



BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

**California Water Fix Change Petition Hearing Part 1 JOINT OPENING STATEMENT
and REQUESTS for OFFICIAL NOTICE; and JOINT MOTION for
RECONSIDERATION and to DISMISS PETITION**

August 31, 2016

Introduction

This is the Part 1 Opening Statement of protestants Friends of the River, Planning and Conservation League and Sierra Club California. This Opening Statement also includes Requests for Official Notice based on new developments taking place recently (June, July and August of 2016). Our Motion for Reconsideration and to Dismiss the Petition based on the new developments is at the end of this document.

Our Table of Contents is on the next page.

TABLE OF CONTENTS

| | |
|---|-----------|
| OPENING STATEMENT INCLUDING REQUESTS FOR OFFICIAL NOTICE | 3 |
| SUMMARY | 3 |
| PETITIONERS HAVE FAILED TO ESTABLISH THAT THE DIVERSION CHANGE WILL NOT OPERATE TO THE INJURY OF ANY LEGAL USER OF THE WATER INVOLVED | 5 |
| THE SUPPLEMENTAL ENVIRONMENTAL INFORMATION AND ANALYSES EXPECTED BY THE EPA HAVE NOT BEEN PROVIDED | 6 |
| THE REFUSAL OF DWR AND RECLAMATION TO DISCLOSE OBVIOUS SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS ON WATER QUALITY IN THE BDCP/WATER FIX DRAFTS RENDERED THE DRAFTS USELESS FOR INFORMING THE PUBLIC ABOUT THE ADVERSE IMPACTS OF THE PROJECT | 10 |
| <i>Facts</i> | 10 |
| <i>The Draft EIR/EIS and RDEIR/SDEIS were so Inadequate and Conclusory in Nature that Meaningful Public Review and Comment were Precluded</i> | 11 |
| THE REQUIRED RANGE OF REASONABLE ALTERNATIVES REMAINS ABSENT | 13 |
| <i>Alternatives Increasing Delta Flows are Obvious and Required</i> | 13 |
| <i>Deliberate Reclamation and DWR Refusal to Consider Alternatives Increasing Delta Flows</i> | 14 |
| <i>The State Water Board Must Require Presentation and Evaluation of Alternatives that will Increase Delta Flows in order to Comply with NEPA and CEQA</i> | 17 |
| THE STATE WATER BOARD IS VIOLATING THE DELTA REFORM ACT DURING THIS HEARING PROCESS | 18 |
| OPENING STATEMENT AND REQUESTS FOR OFFICIAL NOTICE CONCLUSION | 20 |
| MOTION FOR RECONSIDERATION AND TO DISMISS PETITION | 21 |
| LIST OF OFFICIAL NOTICE REQUESTS ATTACHMENTS | 24 |

OPENING STATEMENT INCLUDING REQUESTS FOR OFFICIAL NOTICE

SUMMARY

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.*

Petitioners have failed to present reliable evidence establishing that the proposed diversion change will not operate to the injury of any legal user of the water involved. Consequently, there is no valid reason to continue going forward with this Hearing and to require protestants to put on any evidence whatsoever.

Agencies may take official notice of any facts which can be judicially noticed by courts. Government Code § 11515. “The Board or presiding officer may take official notice of such facts as may be judicially noticed by the courts of this state.” 23 Cal. Code Regs § 648.2. Courts take judicial notice of the obvious and the undeniable. Evidence Code § 452(c) authorizes judicial notice of official acts of the executive departments of the State of California and the United States. Judicial notice of undeniable facts, conditions, and requirements is also appropriate pursuant to Evidence Code § 452(g), facts of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and § 452(h), facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Judicial and thus official notice of the decisional, constitutional, and public statutory law of this State and of the United States is *mandatory* under Evidence Code § 451(a). In addition, judicial notice is mandatory under Evidence Code §453 of all items subject to judicial notice under § 452 if requested by a party and the party gives sufficient notice of the request and furnishes sufficient information with respect to the request. Official notice is requested of the following:

To briefly summarize several recent developments, 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 State Water Board during their review processes. That did not happen. The failure of other processes by other agencies including the State Water Board to provide the missing environmental information and analyses is a recent development. Official notice is requested of the inadequate rating given the RDEIR/SDEIS by the EPA. Official notice is also requested of

the fact that the missing environmental information and analyses have not been provided by other agencies such as the State Water Board in their review processes.

