State of California State Water Resources Control Board

DIVISION OF WATER RIGHTS

P.O. Box 2000, Sacramento, CA 95812-2000

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PROTEST– PETITION

This form may also be used for objections

PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT CHANGE OR TRANSFER ON

APPLICATION see fn. 1 below PERMIT ____[1]_below_____ LICENSE __1 below

OF _DWR and Reclamation for California WaterFix project

We, E. Robert Wright, Senior Counsel for Friends of the River, 1418 20th Street, Suite 100, Sacramento, California, 95811, bwright@friendsoftheriver.org , (916) 442-3155 x207, and Kathryn Phillips, Director, Sierra Club California, kathryn.phillips@sierraclub.org , (916) 557-1102 have carefully read: the October 30, 2015 Notice of Petition requesting changes in water rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project

Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

Protest by Friends of the River and Sierra Club California based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS (Prior right protests should be completed in the section below):

X the proposed action will not be within the State Water Resources Control Board's jurisdiction.
X not best serve the public interest.
X be contrary to law.
X have adverse environmental impacts.

State facts which support the foregoing allegations

The new upstream diversion for the Water Fix Water Tunnels would unlawfully worsen already existing water quality violations in the Delta and adversely modify designated critical habitat for endangered and threatened species of fish. The facts supporting the above allegations are set forth in the attached supplemental sheets.

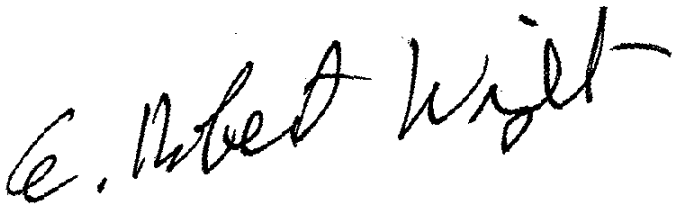
[1] Petition for diversion and rediversion submitted by DWR and the Bureau applies to Permits 16478, 16479, 16481, and 16482 and 16483 (Applications 5630, 14443, 14445A, and 17512, respectively) of the Department of Water Resources for the State Water Project; and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722, 12723, respectively) of the United States Bureau of Reclamation for the Central Valley Project.

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

This protest may be disregarded and dismissed if the Petition is withdrawn and the State Water Board terminates consideration of the Petition. 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 logical decision is whether or not to approve the diversion change. Approving the diversion change subject to conditioning it on not damaging Delta water quality or fish habitat would be an absurdity. It is not possible to operate the Tunnels by taking away large quantities of freshwater that presently flow through the Delta before being diverted without reducing freshwater flows through the Delta, worsening Delta water quality and quantity and damaging fish and fish habitat.

Protest based on INJURY TO PRIOR RIGHTS: This section is not applicable as protestant does not claim a right to the use of water from a source involved in the petition.

All protests must be signed by the protestant or authorized representative:



Signed: _/

/s/ E. Robert Wright, Senior Counsel, Friends of the River_ Date: ___January 4, 2016__

/s/ Kathryn Phillips, Director, Sierra Club California, January 4, 2016

All protests must be served on the petitioner. Provide the date served and method of service used:
Protest served by email on DWR to James.Mizell@water.ca.gov on January 4, 2016
Protest served by email on Reclamation to Amy.Aufdemberge@sol.doi.gov on January 4, 2016

Attached Supplemental Sheets to Protest start below:

ATTACHED SUPPLEMENTAL SHEETS TO PROTEST

FACTS SUPPORTING ALLEGATIONS:

(1) The Petition will not be within the SWRCB's jurisdiction

The Petition in fact seeks a new water right. That is not within the Board's jurisdiction over the Petition for a change in points of diversion.

(2) The proposed petition will not best serve the public interest

The Petition will not best serve the public interest because essential quantities of freshwater that presently flow through the Delta before being diverted for export at the South, would instead be diverted upstream. The Delta is already in crisis violating water quality standards, with declining fish populations and faces further degradation as a result of climate change, less freshwater in the future, and increasing salinity due to sea level rise. The proposed upstream diversion would increase and accelerate degradation. Additionally, the Tunnels would cost many billions of dollars which would be an "opportunity cost" lost to modern water supply solutions such as development of recycling, conservation, drip irrigation for agriculture, and taking desert lands out of agricultural production which should not be farmed because of the resulting selenium pollution.

