through the Delta is to take less water out. A broad policy alternative that should have been included in the Drafts and Final EIR/EIS would be to reduce existing export goals thereby increasing Delta flows and not taking additional flows away from the Delta by developing new upstream conveyance.<sup>21</sup>

Development of alternatives increasing flows through the Delta by reducing exports has always been a direct and obvious first step to complying with CEQA and NEPA in the course of accomplishing the co-equal goals established by the Delta Reform Act, California Water Code § 85054:

‘Coequal goals’ means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

Reclamation and DWR must develop and consider a range of reasonable alternatives that would increase flows by reducing exports in order to satisfy California and federal 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

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<sup>21</sup> 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).

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). In addition, 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. 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.

The alternative of increasing flows through the imperiled Delta by reducing exports is so obvious that the Ninth Circuit recently reversed in part a district court decision denying environmental plaintiffs' summary judgment because the challenged environmental document issued by Reclamation under NEPA “did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities.” *Pacific Coast Federation of Fishermen’s Assn’s v. U.S. Dept. of the Interior*, \_\_\_Fed.Appx. \_\_\_, 2016 WL 3974183 \*3 (9<sup>th</sup> Cir., No. 14-15514, July 25, 2016)(Not selected for publication). “Reclamation’s decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study.” *Id.* at \*2. Reclamation’s “reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts.” *Id.* at \*3. A copy of the Ruling is attached.

The requirement under NEPA for Reclamation to consider the obvious alternative of reducing exports to increase flows through the Delta is so obvious that the Ninth Circuit’s decision was not selected for publication because no new legal analysis was required to reach the decision. <sup>22</sup>The decision pertained to interim two-year contract renewals. If the alternative of

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<sup>22</sup> In *California v. Block*, 690 F.2 753, 765-769 (9<sup>th</sup> Cir. 1982), the project at issue involved allocating to wilderness, non-wilderness or future planning, remaining roadless areas in national forests throughout the United States. The court held that the EIS failed to pass muster under NEPA because of failure to consider the alternative of increasing timber production on federally owned lands currently open to development; and also because of failure to allocate to wilderness a share of the subject acreage “at an intermediate percentage between 34% and 100%.” 690 F.2d at 766. Like the situation here where the Water Fix agencies claim a trade-off involved between water exports and Delta restoration (RDEIR/SDEIS ES 4-6), the Forest Service program involved “a trade-off between wilderness use and development. This trade-off however, cannot be intelligently made without examining whether it can be softened or eliminated by increasing resource extraction and use from already developed areas.” 690 F.2d at 767. Here, likewise, trade-offs cannot be intelligently analyzed without examining whether the impacts of alternatives reducing exports can be softened or eliminated by increasing water conservation, recycling, and eventually retiring drainage-impaired agricultural lands in the areas of the exporters from production. *Accord, Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1122-1124 (9<sup>th</sup> Cir. 2010) (EIS uncritical alternatives analysis privileging of one form of use over another violated NEPA). Here, the BDCP alternatives analysis has unlawfully privileged water exports over protection of Delta water quality, water quantity, public trust values, and ESA values.

reducing exports must be considered during renewal of two-year interim contracts it most assuredly must be considered during the course of the epic decision involved here.

As pointed out in Section 1 above, a Superior Court Final Judgment ordered the DSC to vacate and set aside the Delta Plan and to revise the Delta Plan to:

- (a) include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoration of more natural flows, and increased water supply reliability, in compliance with the Delta Reform Act; (b) provide a flow policy that includes “quantified or otherwise measurable targets;” and (c) comply with the Delta Reform Act section 85304 requirement that the plan “promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals.”

Having lost the case, the DSC appealed. The appeal lacks merit. The DRA requires that the Delta Plan “*Include quantified or otherwise measurable targets* associated with achieving the objectives of the Delta Plan.” DRA § 85308(b).<sup>23</sup> (Emphasis added). The DRA establishes State policy to, “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” § 85020(c). Moreover, “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. . .” § 85021. (Emphasis added). “The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem” including: “viable populations of native resident and migratory species” “reduced threats and stressors on the Delta ecosystem” and “conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.” § 85302 (c)(1), (4), and (5). “[S]ubgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan” including “*restore Delta flows* and channels to support a healthy estuary and other ecosystems” and “improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.” § 85302(e)(4) and (5). (Emphasis added).

All of the so-called BDCP/Water Fix alternatives involve new conveyance as opposed to consideration of any alternatives/options reducing exports and not including new upstream conveyance.

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<sup>23</sup> The Delta Reform Act is codified in the California Water Code. The section numbers provided here are the Water Code section numbers.

The Delta Reform Act declared in Water Code § 85086(b):

It is the intent of the Legislature to establish an accelerated process to determine instream flow needs of the Delta for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan.

The Water Quality Control Plan for the San Francisco Bay/San Joaquin -Sacramento Delta Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended without substantive changes in 2006. The state Water Board is in the process of a periodic update of the WQCP, which is occurring in phases. The statement in the State Water Board February 11, 2016 Ruling (p.4) reflecting reality is that: “The appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may well be more stringent than petitioners’ preferred project.”

