

FRIENDS OF THE RIVER  
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August 18, 2016

Via Email

The Honorable Sally Jewell  
Secretary of the Interior

Christina Goldfuss, Managing Director  
Council on Environmental Quality

The Honorable Penny Pritzker  
Secretary of Commerce

John Laird, Secretary  
California Natural Resources Agency

The Honorable Gina McCarthy, Administrator  
U.S. Environmental Protection Agency

David Murillo, Regional Director  
U.S. Bureau of Reclamation

Additional Addressees at end of Letter

**Re: URGENT Request for Reclamation and DWR to Issue a New California Water Fix Draft EIR/EIS to Finally Disclose and Analyze Adverse Environmental Impacts and to Develop and Consider a Reasonable Range of Alternatives Increasing Delta Flows**

Dear Secretary Jewell, Secretary Pritzker, Administrator McCarthy, Managing Director Goldfuss, Secretary Laird, Regional Director Murillo, and Federal and California Agencies, Officers, and Staff Members Carrying out and Reviewing the BDCP/California Water Fix:

## SUMMARY

Our public interest organizations write to you in this latest of many efforts to finally obtain compliance with the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) during the environmental review of the California Water Fix Delta Water Tunnels proposed project.<sup>1</sup>

The Water Fix Delta Water Tunnels would divert enormous quantities of freshwater that presently flow through the Sacramento River, sloughs, and the San Francisco Bay-Delta estuary before being diverted for export from the South Delta. Due to the new points of diversion north of the Delta, freshwater that presently contributes to water quality, water quantity, fish, fish habitat, Delta agriculture and public health by flowing through the already impaired Delta would instead flow through massive Tunnels no longer providing benefits within the lower river, sloughs, and the Delta. *This undeniable truth is obvious. And this undeniable truth has been ignored for years by the federal and California agencies trying to take the water away from the Delta.*

Extinction is forever. The San Francisco Bay-Delta estuary is the most important estuary in the Western Hemisphere.<sup>2</sup> Given the destruction threatened by the Water Tunnels, it is disturbing to learn that the federal Bureau of Reclamation (Reclamation) and California Department of Water Resources (DWR) “target completion of a Final EIR/EIS by September 2016. . .” for the Water Fix project. (DWR and Reclamation letter to the California Water Resources Control Board, p. 2, August 3, 2016).<sup>3</sup> We are supposed to have a government of laws not of rulers. Yet Reclamation and DWR apparently plan on ignoring our laws such as NEPA and CEQA by issuing a patently insufficient *Final* EIR/EIS [Environmental Impact Report/Environmental Impact Statement] for this controversial project. They must instead proceed in the manner required by law by issuing a new *Draft* EIR/EIS for public review and comment.

To briefly summarize, the U.S. Environmental Protection Agency (EPA) gave the most recent Draft NEPA and CEQA environmental review documents for the project its failing grade in October 2015. The EPA expected that the essential but missing environmental information and analyses would be supplied by other agencies, in particular, the California State Water Resources Control Board (State Water Board) during their review processes. That did not happen.

In addition, the July 2015 Drafts contained false denials by Reclamation of the project having significant adverse impacts on Delta water quality, water quantity, fish and fish habitat. But earlier this month, the Biological Assessment (BA) issued by the same agency, Reclamation,

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<sup>1</sup> AquAlliance, California Sportfishing Protection Alliance, California Water Impact Network, Center for Biological Diversity, Environmental Justice Coalition for Water, Environmental Water Caucus, Friends of the River, Planning and Conservation League, Restore the Delta, and Sierra Club California join in this letter.

<sup>2</sup> “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).

<sup>3</sup> August 3, 2016 letter signed by Tripp Mizell, Senior Attorney, DWR, and Amy L. Aufdenberge, Assistant Regional Solicitor, U.S. Dept. of the Interior.

under the Endangered Species Act (ESA) made contrary determinations of “likely to adversely affect” several endangered and threatened fish species and their designated critical habitats.