There are only two possibilities if the Petition is approved. If the water is diverted for the Water Tunnels upstream from the Delta, that will further degrade Delta freshwater flows, water quality, and fish habitat. On the other hand, if the Petition is approved and the Tunnels are constructed but not used to avoid detriment to Delta water, the result will have been in an enormous waste of funds anywhere from 15 billion to 60 or more billion dollars. Neither result would best serve the public interest. The Delta Independent Science Board (DISB) review of the Water Fix environmental documents was attached to the October 27, 2015 Water Fix comments by the Delta Stewardship Council. The DISB noted that "several potential long-term impacts" not receiving attention "are likely to affect project operations and the capacity to deliver benefits over the long operational life of the proposed conveyance facilities." (DISB Review at 8). "Climate change is expected to reduce water availability for the proposed northern intakes, and both climate change and sea-level rise are expected to influence tidal energy and salinity intrusion within the Delta. Changes in water temperature may influence the condition of fishes that are highly temperature -

dependent in the current analyses." (*Id.*). Moreover, "the failure to consider how climate change and sea-level rise could affect the outcomes of the proposed project is a concern that carries over from our 2014 review and is accentuated by the current drought. . ." (*Id.*).

What would instead best serve the public interest would be to not approve the new diversion point so that the freshwater ultimately exported from the South of the Delta would continue to flow through the Delta providing benefits for Delta water supply, Delta water quality, fisheries and fish habitat prior to being diverted for export. What would further serve the public interest would be to begin to reduce exports from the Delta to begin to improve Delta water supply and water quality conditions instead of continuing to worsen already bad conditions in the Delta by reducing freshwater flows through the Delta.

(3) The Petition is Contrary to Law

The Petition is contrary to several laws for many reasons. No adequate Draft EIR has been prepared for the Petition and/or the proposed Water Fix Water Tunnels which project is the object of the Petition for a new diversion of water upstream from the Delta. Pursuant to the California Environmental Quality Act (CEQA) an adequate Draft EIR disclosing and evaluating significant adverse environmental impacts that would result from the project and including a range of reasonable alternatives to the project must be prepared and circulated for public and decision-maker review and comment before commencing any part of the evidentiary hearing. The reason this is necessary is to provide an adequate informational basis for evaluation of the Petition. Moreover, project opponents are prejudiced by the absence of an adequate Draft EIR because an adequate Draft EIR would constitute much if not all of the evidence that project opponents would be able to rely on during the evidentiary hearing. The existing Draft environmental documents for the Water Fix are inadequate for many reasons. But above all, the Environmental Protection Agency (EPA) formally rates Draft environmental documents as required by the Clean Air Act. On October 30, 2015, the EPA gave the Water Fix Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) its failing rating of "3 *Inadequate".* Consequently, it will violate CEQA to commence an evidentiary hearing on the Petition prior to preparation of and circulation of an adequate Draft EIR for public review and comment.

The diversion of water sought by the Petition will also violate the federal and California Endangered Species Acts. That is so because the diversion of water upstream from the Delta would adversely modify the designated critical habitats for at least five federally listed species of fish, as well as jeopardize the continued existence of the listed fish species. Another ESA violation is the failure of Reclamation to obtain from the federal fishery agencies the "Reasonable and Prudent Alternatives" ("RPA") required by the ESA. This also serves to violate CEQA because the RPA would be mandatory alternatives for consideration as a part of the reasonable range of alternatives required to be in a Draft EIR by CEQA. However, the RPA have not been developed and presented.

The water diversion sought by the Petition would cause or worsen violation of water quality standards under the Clean Water Act (CWA). That would violate the CWA. In addition, the Petitioners have failed to develop the Least Environmentally Damaging Practicable Alternative (LEDPA) required by the CWA. That also violates the CEQA requirement to develop and pre-

sent a range of reasonable alternatives in the Draft EIR because the LEDPA would be a mandatory alternative to include in the CEQA-required range of reasonable alternatives.

