



December 17, 2018

State Water Resources Control Board Hearing Officers
WaterFix Hearing Team

**Re: REQUESTS FOR OFFICIAL NOTICE AND FOR CEQA COMPLIANCE AND
JOINDERS IN OTHER FILINGS PERTAINING TO THE CALIFORNIA WATER FIX
PROJECT**

Dear WaterFix Hearing Officers and Hearing Team:

INTRODUCTION

Protestants Friends of the River (Friends) and Sierra Club California (Sierra Club) request official notice of significant new circumstances and changes in and affecting the California WaterFix Project that is the subject of the pending petition by the Department of Water Resources (DWR) and Bureau of Reclamation (Reclamation) to change points of diversion. Protestants request California Environmental Quality Act (CEQA) compliance with respect to the new circumstances and changes. A subsequent Environmental Impact Report (EIR) must be prepared addressing the changes and new circumstances before the Hearing could proceed.

As Winston Churchill said about Russia, this WaterFix project is now “a riddle wrapped in a mystery inside an enigma.”

JOINDER IN OTHER FILINGS

These protestants join in the letter filed earlier today, December 11, 2018, by Local Agencies of the North Delta et al., addressing “Re: Changes to Petition for California Water Fix/Delta Tunnels Project from Addendum to COA and Other New Agreements,” and the letter filed earlier today by the City of Stockton, Sacramento County, and Sacramento County Water Agency, addressing “Re: Substantial Changes to California WaterFix Project and Circumstances Surrounding Project from Addendum to Coordinated Operations Agreement (COA) and other New Agreements.”

CHANGES IN PROJECT AND CIRCUMSTANCES

Changes to Project and Circumstances from Addendum to COA and other New Agreements

These protestants adopt and incorporate herein by reference the letters by Local Agencies of the North Delta, et al., and by the City of Stockton et al., joined in above, and the exhibits attached and referred to therein. These letters set forth the known features of the recent changes as well as the fact that the changes “presage additional changes to the Project and/or information relevant to the key Hearing issues.” (City of Stockton et al. letter at p.3.)¹

Inconsistency of the Project with the Delta Plan

The project must be consistent with the Delta Plan adopted by the Delta Stewardship Council (DSC) in order to proceed. The DSC was created by the legislature by the Delta Reform Act of 2009, codified at Water Code §§ 85000 et seq. In preparation for the DSC public workshop on November 15, 2018, the DSC Staff recommended that DWR’s project be found *inconsistent* with the Delta Plan on several key grounds, including, absence of substantial evidence supporting findings to establish consistency with the coequal goals of the Delta Reform Act; absence of substantial evidence of compliance with requirement to show best available science; failure to demonstrate reduced reliance on the Delta; and failure to demonstrate compliance with Delta Flow Objectives or meet D-1641’s export-inflow ratio. (November 15, 2018, Agenda Item 1, DSC Report at p. 11 – 13.)

The Report stated (at. p. 1),

As summarized in the conclusion to this report and in the attached staff draft Determination, staff recommends that the Council conclude that substantial evidence does not exist in the record to support the Department’s findings that California Water Fix is consistent with the Delta Plan. Staff further recommends that the Council remand

¹ Official Notice is requested of all documents discussed in this letter, at the end with references.

the matter to the Department for reconsideration, pursuant to Water Code section 85225.25.

Following the November 15 DSC workshop, DWR withdrew its Certification of Consistency for WaterFix that it filed on July 27, 2018. (December 7, 2018, letter from DWR Director Karla Nemeth to Randy Fiorini, Chair, DSC.)

New Federal Policy to Maximize Exports Regardless of State Law or State Water Board Flow Objectives

With climate change fueling more severe and prolonged droughts, it is only a matter of time before the Tunnels would be used to take every last drop of water they can, just as Interior Secretary Ryan Zinke directed. On August 17, 2018, Secretary Zinke sent a memo to his staff with the Subject “California Water Infrastructure” that states:

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

- o maximizing water supply deliveries; ...

The memo (copy attached) is posted on the website of California Congressman Jeff Denham at: https://denham.house.gov/uploadedfiles/8.17.18_doi_memo_on_california_water_infrastructure.pdf.

The same Memorandum from the Secretary of the Interior also directed Assistant Secretaries and the Solicitor to develop a plan of action for, among other things,

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

It is imperative that a subsequent or supplemental EIR/EIS be prepared disclosing to the public the issues between the federal parties and DWR regarding the WaterFix project. The same is true with respect to measures that may be taken to maximize water supply deliveries.

There is more. On October 19, 2018, the president issued the *Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West*. (Copy attached.) The Presidential Memorandum in Section 2 (a) (ii) orders the Secretary of the Interior and the Secretary of Commerce to within 30 days designate one official to,

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

These federal actions directed by the president and the Secretary of the Interior must be disclosed and analyzed in a subsequent or supplemental EIR/EIS addressing project operations.

THE CHANGES IN THE PROJECT AND CIRCUMSTANCES REQUIRE PREPARATION OF A SUBSEQUENT OR SUPPLEMENTAL EIR

A Subsequent or Supplemental EIR must be Prepared Disclosing, analyzing, and assessing the Changes and the resulting Environmental Consequences

CEQA requires a subsequent or supplemental EIR if substantial changes are proposed in the project or substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions of the EIR, or new information which was not known and could not have been known at the time the EIR was certified, becomes available. Public Resources Code §21166(a), (b), and (c).

The CEQA Guidelines are codified at 14 Code Cal Regs §15000 et seq. Guideline §15162 requires a subsequent, not just a supplemental, EIR if any of the above circumstances are present. Guideline §15163 does allow a supplemental EIR if any of the above circumstances are present, and, “Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.” Guideline §15163(a)(2).

Here, the changes in the project and circumstances are substantial, requiring a subsequent, not just a supplemental, EIR. The changes range from the Addendum to the COA and other new agreements, to the withdrawal of DWR’s certification of consistency of the Project with the Delta Plan, to the new federal policies to maximize exports. Again, this Project is now “a riddle wrapped in a mystery inside an enigma.”

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

Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, 88.

A subsequent EIR must be prepared to analyze the changes and reveal the unknowns. Otherwise, the State Water Board and the parties will be proceeding in the dark. The CEQA and NEPQ required task for DWR and Reclamation is to reveal, not to conceal.

There is no Accurate, Stable, and Finite Project Description

Pursuant to CEQA,

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

Now, a subsequent EIR must be prepared to provide the required accurate, stable, and finite project description given the changes in the Project and the circumstances.

Moreover, pursuant to CEQA an EIR:

must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.