In addition, the July 2015 RDEIR/SDEIS 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, 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 issuance of the BA and findings there contrary to the denials by Reclamation in the July 2015 Draft environmental documents (RDEIR/SDEIS) is another recent development. Official notice is requested of the “likely to adversely affect” determinations in the BA.

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 and CEQA process for this project. The issuance of the *Final Guidance* which is binding on Reclamation and logically also applicable to DWR and the State Water Board is yet another recent development. Official notice is requested of the *Final Guidance*.

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. That refusal by Reclamation and DWR also violates CEQA. This new decision is another recent development. Official notice is requested of the new Ninth Circuit decision. Yet another recent development is the Sacramento Superior Court Ruling holding that the Delta Reform Act requires measurable targets reducing Delta reliance. Official notice is requested of this Ruling also.

Continuing to go forward with this Hearing, in addition to the violations of such laws as CEQA, NEPA, and the Clean Water Act pointed out previously by these and other protestants, constitutes violation of the Delta Reform Act, as will be shown below.

The State Water Board must take official notice of these facts and actions during this Hearing. Detail identifying precisely these recent developments is provided below. The public has never been afforded the opportunity to review and comment upon a legally sufficient Draft EIR/EIS for this project. The public has never been afforded the opportunity to review and comment upon a Draft EIR/EIS containing the “likely to adversely affect” determinations in the recently issued BA. The public has never been afforded the opportunity to review and comment upon a Draft EIR/EIS including the required range of reasonable alternatives which necessarily

requires inclusion of alternatives increasing Delta flows by reducing exports and not developing new upstream conveyance.

**PETITIONERS HAVE FAILED TO ESTABLISH THAT THE DIVERSION
CHANGE WILL NOT OPERATE TO THE INJURY OF ANY LEGAL USER OF THE
WATER INVOLVED**

The California Water Code establishes strong protection for legal users of the water involved. Water Code § 1702 creates a clear prohibition:

Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that *the change will not operate to the injury of any legal user of the water involved*. (Emphasis added).

It defies common sense to even claim, let alone find, that massive new diversions upstream from the already imperiled Delta *will not operate to the injury of any legal user of the water involved*. The diminishing of freshwater flows posed by the Water Fix would be exacerbated by the climate change-caused reduction in snowpack and watershed stream flow. The greater salinity intrusion caused by the taking away of freshwater flows for the Water Fix would be exacerbated by the climate change-caused rise in sea level. The new CEQ *Final Guidance* for dealing with climate change during the NEPA process is discussed below. 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. The Water Fix project would be a new infrastructure project with a long anticipated lifecycle.

The courts do not approve the actions of public agencies if they defy common sense. In *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-7, the court said: "Although Respondents contend that we should defer to the Board's findings that the mitigation measures are effective, we decline to do so where the Board's findings are not supported by substantial evidence or defy common sense. Law is not required to abandon common sense. Here, our common sense informs us that the mitigation measures will not effectively replace the water that could be lost by the neighboring landowners." It defies common sense to either claim or "find," given such undeniable facts as the capacity of the Water Tunnels and the exacerbation of project impacts by climate change diminished watershed runoff and rising sea level that the project *will not operate to the injury of any legal user of the water involved*.

As just one of many possible examples, evidence has not been presented by petitioners showing how the project will be operated in dry periods and what those impacts would be on legal users of water. The Temporary Urgency Change Petitions (TUCP's) were not even included in the modeling relied upon by petitioners. But to be clear, whether wet or dry or

average periods are involved, it defies common sense to maintain that a diversion of this magnitude will not operate to the injury of any legal user of the water.