The water diversion sought by the petition will also violate the Delta Reform Act (DRA). There are numerous provisions in the DRA that would be violated including Water Code § 85320 that includes requirements to comprehensively review and analyze a reasonable range of flows necessary for recovering the Delta ecosystem and restoring fisheries . . . which will identify the remaining water available for export and other beneficial uses; a reasonable range of Delta conveyance alternatives including through-Delta; the potential effects of climate change and possible sea level rise up to 55 inches and possible changes in total precipitation and runoff patterns on conveyance alternatives and habitat restoration activities; potential effects on migratory fish and aquatic resources; and the potential effects of each Delta conveyance alternative on Delta Water quality. The Petition is also contrary to the declared policy of the state of California "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Water Code § 85021. The proposed action also violates the State policy that the Delta is to be restored, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem. Water Code § 85020(c). Taking more water away before it flows through the Delta is doing the opposite from restoring the Delta and its fisheries.

(4) The Diversion sought by the Petition would have adverse environmental impacts.

The diversion of water sought by the Petition would have numerous adverse environmental impacts on Delta freshwater flows, Delta water supply, Delta water quality, and on fish species and habitat including endangered and threatened fish species and their designated critical habitats.

The EPA in its formal Water Fix RDEIR/SDEIS review letter of October 30, 2015, identifies continued operations as jeopardizing the existence of Delta smelt, winter-run Chinook salmon, green Sturgeon and several other fish species as concluded by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service in 2008 and 2009. The EPA has also concluded that even with the predictive limitations of modeling,

> the SDEIS predicts a loss of valuable aquatic habitat for many fish species in the Delta and upstream tributaries due to the combined effects of the Water Fix project, CVP/SWP exports, climate change, and increased water diversions upstream of the Delta in the Sacramento River Basin. These species have experienced sharp population declines in the last decade and showed record low abundance over the last five years. (EPA Letter at p. 3).

EPA has also pointed out that the modeling results in the SDEIS show predicted exceedances of a salinity standard and that there will also be increased exceedances of chloride criteria near municipal water supply intakes. (EPA Letter at p. 3). According to the EPA, "The Delta is listed as impaired for several water quality parameters under Section 303(d) of the CWA." (EPA Letter, p. 4). "Water quality and aquatic life analyses in the SDEIS show that the proposed project may cause or contribute to violations of state water quality standards and significant degradation of waters of the U.S. . ." (*Id.*)

EPA determined that:

> . . .the most essential decision for achieving the desired balance between water reliability and restoration of the Bay Delta ecosystem is how freshwater flows through the Delta will be managed. This key decision is not described in the SDEIS and is, instead, deferred to future regulatory processes administered by the State of California in consultation with federal resource and regulatory agencies. The decision by the State of California and Reclamation to defer these decisions means that the impacts of the Water Fix project on the Delta ecosystem cannot be fully evaluated at this time, and 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 at p. 2).

The EPA was not alone in its findings. The Delta Independent Science Board 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 at 1).

Here are a few examples of adverse environmental impacts of the Water Fix as set forth in the California Department of Fish and Wildlife October 30, 2015 Supplemental Document comments on the Water Fix REDIR/SDEIS. The new diversion "could substantially reduce suitable spawning habitat and substantially reduce the number of Winter-run as a result of egg mortality" with respect to the endangered Winter-run Chinook salmon. Moreover "there would be reductions in flow and increased temperatures in the Sacramento River that could lead to biologically meaningful reductions in juvenile migration conditions, thereby reducing survival relative to Existing Conditions." Similarly, "there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality and overall reduced habitat conditions for spawning spring-run and egg incubation, as compared to Existing Conditions." The Water Fix "could substantially reduce rearing habitat and substantially reduce the number of spring-run Chinook salmon as a result of fry and juvenile mortality." With the Water Fix, "there would be moderate to substantial flow reductions and substantial increases in temperatures and temperature exceedances above thresholds in the Sacramento, Feather, and American Rivers, which would interfere with fall-/late fall -run Chinook salmon spawning and egg incubation. There would be cold water pool availability reductions in the Feather, American, and Stanislaus Rivers, as well as temperature increases in the Feather and American Rivers that would lead to biologically meaningful increases in egg mortality and overall reduced habitat conditions for spawning steelhead and egg incubation as compared to Existing Conditions." With the diversion change, there would be flow reductions in five watershed Rivers "and temperature increases in the Sacramento, Feather, American, and Stanislaus Rivers that would lead to reductions in quantity and quality of fry and juvenile steelhead rearing habitat relative to Existing Conditions." The difference between Existing Conditions and the Water Fix "could substantially reduce suitable spawning habitat and substantially reduce the number of green sturgeon as a result of elevated exceedances above temperature thresholds." Under the Water Fix, "there would be frequent small to large reductions in flows in the Sacramento and Feather Rivers upstream of the Delta that would reduce the ability of all three life stages of green sturgeon to migrate successfully."