The new *Final Guidance* issued earlier this month by the Executive Office of the President, Council on Environmental Quality (CEQ) on consideration of the effects of climate change in NEPA reviews graphically demonstrates the inadequacy of the NEPA process for this project.

The Drafts have at all times also failed to include the *heart* of such documents under both NEPA and CEQA -- the required range of reasonable alternatives. In this case, an obvious alternative that Reclamation and DWR have consistently refused to include and consider is to increase rather than decrease freshwater flows through the Delta by reducing exports. A Ninth Circuit Court of Appeals decision issued last month makes it crystal clear that this persistent refusal by Reclamation to consider alternatives reducing exports violates NEPA.

As a result, the public review and comment time periods afforded for the Draft NEPA and CEQA documents were worthless in terms of allowing informed and meaningful public review and comment. Issuance of a Final EIR/EIS for the Water Fix project without having first prepared and circulated for public review and comment a new Draft EIR/EIS correcting these deficiencies will constitute failure to proceed in the matter required by law, including NEPA and CEQA. There are many, many deficiencies in Reclamation’s and DWR’s NEPA and CEQA processes to date during the Bay Delta Conservation Plan (BDCP)/Water Fix review process. In confining this letter to only several of the elementary NEPA and CEQA violations, we do not in any way withdraw or modify any of the comments we have made previously during these processes.

### **THE SUPPLEMENTAL ENVIRONMENTAL INFORMATION AND ANALYSES EXPECTED BY THE EPA HAVE NOT BEEN PROVIDED**

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>4</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 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

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<sup>4</sup> October 30, 2015 letter from Jared Blumenfeld, EPA Region IX Administrator to David Murillo, Regional Director, Reclamation, Mid-Pacific Region.

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).

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.” (Board Letter, p. 2).<sup>5</sup>

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 has 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>6</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 has refused to even acknowledge or admit that the EPA found the environmental documentation inadequate.

The EPA also noted that the State Water Board:

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<sup>5</sup> The EPA and State Water Board were hardly alone in their findings. The Delta Independent Science Board (DISB) Review found “the Current Draft sufficiently incomplete and opaque to deter its evaluation and use by decision-makers, resource managers, scientists, and the broader public.” (DISB Review, September 30, 2015, at 1, attached to Delta Stewardship Council October 27, 2015 comment letter).

<sup>6</sup> California Water Fix Project Pre-Hearing Conference Ruling, State Water Board, pp. 8-9, February 11, 2016.

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 are no updated standards upon which to base conclusions in a Final EIR/EIS.

There is more. It gets worse. On August 2, 2016, Reclamation issued the Biological Assessment (BA) (July 2016) for the California Water Fix and requested formal consultation with the National Marine Fisheries Service (NMFS) and United States Fish and Wildlife Service (USFWS) under §7 of the Endangered Species Act (ESA). As shown in further detail below, the BA contained admissions of “likely to adversely affect” several endangered and threatened fish species and their designated critical habitats, contrary to the falsities in the Drafts of the EIR/EIS. However, the same Reclamation/DWR letter stating they target completion of the Final EIR/EIS by September 2016, states that they do not expect that the Services will complete the Biological Opinion (BiOp) until the end of 2016.

This segmentation of the NEPA and CEQA processes from the ESA process defies the law as well as common sense. ESA Regulations (50 C.F.R. § 402.14(a)) require that “Each Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. . . .” *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013).

The NEPA regulations require that “To the fullest extent possible, agencies shall prepare draft environmental impact statements *concurrently with and integrated with* environmental impact analyses and related surveys and studies required by the . . . Endangered Species Act. . . .” 40 C.F.R. § 1502.25(a)(emphasis added). “The [ESA] regulations also acknowledge that the agencies are expected to concurrently comply with both Section 7 of the ESA and NEPA. *See* 50 C.F.R. § 402.06 (‘Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA).’).” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 648 (9<sup>th</sup> Cir. 2014), *cert. denied*, 135 S.Ct. 948 and 950 (2015). Consequently, against this threat of extinction, conducting the draft EIS public review and comment stage without Biological Assessments or Biological Opinions has left the public in the

dark and violated both the ESA and NEPA.<sup>7</sup> In the absence of the ESA required analyses, the Draft and Supplemental Draft EIS/EIR were “so inadequate as to preclude meaningful analysis” in violation of NEPA. 40 C.F.R. § 1502.9(a).<sup>8</sup>