The Bay-Delta Plan was 15 years out of date when the Delta Reform Act was enacted. The Plan is now 20 years out of date. The Delta Reform Act required the State Water Board to develop new flow criteria for the Delta ecosystem necessary to protect public trust resources “for the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan.” Water Code § 85086(c)(1). The Delta Reform Act includes very specific requirements for comprehensive review of specific subjects for the BDCP in Water Code § 85320 (b)(2):

(A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows 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.

(B) A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.

(C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.

(D) The potential effects on migratory fish and aquatic resources.

[deletions]

(G) The potential effects of each Delta conveyance alternative on Delta water quality.

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

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

DWR and Reclamation have violated the Delta Reform Act in the process of violating CEQA and NEPA. They have done so by limiting alternatives in the EIR/EIS to their desired new upstream conveyance instead of doing the work and considering a reasonable range of the alternatives expressly required by the Delta Reform Act including Water Code § 85320 and carrying out the policies in sections such as Water Code §§ 85020(c) and 85021. These violations were clear before. They are even clearer now given the September 2016 Evaluation and October 2017 Report by the State Water Board demonstrating that more through-Delta flows are necessary thus requiring reduction in exports.

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 Water Fix alternatives including new Recirculated Draft EIR (RDEIR)/ Supplemental Draft EIS (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 were 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 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).

The Final Water Fix EIR/EIS (December 2016) did nothing to cure the failure to include the required range of reasonable alternatives in the previous Drafts that had been issued for public and decision-maker review and comment. As explained by the Final EIR/S:

The 18 action alternatives are variations of alternative water conveyance plans and restoration actions or Environmental Commitments that differ primarily in the location, design, conveyance capacity, and rules that would determine the operation of water conveyance facilities. For instance, the alternatives range from the proposed construction of one 3000-cubic feet per second (cfs) intake to five such intake facilities, representing a range of north Delta conveyance capacities from 3000 cfs to 15,000 cfs. (Water Fix Final EIR/S, Vol. I, Chapter 3, Alternatives, p. 3-2).

Our organizations have communicated repeatedly over the years with BDCP/Water Fix officials about the failure to develop a range of reasonable alternatives in the environmental review process.<sup>24</sup>

DWR and Reclamation have ignored our repeated calls over the past several years to develop and consider alternatives increasing freshwater flows through 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. This deficient BDCP California Water Fix alternatives analysis is not something that has been “fixed” by responses to comments in the Final EIR/EIS. Instead, DWR and Reclamation need to prepare and circulate a new Draft EIR/EIS that will include alternatives increasing Delta flows for consideration by the public and decision-makers.

#### *16a4) Deliberate Refusal to Consider Alternatives Increasing Delta Flows*

The Final EIR/EIS responses to comments tacitly admit violating the Delta Reform Act mandates by arbitrarily stating project purposes and objectives that do not comply with requirements of the Act including developing real alternatives, reducing reliance on the Delta and restoring more natural flows.

DWR and Reclamation<sup>25</sup> have now marched along for more than five years in the face of “red flags flying” deliberately refusing to develop and evaluate a range of reasonable alternatives, or indeed, any real alternatives at all, that would increase flows by reducing exports. Over five years ago the National Academy of Sciences declared in reviewing the then-current version of the draft BDCP that: “[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan.” (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011).

We presented *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015) during the RDEIR/SDEIS public review period as a reasonable alternative to the Water Tunnels.<sup>26</sup> The plan is at: <http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf>. A copy of *A Sustainable Water Plan for California* is also attached hereto. The actions called for by this alternative 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

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<sup>24</sup> A partial list of these repeated efforts include: May 2012 presentation of our Reduced Exports Plan; December 2012 same; February 20, 2013 same; Letter of November 18, 2013 presentation of our Responsible Exports Plan; Letters of May 21, 2014; May 28 2014; June 11, 2014; September 4, 2014; July 22, 2015; October 29, 2015, and August 18, 2016.

<sup>25</sup> Water Fix Applicants include San Luis Delta Mendota Water Authority, Westlands Water District, Kern County Water Agency, Zone 7 Water Agency, Metropolitan Water District of Southern California, and Santa Clara Valley Water District.

<sup>26</sup> We have repeatedly presented earlier versions of this alternative since May 2012. Reclamation and DWR continue to ignore such alternatives.

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 in reservoirs. We also requested 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. *A Sustainable Water Plan for California* is a carefully conceived modern, 21<sup>st</sup>-century Plan B. It should be Plan A.

Here, climate change will be reducing, in the long-term, mountain snowpack and mountain stream runoff thereby reducing freshwater flows in the San Francisco Bay-Delta watershed and in the Delta itself. Among other things, reduction in flows will add heat to the water exacerbating impacts to fish, fish habitat, and human health. At the same time, climate change induced rising sea levels will exacerbate the salinity intrusion in the Delta. However, the RDEIR/SDEIS effectively ignored the effects of climate change in making determinations of significant impacts because those effects were already included in the baseline used for comparison.