Consequently, it is clear that the new diversion if approved will have numerous adverse environmental impacts. What is also clear is that the existing environmental documentation does

not disclose and evaluate those impacts. Thus, as the EPA says, "any attempt to describe the environmental impacts of the project is necessarily incomplete." If and when an adequate Draft EIR is prepared on the diversion change sought by the Petition and the Biological Opinions have been obtained, it should then be possible to identify and describe all or most of the adverse environmental impacts of the project. The responsibility for preparing an adequate Draft EIR is on the government, here, DWR and Reclamation or the SWRCB. It is not on protestants. It is the government agency prepared Draft EIR and government agency prepared Biological Opinions that have official status. An environmental document prepared by protestants would have no such status.

The absence of sufficient information at this time about the potential effects of the Petition on fish and wildlife is reflected in the SWRCB's Notice of Petition reciting (under "Hearing to be Conducted in Parts") that "The second part of the hearing is proposed to begin at least 30 days after the CEQA, ESA, and CESA processes have been completed such that the associated documents for these processes can be included as exhibits in the hearing record."

The above constitutes a short summary of the facts which support the allegations that the Petition will not best serve the public interest, will be contrary to law, and will have an adverse environmental impact.

Additional supplemental sheets are attached starting on the next page, to provide further details about the facts supporting the allegations.

ADDITIONAL SUPPLEMENTAL SHEETS TO PROTEST

Facts Supporting Allegations that the Petition will:

(1) not be within the State Water Researchers Control Board's (SWRCB) jurisdiction
(2) not best serve the public interest
(3) be contrary to law
(4) have an adverse environmental impact

INTRODUCTION

Friends of the River (FOR) is a nonprofit public interest organization devoted to protecting and restoring our California rivers and the Delta. Sierra Club California is the arm of the national Sierra Club that engages in state-level policy in California. The Sierra Club has a long history of involvement in state water policy issues, including those addressing Delta water supplies, river and stream flows, and fisheries protection.

The essential feature of the project is the Delta Water Tunnels that would divert enormous quantities of freshwater that presently flow through the Sacramento River, sloughs, and the Delta before being diverted for export from the South Delta. Due to the new points of diversion north of the Delta, freshwater flows that presently contribute to water quality, water quantity, fish, fish habitat, and other benefits by flowing through the Delta would instead flow through massive Tunnels no longer providing benefits within the lower River, sloughs, and the Delta.

The Tunnels Project Change Petition is the most damaging and controversial diversion and rediversion proposal in California history. It is the most expensive water project proposal in California history. The 1970's version of the Water Tunnels, then known as the peripheral canal, was voted down in a statewide referendum in June 1982 by a 2 to 1 margin.

The Tunnels Project would take enormous quantities of water from the Sacramento River upstream along the lower Sacramento River between Clarksburg and Courtland. As a result of its massive diversions, the freshwater that presently flows through designated critical habitats for now-crashing fish populations in the Sacramento River and sloughs to and through the Bay-Delta before being diverted for export at the south Delta, would no longer even reach the Delta. The loss of these flows would dramatically deplete the freshwater flows badly needed for vulnerable listed species, fisheries, local drinking water supplies and marinas. The benefits of those freshwater flows for Delta water flows and water quality, fish, and fish habitat would be lost. The question is not whether the new upstream diversion would be bad for Delta freshwater flows, water quality, and endangered and threatened species of fish and their designated critical habitats. The question instead is how bad will it be?