Reclamation has violated the “at the earliest possible time” ESA mandate and the “concurrently with and integrated with” NEPA mandate by prematurely issuing the Draft EIR/EIS and then the RDEIR/SDEIS (Recirculated Draft EIR/Supplemental Draft EIS) attempting to hide from the reviewing public the critical pertinent information and analyses that would be supplied by the missing Biological Assessments and Biological Opinions. New upstream diversions of large quantities of water from the Sacramento River will undeniably “affect” the listed fish species and their critical habitats.<sup>9</sup>

We provide more detail out of an abundance of caution. It is, however, clear that the inadequate Draft environmental documents for the Water Fix project have not been somehow “fixed” by another government agency such as the State Water Board. Consequently, the inadequacies must be “fixed” by Reclamation and DWR followed by circulation of a new Draft EIR/EIS for public review and comment. Anything less amounts to an intentional, bad faith, “not now not ever” end run on the environmental analysis and disclosure requirements of NEPA and CEQA. Likewise, the new Draft EIR/EIS must include the information provided by the BA just issued and the BiOp which may be issued by the end of the year. The choices are to either proceed in the manner required by law now, or do so months or years down the road following judicial review, having wasted time and public funds in the course of trying to evade elementary NEPA, CEQA, and ESA requirements.

**THE REFUSAL OF RECLAMATION AND DWR TO DISCLOSE IN THE  
BDCP/WATER FIX DRAFTS OBVIOUS SIGNIFICANT ADVERSE  
ENVIRONMENTAL IMPACTS ON WATER QUALITY, WATER QUANTITY, FISH,  
AND FISH HABITAT RENDERED THE DRAFTS USELESS FOR INFORMING THE  
PUBLIC ABOUT THE ADVERSE IMPACTS OF THE PROJECT**

*Facts*

The RDEIR/SDEIS issued in July of 2015 actually claimed there would be no adverse impacts under NEPA or CEQA 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 are supposed to be environmental full disclosure documents. Whether

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<sup>7</sup> Reclamation has been ignoring the “at the earliest possible time” and “concurrently with and integrated with” duties under NEPA and the ESA for more than three years now despite repeated requests for compliance with these laws starting with Friends of the River comment letters to federal and State officials of June 29, 2013, p. 6; and November 18, 2013, p. 4.

<sup>8</sup> The CEQA rule is the same. Recirculation is required where feasible project alternatives were not included in the Draft EIR. CEQA Guidelines, 14 Cal. Code Regs., § 15088.5(a), or 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).

<sup>9</sup> “The ESA requires an agency to use ‘the best scientific and commercial data available.’” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9<sup>th</sup> Cir. 2015). “The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise.” *Locke*, 776 F.3d at 995.

from project-consultant bias or orders from above, it is 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 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 are 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 are 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 are completely worthless in terms of providing truthful information and analyses for informed public and decision-maker review.

To be clear, denial of the adverse impacts of taking freshwater flows away from the Delta for the Water Tunnels is even more absurd than denial of human-caused climate change. *Fish need water.*

Then there is the new, other side of the story from the same agency, Reclamation. Reclamation’s BA, referenced above, 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).

This amounts to prejudicial delay in finally admitting some truth. 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 Reclamation’s denial in the Draft EIR/EIS documents of the adverse impacts of taking yet more water away from their habitat is both false and absurd.