The projections of long-term reduced San Francisco Bay Delta watershed runoff and rising sea levels inducing greater salinity intrusion continue to worsen. This will be reducing available water supply making the Water Tunnels alternative all the more infeasible as well as exacerbating the adverse environmental impacts if nevertheless the alternative is developed. This made the persistent refusal of DWR and Reclamation to develop and consider alternatives increasing freshwater flows through the Delta by reducing exports in the Draft Water Fix NEPA and CEQA documents all the more prejudicial to any kind of meaningful, informed public review. The failure to properly assess climate change impacts here is extremely serious.<sup>27</sup>

***16a5) DWR Must Present and Evaluate Alternatives that will Increase Delta Flows in order to Comply with CEQA and NEPA***

Under NEPA Regulations, “This [alternatives] section is the heart of the environmental impact statement.” The alternatives section should “sharply” define the issues and provide a clear basis for choice among options by the decision-maker and the public. 40 C.F.R. § 1502.14. Moreover, if “a draft statement is so inadequate as to preclude meaningful analysis, the agency

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<sup>27</sup> The modeling for the Water Fix used 2007 estimates of 6” of sea level rise by Early Long Term, approximately 2030, and 18” by Late Long Term, approximately 2065. NOAA’s Climate Change Program Office new sea level guidelines issued in 2012 recommends use of their empirical estimate of a maximum of 2 meters (78.8”) by 2100 for new infrastructure projects with a long anticipated life cycle). This estimate is consistent with recent satellite data on accelerated ice sheet melting.

shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.” § 1502.9(a). *A Sustainable Water Plan for California* and variants on it must be among those alternatives in a new Draft EIR/EIS for the Water Fix that helps to disclose, sharpen and clarify the issues.<sup>28</sup>

Reclamation and DWR have failed to produce an alternatives section that “sharply” defines the issues and provides a clear basis for choice among options as required by the NEPA Regulations, 40 C.F.R. § 1502.14. Again, those issues must include producing more Delta inflow and outflow through the estuary as habitat for listed fish species, and documenting the impacts on Delta ecosystems as called for in Water Code § 85021. The choice presented must include increasing flows by reducing exports, not just reducing flows by increasing the capacity for exports as is called for by *all* of the so-called “alternatives” presented in the BDCP Draft Plan, Draft EIR/EIS, and RDEIR/SDEIS. Instead of sharply defining the issues and providing a clear basis for choice among options, the BDCP consultants have now produced about 90,000 pages of conclusory Water Tunnels advocacy.

The failure to include a range of reasonable alternatives also 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).

The court explained in *Watsonville Pilot’s Ass’n v. City of Watsonville* (2010) 183 Cal.App.4<sup>th</sup> 1059, 1087 that, “It is virtually a given that the alternatives to a project will not attain *all* of the project’s objectives. [citations] Nevertheless, an EIR is required to consider those alternatives that will ‘attain most of the basic objectives’ while avoiding or substantially reducing the environmental impacts of the project. (CEQA Guidelines, [§ 15126.6\(a\).](#))”

The RDEIR/SDEIS conceded 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). The same is true of the Final EIR/EIS. (Executive Summary, Table ES – 8, pp. ES 57 – 146; Ch. 31, Table 31 – 1, pp. 31 – 9 – 15). 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

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<sup>28</sup> The EIS alternatives section is to “Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” § 1502.14(a).

Cal.App.4<sup>th</sup> 859, 873 (2003).<sup>29</sup> Instead of complying with CEQA by considering such alternatives, the lead agencies have refused to do so.

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*, 213 Cal.App.4<sup>th</sup> 1277, 1300-1305 (2013). "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] LAFCO with relevant information." 213 Cal.App.4<sup>th</sup> at 1305. The CEQA documents here likewise fail to satisfy the informational purpose of CEQA.

Alternatives reducing exports and not including new upstream conveyance are obvious alternatives to the Water Fix Tunnels project. Such alternatives, including *A Sustainable Water Plan for California* must be developed, considered and circulated for public review and comment in the EIR/EIS. Unless and until the CEQA mandate to develop and present a reasonable range of alternatives is complied with the decision-making stage of selecting an alternative and rejecting the alternatives not selected is not lawfully reached.

Recirculation of a new Draft EIR/EIS will be required by CEQA Guidelines section 15088.5(a)(3) because the *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.

As conceded by BDCP Chapter 9, Alternatives to Take, the analysis of take alternatives must explain, "why the take alternatives [that would cause no incidental take or result in take levels below those anticipated for the proposed actions] were not adopted." (BDCP Plan, Chapter 9, pp. 9-1, 9-2). Here, the lead agencies failed to even develop let alone adopt alternatives reducing exports and increasing flows to eliminate or reduce take.

CEQA Guideline section 15088.5 (14 Cal. Code Regs. § 15088.5) requires that a new Draft EIR will 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*

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<sup>29</sup> 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.4<sup>th</sup> 603, 620-21 (2006).

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*, 40 Cal.4<sup>th</sup> 412, 447-448 (2007) (Internal citations and quotation marks deleted).

As explained in *Mountain Lion Coalition v. Fish & Game Com.*, 214 Cal.App.3d 1043, 1052 (1989), 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.*).<sup>30</sup>

As the EPA explained, it 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 Letter, p. 4; Our prior Letter, p. 4). The EPA concluded that deferral of water flow management decisions means “that any attempt to describe the environmental impacts of the project is necessarily incomplete.” (EPA Letter, p. 2). 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.*, 57 Cal.4<sup>th</sup> 439, 447 (2013). “[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*, 184 Cal.App.4<sup>th</sup> 70, 88 (2010).

