



April 14, 2020

DeltaConveyanceScoping@water.ca.gov via email

Re: Comments on Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project and the Scoping Process

Dear Department of Water Resources:

By this letter our public interest organizations, AquAlliance, California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity, Environmental Water Caucus, Planning and Conservation League, Restore the Delta, and Sierra Club California, comment, pursuant to the California Environmental Quality Act (CEQA), on the Department of Water Resources' (DWR) Notice of Preparation (NOP) of Environmental Impact Report (EIR) for the Delta Conveyance Project (hereinafter "Project or Tunnel Project") and the Scoping process.

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Introduction

The Draft EIR must have a much larger scope than is set forth in the NOP. A foundational deficiency is the apparent intention evidenced by the NOP to violate the CEQA requirement to set forth a range of reasonable alternatives to the project and evaluate comparative merits of the alternatives. The NOP also evidences apparent intention to violate the Delta Reform Act and California's public trust doctrine, in the course of evading consideration of obvious and required alternatives that would protect California's rivers and restore freshwater flows through the San Francisco Bay-Delta Estuary (Delta) by reducing exports. The Delta is in a state of crisis. The crisis and CEQA require no-Tunnel alternatives.

In its January 30, 2020 *Comments on Draft Environmental Impact Report for the Long-Term Operation of the State Water Project [SWP]* (Copy attached), The State Water Resources Control Board (Water Board) explained harms to the Delta. There is "broad agreement in the scientific community that increased freshwater flows through the Delta and aquatic habitat restoration are needed to protect Bay-Delta ecosystem processes and native fish species." (Water Board comments 4.)¹ The Water Board continued:

As stated in the [2017 Water Board staff] Scientific Basis Report: It is widely recognized that the Bay-Delta ecosystem is in a state of crisis....

The Scientific Basis Report concluded that increased Delta inflows and outflows, and cold-water habitat and constraints on pumping in the interior Delta are necessary in order to reasonably protect at-risk fish species. Accordingly, it is not clear how the proposed project will not further degrade conditions for fish and wildlife species that are already in poor conditions, some of which are on the verge of functional extinction or extirpation. Given this, it is also not clear how the proposed project is consistent with existing obligations, including the California Delta Reform Act, CESA, the California Porter-Cologne Water Pollution Control Act (Porter-Cologne Act), various provisions of the California Water Code governing water rights, and the public trust doctrine. (Water Board comments 4.)

In addition to the threats posed to endangered and threatened species of fish by water exports, there are also adverse impacts on water flows, water quality and public health. The NOP only vaguely addresses these impacts by reciting probable significant environmental effects of the Project as including, among other things:

- Water Supply: changes in water deliveries.

¹ Unless otherwise indicated, the number in document cites refers to the page number.

- Surface Water: changes in river flows in the Delta.
- Water Quality: changes to water quality constituents and/or concentrations from operation of facilities.
- Public Health: changes to surface water could potentially increase concerns about mosquito-borne diseases (NOP 9-10.)

The NOP is oblivious to the fact that Delta urban waterways are stagnant and thick with algal scum and toxins, resulting in Harmful Algal Blooms (HABs). HABs can be easily found from Stockton to Discovery Bay with smaller ones becoming visible in sloughs between the cities. According to the EPA, HABs can:

- Produce extremely dangerous toxins that can sicken or kill people and animals
- Create dead zones in the water
- Raise treatment costs for drinking water
- Hurt industries that depend on clean water

(<https://www.epa.gov/nutrientpollution/harmful-algal-blooms>). Reducing freshwater flows by the Proposed project will increase the buildup of these dangerous algal blooms.