And:

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

A subsequent EIR is necessary to provide accurate and complete information on water sources and the impacts of providing water for the Project.

The environmental review of the COA and other Changes is Segmented from environmental review of the Change Petition

In addition, CEQA prohibits the piecemealing or segmentation of environmental analysis.

A lead agency must not piecemeal the analysis of several smaller projects that are part of a larger

project, in order to ensure “that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.” *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592. Pertinent analysis of the changes in the project and circumstances set forth above, must be addressed in a subsequent EIR. It is not lawful under CEQA to isolate the change petition issues in a vacuum from changes to the COA and the new federal policies to maximize exports. CEQA’s policy is to conduct integrated review. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 939, 942.

REQUESTS FOR OFFICIAL NOTICE AND ATTACHMENTS

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. Official notice is requested of the following documents referred to above:

December 12, 2018, Addendum to the COA Agreement between the United States and the State of California, attached as Exhibit A to the December 17, 2018 letter from Local Agency of the North Delta et al., incorporated in this letter at p. 2. The Addendum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code § 452 (c.) The Addendum is also an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.)

December 18, 2018, Westlands Water District Board of Directors Meeting, Item 5, attached as exhibit B to the December 17, 2018 letter from Local Agency of the North Delta et al., incorporated in this letter at p. 2. The document’s contents are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, subject to judicial notice under Evidence Code § 452(h.)

December 12, 2018, Memorandum of Agreement, between DWR and Reclamation, attached as Exhibit D to the December 17, 2018 letter from Local Agency of the North Delta et al., incorporated in this letter at p. 2. The Memorandum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code § 452 (c.) The Memorandum

is also an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.)

November 15, 2018, DSC Report, Agenda Item 1, attached hereto, referred to above at p. 2.

The Report is an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.) The Report's contents are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, subject to judicial notice under Evidence Code § 452(h.)

December 7, 2018, letter from DWR Director to DSC Chair, attached hereto, referred to above at p. 3. The letter is an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.)

August 17, 2018, Secretary of the Interior Memorandum, attached hereto, referred to above at p.3. The Memorandum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code § 452 (c.)

October 19, 2018, Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West, attached hereto, referred to above at p. 3. The Memorandum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code §452 (c.)

CONCLUSION

In conclusion, a subsequent EIR is necessary to address changes in the Project and surrounding circumstances ranging from the Addendum to the COA, to the new federal policies to maximize exports. That is necessary before a meaningful Hearing on the Petition can resume. Respectfully submitted,



E. Robert Wright, Senior Counsel
Friends of the River

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 document(s):

LETTER DATED DECEMBER 17, 2018 AND ATTACHMENTS, by protestants Friends of the River and Sierra Club California

To be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service List for the California Water Fix Petition Hearing, dated October 30, 2018, 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 December 17, 2018.



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



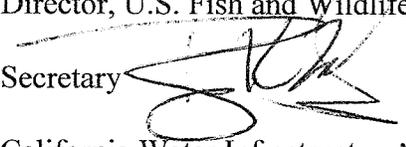
THE SECRETARY OF THE INTERIOR

WASHINGTON

AUG 17 2018

Memorandum

To: Solicitor
Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary – Water and Science
Commissioner, Bureau of Reclamation
Director, U.S. Fish and Wildlife Service

From: Secretary 

Subject: California Water Infrastructure⁹

Leadership in California and at the Department of the Interior (Department) has spent decades evaluating the need to improve the water infrastructure and water delivery situation in California's Central Valley Project. While the Federal and State Governments have engaged in negotiations, our infrastructure has degraded. Communities have been harmed, productive land has stood fallow, and the populations of fish these particular water delivery limitations were intended to protect have seen no meaningful improvements.

The Central Valley Project is an important project operated by the Bureau of Reclamation. It is a major water source for farms, families, industry, and fish and wildlife in California. It is a significant contributor in facilitating California's ability to produce more than a third of our Nation's vegetables and two-thirds of our fruits and nuts.

Today, the Central Valley Project is in such a desperate state of disrepair that it cannot effectively achieve its design capacity operations without the assistance of California's own State Water Project to move water. Beyond neglecting our infrastructure, actions taken by the various agencies have significantly reduced the water available for delivery south of the Sacramento-San Joaquin River Delta.

The State of California is now proposing additional unacceptable restrictions that further reduce the Department's ability to deliver water to Federal contractors. Our operational needs and our environmental regulations must innovate, incorporate best science, implement best practices, and produce greater reliability and better stewardship. The time for action is now.

Therefore, I direct:

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

- better incorporating best science into real-time and long-term decision making;
 - streamlining the Endangered Species Act consultation and National Environmental Policy Act processes to more expeditiously modify long-term Central Valley Project operations;
 - moving to construction of new water storage;
 - identifying and making infrastructure improvements necessary to independently operate the Central Valley Project;
 - reassessing legal interpretations, which were adopted prior to the existence of the significant constraints on Central Valley Project operations and those enacted since 2009;
 - resolving issues with the State of California regarding the Coordinated Operations Agreement, the California Water Fix, and the potential enhancement of Shasta Dam;
 - preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people; and
 - coordinating between the National Marine Fisheries Service and the U.S. Fish and Wildlife Service.
- Within 10 days after receiving the initial plan of action, the Office of the Deputy Secretary shall provide me with a final recommendation for action. Such a recommendation must include specific objectives and implementation timelines, identify the accountable official, and be designed to meet any legal procedural requirements by the earliest possible date.



PRESIDENTIAL MEMORANDA

Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West

LAND & AGRICULTURE | Issued on: October 19, 2018



MEMORANDUM FOR THE SECRETARY OF THE INTERIOR
THE SECRETARY OF COMMERCE
THE SECRETARY OF ENERGY
THE SECRETARY OF THE ARMY
THE CHAIR OF THE COUNCIL ON ENVIRONMENTAL QUALITY

Subject: Promoting the Reliable Supply and Delivery of Water in the West

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. Policy. During the 20th Century, the Federal Government invested enormous resources in water infrastructure throughout the western United States to reduce flood risks to communities; to provide reliable water supplies for farms, families, businesses, and fish and wildlife; and to generate dependable hydropower. Decades of uncoordinated, piecemeal regulatory actions have diminished the ability of our Federal infrastructure, however, to deliver water and power in an efficient, cost-effective way.

Unless addressed, fragmented regulation of water infrastructure will continue to produce inefficiencies, unnecessary burdens, and conflict among the Federal Government, States, tribes, and local public agencies that deliver water to their citizenry. To meet these challenges, the Secretary of the Interior and the Secretary of Commerce should, to the extent permitted by law, work together to minimize unnecessary regulatory burdens and foster more efficient decision-making so that water projects are better able to meet the demands of their authorized purposes.