An Adequate Draft EIR/EIS must be Prepared Because the Water Fix SDEIS is Inadequate and the EPA Has Determined it to be Inadequate

An *adequate* Draft Environmental Impact Report (EIR)/Environmental Impact Statement (EIS) must be prepared *before* commencing any part of the evidentiary hearing. Such an adequate Draft EIR/EIS does not yet exist. FOR has submitted comments on the numerous inade-

quacies of the recirculated Draft EIR/EIS. We have urged on various issues that the project should be withdrawn.

The Board commented on the Water Fix Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) in its comment letter of October 30, 2015. The Board stated:

> The State Water Board has received and is currently processing the water right change petition and the water quality certification for the Cal WaterFix, the current preferred project. *The RDEIR/EIS and Final EIR/EIS will inform these processes.* (Board Letter, p. 1) (emphasis added).

In fact, the RDEIR/SDEIS will *not* inform these processes. On that same date of October 30, 2015, the U.S. Environmental Protection Agency (EPA) issued its letter reviewing the Water Fix SDEIS as required by Section 309 of the Clean Air Act. The EPA has, in that letter, given the SDEIS a rating of "' 3' (*Inadequate*)". (EPA Letter, October 30, 2015, p. 4).[1] That is EPA's failing grade. EPA's *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (10/3/84) explains what that means in section 4(b) of that document entitled "Adequacy of the Impact statement":

> (3) '3' (Inadequate). The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA [National Environmental Policy Act] and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. (p. 4-6).

The EPA says they expect 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" is one of the future processes that the EPA expects "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).

The EPA concluded that deferral of water flow management decisions means "that any attempt to describe the environmental impacts of the project is necessarily incomplete." (EPA Letter, p. 2). The EPA also found that the information in the SDEIS:

> predicts a loss of valuable aquatic habitat for many fish species in the Delta and upstream tributaries due to the combined effects of the Water Fix project, CVP/SWP exports, cli-

[1] A copy of the October 30, 2015 EPA letter was attached to our letter of November 24, 2015.

> mate change, and increased water diversions upstream of the Delta in the Sacramento River Basin. These species have experienced sharp population declines in the last decade and showed record low abundance over the last five years. (EPA Letter, p. 3).

The EPA is not the only agency concerned about loss of valuable aquatic habitat. The California Department of Fish and Wildlife noted many adverse impacts of reduced flows from Water Fix operation on fish species in its RDEIR/SDEIS comments of October 29, 2015, and Supplemental Document of October 30, 2015.[2]

Moreover, the EPA explained that "the Water Fix project does not propose additional flows in the Delta, nor does it propose significant habitat restoration (See EcoRestore above)."(EPA Letter, p.3). And, "Water quality and aquatic life analyses in the SDEIS show that the proposed project may cause or contribute to violations of state water quality standards and significant degradation of waters of the U.S. . ." (EPA Letter, p. 4).

Thus, beyond our own findings of inadequate documentation, the EPA has also found the RDEIR/SDEIS inadequate.[3] In addition, the October 30, 2015 EPA letter does not say that the EPA's prior concerns have been addressed. So, all of those concerns still apply.[4] Critical omissions include the failure to develop the required reasonable range of alternatives. As just one example, "CVP/SWP [Central Valley Project/State Water Project] operations scenarios that propose additional outflow, such as BDCP Alternatives 7 and 8 from the DEIS, could provide substantially more water for resident and migratory fish and provide benefits to aquatic life; however, these were not evaluated as alternatives in the SDEIS." (EPA Letter, p. 3). Because of the failure to complete the ESA required consultations, the reasonable and prudent alternatives required under the ESA have not been identified, let alone adopted. "When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest 'reasonable and prudent alternatives [RPA].' *Id.*" *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015).

There has also been complete failure to identify, let alone adopt, the Least Environmentally Damaging Practicable Alternative (LEDPA) required by Clean Water Act (CWA) § 404(b)(1). "A proposed action is not the LEDPA simply because a federal agency is a partner and chooses that proposed action as its preferred alternative." (EPA Letter, August 27, 2014, Corrections and Additional Editorial Recommendations, p. 1). Finally, the Board in its RDEIR/SDEIS comment letter of October 30, 2015, reminded that its prior request for a scenario that would increase Delta outflows without impacting cold water pools be evaluated was not developed into an alternative. (Board Letter, p. 2).