The State is well aware of the increased frequency of these substances: according to the Draft Water Resilience Portfolio (Draft Portfolio) (Copy attached), released by the California Natural Resources Agency, CalEPA, and the California Department of Food & Agriculture on January 3, 2020, “[a] warmer climate provides optimal conditions for worsening harmful algal blooms, which can force the closure of beaches, rivers, and lakes due to health risks for people and pets.” (Draft Portfolio 13) “Waterways are becoming increasingly prone to harmful algal blooms and low dissolved oxygen levels.” (Draft Portfolio 13)

So, to protect endangered species and public health, the Draft EIR must accurately and honestly disclose and assess the public health risks posed by the Project. Real alternatives must be developed and considered that would not cause or worsen these significant adverse impacts because freshwater flows would *not* be diverted into a Tunnel Project. Unfortunately, the NOP does not signal that DWR intends to do this, as it includes no real alternatives whatsoever. The NOP declares,

The scoping process will inform preliminary locations, corridors, capacities and operations of new conveyance facilities to be evaluated in the EIR. In identifying the possible EIR alternatives to be analyzed in detail, DWR is currently considering alternatives with capacities that range from 3,000 to 7,500 cfs, with varying degrees of involvement of the CVP, including no involvement.

(NOP 9.) These are not “alternatives.” They are simply the same Tunnel Project dressed up in different outfits. The Draft EIR must include real alternatives, specifically a “no tunnel” alternative, that analyzes the state’s use of and investment in local programs and projects relating to water conservation and efficiency measures, along with others, that achieve the same water reliability goals as the proposed project and increase freshwater flows through the Delta by reducing exports. Such alternatives would keep the freshwater flowing through the Sacramento River and the Delta instead of diverting significant flows into an underground Tunnel for export.

I. Alternatives Reducing Reliance on the Delta are Required by the Delta Reform Act

The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) establishes the policy of the State of California “to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” (Water Code § 85021.) The Act establishes co-equal goals “of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem,” (Water Code § 85054) and expressly requires that a new conveyance process (previously called the BDCP) evaluate “[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).)

The Tunnel Project is antithetical to these provisions of the Delta Reform Act. Its purpose would be to divert enormous quantities of freshwater flows out of and away from the Sacramento River and Delta. The Project would do the opposite of *reducing* reliance on the Delta as required by the Delta Reform Act. The massive Project and expenditures would instead *increase* reliance on the Delta.

The NOP states that DWR’s purpose in proposing the Project “is to develop new diversion and conveyance facilities in the Delta necessary to restore and protect the reliability of State Water Project (SWP) water deliveries and, potentially, Central Valley Project (CVP) water deliveries south of the Delta, consistent with the State’s Water Resilience Portfolio.”(NOP 2.) However, The NOP does not set forth how the proposed project is consistent with state policy as established by the Delta Reform Act.

A central issue in a legally sufficient Draft EIR would be consideration of the trade-offs between delivery of full contract quantities, and reduction of deliveries in order to improve water quantities and quality in California’s rivers and the Delta. DWR must comply with law by including alternatives in the Draft EIR that would reduce reliance on

the Delta and include through-Delta, not just tunnel “alternatives,” as required by the Delta Reform Act.

II. Public Trust Doctrine Analysis Will be of Critical Importance in Doing the Quantification Work Required by the Delta Reform Act and the Alternatives Analysis Required by CEQA

The California Supreme Court has held that under California’s public trust doctrine, “[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446). The Delta Reform Act incorporates this principle as it mandates, “[t]he longstanding 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.” (Water Code § 85023.)

In accordance with this, DWR must consider the public trust doctrine during all stages of the proposed project, especially when assessing the quantity of water that will be allocated to flow through the Project. But the NOP fails to mention the public trust doctrine altogether, even though the doctrine is crucial in understanding the state’s water supply availability.

The Draft Portfolio admits that “[i]mproved understanding is needed about the amount of water that must stay in rivers and streams to protect fish, wildlife, habitat, and water quality....Drastic loss of fish and wildlife habitat makes it important to restore and connect habitat where feasible. (Draft Portfolio 13.) The Draft Portfolio goes on to state that:

The projected statewide water needs of California fish, wildlife, and natural ecosystems have not been quantified, given the diversity of the state’s river systems and evolving understanding of both the biological needs of species and future climate-driven conditions. However, it is clear that each river system requires adequate season-by-season water flow to protect the natural functions fish and wildlife need. Such flows also support healthy water quality and temperatures and should be complemented by adequate habitat and removal of invasive species to enable fish and wildlife to thrive. (Draft Portfolio 15.)