Coming up with “conditions” on project operations does nothing of value here. It is not possible to “condition” reality. The Water Tunnels would cost many billions of dollars to construct. Their capacity is about equal to the normal entire summer flow of the Sacramento River at the diversion point. The only decision that could be made in the public interest is whether or not to approve the diversion change. Approving the diversion change subject to “conditioning” it on not operating to the injury of any legal user of the water involved would be an absurdity. If enforced, it would result in a stranded asset wasting billions of dollars of public funds. If not enforced, there would be the prohibited injury to legal users of the water involved. Again, the courts will not approve or defer to Board findings that “conditioning” measures will be effective that “are not supported by substantial evidence or defy common sense.” *Gray v County of Madera*, 167 Cal.App.4th 1099, 1116-7 (finding mitigation measures ineffective).

Because the petitioners have not analyzed all likely project operations including under TUCP’s, there is no way the State Water Board can determine there would not be harm to legal users of the water involved. Therefore, there is no evidence in the Record to support any permit conditions that the State Water Board itself might develop and impose to avoid injury to legal users of the water.

In any event, petitioners have not provided proposed conditions for their project. Consequently, since no conditions have been provided by petitioners, there is no basis for the State Water Board to develop conditions out of the blue.

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).¹ 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

¹ October 30, 2015 letter from Jared Blumenfeld, EPA Region IX Administrator to David Murillo, Regional Director, Reclamation, Mid-Pacific Region.

discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. (p. 4-6).

Judicial notice of official acts of the executive departments of the United States is authorized by Evidence Code § 452(c). Judicial notice of matters specified in § 452 is compulsory under Evidence Code § 453 when requested by a party giving sufficient notice of the request. The EPA is an executive department of the United States and its review Letter was an official act of the executive department of the United States. We attach a copy of EPA's October 30, 2015 Letter and repeat our previous request for official notice of the Letter.²

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).³

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

² We have referenced and attached this EPA letter previously, including in the joint letter (p. 4) to all State Water Board members of November 24, 2015 on behalf of the California Sportfishing Protection Alliance, Environmental Water Caucus, Friends of the River, and Restore the Delta, and our joint pre-hearing conference letter of January 21, 2016 on behalf of these protestants. In our Joint Motion and Joint Objections filed July 11, 2016 (at p. 13) we requested official notice of the EPA Letter. In the Ruling pertaining to evidentiary objections of July 11, 2016, the Hearing Officers made no Rulings on evidentiary objections and made no Rulings on whether to take Official Notice.

³ 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).

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 Water Fix for purposes of CEQA is not a key hearing issue.⁴

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. It is time for the State Water Board to take official notice of the undeniable fact that the EPA graded the Water Fix Draft Environmental review documents *inadequate*. It is also time to take official notice of the fact that the missing information and analyses determined by the EPA have not been provided by other agencies such as the State Water Board. Judicial notice is authorized of "facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" (Ev. Code § 452(g) and of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Ev. Code § 452(h)).

The State Water Board is expressly authorized by statute to request additional information reasonably necessary to comply with CEQA. Water Code § 1701.3(b)(3). It is long past time for the State Water Board to request and obtain preparation and circulation for public review and comment of an adequate Draft EIR/EIS on the Water Fix before continuing on with this Hearing.

The EPA also noted that the State Water Board:

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

⁴ California Water Fix Project Pre-Hearing Conference Ruling, State Water Board, pp. 8-9, February 11, 2016.

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. On August 2, 2016, Reclamation issued the 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 (9th 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. 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).⁵

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. ⁶

The inadequate Draft environmental documents for the Water Fix project have not been somehow “fixed” by another government agency such as DWR or the State Water Board. Likewise, the information provided by the BA issued by Reclamation earlier this month directly contradicts the denials of adverse impacts on water quality, fish, and fish habitat contained in the July 2015 RDEIR/SDEIS. These are recent, new developments of critical importance here.