Sec. 2. Streamlining Western Water Infrastructure Regulatory Processes and Removing Unnecessary Burdens. To address water infrastructure challenges in the western United States, the Secretary of the Interior and the Secretary of Commerce shall undertake the following actions:

(a) Within 30 days of the date of this memorandum, the Secretary of the Interior and the Secretary of Commerce shall:

(i) identify major water infrastructure projects in California for which the Department of the Interior and the Department of Commerce have joint responsibility under the Endangered Species Act of 1973 (ESA) (Public Law 93-205) or individual responsibilities under the National Environmental Policy Act of 1969 (NEPA) (Public Law 91-190); and

(ii) for each such project, work together to facilitate the designation of one official to coordinate the agencies' ESA and NEPA compliance responsibilities. Within the 30-day time period provided by this subsection, the designated official shall also identify regulations and procedures that potentially burden the project and develop a proposed plan, for consideration by the Secretaries, to appropriately suspend, revise, or rescind any regulations or procedures that unduly burden the project beyond the degree necessary to protect the public interest or otherwise comply with the law. For purposes of this memorandum, "burden" means to unnecessarily obstruct, delay, curtail, impede, or otherwise impose significant costs on the permitting, utilization, transmission, delivery, or supply of water resources and infrastructure.

(b) Within 40 days of the date of this memorandum, the Secretary of the Interior and the Secretary of Commerce shall develop a timeline for completing applicable environmental compliance requirements for projects identified under section 2(a)(i) of this memorandum. Environmental compliance requirements shall be completed as expeditiously as possible, and in accordance with applicable law.

(c) To the maximum extent practicable and consistent with applicable law, including the authorities granted to the Secretary of the Interior and the Secretary of Commerce under the **Water Infrastructure Improvements for the Nation Act** (Public Law 114-322):

(i) The Secretary of the Interior and the Secretary of Commerce shall ensure that the ongoing review of the long-term coordinated operations of the Central Valley Project and the California State Water Project is completed and an updated Plan of Operations and Record of Decision is issued.

(ii) The Secretary of the Interior shall issue final biological assessments for the long-term coordinated operations of the Central Valley Project and the California State Water Project not later than January 31, 2019.

(iii) The Secretary of the Interior and the Secretary of Commerce shall ensure the issuance of their respective final biological opinions for the long-term coordinated operations of the Central Valley Project and the

California State Water Project within 135 days of the deadline provided in section 2(c)(ii) of this memorandum. To the extent practicable and consistent with law, these shall be joint opinions.

(iv) The Secretary of the Interior and the Secretary of Commerce shall complete the joint consultation presently underway for the Klamath Irrigation Project by August 2019.

(d) The Secretary of the Interior and the Secretary of Commerce shall provide monthly updates to the Chair of the Council on Environmental Quality and other components of the Executive Office of the President, as appropriate, regarding progress in meeting the established timelines.

Sec. 3. Improve Forecasts of Water Availability. To facilitate greater use of forecast-based management and use of authorities and capabilities provided by the Weather Research and Forecasting Innovation Act of 2017 (Public Law 115-25) and other applicable laws, the Secretary of the Interior and the Secretary of Commerce shall convene water experts and resource managers to develop an action plan to improve the information and modeling capabilities related to water availability and water infrastructure projects. The action plan shall be completed by January 2019 and submitted to the Chair of the Council on Environmental Quality.

Sec. 4. Improving Use of Technology to Increase Water Reliability. To the maximum extent practicable, and pursuant to the Reclamation Wastewater and Groundwater Study and Facilities Act (Public Law 102-575, title XVI), the Water Desalination Act of 1996 (Public Law 104-298), and other applicable laws, the Secretary of the Interior shall direct appropriate bureaus to promote the expanded use of technology for improving the accuracy and reliability of water and power deliveries. This promotion of expanded use should include:

(a) investment in technology and reduction of regulatory burdens to enable broader scale deployment of desalination technology;

(b) investment in technology and reduction of regulatory burdens to enable broader scale use of recycled water; and

(c) investment in programs that promote and encourage innovation, research, and development of technology that improve water management, using best available science through real-time monitoring of wildlife and water deliveries.

Sec. 5. Consideration of Locally Developed Plans in Hydroelectric Projects Licensing. To the extent the Secretary of the Interior and the Secretary of Commerce participate in Federal Energy Regulatory Commission licensing activities for hydroelectric projects, and to the extent permitted by law, the Secretaries shall give appropriate consideration to any relevant information available to them in locally developed plans, where consistent with the best available information.

Sec. 6. Streamlining Regulatory Processes and Removing Unnecessary Burdens on the Columbia River Basin Water Infrastructure. In order to address water and hydropower operations challenges in the Columbia River

Basin, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Energy, and the Assistant Secretary of the Army for Civil Works under the direction of the Secretary of the Army, shall develop a schedule to complete the Columbia River System Operations Environmental Impact Statement and the associated Biological Opinion due by 2020. The schedule shall be submitted to the Chair of the Council on Environmental Quality within 60 days of the date of this memorandum.

Sec. 7. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of the Interior is hereby authorized and directed to publish this memorandum in the *Federal Register*.

DONALD J. TRUMP

COUNCIL WORKSHOP

Appeals of the Certification of Consistency by the California Department of Water Resources for the California WaterFix Project (Certification Number C20185)

Summary: The Council will conduct a public workshop to review and discuss a staff draft Determination related to appeals received on the California WaterFix project Certification of Consistency. Staff is presenting this version of the Determination to the Council, interested parties, and the public to discuss recommended edits and revisions prior to releasing a proposed Determination for Council consideration and action at a hearing during the December 20 - 21, 2018 Council meeting¹.

The Delta Stewardship Council (Council) will conduct a public workshop on November 15-16, 2018 to receive information from staff and seek input from interested parties and the public regarding a staff draft Determination prepared in response to appeals received on the Certification of Consistency with the Delta Plan submitted by the California Department of Water Resources (Department) for the California WaterFix project (Certification Number C20185). A copy of the staff draft Determination is provided as Attachment 1 to this report.

As summarized in the conclusion to this report and in the attached staff draft Determination, staff recommends that the Council conclude that substantial evidence does not exist in the record to support the Department's findings that California WaterFix is consistent with the Delta Plan. Staff further recommends that the Council remand the matter to the Department for reconsideration, pursuant to Water Code section 85225.25. No Council action will be taken at the November 15-16 workshop.