Given the Draft Portfolio’s admission that a quantitative analysis of water supply is necessary, the Draft EIR must include an analysis of the 26 rivers of the Delta watershed that conforms with the public trust doctrine and allows decision makers to make informed, rational decisions about whether the Project is a reasonable or even a feasible alternative. Having a real public trust analysis that includes all non-market public

trust resources, including clean water, healthy flowing rivers, healthy abundant fish, and recreational opportunities, is also critical information for a holistic alternatives analysis.

III. The Draft EIR Must Include the CEQA-Required Range of Reasonable Alternatives

“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.) 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.” 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).

However, there is no indication that DWR intends to comply with the law stated above. The NOP does not mention alternatives that would reduce reliance on the Delta as required by the Delta Reform Act, nor does the NOP address Delta Reform Act-required “through-Delta” as opposed to “dual conveyance” alternatives. There are no mentions of alternatives that would increase freshwater flows through the Delta and protect California’s rivers by reducing exports. And the NOP does not state an intention to give a “hard look” at trade-offs between maintaining or increasing exports by way of the Tunnel Project as opposed to reducing exports to protect the Delta and California’s rivers.

The founders of our nation and our State created governments of laws not rulers. Whether California Executive Branch officers wish to consider real alternatives to the Project, is not the standard. The standard is set by CEQA, the Delta Reform Act, and the public trust doctrine. To comply with these laws, the Draft EIR must meaningfully consider and include alternatives that attain most of the proposed project’s lawful objectives and are less environmentally degrading. Meaningful consideration of a “no tunnel” alternative would comply with both CEQA and, the Delta Reform Act policy of “reduc[ing] reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” (Water Code § 85021.)

The Governor’s April 2019 *Executive Order N-10-19* called for the water resilience portfolio and required state agencies to “embrace innovation and new

technologies” and “incorporate successful approaches from other parts of the world.” Implementing such modern water measures would reduce the claimed need for the Project, and thus improve water quality in California’s rivers and the Delta.²

But when government agencies refuse to meaningfully consider less environmentally harmful alternatives due to policy reasons, and offer no explanation as to why they are refusing to do so, courts have regularly invalidated certification of environmental review documents. In *Pacific Coast Federation of Fishermen’s Assn’s v. U.S. Dept. of the Interior*, the U.S. Court of Appeals for the Ninth Circuit reversed a district court decision denying environmental plaintiffs’ summary judgment because the challenged environmental document issued by the Bureau of Reclamation under NEPA (National Environmental Policy Act), “did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities.” (655 Fed.Appx. 595, 2016 WL 3974183*3 (9th. 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.) The Court noted that 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.)

The requirement under NEPA, also true under CEQA, to consider the 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. The decision pertained to interim two-year contract renewals. If the alternative of reducing exports must be considered during renewal of two-year interim contracts, it most assuredly must be considered in the Draft EIR for the Project.

² As for examples of such alternatives, our organizations have presented DWR numerous times, *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015) ([Copy attached.](#)) The *Sustainable Water Plan* alternative includes reducing exports out of the Delta to 3,000,000 acre-feet, or other variants on that quantity. Also included are: spending funds on such modern water measures as water conservation, water recycling, groundwater treatment and desalination and agricultural water conservation including conversion to drip irrigation in export areas, annual crops in export areas that can be fallowed in drought years, and staged removal from production of drainage-impaired lands in export areas that worsen water quality by such consequences as selenium discharge.

So, alternatives reducing exports must be considered pursuant to CEQA and under the mandates of the Delta Reform Act., which, again, requires the State of California “to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” (Water Code § 85021.) DWR must comply with CEQA by developing and including real alternatives including “through-Delta/no Tunnel” alternatives in the Draft EIR.