THE REFUSAL OF DWR AND RECLAMATION TO DISCLOSE OBVIOUS SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS ON WATER QUALITY IN THE BDCP/WATER FIX DRAFTS 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 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,

⁵ 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).

⁶ “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 (9th 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.

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, petitioner 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). Chapter 7 of the BA is attached. Official notice is requested of Chapter 7 of the BA including its determinations of "likely to adversely affect." Reclamation is part of the executive Department of the United States. The BA was an official act. Judicial notice is authorized of official acts of the executive department of the United States. (Ev. Code § 452(c).

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. Reclamation's denial is also now directly contradicted by the truthful admissions in the BA issued earlier this month.

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.'"⁷ The Court required recirculation of the Draft EIR. Of course reductions in freshwater flows would be significant adverse impacts. Yet the Executive Summary falsely concluded in all cases that they are not. (RDEIR/SDEIS Table ES-9, pp. ES-47 through 60, Aqua-NAA-1 through 16, Aqua-1 through 217). Until about April 2015, the claim being made in the Draft EIR/EIS had been that while there would be adverse impacts of Water Tunnels operations on the fish and their habitat, much of that would be mitigated by the provision of wetland restoration. Now however, the "65,000 acres of tidal wetland restoration" has been eviscerated down to "59 acres" (RDEIR/SDEIS p. ES-17) as a result of the project no longer being a Habitat Conservation Plan. Yet impacts previously either determined to be adverse or undetermined are now determined to not be significant or adverse.

The 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).⁸

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

⁷ The Court noted that a "potential substantial impact on endangered, rare or threatened species is per se significant." 40 Cal.4th at 449 citing Guidelines section 14 Cal. Code Regs §15065(a).

⁸ The requirements under CEQA are similar. 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4).

THE REQUIRED RANGE OF REASONABLE ALTERNATIVES REMAINS ABSENT

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.

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 (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. Reclamation’s “reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts.” *Id.* at *3. A copy of the Ruling is attached. Official Notice of the Ruling is requested. The decisional law of the United States is subject to mandatory judicial notice. (Ev. Code § 451(a).

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.⁹ The decision pertained to interim two-year contract renewals. If the alternative of

⁹ In *California v. Block*, 690 F.2 753, 765-769 (9th 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

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.

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 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).

Deliberate Reclamation and DWR Refusal to Consider Alternatives Increasing Delta Flows

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 (9th 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.

The State Water Board must require development and consideration of an alternative that would increase flows by reducing exports in order to satisfy federal and California law. The Delta Reform Act, as shown below, requires development of such alternatives.

Reclamation and DWR 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.¹⁰ The plan is at: <http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf>. 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, 21st-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:

¹⁰ We have repeatedly presented earlier versions of this alternative since May 2012. Reclamation and DWR continue to ignore such alternatives. We attached *A Sustainable Water Planned for California* to our January 21, 2016 letter, and referred to it again in our February 17, 2016 letter.

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 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).

We attach a copy of the *Final Guidance*. We request that Official Notice be taken of the *Final Guidance*. The *Final Guidance* is an official act of the executive department of the United States. Judicial notice of official acts of the executive departments of the United States is authorized by Ev. Code § 452(c).

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 under NEPA because those effects were already included in the baseline used for comparison. The RDEIR/SDEIS excluded the effects of climate change in making determinations of significant impacts under CEQA by failing to consider the effects of climate change and sea level rise together with the impacts of the project alternatives on fisheries and water quality. That was done even though the RDEIR/SDEIS admitted that climate change is likely to result in significant changes to water temperatures and hydrology which are likely to be adverse to numerous fish species. (RDEIR/SDEIS pp. 5-79,-105,-112,-114, and-115).

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 absence of development and consideration of 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.¹¹

The State Water Board Must Require Presentation and Evaluation of 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.¹²

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.

¹¹ 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.

¹² 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).