Background

This report provides an overview of the Delta Reform Act and the requirements for the Council to develop and implement an enforceable long-term management plan for the Delta, the Council's covered action authority, and the certification and appeals process. We then discuss the covered action at issue here (California WaterFix), and the process and analysis completed by Council staff that led to the draft staff recommendation regarding the project certification and appeals.

The report concludes by describing the upcoming November 15-16 workshop.

Delta Reform Act, Delta Plan and Covered Action Authority

The Delta Reform Act of 2009 established that it was the policy of the State of California "to achieve the coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." It further established that "the coequal goals shall be achieved in a manner that protects and enhances the unique cultural,

¹ A public notice for the December 2018 Council hearing will be issued shortly.

recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Water Code section 85054.)

The Delta Reform Act also stated that it was the policy of the State to “reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” (Water Code section 85021.)

The Delta Reform Act also established the Delta Stewardship Council in part to further the State’s policy goals by developing, adopting, and implementing a comprehensive management plan for the Delta (Delta Plan). The Act granted the Council specific regulatory and appellate authority over certain actions that take place in whole or in part in the Sacramento-San Joaquin Delta (Delta) and Suisun Marsh, which are referred to in the Act as “covered actions.”

The Council exercises that authority through the Delta Plan, which includes regulatory policies intended to meet objectives that the Legislature said were inherent in the coequal goals: manage the Delta’s water and environmental resources and the water resources of the State over the long term; protect and enhance the unique cultural, recreational, and agricultural values of the Delta as an evolving place; restore the Delta ecosystem; promote statewide water conservation and water use efficiency; improve the water conveyance system and expand statewide water storage; and reduce risks to people, property and State interests in the Delta.

State and local agencies are required to demonstrate consistency with these regulatory policies when carrying out, approving, or funding a covered action prior to initiating the implementation of that action, by submitting to the Council a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan. (Water Code section 85225.) On July 27, 2018, the Department submitted a Certification of Consistency (Certification) to the Council regarding the California WaterFix.

Certification and Appeals Process Overview

The Delta Reform Act establishes a process for State and local public agencies to follow when determining whether a project is a covered action, as well as a process for submitting a certification of consistency with detailed findings to the Council. As part of this process, Department and Council staff conducted numerous early consultation meetings for the California WaterFix project. (See Water Code section 85225.5.) On July 17, 2018, the Department ended the early consultation process, and posted a draft copy of the Certification on its website for a 10-day public review period. The Council placed itself under ex parte communication restrictions on the same day. Ten days later, on July 27, 2018, the Department electronically submitted the Certification to the Council on its covered actions website, along with the corresponding record. The Department included public comments received during the 10-day review period within the record submitted to the Council. The Council notified interested parties on its listserv that the Certification was submitted and posted a copy of the notice on its webpage.

The Delta Reform Act allows any person who claims that a covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on one or both of the State’s coequal goals for the Delta or implementation of

government-sponsored flood control programs to reduce risks to people and property in the Delta, to file an appeal of a certification of consistency submitted to the Council. (Water Code section 85225.10, subdivision (a)). The Council received nine appeals of the California WaterFix project Certification, which staff deemed filed on August 27, 2018. (See Council Administrative Procedures Governing Appeals [Council Appeals Procedures] section 7.) The Department submitted additional items to the record, and certified the record complete on September 7, 2018. (See Council Appeals Procedures section 4, subdivision (b).)

Water Code section 85225.20 requires the Council to conduct a hearing on appeals within 60 days of the date of filing, and to make a decision on the appeal within 60 days of the hearing. The Council issued a notice of public hearing on September 14, 2018, followed by a September 28, 2018 supplemental notice containing questions to the Department and parties submitting appeals (appellants). The questions were intended to help the parties focus on specific substantial evidence in the record supporting their arguments. The Council then conducted a hearing on the appeals on October 24 – 26, 2018.

Hearing testimony and written responses received from the Department, the Delta Protection Commission (Commission), and appellants by October 15, 2018 are incorporated in the staff draft Determination. The Council is conducting today's workshop to receive information from staff, and seek input from the parties, the Commission, and the public regarding the staff draft Determination (Attachment 1) prior to releasing final proposed versions of that document for Council consideration and action at a hearing during the December 20-21, 2018 Council meeting.

Proposed Project: California WaterFix

The California WaterFix proposes large physical and operational improvements to the State Water Project in the Delta: new intake facilities in the north Delta, expanded south Delta intake facilities, and underground tunnels to connect the two.

The new north Delta intake facilities will consist of three separate intakes along the east bank of the Sacramento River between Clarksburg and Courtland. These fish-screened intakes will divert water through a complex sedimentation system before conveying it to two large tunnels. These tunnels, up to 40 feet in diameter, once complete will have the capacity to convey up to 9,000 cubic-feet per second. The water will travel by gravity through the tunnels to expanded south Delta intake facilities. These facilities will undergo physical improvements to isolate water flowing from the north Delta and manage the relative quantities diverted from the north and south. Diversions from existing south Delta facilities will also continue.

California WaterFix would enable the State Water Project to operate using a dual-conveyance system: water would primarily be diverted from the north Delta, with the option of diverting water from the south Delta based on conditions. The California WaterFix would also include mitigation measures, such as fish screens, habitat restoration, and management activities. The Department maintains that, through construction and mitigation, the California WaterFix could reduce the State Water Project's ongoing reliance on diversions from the south Delta, increase

the flexibility of operations in order to protect fish, and capture more water during times of high flow.

Figure 1 on the following page identifies the project location and key project features.

It should be noted that the Department is completing several parallel and overlapping review and approval processes for the California WaterFix project. These include preparation of a Draft Supplemental Environmental Impact Report/Environmental Impact Statement (DSEIR/EIS) which the Department released in July 2018 that describes proposed project modifications; Change in Point of Diversion hearings before the State Water Resources Control Board (SWRCB hearings) dating back to 2015; and contract extensions related to the State Water Project (SWP) and California WaterFix (contracts) currently under consideration. To varying degrees, these ongoing processes are both referenced by appellants as part of the project description, and offered as evidence by the Department or appellants to support or challenge a finding of consistency with the Delta Plan.

The Department has submitted materials and testified that the project it has certified is limited to the California WaterFix project as described in the 2017 Final Environmental Impact Report/Environmental Impact Statement (FEIR/EIS). Thus, to the extent that the Department or appellants reference the DSEIR/EIS, documents or testimony submitted in the SWRCB hearings after July 27, 2018, and/or the contracts as a part of the project description under appeal, staff recommends that the Council not consider such arguments because the Department has not included them in the project description before the Council for consideration. The attached staff draft Determination identifies that review of the Certification based on the project presented to the Council at this time is not premature.