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 CEQA and NEPA documents “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” 40 C.F.R. § 1502.9(a); 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4).<sup>31</sup>

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<sup>30</sup> See *Gray v. County of Madera* (2008) 167 Cl.App.4<sup>th</sup> 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.”)

<sup>31</sup> Our organizations have commented repeatedly over the years that expert federal and State agencies have also found the alternatives analyses deficient as shown by the August 26, 2014 EPA 40-page review; July 29, 2014 State Water Board 38-page review; and July 16, 2014 U.S. Army Corps of Engineers comment letter.

In conclusion, DWR and Reclamation must either drop the Water Tunnels project or finally prepare and issue for public review and comment and decision-maker review a new Draft EIR/EIS that includes the required range of reasonable alternatives. Alternatives including through-Delta conveyance and increasing Delta flows by reducing exports must be included.

There are presently 17 lawsuits pending against DWR alleging that the BDCP/WaterFix EIR fails to comply with CEQA. These actions have all been coordinated under the name of *CDWR Environmental Impact Cases* No JCCP 4942 and are pending in Dept. 23 in the Superior Court, County of Sacramento, before Judge Kevin R. Culhane.

***16b) The DSC has failed to prepare a legally sufficient EIR for the Delta Plan***

Paragraphs 2, 3, and 4 of the 2016 Judgment referred to in Section 1 above, provided that the Court had not resolved the CEQA claims alleged in the action and that all existing CEQA claims are preserved with no defenses such as statute of limitations applying to petitioners re-pleading of their existing CEQA claims at a later date. Four new actions were filed on or about May 25, 2018 in the Superior Court, County of Sacramento, alleging that the PEIR for the Delta Plan Amendments adopted by the DSC on April 26, 2018, failed to comply with CEQA and also that the Plan Amendments failed to comply with the Delta Reform Act and the 2016 Judgment. The action filed by Friends of the River et al., No. 34-2018-80002901, also re-pleads allegations that the DSC failed to comply with CEQA in adopting the 2013 Delta Plan.

***16c) The DSC failed to prepare a legally sufficient EIR for the Delta Plan Amendments***

***16c1) Misrepresentation of what the Project Actually Is***

The Bay Delta Conservation Plan (BDCP)/California Water Fix Final EIR/S was issued by DWR and Reclamation in December 2016. DWR gave final approval to the specific Delta Water Tunnels project on July 21, 2017. DWR among other actions issued the Notice of Determination, and its Findings on its approval of this massive project on that same date. The Project was so specific and so final that DWR also filed a complaint for Validation in the Superior Court, County of Sacramento, on that same date, seeking to validate issuance of WaterFix Revenue bonds of \$8.8 billion to finance construction of the massive project.<sup>32</sup>

The approved Tunnels project would have an overall length of 45 miles.<sup>33</sup> The two long Tunnels would each have a length of 30.1 miles, and an inside diameter of 40 feet. The three

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<sup>32</sup> The July 21, 2017 Validation Complaint is attached.

<sup>33</sup> Project description taken from description of alternative 4A and 4 in the BDCP Water Fix FEIR/S Chapter 3 pp. 3-89 through 3-93, especially Table 3-17 p. 3-91, and pp. 3-111 through 3-112. These pages were attached to our January 22, 2018 comment letter.

intake structures would each have a conveyance capacity of 3000 cfs, amounting to a total conveyance capacity of 9000cfs. The Tunnels would have a capacity of about 15000cfs.

The Delta Plan EIR (2013) did *not* evaluate the potential environmental consequences of conveyance options. The Final EIR on the Delta Plan stated:

the proposed Delta Plan does *not* make any recommendations regarding conveyance at this time because the Council has determined that the BDCP agencies are in the best position to complete the planning process, including defining acceptable ranges of exports and through-Delta flows. *Accordingly, the PEIR does not evaluate the potential environmental consequences of various BDCP options that DWR may be considering.* (FEIR, p. 3-15, May 2013) (Emphasis added).

The Draft PEIR was misrepresented to be a *program* EIR. At the outset of the Delta Plan CEQA process —back in September 2010 -- the California Attorney General Office informed the DSC that a “program EIR” “would be particularly appropriate for the Delta Plan.” (G1297).<sup>34</sup> The State’s lawyers told the DSC that a number of advantages to preparation of a program EIR set forth in CEQA Guidelines, 14 Cal. Code Regs. § 15168(b) include: “(1) providing ‘for a *more exhaustive consideration of effects and alternatives* than would be practical in an EIR on an individual action;’ (2) ensuring full consideration of cumulative impacts; (3) avoiding ‘duplicative reconsideration of *basic policy considerations*,’ and (4) allowing for *consideration of ‘broad policy alternatives* and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.’” (G1207)(Emphasis added).

A lawful program EIR is done *before* the specific project level EIR. A PEIR is not supposed to be a post hoc rationalization in support of an action already taken. A PEIR analyzes the general so the later project-specific EIR can utilize the effort in assessing environmental impact. Here, the DSC has done the opposite, issuing a Program EIR *after* the specific project has already been approved.