The result is that, in addition to there not being an adequate informational basis at this time for any portion of the evidentiary hearing yet to commence, there has been a complete failure to present for public and decision-maker evaluation the required reasonable range of alterna-

[2] A copy of the CDFW Letter was furnished separately on November 24, 2015 to the Board's Chief Counsel.
[3] A copy of the October 30, 2015 EPA letter was attached to our November 24, 2015 letter.
[4] A copy of the August 26, 2014 EPA letter setting forth those many prior concerns was furnished separately on November 24, 2015 to the Board's Chief Counsel.

tives. The absence of reasonable and prudent alternatives under the ESA and Least Environmentally Damaging Practicable Alternative under the CWA graphically demonstrate that the Change Petition is not ready for commencement of any part of the evidentiary hearing.

In addition, unless and until an adequate Draft EIS/EIR is prepared there is no basis whatsoever for processing or issuing a water quality certification for the Water Fix project. The Staff proposal to process the application for water quality certification pursuant to §401 of the Clean Water Act (CWA) (Notice of Petition, p. 6), like the Petition itself, must await preparation and circulation of an adequate Draft EIR/EIS.

The California Environmental Quality Act (CEQA) Guidelines require that:

> 'Significant new information' *requiring recirculation* include, for example, a disclosure showing that:
> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
> (2). . .
> (3)A *feasible project alternative* or mitigation measure considerably different from others previously analyzed *would clearly lessen the significant environmental impacts* of the project, *but the project's proponents decline to adopt it.*
> (4)The draft EIR was *so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded*. 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4)(emphasis added).[5]

Again, the RDEIR/SDEIS is inadequate. Under CEQA, unless the change Petition is dropped, a new Draft EIR/EIS sufficient to provide for meaningful public review and comment must be prepared and circulated to provide an adequate informational basis and a range of reasonable alternatives for the evidentiary hearing.

This foundational deficiency is not something that can be fixed by an adequate Final EIR/EIS. The development and circulation for public review and comment of an *adequate Draft* EIR/EIS is indispensable to meaningful public review of environmental impacts and informed evaluation of a range of reasonable alternatives *before*, rather than *after*, a government decision adopting an alternative is made.

The fact that more time and more work are necessary before the Water Fix can be lawfully reviewed is not the fault of the law, the EPA, the State Water Board, or Water Tunnels opponents. Reclamation delayed nine years before commencing the ESA consultation process. Rec-

[5] 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), emphasis added. As is the case under CEQA, under NEPA, unless the change Petition is dropped, a new Draft EIR/EIS sufficient to provide an adequate basis for the evidentiary hearing must be prepared and circulated.

lamation and DWR could have prepared an adequate Draft EIR/EIS. Reclamation and DWR could have developed a reasonable range of alternatives to increase Delta flows by reducing exports that might have served as the basis for a habitat conservation and national community conservation plan. Reclamation could have obtained reasonable and prudent alternatives (RPA) pursuant to the ESA and could have developed the Least Environmentally Damaging Practicable Alternative (LEDPA) pursuant to the CWA. Reclamation and DWR have failed to do what the law requires.

Unless Reclamation and DWR prepare an adequate Draft EIR/EIS, the State Water Board will have to do that prior to commencing Part 1 of the hearing. Part 1 is focused on "the potential effects of the Petition on agricultural, municipal and industrial users of water and conditions that should be placed on the approval of the Petition to protect those users." (State Water Board combined notice). Part 1 of the hearing is presently scheduled to commence April 7, 2016. That will need to be changed to allow the time necessary to prepare an adequate Draft EIR. This is because legal users, like other citizens, need an *adequate Draft* EIR on the Change Petition for the hearing to be conducted using as complete and accurate an evidentiary record as possible with proper due diligence by all parties involved. Presently, the RDEIR/SDEIS cannot accurately disclose water supply, water flow or water quality degradation issues that are essential to Change Petition review of the potential for injury to other legal users of water. Moreover, the present RDEIR/SDEIS fails to acknowledge in its baseline that unimpaired flows in the Central Valley watershed of the Bay Delta Estuary are over appropriated by water rights claimants in average years by over fivefold. Likewise, any consideration of a water quality certification under §401 of the CWA also requires preparation of an adequate Draft EIR/EIS. Finally, an *adequate Draft* EIR is necessary before Part 2 of the hearing is commenced. An adequate *Draft* EIR will be the starting point, along with the biological opinions to be prepared, for what project proponents, opponents, and Board Staff will be responding to.