The failure to include a range of reasonable alternatives also violates CEQA. An EIR must “describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” 14 Code Cal. Regs (CEQA Guidelines) § 15126.6(a). “[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” § 15126.6(b). 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, this Hearing, proceeding to evaluate the Water Fix project *in a vacuum* from the CEQA and NEPA required range of reasonable alternatives constitutes failure to proceed in a manner required by law. This follows in the footsteps of DWR and Reclamation which led to CEQA and NEPA documents ignoring feasible alternatives and “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” Recirculation of a new Draft is required. § 15088.5(a)(3) and (4)¹³

THE STATE WATER BOARD IS VIOLATING THE DELTA REFORM ACT DURING THIS HEARING PROCESS

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. 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

¹³ 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.

conveyance and storage systems. (Ruling pp. 38, 72).¹⁴ We repeat our request for Official Notice of the Superior Court Rulings of May 18 and June 24, 2016.¹⁵ Judicial notice of the decisional law of this state is mandatory. (Ev. Code § 451(a).

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

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

The Water Quality Control Plan for the San Francisco Bay/San Joaquin -Sacramento Delta Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended without substantive changes in 2006. “The state Water Board is in the process of a periodic update of the WQCP, which is occurring in phases.” (Reference, DWR-51, Jennifer Pierre testimony p.4, fn.4). The statement in the State Water Board February 11, 2016 Ruling (p.4) reflecting reality is that: “The appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may well be more stringent than petitioners’ preferred project.” The State Water Board has acknowledged “that the WaterFix, if approved, would be a significant component of Delta operations, and it would be preferable to have Phase 2 [of the Plan update] completed prior to acting on the change petition.” (February 11, 2016 Ruling, pp. 4-5).

The Bay-Delta Plan was 15 years out of date when the Delta Reform Act was enacted. The Plan is now 20 years out of date. The Act is being ignored by the State Water Board in the course of rejecting the numerous requests over the months by these and other protestants for the Board to update the Bay-Delta Plan before holding a Hearing to consider the change Petition. The Delta Reform Act required the State Water Board to develop new flow criteria for the Delta ecosystem necessary to protect public trust resources “for the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan.” Water Code § 85086(c)(1). The Delta Reform Act includes very specific requirements for comprehensive review of specific subjects for the BDCP in Water Code § 85320 (b)(2) also being ignored by the State Water Board:

(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

¹⁴ 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.” The Delta Stewardship Council filed a Notice of Appeal from the Ruling on August 24, 2016.

¹⁵ We attached the Rulings to our Joint Motion and Joint Objections filed July 11, 2016 and requested Official Notice (at p. 10 of our Joint Objections). The Hearing Officers’ Ruling of July 22, 2016 (at p. 3) re Objections referred to the Superior Court Rulings but did not expressly take Official Notice of the Rulings.

provided in [subdivision \(a\) of Section 2820 of the Fish and Game Code](#), and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.

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

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

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

[deletions]

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

The Delta Reform Act (Water Code § 85021) provides 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. . . .

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

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

Thus it not only is bad planning, illogical, and violating the Clean Water Act to continue with this Hearing before rather than after updating the Bay-Delta Plan. The Plan is 20 years out of date and blind to the worsened plight of the Delta and the worsening projections of diminished runoff and increased sea level rise caused by climate change. This process is also violating the Delta Reform Act which clearly calls for doing the planning first to facilitate the planning decisions, rather than making planning decisions and then doing the planning work after the horse is out of the barn.

OPENING STATEMENT AND REQUESTS FOR OFFICIAL NOTICE 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. 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 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 and DWR effectively ignored these effects. It is time to cease defying common sense by pretending that this massive project will not operate to the injury of any legal users of the water involved. It is time to start complying with the Delta Reform Act by doing the planning work first and making the decisions later, instead of acting first and thinking later.