The specific Tunnels project was given final approval on July 21, 2017. The Delta Plan Amendments Draft PEIR was issued more than three months *after* that date, on November 1, 2017. The Draft PEIR did not flag for attention DWR’s final approval of the specific Tunnels project in the Executive Summary or chapter 9 on Alternatives. Instead, a brief false and misleading description was given of the Water Fix project as an “*example* project for conveyance” in the middle of Chapter 4 (pp. 4-14, 4-15):

#### 4.3.4 *Example* Projects for Conveyance, Storage Systems, and the Operation of Both

This section describes projects that are under review by other agencies and that represent examples of types of projects that could result from implementation of the proposed Conveyance, Storage Systems, and the Operation of Both Amendment.

##### *Example* Projects for Conveyance

◆ U.S. Bureau of Reclamation (Reclamation) and DWR California WaterFix: This project, which involves upgrading the State’s water infrastructure by three new intakes in

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<sup>34</sup> The reference is to a page in the Administrative Record prepared for judicial review.

the northern Delta and two 35-mile-long tunnels to transport water to the existing pumping plants in the south Delta, was approved by DWR on July 21, 2017.

Water would primarily be conveyed from the north Delta to the south Delta through tunnels. Water would be diverted from the Sacramento River through three fish-screened intakes on the east bank of the Sacramento River between Clarksburg and Courtland. Water would travel from the intakes to a sedimentation basin before reaching the tunnels. From the intakes, water would flow into an initial single-bore tunnel, which would lead to an intermediate forebay on Glannvale Tract. From the southern end of this forebay, water would pass through an outlet structure into a dual-bore tunnel, in which water would flow by gravity to the south Delta. Water would then reach pumping plants to the northeast of Clifton Court Forebay, where water would be pumped into the north cell of the expanded Clifton Court Forebay. The forebay would be dredged and redesigned to provide an area isolating water flowing from the new north Delta facilities. New siphon and canal connections would be constructed between the north cell of the expanded Clifton Court Forebay and the Harvey O. Banks and C.W. “Bill” Jones Pumping Plants, along with control structures to regulate the relative quantities of water flowing from the north Delta and the south Delta. The project would include the continued use of the SWP/CVP south Delta export facilities. (Emphasis of word “example” added.)

The Water Fix Tunnels were no mere “example” of a possible project. The Tunnels approval was so final that a Validation case had been filed by DWR to validate the issuance of over \$8 billion of bonds to pay for construction of the project, more than three months *before* the Draft PEIR was issued.

The Final PEIR continued the deception about the WaterFix Project merely being an example:

Specifically, California WaterFix was used as an example of new, large-scale conveyance through the Delta in the Draft PEIR because it provides information useful to the program-level analysis concerning the types and magnitude of impacts that might be expected from construction and implementation of this type of conveyance project. . . . Analyses of physical impacts of the project as it was described at the time the California WaterFix Final EIR/EIS was certified, .support the conclusions in this Draft PEIR, *regardless of the final configuration of the California WaterFix project if and when it is approved* and proceeds to construction. (Final PEIR p. 3-25)(Emphasis added.)

There is no “if and when it [the WaterFix] is approved.” The WaterFix Project was approved by DWR on July 21, 2017.

The horse left the barn with DWR’s approval of the Water Fix Tunnels project in July of 2017. The Draft PEIR was a deceptive and misleading document designed to facilitate the Tunnels project in the guise of simply being a set of Program recommendations and policies. The Delta Plan Amendments specifically state that DWR and the federal Bureau of Reclamation, and local beneficiary agencies:

should pursue a dual-conveyance option for the Delta. Dual conveyance is a combination of through-Delta conveyance and isolated conveyance to allow operational flexibility. . . . Dual conveyance should incorporate existing and new intakes and facility improvements

for both isolated, below-ground conveyance and through-Delta conveyance of State Water Project (SWP) and Central Valley Project (CVP) water supplies from the Sacramento River to the south Delta, . . . (App. A, Revisions to Text of Proposed Delta Plan Amendments, p. 126, April 2018.)

That language is calling for the BDCP WaterFix Tunnels because that is the Project that received DWR's final approval on July 21, 2017.

Like the Draft PEIR, the Final PEIR failed to include the accurate, stable, and finite project description required by CEQA. Likewise, the Final PEIR failed as an environmental full disclosure document; failed to analyze the impacts of providing water for the Project; unlawfully piecemealed environmental review; and failed to integrate CEQA review of the Delta Plan Amendments with the CEQA review of the WaterFix Tunnels Project.

***16c2) The Fragmented Presentation in the Final PEIR and WaterFix EIR/S Violates CEQA***

The Final PEIR states:

The Final EIR/EIS for the BDCP/California WaterFix Project (DWR and Reclamation 2016a) describes the impacts associated with the California WaterFix, which is Alternative 4A, and which consists of construction and operation of a new river intake, large-diameter tunnels, and other related improvements to convey Sacramento River water to south Delta export facilities. This information is useful to the program-level analysis in this Draft PEIR regarding the types and magnitude of impacts that might be expected due to the construction and operation of new-large-scale conveyance in the Delta *and constitutes substantial evidence supporting the conclusions in this PEIR.* (Final PEIR p. 3-9)(Emphasis added.)