***The Draft EIR/EIS and RDEIR/SDEIS were so Inadequate and Conclusory in Nature that Meaningful Public Review and Comment were Precluded***

The NEPA Regulations provide help in determining whether an impact “significantly” affects the environment. “Significantly as used in NEPA requires considerations of both context and intensity . . .” 40 C.F.R. § 1508.27. Considerations of context include “the affected region, the affected interests, and the locality.” § 1508.27(a). The Delta is recognized already as being threatened by reductions in freshwater flows through the Delta and the Delta includes at least five listed endangered or threatened fish species and designated critical habitats for each of these crashing fish populations.

Considerations of intensity refer to the “severity of impact.” § 1508.27(b). Each of the ten subsections in § 1508.27(b) cry out that the impacts falsely denied by the lead agencies are significant, severe, and adverse. One example is the subsection providing that: “The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” § 1508.27(b)(9).

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>10</sup> The Court required recirculation of the Draft EIR.

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<sup>10</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).



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 NEPA Regulations require that:

The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency 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. 40 C.F.R. § 1502.9(a).<sup>11</sup>

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 are so inadequate as to preclude meaningful analysis. To comply with NEPA and CEQA the lead agencies must either drop the Water Tunnels project or provide an informative and honest Draft EIS/EIR including the "likely to adversely affect" determinations set forth recently in the BA. That would afford a basis for meaningful public review and comment and decision-maker review.

## **RECLAMATION AND DWR CONTINUE TO REFUSE TO CONSIDER THE REQUIRED RANGE OF REASONABLE ALTERNATIVES**

### ***Alternatives Increasing Delta Flows are Obvious and Required***

Development of alternatives increasing flows through the Delta by reducing exports has always been a direct and obvious first step to complying with NEPA and CEQA 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.

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<sup>11</sup> The requirements under CEQA are similar. 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4).

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.

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. 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 during the course of the epic decision involved here.

On May 18, 2016, the Superior Court, County of Sacramento, issued its 73 page ruling in the *Delta Stewardship Council Cases* (Judicial Council Coordination Proceeding No. 4758) that invalidated the Delta Plan adopted by the Delta Stewardship Council pursuant to the Delta Reform Act. Without even reaching CEQA issues, the court found the adopted Plan violated the Delta Reform Act because it failed to include quantified or otherwise measurable targets associated with achieving reduced Delta reliance (Ruling p. 12), failed to include quantified or otherwise measurable targets associated with restoring more natural flows (Ruling p. 36), and failed to promote options for water conveyance and storage systems. (Ruling pp. 38, 72).<sup>12</sup>

But all of the so-called BDCP/Water Fix alternatives involve new conveyance as opposed to consideration of any through-Delta conveyance alternatives or options reducing 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

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<sup>12</sup> On June 24, 2016 the court issued its Ruling clarifying its earlier Ruling, by determining: “To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed.”

alternatives, instead of just replicating the same conveyance project dressed up in different outfits. To be clear, 14 of the so-called 15 “alternatives” in the Draft EIR/EIS, 10 of the so-called 11 “take alternatives” in the Draft Plan (Chapter 9) and the 4 “alternatives” in the new RDEIR/SDEIS are all peas out of the same pod. They would create different variants of new upstream conveyance to divert enormous quantities of freshwater away from the lower Sacramento River, sloughs, and San Francisco Bay-Delta for export south.

The 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).

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>13</sup>

Reclamation and DWR 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 can be “fixed” by responses to comments in a Final EIR/EIS. Instead, Reclamation and DWR 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.

### ***Deliberate Reclamation and DWR Refusal to Consider Alternatives Increasing Delta Flows***

Reclamation and DWR must develop and consider an alternative that would increase flows by reducing exports in order to satisfy federal and California law. The Delta Reform Act establishes that “The policy of the State of California is to *reduce reliance on the Delta in meeting California’s future water supply needs* through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” Cal. Water Code § 85021 (emphasis added). The Act also mandates that the BDCP include a comprehensive review and analysis of “A reasonable range of flow criteria, rates of diversion, and other operational criteria . . . necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.” Cal. Water Code § 85320(b)(2)(A). And, the Act requires: “A reasonable range of Delta conveyance alternatives, including through-Delta,” as well as new dual or isolated conveyance alternatives. Cal. Water Code § 85320(b)(2)(B). In addition, the Act mandates that “The long-standing constitutional principle of reasonable use and the public trust doctrine shall

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<sup>13</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; and October 29, 2015.

be the foundation of state water management policy and are particularly important and applicable to the Delta.” Cal. Water Code § 85023.