It is time for the State Water Board to take ***Official Notice*** of the facts and actions referenced above. Undeniable facts are undeniable. The truth is the truth. EPA gave the Draft environmental documents for the Water Fix a failing grade. Other public agency processes including this Hearing, have not “fixed” the deficiencies determined by the EPA. The RDEIR/SDEIS denied that the Water Fix would have significant adverse impacts on water quality, fisheries, and fish habitat. The BA issued earlier this month by Reclamation now admits that the Water Fix is, indeed, “likely to adversely affect” several endangered and threatened fish species and their designated critical habitats. The *Final Guidance* issued earlier this month by the CEQ graphically demonstrates the inadequacy of the treatment of climate change impacts by the RDEIR/SDEIS. The recent Rulings by the Ninth Circuit Court of Appeals and the California Superior Court, County of Sacramento, make it crystal clear that alternatives reducing reliance on the Delta and increasing flows through the Delta by reducing exports must be developed and considered in order to proceed lawfully under such laws as CEQA, NEPA and the Delta Reform Act. However much DWR and Reclamation may wish that things were different, the facts are what they are.

MOTION FOR RECONSIDERATION AND TO DISMISS PETITION

Our Opening Statement and Requests for Official Notice set forth above are adopted and repeated in this Motion for Reconsideration and to Dismiss the Petition. There is ample ***justification*** for ***Reconsideration***. Though motions and requests to update the Bay-Delta Plan and to prepare or obtain preparation and circulation for public review and comment of an adequate Draft EIR/EIS before conducting this Hearing have been previously denied, the recent events summarized above compel ***Reconsideration***. Reclamation issued the BA on August 2, 2016 containing admissions of “likely to adversely affect” several endangered and threatened fish species, contradicting Reclamation’s Drafts of the EIR/EIS. It was not possible to bring that up before in prior motions and requests, because issuance of the BA and request for formal consultation under the ESA are new events that had not yet happened. The same is true with

respect to the *Final Guidance* on dealing with the effects of climate change in NEPA reviews that CEQ issued August 1, 2016. The same is true with respect to the new Rulings by the Ninth Circuit Court of Appeals and the Superior Court, County of Sacramento, making it crystal clear that alternatives increasing Delta flows by reducing exports simply must be developed and considered under CEQA, NEPA and the Delta Reform Act. Also, even though the State Water Board disclaimed any responsibility to itself prepare an adequate Draft EIR/EIS, Reclamation and DWR could have done so. Now, it is established that they have not done so, and instead plan to issue a Final EIR/EIS on the Water Fix next month. Thus the failure/refusal of any other public agency to prepare and circulate for public review and comment an adequate Draft EIR/EIS curing the deficiencies determined by the EPA during its formal review, has now been established. These, along with the failure of petitioners to present reliable evidence establishing that the proposed diversion change will not operate to the injury of any legal users of the water involved, are all new events justifying reconsideration.

The Hearing Officers recognized in the February 11, 2016 Ruling (p. 9) that “ultimately the final EIR must be adequate to support the State Water Board’s decision in this proceeding.” They also stated that:

If during the course of this proceeding, the State Water Board determines that the range of alternatives evaluated by DWR is not adequate to support the Board’s decision, then either DWR for the Board will need to prepare subsequent or supplemental documentation. (See, *id.*, §§ 15096, subd. (e), 15162, 15163.) At this point, however, it is uncertain whether any subsequent or supplemental documentation will be required.

The recent events summarized in our Opening Statement above, graphically demonstrate the need for either DWR or the Board to prepare a new or subsequent Draft EIR to comprehensively disclose and assess the adverse environmental impacts of the proposed Water Fix Project. That must include impacts disclosed in the recently issued BA and exacerbation of adverse impacts by climate change. Moreover, the new Ninth Circuit Ruling issued a month ago, and the recent Sacramento Superior Court Ruling enforcing the Delta Reform Act make it plain that it is not possible to proceed lawfully any further with this Hearing process in the absence of development and consideration of, and circulation for public review and comment on, a new Draft EIR/EIS. The new Draft EIR/EIS must include the required range of reasonable alternatives specifically including alternatives that would increase Delta flows by reducing exports and that would not include new upstream conveyance.