This Final PEIR claim that the substantial evidence supporting the PEIR's conclusions is in a *different* EIR graphically demonstrates the CEQA violation here. Pursuant to CEQA, "Readers of an EIR should not be required to 'ferret out an unreferenced discussion in [related material] . . . The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision-makers, who may not be previously familiar with the details of the project. [I]nformation scattered here and there in EIR appendices, or a report buried in an appendix, is not a substitute for a good faith reasoned analysis . . ." *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5<sup>th</sup> 918, 941 (internal quotation marks omitted), citing *Vineyard Area Citizens for Responsible Growth, Inc.* (2007) 40 Cal.4<sup>th</sup> 412, 442.

Here, information necessary to try to understand what was actually going on was not even buried somewhere in the Final or Draft PEIR. The information was instead buried in the 80,000 pages of the BDCP/WaterFix EIR issued in December of 2016. There has not been the good faith reasoned disclosure and analysis of the impacts of the WaterFix Tunnels Project in the Final or Draft PEIR.

*16c3) The Draft and Final PEIR Failed to include the Range of Reasonable Alternatives required by CEQA as well as the Alternatives required by the Delta Reform Act*

The failure to consider the required range of reasonable alternatives was discussed at length with respect to the DWR Water Fix EIR/S, in Sections 16a3-16a5 above. The Delta Reform Act (DRA) requires that the Delta Plan “*Include quantified or otherwise measurable targets* associated with achieving the objectives of the Delta Plan.” DRA § 85308(b).<sup>35</sup> (Emphasis added). The DRA establishes State policy to, “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” § 85020(c). Moreover, “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. . .” § 85021. (Emphasis added). “The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem” including: “viable populations of native resident and migratory species” “reduced threats and stressors on the Delta ecosystem” and “conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.” § 85302(c)(1), (4), and (5). “[S]ubgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan” including “*restore Delta flows* and channels to support a healthy estuary and other ecosystems” and “improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.” § 85302(e)(4) and (5). (Emphasis added).

The Trial Court, as explained in Section 16a3 above, carefully read the DRA and handed down Rulings enforcing that law. As shown by the above paragraph, *the language in the Court ruling* requiring “quantified or otherwise measurable targets associated with achieving reduced reliance on the Delta” and “restoring more natural flows” *comes right out of the express language of the DRA*.

In other words, consideration of alternatives that would reduce reliance on the Delta and restore more natural flows is required by the DRA. One readily apparent way that alternatives could do that is by maintaining through-Delta conveyance and *increasing* through-Delta freshwater flows by reducing exports, as opposed to adding new upstream conveyance in the form of the Water Fix Tunnels, which would *reduce* flows through the Delta.

The Final PEIR fails to contain the range of reasonable alternatives required by CEQA and the DRA. Instead, the Final PEIR simply supplies conclusory statements unsupported by factual information. (Final PEIR pp. 3-32, through 3-41.) There is not the required good faith, reasoned analysis regarding the absence of Final PEIR alternatives maintaining through-Delta conveyance while reducing exports to increase freshwater flows through the Delta. (*Id.*) As an example, the Final PEIR admits (at p. 3-37) that:

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<sup>35</sup> The Delta Reform Act is codified in the California Water Code. The section numbers provided here are the Water Code section numbers.

Comments suggested that adequate consideration was not given to the potential to reduce Delta exports and achieving increased water supply reliability through conservation and development of local/regional supplies.

“Evaluation of project alternatives and mitigation measures is ‘the core of an EIR.’” *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 937. There is “no there there” in the Final PEIR in terms of actually curing or even addressing the failure to include alternatives that would increase freshwater flows through the Delta by reducing exports.

A key purpose of a program EIR was explained by the California Attorney General Office to the DSC back in September 2010. (As shown above in Section 16c1.) Guideline §15168(b)(4) specifies that a program EIR allows for “consideration of ‘broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.’” Instead of considering broad policy alternatives, the Final and Draft PEIRs have simply marched along to the beat of creating new upstream conveyance that will further reduce freshwater flows through the Delta.

The Draft and Final PEIR alternatives “analyses” were shams. The preferring of the “Project” over other alternatives was not based on the *real* Project, CEQA, the DRA, practical reality, or common sense.<sup>36</sup> Because of the final approval given the WaterFix Tunnels by DWR in July 2017, that was the real Project. The real Project was not some vague, undefined, possibly minor new upstream conveyance.

The fundamental flaws in the alternatives section in the Final and Draft PEIR have led to a CEQA document ignoring a feasible project alternative considerably different from others previously analyzed, Guidelines § 15088.5(a)(3), and “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” § 15088.5(a)(4). Preparation and recirculation of a new Draft EIR is therefore required by Guidelines § 15088.5.

As was set forth above with respect to DWR, reasonable alternatives based on CEQA, the DRA and common sense have been handed to DSC on a silver platter but such alternatives have been ignored.

**16c4) *The Draft PEIR Failed to include the Accurate, Stable, and Finite Project Description required by CEQA***

Pursuant to CEQA,

[a]n accurate, stable and finite project description is the *sine qua non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. However, a

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<sup>36</sup> The courts, for example, will not approve or defer to agency findings that “conditioning” measures will be effective that “are not supported by substantial evidence or defy common sense.” *Gray v County of Madera*, 167 Cal.App.4th 1099, 1116-7 (finding mitigation measures ineffective).

curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. Only through an accurate view of the project, may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 [bracket internal citations omitted].”