Certification of Consistency

After posting the draft Certification on its website for 10 days (See Council Appeals Procedures section 3), the Department submitted the Certification to the Council via its online system on July 27, 2018. The Certification is available on the Council's website at https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105. The Department's Certification provides background and descriptive information about the project and offers an overview of the Department's detailed findings pertaining to consistency of the California WaterFix project with the Delta Plan. The Certification also discusses the relationship between California WaterFix and the coequal goals. In the Certification, the Department made findings regarding consistency with the Delta Plan regulatory policies as identified in **Table 1**.

The Certification cites to portions of the record that the Department offers as demonstrating substantial evidence in support of the Certification.

Table 1: Department of Water Resources' Consistency Findings by Delta Plan Regulatory Policy

Delta Plan Policy	Policy Title	Department's Finding
G P1 (b)(2) (23 CCR section 5002(b)(2))	Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)	Consistent
G P1 (b)(3) (23 CCR section 5002(b)(3))	Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science)	Consistent
G P1 (b)(4) (23 CCR section 5002(b)(4))	Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)	Consistent
WR P1 (23 CCR section 5003)	Reduce Reliance on the Delta through Improved Regional Water Self-Reliance	Consistent
WR P2 (23 CCR section 5004)	Transparency in Water Contracting	Not Applicable
ER P1 (23 CCR section 5005)	Delta Flow Objectives	Consistent
ER P2 (23 CCR section 5006)	Restore Habitats at Appropriate Elevations	Consistent
ER P3 (23 CCR section 5007)	Protect Opportunities to Restore Habitat	Consistent
ER P4 (23 CCR Section 5008)	Expand Floodplains and Riparian Habitats in Levee Projects	Consistent
ER P5 (23 CCR Section 5009)	Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species	Consistent
DP P1 (23 CCR section 5010)	Locate New Urban Development Wisely	Not Applicable
DP P2 (23 CCR section 5011)	Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	Consistent
RR P1 (23 CCR section 5012)	Prioritization of State Investments in Delta Levees and Risk Reduction	Consistent
RR P2 (23 CCR section 5013)	Require Flood Protection for Residential Development in Rural Areas	Not Applicable
RR P3 (23 CCR section 5014)	Protect Floodways	Consistent
RR P4 (23 CCR section 5015)	Floodplain Protection	Consistent

Appeals

The nine appellants identified in **Table 2** submitted timely appeals of the Certification via the Council's online system, which Council staff deemed filed on August 27, 2018. **Table 2** also identifies Delta Plan policies substantively appealed by each appellant. Appellants substantively challenge the Certification's findings of consistency with 12 Delta Plan policies.

Table 2: Appellants and Delta Plan Policies Appealed

Appeal Number	Appellant Group	Delta Plan Policies Appealed
C20185-A1	North Coast Rivers Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, Winnemem Wintu Tribe	G P1(b)(2) G P1(b)(3) G P1(b)(4) WR P1 ER P1 ER P2 ER P3 ER P5 DP P2
C20185-A2	Save the California Delta Alliance	G P1(b)(2) G P1(b)(3) G P1(b)(4) WR P1 WR P2 ER P1 DP P2
C20185-A3	Friends of the River, California Sportfishing Protection Alliance, California Water Impact Network, Planning and Conservation League, AquAlliance, Environmental Water Caucus, Sierra Club California, Restore the Delta	G P1(b)(2) G P1(b)(3) G P1(b)(4) WR P1 ER P1 ER P2 ER P3
C20185-A4	North Delta CARES Action Committee	DP P2
C20185-A5	City of Stockton	G P1(b)(2) G P1(b)(3) WR P1
C20185-A6	Sacramento Regional County Sanitation District	DP P2
C20185-A7	San Joaquin County, Contra Costa County, Solano County, Yolo County, Local Agencies of the North Delta	GP 1(b)(2) GP 1(b)(3) GP 1(b)(4) WR P1 WR P2 ER P1 DP P2 RR P1
C20185-A8	Central Delta Water Agency, South Delta Water Agency	WR P1 ER P1
C20185-A9	County of Sacramento, Sacramento County Water Agency	GP 1(b)(3) GP 1(b)(4) WR P1 DP P2

Numerous appellants also allege inconsistency with Delta Plan Policy **GP 1(b)(1)**. This policy requires that a covered action be consistent with each Delta Plan policy that it implicates, but recognizes that in some cases, based upon the nature of the covered action, full consistency

with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals.

The appeals are available on the Council's website at:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105.

In addition to challenging the Department's Certification of Consistency with respect to Delta Plan regulatory policies, appellants also seek to supplement the Department's record, in accordance with Appeals Procedures sections 10 and 29. Staff's proposed draft Determination addresses these record requests for the Council's consideration.

As discussed in further detail in the draft staff Determination, the scope of the Council's review of the appeals is limited to whether or not the Certification submitted by the Department is supported by substantial evidence in the record before the Department (i.e., the "substantial evidence standard"). (Water Code section 85225.25.) Substantial evidence includes facts, reasonable assumptions based upon facts, and expert opinion supported by facts. It is reasonable, credible, and of solid value, representing evidence that a reasonable person might accept as adequate to support a conclusion. Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly erroneous or inaccurate. *Under this standard, the Council does not independently review the California WaterFix project to determine whether it is consistent with the Delta Plan.* The Council does not judge whether the Department made the "best" decision in its Certification.

The scope of the Council's review of consistency is also limited to the regulatory policies identified in the Delta Plan. The Council's authority related to covered actions does not extend to Delta Plan narrative, recommendations or performance measures, as none of these has regulatory effect.

The attached staff draft Determination addresses both procedural/legal issues presented by the parties and substantive issues raised by appellants regarding the Certification relative to each Delta Plan regulatory policy. To the extent possible, Council staff have consolidated similar issues and contentions presented by appellants, as described in the staff draft Determination.

Record

The Department began providing portions of the record supporting the Certification to the Council via its online system on July 27, 2018. The Department supplemented the record during the following weeks and certified it as full and complete on September 7, 2018, 10 days after the appeals were deemed filed by the Council. The record consists of more than 26,000 individual documents that were before the Department when it made its Certification. As identified in the record index provided by the Department, these documents generally consist of decision documents (e.g., notices, approval resolutions, California Environmental Quality Act (CEQA) findings), environmental impact documents (e.g., environmental impact reports and permits), draft and final Certification documents, and public comments on the draft Certification received

by the Department during the 10-day review period. The record has been available to the public on the Council's covered actions website since submission.

Under the Administrative Procedures, the Council or executive officer may add to the record if either determines that there are relevant documents that were before the Department when it made the Certification, but which were not included in the Department's record. (Appeals Procedures section 10.) The Council may also take official notice of generally accepted technical or scientific facts which would be useful for the Council's appeal review. (Appeals Procedures section 29.)