The testimony and exhibits offered by Petitioners DWR and Reclamation are not a lawful substitute for the adequate EIR/EIS required by CEQA and NEPA. Because the petitioners have not analyzed all likely project operations including under TUCP’s, there is no way the State Water Board can determine there would not be harm to legal users of the water involved. Therefore, there is no evidence in the Record to support any permit conditions that the State Water Board itself might develop and impose to avoid injury to legal users of the water.

Charging ahead in the absence of the adequate EIR/EIS required by law, trying to make monumental decisions before updating the Bay-Delta Plan, and ignoring the Delta Reform Act appears to be an effort to avoid the law in order to be able to make the common sense-defying finding that the massive reduction of freshwater flows carried out by the Water Fix will not operate to the injury of any legal users of the water involved.

In conclusion, Reconsideration should be granted and the Petition should be dismissed. It is time to obtain an adequate Draft EIR/EIS that has been prepared and circulated for public review and comment on the Water Fix project. If the State Water Board was trying to create a Hearing process prejudicial to the public interest and protestants it would be difficult to create one more prejudicial than this one. Here, protestants are unlawfully deprived of the opportunity to point to alternatives in a legally sufficient EIR/EIS that they would argue are preferable to the proposed Water Fix project. The State Water Board is failing to proceed in the manner required by law, including CEQA and NEPA, by proceeding with this Hearing *in a vacuum*, in the absence of the required adequate EIR/EIS and required range of reasonable alternatives.

Respectfully submitted,



E. Robert Wright, Senior Counsel
Friends of the River



Kyle Jones, Policy Advocate
Sierra Club California



Jonas Minton, Senior Water Policy Advisor
Planning and Conservation League

Attachment: Service Certificate

Attachments: As shown on attached *List of Official Notice Requests Attachments*

cc: All by electronic service

Tom Howard, Executive Director, State Water Resources Control Board (SWRCB)

Michael Lauffer, Chief Counsel, SWRCB

Dana Heinrich, Staff Attorney IV, SWRCB

Diane Riddle, Environmental Program Manager, SWRCB

All party representatives on August 31, 2016 SWRCB service list

LIST OF OFFICIAL NOTICE REQUESTS ATTACHMENTS

EPA Water Fix RDEIR/SDEIS Review Letter, October 30, 2015, attached
Referred to pp. 3-4, Official Notice requested p. 7

Biological Assessment, chapter 7, Effects Determination, August 2, 2016, attached
Referred to p. 4, Official Notice requested p. 11

Council on Environmental Quality (CEQ) *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*, August 1, 2016, attached
Referred to p. 4, Official Notice requested pp. 15-16

Pacific Coast Federation of Fishermen's Assn's v. U.S. Dept. of the Interior, __Fed.Appx.__, 2016 WL 3974183 (9th Cir., No. 14-15514, July 25, 2016) (Not selected for publication), attached
Referred to p. 4, Official Notice requested p. 13

Ruling in *Delta Stewardship Council Cases* (Judicial Council Coordination Proceeding No. 4758), May 18 and June 24, 2016, attached previously to our Joint Motion and Joint Objections filed July 11, 2016, not attached again here
Referred to p. 4, Official Notice requested pp. 18

STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING

Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following documents:

JOINT OPENING STATEMENT and REQUESTS for OFFICIAL NOTICE; and JOINT MOTION for RECONSIDERATION and to DISMISS PETITION; and 4 ATTACHMENTS: EPA REVIEW LETTER October 30, 2015; BIOLOGICAL ASSESSMENT, CHAPTER 7; CEQ FINAL GUIDANCE on Effects of Climate Change in NEPA Reviews; and RULING in PACIFIC COAST FEDERATION OF FISHERMEN'S ASSN's v. U.S. DEPT. OF THE INTERIOR

To be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated August 31, 2016, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

I certify that the foregoing is true and correct and that this document was executed on August 31, 2016.



Signature:

Name: E. Robert Wright

Title: Senior Counsel

Party/Affiliation: Representing Friends of the River and Sierra Club California

Address: Friends of the River
1418 20th Street, Suite 100
Sacramento, CA 95811