IV. The Draft EIR Must Make CEQA-Required Full Environmental Disclosure

“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*, 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.)

As such, the Draft EIR must accomplish full environmental disclosure pursuant to CEQA, meaning the Delta Reform Act mandate to reduce, not increase, reliance on the Delta in meeting California’s water supply needs must be set forth front and center when preparing responsive alternatives. The danger to public health posed by worsening harmful algal blooms in the Delta and other adverse water quality impacts exacerbated by the proposed project must be disclosed and assessed.

Adequate quantification is necessary to carry out an informed analysis of how much water is actually available for export and how much water can be exported while restoring the Delta. *Moreover, it is an undeniable fact that consumptive water rights claims are 5 ½ times more than available supply.* Additionally, quantification is necessary to determine how much claimed water needs can be reduced by such means as conservation and recycling. But the NOP indicates that instead of actually conducting the quantification and impact analysis required by CEQA, the Delta Reform Act, and the Governor’s Executive Order, DWR intends to cherry pick a proTunnel Project statement or two from the Draft Portfolio to substitute for this study. This will not be legally sufficient.

Quantification is required by the both the Delta Reform Act and the Governor’s Executive Order. Water Code section 85320(b)(2) requires “a comprehensive review and analysis of all of the following:”

(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 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.*

(E) The potential effects on Sacramento River and San Joaquin River flood management.

(F) The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.

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

And the *Executive Order* requires the subject agencies to “first inventory and assess” eight subjects, including, “[e]xisting demand for water on a statewide and regional basis and available water supply to address this demand.” (*Executive Order N-10-19* ¶ 2a.) Other required subjects include, “[e]xisting water quality of our aquifers, rivers, lakes and beaches” (¶ 2b); “projected water needs in coming decades for communities, economy and environment” (¶ 2c), and “anticipated impacts of climate change to our water systems, . . . (¶ 2d.)

Paragraph 3 of the *Executive Order* further requires that the “water resilience portfolio” established by the agencies embody seven principles including, “Utilize natural infrastructure such as forests and floodplains” (¶ 3(b)); “Embrace innovation and new technologies” (¶ 3(c)); and “Incorporate successful approaches from other parts of the world.” (¶ 3 (e).) The *Executive Order* establishes a goal of restoring and maintaining the health of our watersheds.

So to fully comply with CEQA, the Delta Reform Act, and the Governor's Executive Order, the Draft EIR must disclose and analyze all significant upstream and downstream impacts as well as all cumulative impacts and growth inducing impacts of the Project. To do so requires adequate quantification.

The possibility that an honest, accurate, and comprehensive Draft EIR on the Project may show the Project is undesirable, infeasible, and/or the death knell for the Delta does not justify a document that amounts to a cover up as opposed to full environmental disclosure. If DWR wishes to attempt to proceed with the Tunnel Project, DWR must proceed in the manner required by CEQA. Sometimes, the truth hurts. The public is, however, entitled to the truth. And the law requires the truth.

V. This Draft EIR Process Must be Integrated with DWR's Other Related Processes

CEQA 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." (Guidelines § 15124(d)(1)(C)). The second sentence in that subsection goes on to require, "*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 v. City of Newport Beach* (2017) 2 Cal.5th 918, 939, 942.) Moreover, "Lead agencies in particular must take a *comprehensive* view in an EIR." (*Banning Ranch Conservancy*, 2 Cal.5th 918, 939, citing Public Resources Code § 21002.1(d).)