The Draft PEIR provided an inaccurate project description drawing a red herring across the path of public input. There was a specific, finite project out there—the Water Fix Tunnels—given final approval by DWR on July 21, 2017. The specific project was so final that on that same date DWR filed its Validation action seeking to validate issuance of over \$8 billion in bonds to finance construction of the project. Instead of doing a misleading “Program” Draft PEIR, the DSC needed to prepare and/or utilize the approximately 80,000 page BDCP/Water Fix EIR issued in December 2016, if the DSC wished to promote that project. This is not about promoting a mere “dual conveyance option for the Delta.” (Draft PEIR, ch. 3, Project Description, p. 3-18.) The project description beyond being inaccurate was deliberately false and misleading. A mere “dual conveyance option” could be a relatively small additional diversion. This is not that. The Water Fix Tunnels would have the capacity to divert approximately the entire typical summer freshwater flow of the Sacramento River at the point of diversion.

The obvious intent of the DSC was to amend its Delta Plan so that DWR can claim that its specific Tunnels project is consistent with the Delta Plan whereas other alternatives such as *not* creating a new diversion in the north Delta while finally beginning to increase freshwater flows through the Delta by reducing exports would not be consistent with the Delta Plan as amended. What the DSC has done in the Draft PEIR is to mislead the public into believing that the Delta Plan Amendments on conveyance were not a threat to foreclose alternatives and to drastically increase the diversions and reduce freshwater flows through the already impaired Delta.

DWR and the DSC have now completed their end run around CEQA's environmental full disclosure requirements as graphically demonstrated by DWR's Certification of Consistency filed shortly after the DSC adopted the Delta Plan Amendments. The inaccurate project description makes the Draft PEIR “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” CEQA Guidelines (hereafter “Guidelines”) § 15088.5(a)(4) (the CEQA Guidelines are codified at 14 Code Cal. Regs §§ 15000 et seq.)

***16c5) The DSC has Not Used its Best Efforts to Find Out and Disclose All that it Reasonably Can***

“While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can.” (Guidelines, §15144.)” *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 938. A primary goal of CEQA is “transparency in environmental decision-making.” *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136. “CEQA requires full environmental disclosure.” *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88.

The Draft PEIR did not disclose all that reasonably can be disclosed. The actual real project was the approved Water Fix Tunnels. That project needed to be flagged in the Draft PEIR and made the basis for identification, disclosure, and analysis of resulting adverse environmental impacts of the true project. The Water Fix Tunnels project needed to be made the basis for comparison and evaluation of alternatives. There is a dramatic difference between bringing an elephant instead of a small dog as a pet into a house. Likewise, there is a dramatic difference between creating the capacity to divert huge quantities of freshwater flows from the north Delta instead of just promoting options and creating a comparatively small new diversion of water.

This CEQA violation also rendered the Draft PEIR so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment have been precluded.

*16c6) The Draft PEIR failed to Assume that all phases of the Water Fix Tunnels project will be Built, will be Operated, will need Water, and failed to Analyze the Impacts of providing Water to the entire Proposed Project*

Pursuant to CEQA an EIR:

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 for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 431.

Moreover:

The future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (“paper water”) are insufficient bases for decision-making under CEQA. *Vineyard Area Citizens*, 40 Cal.4<sup>th</sup> 412, 432.

The Draft PEIR failed to comply with these critically important CEQA requirements pertaining to water and the impacts of providing water to the project because it failed to analyze the real project, which is the approved Water Fix Tunnels.

*16c7) The Draft PEIR unlawfully Piecemealed or Segmented Environmental Analysis*

CEQA prohibits the piecemealing or segmentation of environmental analysis. A lead agency must not piecemeal the analysis of several smaller projects that are part of a larger project. Piecemealing is prohibited in order to ensure “that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.” *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

Guidelines § 15378(a) in pertinent part defines a “project” to be:

‘Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following . . . (Emphasis added.)

Guidelines § 15378(c) adds that:

The term ‘project’ *refers to the activity* which is being approved and which may be subject to several discretionary approvals by government agencies. The term ‘project’ does not mean each separate governmental approval. (Emphasis added.)

The *whole of the action and the activity*, which are being approved here, includes the specific Water Fix Tunnels project which received final approval from DWR on July 21, 2017. The DSC has failed to proceed in the manner required by CEQA because the Draft PEIR environmental analysis has been unlawfully segmented from the environmental review of the Water Fix Tunnels project. Moreover, the Draft PEIR has failed to disclose and analyze the whole of the action and the activity which is being approved.

**16c8) *The DSC has Failed to Integrate CEQA Review of the Delta Plan Amendments with the CEQA Review of the Water Fix Tunnels Project***

Guidelines § 15124(d)(1)(C) requires that the EIR project description include “A list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies.” The second sentence in that subsection goes on to require that “*To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.*” (Emphasis added.) CEQA’s policy is to conduct integrated review. *Banning Ranch Conservancy*, 2 Cal.5<sup>th</sup> 918, 939, 942. Moreover, “Lead agencies in particular must take a *comprehensive* view in an EIR.” *Banning Ranch Conservancy*, 2 Cal.5<sup>th</sup> 918, 939, citing Public Resources Code § 21002.1(d).