On October 18, 2018, in response to a request from Save the California Delta Alliance, Executive Officer Jessica Pearson invoked section 10 of the Appeals Procedures, and determined that the complete docket of the SWRCB hearings through July 27, 2018 was "before" the Department when it filed its Certification, and ordered the Department to add that docket to the record for this proceeding. The Department objected on October 22, 2018, arguing that only select portions of the SWRCB record that it cited in its Certification were "before" it. In response, Executive Officer Pearson offered the parties the opportunity to brief the matter, with submissions due by October 29, 2018, at noon. After reviewing the timely filed briefs on the matter, on October 30, 2018, Executive Officer Pearson ordered the Department to add the entire SWRCB hearing docket through July 27, 2018, to the record.

The staff draft Determination contains additional recommended Council rulings on record-admission requests and objections from parties under sections 10 and 29 of the Appeals Procedures received through the October 26, 2018 hearing. Any requests received after that date will be addressed in staff's proposed Determination for Council consideration and action at the December hearing.

Role of the Delta Protection Commission

The Commission has an important advisory role in Council proceedings. Under Public Resources Code section 29773, the Commission may review and provide comments to the Council on any significant project or proposed project within the scope of the Delta Plan that may affect the unique cultural, recreational, and agricultural values within the primary and secondary zones. The Council's Administrative Procedures also allow for the Commission to address the Council regarding appeals during the required public hearing. (See section 11.)

The Council received a letter from the Commission on October 16, 2018 regarding the California WaterFix project. This letter is available on the Council's website (under "Party Submittals") at: https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105. In its letter, the Commission offered comments and recommendations on Delta Plan Policies **DP P1**, **DP P2**, and **G P1**, related to cultural landscapes, cultural resources, legacy communities, recreation, and agriculture². The Commission also expressed concern regarding how the Department engaged with communities and consulted with local agencies

² It should be noted that while the Commission offers recommendations to the Council regarding Delta Plan Policy **DP P1**, Locate New Urban Development Wisely (23 CCR section 5010), no appellant challenged the Certification as inconsistent with this Delta Plan policy.

and the Commission regarding local land use and economic sustainability policies. The Commission also addressed the Council regarding these concerns at the public hearing described below.

Public Resources Code section 29773, subdivision (b) requires the Council to “take into consideration” Commission recommendations. If the Council, in its discretion, determines that a Commission recommendation “is feasible and consistent with the objectives of the Delta Plan,” the Council shall adopt the recommendation. Where applicable, the staff draft Determination discusses Commission comments considered by the Council related to appeals issues previously raised by appellants.

Hearing

On September 14, 2018, the Council issued a Notice of Public Hearing regarding the appeals for a hearing to be held on October 24-26, 2018 at the Ramada Inn in West Sacramento. In the Notice, the Council stated that it might issue additional guidance prior to the hearing in order to assist the parties in focusing their written and oral hearing presentations. On September 28, 2018, the Council issued a Supplement to the Notice of Public Hearing to the Department and appellants, requesting that in their written submittals they address certain questions identified by staff in its initial review of the appeals. The Department and appellants provided written responses to those questions on or around October 16, 2018. These responses are available on the Council’s website (under “Party Submittals”) at:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105. Numerous interested parties also sent the Council comment letters both in favor of and in opposition to the project in advance of, at, and following the hearing. These letters are available on the Council’s website (under “Public Comments”) at:
https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105.

At the hearing, the Department, most appellants, the Commission, and other persons provided written and/or oral testimony regarding the Certification and appeals. Transcripts of the hearing will be available on the Council’s website approximately 14 days following completion of the hearing. Video of the October 24–26, 2018 hearing is available at: <http://cal-span.org/static/meetings-DSC.php>.

Proposed Staff Draft Determination

At the conclusion of the hearing, Presiding Officer Chair Randy Fiorini directed Council staff to prepare draft findings regarding the appeals based on the record and comments received, and to schedule a public workshop to receive input on the draft findings. The Council announced the possibility of a workshop in the September 14, 2018 notice for the public hearing, and formally noticed today’s workshop on October 29, 2018. Staff released the attached draft Determination for public review as soon as possible after the hearing, on November 8, 2018. The notice states that the public comment period on the staff draft Determination will remain open through Monday, November 19 at noon.

For each substantive issue identified on appeal, staff reviewed and considered the Department’s Certification, the relevant appeals, the supporting record, parties’ written responses to the Council’s Supplemental Notice (i.e. questions to the parties), oral testimony offered by the Department, appellants, Commission, and public comments. Applying the substantial evidence standard of review, in the attached draft Determination staff has prepared proposed findings for each substantive challenge to the Certification raised on appeal.

Staff’s draft findings related to the 12 Delta Plan policies implicated by appeals are:

- the Department fails to demonstrate substantial evidence in the record to support its Certification’s findings that the California WaterFix project is consistent with five (5) Delta Plan policies,
- appellants fail to demonstrate that the Department’s record lacks substantial evidence in support of its Certification with respect to four (4) Delta Plan policies, and
- appellants fail to demonstrate that three (3) policies apply to the California WaterFix project.

Staff’s findings for each appealed Delta Plan policy are summarized in **Table 3** below.

Table 3: Preliminary Council Staff Findings for Staff Draft Determination by Delta Plan Policy

Delta Plan Policy	Substantial Evidence Supports Department’s Certification? ¹
<p>G P1 (b)(1) (23 CCR section 5002(b)(1)) Detailed Findings to Establish Consistency with the Delta Plan (Coequal Goals)</p>	<p>No</p>
<p><u>GP 1(b)(1) Summary:</u> The Department asserts infeasibility under Policy GP 1(b)(1) as an alternative approach to consistency for numerous policies within its Certification, but at the October 25, 2018 hearing, the Department clarified that it wishes to invoke these provisions for only two Delta Plan policies – Policy DP P1 and Policy WR P1. No appeal has asserted inconsistency with Policy DP P1. With regard to Policy WR P1, as discussed under that policy below, the Department states that consistency with the policy is infeasible due to water management planning statutory requirements, the limits of the Department’s authority, and the difficulty in either creating or assembling certain data required by the policy. The staff draft Determination concludes that none of these reasons supports a determination of infeasibility.</p>	
<p>G P1 (b)(2) (23 CCR section 5002(b)(2)) Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)</p>	<p>Yes</p>
<p><u>GP 1(b)(2) Summary:</u> Appellants fail to demonstrate that the Department’s record lacks substantial evidence in support of its Certification. The Department provides information in the FEIR/EIS and a mitigation crosswalk between Delta Plan mitigation measures and California WaterFix project mitigation measures. Appellants assert that the Department’s measures are</p>	