The NOP makes no mention of DWR's other related processes that affect the proposed project. Instead of integrated CEQA review, key environmental review processes are going ahead separately, each in its silo. With one hand, DWR is proceeding to prepare a Draft EIR on the Tunnel Project. With another hand, DWR released its Draft EIR for Long-Term Operation of the SWP on November 21, 2019. DWR closed the public review period on that Draft EIR on January 6, 2020. Though the SWP is the stated reason for the Tunnel Project, the SWP Draft EIR failed to even mention or disclose, let alone analyze, the addition and inclusion of the Tunnel Project. Moreover, through the Delta Conveyance Design and Construction Authority process DWR and the State Water Contractors have already been designing the Proposed project in the absence of any CEQA compliance whatsoever. And with an extra hand, DWR is already negotiating cost allocations with the water exporters for the Project.

This “silo” approach is puzzling given that the Draft Portfolio emphasizes that addressing new challenges such as climate change requires reflection, innovation, communication, and coordination. “*This cannot take place in silos but must be integrated within and across regions.*” (Draft Portfolio 25) (Emphasis added.)

To proceed in the manner required by CEQA, DWR must prepare a new Draft EIR on the SWP Long-Term operation including environmental analysis of the Project, and recirculate it for public review and comment. An accurate water availability and needs analysis, quantification, and disclosure and analysis of the Project and its causal relationship with SWP Long-Term operations must be central focuses of the new Draft EIR. And this analysis should have been conducted prior to the commencement of any design processes or negotiations for cost allocations.

VI. DWR Must Not Segment Environmental Analysis

CEQA Guidelines § 15378(a), in relevant part, states: “‘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....” (Emphasis added.) Guideline § 15378(c) adds that “[t]he 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 court in *Burbank-Glendale-Pasadena Airport Authority v. Hensler* noted CEQA’s broad definition of “project” avoids potential piecemealing or segmentation of environmental analysis the definition, ensuring “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.” (233 Cal.App.3d 577, 592 (1991)). As such, a lead agency must not piecemeal the analysis of several smaller projects that are part of a larger project.

Unfortunately, DWR’s actions relating to the Tunnel Project are contrary to this legal obligation. DWR and others are designing the construction and operations of the Project in the absence of any CEQA compliance whatsoever, and negotiating an agreement in principle for the specific project without the project ever being approved or evaluated. The Draft EIR on Long-Term SWP operations conceals rather than analyzes the Project and those ongoing DWR activities. In *separate* processes during the same timeframe, DWR seeks to conduct the environmental analysis of SWP Long-Term operation as well as the environmental analysis of the Tunnel Project which is intended

“to restore and protect the reliability of State Water Project (SWP) water deliveries....” (NOP 2).

Instead of dealing with the whole of the action as required by CEQA, these processes are all being done separately and segmented from each other. DWR is failing to proceed in the manner required by CEQA.

VII. DWR Must Analyze the Impacts of Providing Water to the Entire 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.4th 412, 431.) Moreover, “[t]he 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.4th at 432.)

Thus, the inventory and assessment in the water resilience portfolio required by the Governor’s *Executive Order* are also the type of information required by CEQA to be in an EIR. The Draft EIR must provide this information regarding water needs and the impacts of taking the water. “Speculative sources and unrealistic allocations (“paper water”) are insufficient bases for decision-making under CEQA.

VIII. DWR Must Evaluate the Reality that DWR’s Federal Partner is Committed to Maximizing Exports Regardless of the Environmental Consequences

In *Banning Ranch Conservancy v. City of Newport Beach*, the court noted that certain governmental actions not only conflicted with CEQA obligations, “but also ignored the practical reality....” (2 Cal.5th 918, 941 (2017)). The integrity of the process of decision making under CEQA is to be ensured “by precluding stubborn problems or serious criticism from being swept under the rug....” (*Id.*)

To comply with the above principle, the Draft EIR needs to address the “practical reality” in which the proposed project is being considered by evaluating the proposed project in light of the actions by DWR’s federal counterpart, the U.S. Bureau of Reclamation.

Until recently, there was understanding that federal and state agencies would act in good faith to work together to protect water quality while operating the SWP in the case

of the State, and the Central Valley Project (CVP) in the case of the U.S. Bureau of Reclamation. Unfortunately, there is no longer any basis for this understanding with respect to the federal government, as it has continuously abdicated its legal obligation to protect endangered species in the Delta.