Reclamation and DWR<sup>14</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. 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) as a reasonable alternative to the Water Tunnels over a year ago.<sup>15</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 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.

There is more. On August 1, 2016, the CEQ issued a Memorandum for Heads of Federal Departments and Agencies: *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*. The *Final Guidance* fits this situation perfectly:

The analysis of climate change impacts should focus on those aspects of the human environment that are impacted by both the proposed action and climate change. Climate change can make a resource, ecosystem, human community, or structure more susceptible to many types of impacts and lessen its resilience to other environmental impacts apart from climate change. This increase in vulnerability can exacerbate the

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<sup>14</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>15</sup> We have repeatedly presented earlier versions of this alternative since May 2012. Reclamation and DWR continue to ignore such alternatives.

effects of the proposed action. *For example, a proposed action may require water from a stream that has diminishing quantities of available water because of decreased snow pack in the mountains, or add heat to a water body that is already warming due to increasing atmospheric temperatures.* Such considerations are squarely within the scope of NEPA and can inform decisions on whether to proceed with, and how to design, the proposed action to eliminate or mitigate impacts exacerbated by climate change. (*Final Guidance*, p. 21)(Emphasis added).

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. But the RDEIR/SDEIS-- directly contrary to the *Final Guidance*— 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 *Final Guidance* states that:

Agencies should consider applying this guidance to projects in the EIS or EA preparation stage *if this would inform the consideration of differences between alternatives* or address comments raised through the public comment process with sufficient scientific basis that *suggest the environmental analysis would be incomplete* without application of the guidance, and the additional time and resources needed would be proportionate to the value of the information included. (*Final Guidance*, p. 34)(Emphasis added).

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 makes the persistent refusal of Reclamation and DWR 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>16</sup>

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<sup>16</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.

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

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 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>17</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.<sup>18</sup>

Instead of sharply defining the issues and providing a clear basis for choice among options, the BDCP consultants have now produced 48,000 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

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<sup>17</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).

<sup>18</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.

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

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS, Chapter 9 of the BDCP plan and the RDEIR/SDEIS have led to NEPA and CEQA documents “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” 40 C.F.R. § 1502.9(a).<sup>19</sup>

### ***Alternatives Conclusion***

Reclamation and DWR 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.

## **CONCLUSION**

Extinction is forever. It is time to cure the deficiencies found by the EPA in October of 2015. It is time to finally stop hiding the ball from the public. Reclamation and DWR falsely denied in the Draft NEPA and CEQA documents issued in July 2015 that there would be significant adverse impacts resulting from taking large quantities of water upstream from the Delta. That was what they had told the public in opening the public review and comment period. Now, when there is no public review and comment period, and on the verge of issuing a Final EIR/EIS, Reclamation has issued a BA admitting that indeed, the project is “likely to adversely affect” endangered and threatened fish species and their designated critical habitats. This is the opposite of timely environmental full disclosure. Would it be unfair to call this environmental fraud? The only way this trick on the public can be prevented is by either dropping the project or issuing a new, honest Draft EIR/EIS for public review and comment. And the required range of reasonable alternatives including ones increasing Delta flows by reducing exports must be included in the new Draft. In addition, CEQ’s recently issued *Final Guidance* requires

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<sup>19</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.

consideration of the effects of climate change exacerbating the effects of the proposed action in a new Draft EIR/EIS in contrast to the way Reclamation effectively ignored these effects by including them in the baseline used for comparison.

Should you have any questions, please contact Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or [bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org).

Sincerely,



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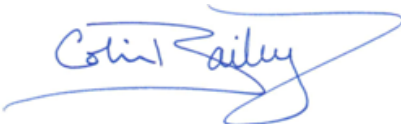
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Attachment, *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015)

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