Delta Plan Policy	Substantial Evidence Supports Department's Certification? ¹
<p>vague and unenforceable, are deferred, do not address water quality impacts to the City of Stockton, or are not comparable. However, the assertions regarding vagueness and enforceability do not undermine substantial evidence offered by the Department in support of the equivalency of its mitigation measures with those adopted by the Council. Many of the Council's required measures must be implemented prior to construction, not at time of certification. There is no Delta Plan measure specific to water quality impacts to Stockton; and, substantial evidence supports that California WaterFix project mitigation measures are comparable to Delta Plan mitigation measures.</p>	
<p>G P1 (b)(3) (23 CCR section 5002(b)(3)) Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science)</p>	<p>No</p>
<p><u>G P1 (b)(3) Summary:</u> The Department fails to demonstrate substantial evidence in the record to support its findings that California WaterFix is consistent with the Delta Plan's Best Available Science timeliness criterion. Substantial evidence in the record demonstrates that updated climate change information was reasonably available to the Department before it released its Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS) and FEIR/EIS for the project, and the Department has not supported its conclusion in the Certification that such updated information would not have changed its projections, impact analyses, or management decisions.</p>	
<p>G P1 (b)(4) (23 CCR section 5002(b)(4)) Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)</p>	<p>Yes</p>
<p><u>G P1 (b)(4) Summary:</u> Appellants fail to demonstrate that the Department's record lacks substantial evidence in support of its Certification. In some cases, appellants make general allegations regarding adaptive management, but fail to allege inconsistency with the Council's adaptive management policy requirements outlined in Delta Plan Appendix 1B. In other cases, issues raised by appellants address perceived deficiencies in only one component of the Department's submittal (the Biological Opinion Adaptive Management Plan), which are adequately addressed in other parts of the Project-wide Adaptive Management Plan (PAMP) the Department submitted as part of its Certification.</p>	
<p>WR P1 (23 CCR section 5003) Reduce Reliance on the Delta through Improved Regional Water Self-Reliance</p>	<p>No</p>
<p><u>WR P1 Summary:</u> The Department fails to identify substantial, quantitative evidence demonstrating that water suppliers receiving water as a result of the project have adequately contributed to reduced reliance on the Delta through improved regional self-reliance and that this failure did not significantly cause the need for the project.</p> <p>The Department provides extensive information regarding efforts that certain water suppliers have undertaken to reduce their reliance on the Delta. Appellants argue that California</p>	

Delta Plan Policy	Substantial Evidence Supports Department's Certification? ¹
<p>WaterFix must satisfy the specific requirement of subdivision (a)(1) of the policy, including required quantitative data, in order to be consistent.</p> <p>The Department also states that the need for California WaterFix was not significantly caused by a failure to adequately reduce reliance, but rather by factors that pre-date and exist independently of the reduced reliance policy. Appellants dispute this conclusion, contending that Delta exports resulted in the environmental problems that DWR now maintains are causing the need for California WaterFix.</p> <p>Finally, the Department states that the export of water will not have a significant adverse environmental impact because the volume of Delta exports would remain about the same or decrease slightly compared to exports under existing conditions. Appellants dispute this by taking issue with the volume of projected exports and the Department's assertion that no significant change in the amount of water exported will ensure that the project will not have significant adverse environmental impact in the Delta. In its supplemental response to hearing questions, the Department notes that California WaterFix will have a significant adverse environmental impact due to the project's effect on the earliest stages of American Shad and striped bass.</p>	
<p>WR P2 (23 CCR section 5004) Transparency in Water Contracting</p>	<p>n/a</p>
<p><u>WR P2 Summary:</u> The State Water Project Contract Amendments are not part of the project description certified by the Department, therefore WR P2 does not apply. When the Department takes action on the contract amendments, the Council's expectation is that the Department will submit a certification of consistency, assuming the contract amendments satisfy the criteria for covered actions.</p>	
<p>ER P1 (23 CCR section 5005) Delta Flow Objectives</p>	<p>No</p>
<p><u>ER P1 Summary:</u> The Department fails to demonstrate substantial evidence in the record to support its findings that the project is consistent with the Delta Plan with respect to Delta flow objectives. The Certification offers two main sources of evidence: modeling studies and a historical record of compliance. Appellants assert that the Department does not comply with the SWRCB Decision 1641 (D-1641) export/inflow ratio requirement and does not account for relaxation of water quality standards when reporting historic compliance, among other issues. The historical record is meant to show that the Department can use real-time operations to meet water quality standards at a greater rate than suggested by monthly models. However, neither the models nor the historical record demonstrate compliance with SWRCB Decision 1641 (D-1641), which is the applicable Delta flow objective at the time of certification. In addition, the Department's model provides no evidence that California WaterFix would be operated to meet D-1641's export/inflow ratio with the inflow measured at Freeport, as required by D-1641.</p>	

Delta Plan Policy	Substantial Evidence Supports Department's Certification? ¹
ER P2 (23 CCR section 5006) Restore Habitats at Appropriate Elevations	n/a
<p><u>ER P2 Summary:</u> The Department's certification commits to fulfill habitat restoration obligations described in multiple Environmental Commitments included as part of the project description. The Certification does not identify the specific locations for all of the commitments, as the Department has not settled upon the appropriate sites yet, and therefore it is not possible to document the elevation being proposed for each specific site. When the Department selects sites and is prepared to undertake habitat restoration activities, the Council's expectation is that the Department will submit certifications of consistency for those activities, assuming they satisfy the criteria for covered actions. Therefore, Policy ER P2 does not apply to the project before the Council.</p>	
ER P3 (23 CCR section 5007) Protect Opportunities to Restore Habitat	Yes
<p><u>ER P3 Summary:</u> Appellants fail to cite substantial evidence demonstrating that a reduction of freshwater flows or mitigation measures for temporary project impacts would result in significant adverse impacts to opportunities to restore habitat. The Department acknowledges both temporary and permanent project impacts to Priority Habitat Restoration Areas as defined in Policy ER P3. However, the Department demonstrates substantial evidence that sites affected by temporary project impacts would be returned to previous conditions, and that permanent project impacts would not result in a significant adverse impact to the opportunity to restore habitat.</p>	
ER P5 (23 CCR Section 5009) Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species	Yes
<p><u>ER P5 Summary:</u> Appellants fail to demonstrate substantial evidence in the record that the California WaterFix project does not consider the potential for new introductions of nonnative invasive species to occur. The Department acknowledges potential for project construction and habitat restoration actions to open new habitat to nonnative invasive species already present in the system. However, through numerous enforceable commitments, mitigation measures, permit requirements, habitat restoration adaptive management actions, and invasive species programs, the Department demonstrates substantial evidence that it has considered and will avoid new introductions, including a specific barge operations plan, monitoring requirements, and a commitment to fund efforts by the Division of Boating and Waterways to treat invasive aquatic vegetation in the Delta.</p>	
DP P2 (23 CCR section 5011) Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	No
<p><u>DP P2 Summary:</u> The Department fails to demonstrate substantial evidence in the record to support its findings that the project is consistent with respect to compatibility with local land use plans, conflicts with land uses in existing Delta communities, conflicts with existing land</p>	