Former Secretary of the Interior Ryan Zinke issued his August 17, 2018, memorandum to his staff on the subject “California Water Infrastructure,” in which he stated that within 15 days, the Assistant Secretaries “shall jointly develop and provide to the Office of the Deputy Secretary an initial plan of action that must contain options for: maximizing water supply deliveries....” That same memorandum included a directive to develop a plan of action for “preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people....”

On October 19, 2018, the President issued the *Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West*. (83 Fed.Reg. 53961, October 25, 2018), which ordered the Secretary of the Interior and the Secretary of Commerce to within 30 days designate one official to

identify regulations and procedures that potentially burden the [California water infrastructure] project and develop a proposed plan, for consideration by the Secretaries, to appropriately suspend, revise, or rescind any regulations or procedures that unduly burden the project beyond the degree necessary to protect the public interest or otherwise comply with the law. For purposes of this memorandum, ‘burden’ means to unnecessarily obstruct, delay, curtail, impede, or otherwise impose significant costs on the permitting, utilization, transmission, delivery, or supply of water resources and infrastructure.

(Section 2(a)(ii). And on March 28, 2019, the federal government brought two lawsuits against the State Water Board challenging the Water Board’s new flow requirements set forth in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta estuary and seeking to divert more water for the CVP.³

On July 1, 2019, biologists with the National Marine Fisheries Service (NMFS) concluded in a 1123-page biological opinion that Reclamation’s plan would likely jeopardize listed salmon and steelhead, along with Southern Resident killer whales, and would be likely to destroy or adversely modify critical habitat, all in violation of the

³ One federal lawsuit seeks a writ of mandate in state court, the Superior Court, County of Sacramento, while the other federal lawsuit seeks declaratory and injunctive relief in federal court, in the Eastern District of California.

federal Endangered Species Act.⁴ The federal government subsequently replaced these biologists with political appointees, and on October 21, 2019, NMFS released a biological opinion that concluded Reclamation’s plan was not likely to jeopardize the continued existence of the subject species or destroy or adversely modify their critical habitats. Also, on October 21, 2019, the U.S. Fish and Wildlife Service issued a biological opinion concluding Reclamation’s plan was not likely to jeopardize the continued existence of Delta Smelt or destroy or modify its critical habitat.

On December 2, 2019, several public interest organizations filed a complaint in the United States District Court for the Northern District of California seeking to set aside the October 2019 biological opinions as being unlawful under the Administrative Procedure Act and the Endangered Species Act (ESA). (*Pacific Coast Federation of Fishermen’s Associations et al. v. Wilbur Ross et al.*, Case No. 19-cv-07897.)⁵ And on February 20, 2020, California agencies and the State Attorney General filed suit in the Northern District of California contending the biological opinions are unlawful under the ESA and NEPA. (*The California Natural Resources Agency et al. v. Wilbur Ross et al.*, Case No. 20-cv-01299).

The Draft EIR must honestly disclose and assess the kind and degree of damage to freshwater flows and water quality that could result from developing and operating the Project given the federal policy to maximize water exports regardless of the environmental consequences. The Project cannot be evaluated or determined in a vacuum from the federal efforts to maximize project exports. These new federal policies are a practical reality that cannot be swept under the rug by the State in deciding whether to develop the proposed project.

IX. The Draft EIR Must Evaluate the Tunnel Project in light of Climate Change

The Draft Portfolio notes some impacts Climate Change will have on the Delta. “Rising winter temperatures will reduce mountain snowpack in the Sierra Nevada and Cascade ranges by 65% on average by the end of the century, increasing flashy winter run off and flood risks while reducing spring and summer stream flow.” (Draft Portfolio 14.) Additionally, “San Francisco Bay and the Sacramento-San Joaquin Delta will face salinity intrusion as sea level rises” due to climate change. (Draft Portfolio 14.)“Although

⁴ The July 2019 biological opinion is available at: <https://www.documentcloud.org/documents/6311822-NMFS-Jeopardy-Biop-2019-OCR.html>.