Here, the DSC has done the opposite of conducting *integrated* review and taking a *comprehensive* view in the Draft PEIR. The environmental analysis and the alternatives analysis in the Draft PEIR have not analyzed the elephant in the room. That elephant in the room was the approved Water Fix Tunnels project.

**16c9) *The DSC’s Handling of the Draft PEIR not only Conflicted with its CEQA obligations, but also ignored the Practical Reality of the approved Water Fix Tunnels Project***

The Court noted in the *Banning Ranch Conservancy* case that the handling of an EIR not only conflicted with CEQA obligations, “but also ignored the practical reality . . .” 2 Cal.5<sup>th</sup> 918, 941. Here, the ignored practical reality was that the Water Fix Tunnels project was the approved project and was the “alternative” that will be constructed and operated unless stopped by judicial review or abandoned. The integrity of the process of decision under CEQA is to be ensured “by precluding stubborn problems or serious criticism from being swept under the rug . . .” *Banning Ranch Conservancy*, 2 Cal.5<sup>th</sup> 918, 940-41.

The DSC has designed the Draft PEIR to sweep under the rug serious criticism and the problems posed by significantly reducing freshwater flows through the already impaired Delta.

**16c10) *Preparation and Recirculation of a new Draft PEIR were also required because New Significant Environmental Impacts would result from the Project and there would be a Substantial Increase in the Severity of Environmental Impacts***

Guidelines § 15088.5(a)(1) requires recirculation when “A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.” Guidelines § 15088.5(a)(2) requires recirculation when “A substantial increase in

the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.”

Both of the above Guidelines requirements are triggered here. Because the real project is the approved Water Fix Tunnels, there are significant environmental impacts and a substantial increase in the severity of environmental impacts that would result from approval of the Delta Plan Amendments on conveyance, storage, and operations. One key example is that impacts including adverse impacts on Delta water quality will disproportionately affect low-income communities, and communities of color. All that has been considered in the Draft PEIR are vague, undefined, generalized impacts that might result from “promoting new conveyance.”

*16c11) A new Draft EIR/EIS including the required Range of Reasonable Alternatives must be Prepared and Circulated for Public Review*

CEQA Guidelines § 15088 requires that a new Draft EIR will have to be prepared both to develop a range of reasonable alternatives to increase Delta flows by reducing exports and to accurately analyze the changes to the project, increases in severity of impacts, and failure to have Biological Opinions addressing the impacts of operating the project.<sup>37</sup> 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*, 40 Cal.4<sup>th</sup> 412, 447-448 (2007) (recirculation of a Draft EIR required)(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.*).<sup>38</sup>

In short, the fundamental flaws in the alternatives section in the Draft PEIR have led to a CEQA document ignoring a feasible project alternative considerably different from others

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<sup>37</sup> Guideline § 15088.5(a) requires recirculation: (a)(1) when a new significant environmental impact would result from the project; (a)(2) where a substantial increase in the severity of an environmental impact would result; (a)(3) when a feasible project alternative considerably different from others previously analyzed would lessen the significant environmental impacts of the project but the project's proponents decline to adopt it; and (a)(4) when the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

<sup>38</sup> See *Gray v. County of Madera* (2008) 167 Cl.App.4<sup>th</sup> 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.")

previously analyzed, Guidelines § 15088.5(a)(3), and “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” § 15088.5(a)(4). Preparation and recirculation of a new Draft EIR is therefore required by Guidelines § 15088.5. No finding of consistency can be made because both DWR and the DSC have failed to comply with CEQA.

**17) No Finding of Consistency can be Made because there has been Failure to Comply with the Delta Reform Act**

For the reasons set forth in Sections 16a3 and 16c3, no finding of consistency can be made because both DWR and the DSC in their processes regarding the Covered Action and the Delta Plan have failed to comply with the Delta Reform Act. The good faith starting point would have been to conduct 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.” Water Code § 85320(b)(2)(A). Moreover, the Act requires, “A reasonable range of Delta conveyance alternatives, including through-Delta,” as well as new dual or isolated conveyance alternatives. 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.

Instead, DWR and the DSC have not complied with those sections or any of the other cited sections of the Delta Reform Act. They have ignored the requirements of the Act in a rush to do the plumbing before the planning. Neither agency has a clue as to how much if any water would actually be available for export from a new upstream diversion if they actually complied with the provisions of the Delta Reform Act. DWR and the DSC did not conduct the logical planning process of doing analytical work to answer basic questions of how much water is available and what would the impacts be of operating the project.

**18) Incorporation by Reference of Detailed Statements of Facts, Exhibits and Evidence submitted by Other Appellants**

Appellants by this reference, incorporate the Detailed Statements of Facts, Exhibits, and Evidence submitted or to be submitted today, August 27, 2018, by appellants County of San Joaquin, et al., in support of the Grounds for appeal set forth herein,

**CONCLUSION**

The DSC must make written findings remanding this matter to DWR for reconsideration of the covered action based on findings that the certification of consistency is not supported by substantial evidence in the record before DWR, and for the other reasons set forth herein.

Respectfully submitted,



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/s/ Michael B. Jackson by



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