Delta Plan Policy	Substantial Evidence Supports Department's Certification? ¹
<p>uses due to impacts on cultural and historical resources, conflicts with existing Delta parks and recreation uses, traffic impacts, and conflicts with existing land uses due to noise impacts. For many of these issues, the Department finds that the project would result in significant and unavoidable impacts. Such findings may be sufficient for purposes of compliance with the California Environmental Quality Act (CEQA). However, they do not necessarily demonstrate that the Department has reduced the resulting conflicts with existing or planned Delta land uses to the extent feasible, as the Delta Plan requires.</p> <p>The Department's Certification also acknowledges project impacts to visual and aesthetic resources, public health and hazards, and wastewater discharge facilities. For these issues, the Department identifies substantial evidence in the record showing how the project would avoid or reduce resulting conflicts to the extent feasible. In addition, the Department identifies substantial evidence in the record showing consideration of comments from reclamation districts.</p> <p>Regarding Delta agricultural land conflicts, appellants fail to demonstrate that the Department's commitments to prepare Agricultural Land Stewardship Plans (ALSPs) and other related commitments are not substantial evidence supporting its certification. Where feasible, these commitments would avoid and reduce conflicts related to agricultural land conversion through working with farmers to continue agricultural production during construction, restoring agricultural land after construction, and offering financial and technical support for best management practices on farms. It should be noted that these measures only reduce and avoid conflicts associated with farmland conversion. They do not address other community land uses or economic conditions in legacy Delta communities that rely on agriculture. On this latter topic, the Department fails to demonstrate substantial evidence in the record to support its findings.</p>	
<p>RR P1 (23 CCR section 5012) Prioritization of State Investments in Delta Levees and Risk Reduction</p>	<p>n/a</p>
<p><u>RR P1 Summary:</u> The Department finds that the project is consistent with Policy RR P1. Appellant San Joaquin County, et al., asserts that the project is inconsistent with a portion of the state investment priorities set forth in Policy RR P1, and thus is inconsistent with the policy as a whole. The staff draft Determination recommends that the Council find that Policy RR P1 does not apply, because the project is neither a flood risk management project, nor a discretionary state investment as described in the policy. Specifically, California WaterFix is not a flood risk management project, since the project objectives do not include managing flood risk and any modifications to levees would be completed to ensure that there will be no change in flood risk as a result of the project. Moreover, California WaterFix is not a discretionary state investment, since it will not be funded by programs designed to improve Delta flood risk management, but instead by participating water contractors.</p>	

Note:

1. No = Department failed to demonstrate substantial evidence in the record to support its findings
 Yes = appellants failed to demonstrate that the Department's record lacked substantial evidence
 n/a = appellants failed to demonstrate that the policy applies to the project

Staff Recommendation

Because the Department failed to demonstrate consistency with aspects of Delta Plan Policy **G P(1)(b)(1)**, Delta Plan Policy **G P(1)(b)(3)**, Delta Plan Policy **WR P1**, Delta Plan Policy **ER P1**, and Delta Plan Policy **DP P2**, staff recommends that the Council remand the matter to the Department for reconsideration, pursuant to Water Code section 85225.23.

Today's Workshop

Today's workshop provides an opportunity to affirm or modify the staff draft Determination prior to considering and taking action on a proposed Determination at the hearing during the December 20-21, 2018 Council meeting. At the workshop, Council staff will summarize the Certification and appeals process for the California WaterFix project; and present the content of the staff draft Determination for each applicable regulatory policy, including staff's recommended findings. That presentation will also include staff's recommendations for addressing (1) legal arguments raised by the parties that do not apply to specific Delta Plan policies, and (2) record-admission requests. Following the staff presentation, the Department, the Commission, and each appellant will have an opportunity to address, and respond to questions from, the Council. No action will be taken by the Council at the workshop.

Throughout the remainder of the workshop, staff will be available to the Council to answer questions about the draft findings and discuss potential modifications to staff's draft Determination. Members of the public will have an opportunity to address the Council after Council discussion. Following public comment, the Council may provide direction to staff to prepare a proposed Determination for consideration and decision at its hearing during the December 20-21, 2018 meeting. That proposed Determination will be circulated for public review in advance of the December meeting.

Fiscal Information

Not applicable.

List of Attachments

Attachment 1: Staff draft Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for California WaterFix

Contact

Jeff Henderson, AICP
Deputy Executive Officer

waterfixcert@deltacouncil.ca.gov

Dan Constable
Senior Environmental Scientist

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



December 7, 2018

Mr. Randy Fiorini, Chair
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

Re: Certification of Consistency for the California WaterFix - C20185

Dear Chair Fiorini:

On November 15, 2018, the Delta Stewardship Council (Council) held a workshop on the staff-prepared Draft Determination Regarding Appeals of the Certification of Consistency for the California WaterFix. At the workshop, after receiving comments on the staff's draft Determination, you encouraged the Department of Water Resources (DWR) to "consider withdrawing the Certification of Consistency." In your statement you relayed your conclusions that DWR has "filed its Certification of Consistency before it was ready to demonstrate consistency with the Delta Plan."

While DWR firmly believes the timing of filing the Certification of Consistency for WaterFix was appropriate based on the thorough record that had been prepared for the project, and that this record more than adequately supports the findings that WaterFix is consistent with the Delta Plan Policies, DWR appreciates that there are unresolved issues related to interpretation of the requirements of the Delta Reform Act and Delta Plan policies. Therefore, DWR is hereby withdrawing the Certification of Consistency for WaterFix that was filed on July 27, 2018. As a part of this withdrawal, DWR requests that the Council dismiss all appeals of the WaterFix certification of consistency that were deemed timely filed on August 27, 2018.

Sincerely,

A handwritten signature in blue ink that reads "Karla A. Nemeth".

Karla A. Nemeth
Director

cc: Gary Lippner, Deputy Director, Delta Conveyance Office, Department
of Water Resources
DSC WaterFix Service List (October 11, 2018)