⁵ The facts in this and the preceding paragraph are taken from the filed complaint.

the Delta is not one of the state's ten major hydrologic regions, it plays a complex role in the water resilience of California and faces particularly acute climate risks.” (Draft Portfolio 110.)

The new federal policy to maximize exports will further decrease freshwater flows, and the Tunnel Project will further reduce freshwater flows through the Delta. So the proposed project will worsen the Delta's poor freshwater flows, water quality, and harmful algal blooms.

These issues need to be addressed in the Draft EIR to allow informed development and consideration of alternatives responsive to the problems. That will include reducing exports and staying with through Delta conveyance to by that way increase freshwater flows through the Delta to compensate for declining watershed runoff and worsening salinity intrusion.

X. DWR Must Disclose and Assess the future Reduction in Claimed Needs for the Project as a result of New Technologies and Curtailed Exports

Paragraph 3 of *Executive Order N-10-19* requires any water resilience portfolio adopted by state agencies to embody the following principles, inter alia:

- “Utilize natural infrastructure such as forests and floodplains” (§ 3(b);
- “Embrace innovation and new technologies” (§ 3(c); and
- “Incorporate successful approaches from other parts of the world.” (§ 3 (e).”

This type of information should be assessed and evaluated prior to developing the Project as it would be invaluable in understanding, and likely lessening, the claimed need for the proposed project. For example, the City of Los Angeles has established steps to reduce its imported water supply by 50% by the year 2025. According to Water Replenishment District President John Allen, “Water recycling is the wave of the future.” (Release, August 22, 2019). Increasing water recycling and efficiency is enshrined in state law: SB 606 and AB 1660, enacted in 2018, emphasize efficiency and stretching existing water supplies in our cities and on farms. Moreover, “[m]any Southern California water districts are building regional self-sufficiency but do not expect to be able to feasibly replace *all* water supply diverted from the Delta over the next couple of decades. (Draft Portfolio 113)(Emphasis added).

The Draft Portfolio embraces this approach and notes that diversifying water supply resources “has helped many communities effectively weather drought.” (Draft Portfolio 12). “The most cost-effective, environmentally beneficial way to stretch water

supplies is through better water use efficiency and eliminating water waste... Recycled water is a sustainable, nearly drought-proof supply when used efficiently, and the total volume of water California recycles today could triple in the next decade.” (Draft Portfolio 17.)

As a result, water exports will be reduced: “[t]he trade-off to manage salinity could reduce the amount of water available to support an ecosystem already under stress and for export from the Delta. Exports could be naturally curtailed by about 10% under mid-century climate projections, and by about 25% by 2100.” (Draft Portfolio 111). By 2050, the amount of water used by agriculture is expected to decline. And utilizing natural infrastructure would mean continuing to use the Sacramento River and Delta channels for conveying water as opposed to diverting large river flows into an expensive underground tunnel.

Understanding the degree of need, if any, for the Project is pertinent information that the Draft EIR must fully assess. In the absence of a full understanding, the Draft EIR would simply be a stacking of the deck in favor of the Tunnel Project and prevent a fair, adequate comparative analysis of it with through Delta conveyance alternatives not including a tunnel.

XI. An Accurate Statewide Benefit-Cost Analysis Must be Prepared and Disclosed in the Draft EIR

Accurate economic information is required by both NEPA and CEQA. In *Natural Resources Defense Council v. U.S. Forest Service*, the Ninth Circuit held that “[i]naccurate economic information may defeat the purpose of an EIS by ‘impairing the agency’s consideration of the adverse environmental effects’ and by ‘skewing the public’s evaluation’ of the proposed agency action.” (421 F.3d 797, 811 (9th Cir. 2005)). Accurate economic analysis is required “to allow an informed comparison of the alternatives considered in the EIS.” 421 F.3d at 813.⁶

Thus, to proceed in the manner required by CEQA, DWR must provide an accurate benefit-cost analysis to allow informed comparison by the public of alternatives to the proposed project that must be available throughout the period for public and decision-maker review of the Draft EIR.

Unfortunately, DWR does not intend to proceed this way. DWR’s *Delta Conveyance Notice of Preparation and Public Scoping: Q&A* states:

⁶ California courts often cite NEPA decisions in deciding such issues under CEQA.

There will be a cost estimate, as well as both a Benefit-Cost Analysis and a Financial Analysis, developed during the planning process. At this point, the NOP is a start of the environmental review, which focuses on the relative environmental impacts rather than economic issues. *Cost analyses will come later in the process, after a preferred alternative has been selected* (which may or may not be similar to the “proposed” project defined in the NOP). (Emphasis added.) (No. 18 at p. 4).

To select the preferred alternative *before* doing cost analyses would be to intentionally stack the deck in favor of the proposed project, and makes it impossible to fairly and adequately compare the proposed project with through Delta and no tunnel alternatives which are less environmentally degrading. The financial advantages of the through Delta and no tunnel alternatives are clear: through Delta conveyance already exists and studies show that investment in urban water conservation is generally less expensive than reliance on importing water.⁷ Conversely, the Tunnel Project would cost billions of dollars to construct over a 13-year period.

Moreover, DWR has *never* prepared a statewide benefit-cost analysis consistent with DWR’s economic analysis guidelines. Instead, DWR’s consultants prepare economic analyses narrowly focused on participating water agencies, a practice that has been going on for years. The State now has the opportunity to require an accurate statewide benefit-cost analysis. Up until now, Californians have been told that the beneficiaries of the proposed project would pay all costs. But even the State’s own concealed economic analyses show that a substantial public subsidy would be required because the project costs would greatly exceed project benefits.

And accurate economic analyses are good public policy as they are essential to informed decision-making. The billions of dollars spent on the proposed project would *not* be available for modern 21st century alternatives such as increased water efficiency and demand reduction programs, including urban and agricultural water conservation, recycling, and storm water recapture and reuse. Money spent on the proposed project would not be available to provide the clean drinking water for more than a million Californians called for by Governor Newsom in his February 12, 2019 State of the State Address.

There are numerous other issues that must be addressed in the Draft EIR. Examples of such issues include adverse water quality and air quality impacts on Delta

⁷See https://pacinst.org/wp-content/uploads/2016/10/PI_TheCostofAlternativeWaterSupplyEfficiencyOptionsinCA.pdf

residents including environmental justice communities. Another example is analysis of how operating the tunnel would likely increase the state's energy footprint, in direct contradiction of state policy directing otherwise. Finally, we adopt and incorporate by this reference the written Delta Conveyance Scoping Comments of Restore the Delta, et al., dated March 20, 2020.

Conclusion

The Draft EIR must include real alternatives to the Proposed Project. The Draft EIR must provide environmental full disclosure of the adverse impacts that would result from Proposed Project operations.

Contacts for this comment letter are Conner Everts, Facilitator, Environmental Water Caucus (310) 804-6615 or connere@gmail.com, Brandon Dawson, Policy Advocate, Sierra Club California (916) 557-1100 ext. 1090 or brandon.dawson@sierraclub.org, or Robert Wright, Counsel, Sierra Club California (916) 557-1104 or bwrightatty@gmail.com . We would do our best to answer any questions you may have.

Sincerely,



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Sierra Club California



Kathryn Phillips, Director
Sierra Club California



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Advisor, Planning and conservation
Leagues



Bill Jennings, Executive Director
California Sportfishing Protection Alliance



Barbara Vlamis, Executive Director
AquAlliance

Attachments:

SWRCB January 30, 2020 comments on DWR's DEIR on SWP Long-Term Operation
Draft Water Resilience Portfolio (January 3, 2020)
A Sustainable Water Plan for California (Environmental Water Caucus, May 2015)