The State Water Board (Board) must start by conducting scoping under the CEQA process and prepare a Draft and then Final Environmental Impact Report (EIR) to form a basis for informed review of the Water Fix Change Petition.

There is more set forth in this Protest. But it is crystal clear before anything more is said, that the law demands that the Board conduct scoping under CEQA and prepare and circulate for public review and comment an adequate Draft EIR concurrently with and integrated with the as yet to be prepared Biological Opinions under the ESA.

None of the deficiencies found last year by the EPA have been corrected. All that has happened is that the adverse impacts of the Water Tunnels have been worsened by the deletion of mitigation in the switch from the BDCP Habitat Conservation Plan to the Water Fix Tunnels only project. The plan to provide "*65,000 acres* of tidal wetland restoration" has been slashed down to merely "*59 acres* of tidal wetland restoration." (RDEIR/SDEIS ES–17 (emphasis added)). Consequently, the current Water Tunnels project is *even more of a threat* to water quality, Clean Water Act standards, fish species and their habitat compared to the previous version that resulted in the concerns raised last year by the EPA, Army Corps, SWRCB, and NMFS and USFWS scientists.

Threshold CEQA Conclusion

The Board cannot rely on the BDCP Draft EIR/EIS and/or RDEIR/SDEIS for its evidentiary hearing. Instead, if the Board is going to proceed with processing the Change Petition, the Board must conduct CEQA scoping and then proceed to prepare an adequate Draft EIR and ultimately Final EIR with respect to the permit application.

About 40 more pages, below, are included in this protest. These initial threshold facts, however, should be sufficient to help the Board determine that it must conduct CEQA scoping and then proceed to prepare an adequate Draft EIR before commencing any part of the evidentiary hearing.

THE BOARD MUST DEVELOP AND CONSIDER THE REQUIRED RANGE OF REASONABLE ALTERNATIVES

Summary

The lead agencies for the Water Fix project are the U.S. Bureau of Reclamation and DWR.

Development of alternatives increasing flows through the Delta has always been a direct and obvious first step to complying with California's public trust doctrine protecting Delta water quantity and quality. Instead of complying with the Delta Reform Act (DRA), the Endangered Species Act (ESA), the Clean Water Act (CWA) and applying the public trust doctrine, all of the so-called BDCP/Water Fix alternatives involve new conveyance as opposed to consideration of any through-Delta conveyance alternatives 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, California Environmental Quality Act (CEQA), and ESA required range of reasonable alternatives. Instead, all BDCP alternatives including new RDEIR/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.

Organizations including FOR have already communicated several times over the years with BDCP officials about the failure to develop a range of reasonable alternatives in the BDCP process.[6]

The direct and obvious way to increase flows through the Delta is to take less water out. The broad policy alternatives that should be highlighted in the Water Fix NEPA and CEQA documents are to: 1) reduce existing export levels and thereby increase Delta flows; 2) maintain existing export levels and Delta flows; and 3) further reduce Delta flows by establishing a massive new diversion, the Delta Water Tunnels, upstream from the Delta.[7] The Water Fix agencies and the new RDEIR/SDEIS continue *to ignore* the direct and obvious broad policy alternative of reducing existing export levels to thereby increase Delta flows—which is mandated by section 85021 of the California Water Code.

Reclamation and DWR have ignored our repeated calls over the past several years to develop and consider alternatives increasing freshwater flows though the Delta by reducing exports. They do so to stack the deck making it easier for them to adopt the Water Tunnels alternative because they do not consider any alternatives other than new, upstream conveyance. So now, the Board must do what DWR and Reclamation have refused to do. The violations of CEQA here include the presentation of only one alternative—the Water Fix Water Tunnels that are the focus of the Change Petition. There is no lawful basis to present that sole alternative, because of the failure to prepare an adequate *Draft* EIR/EIS. As EPA has determined:

> The decision by the State of California and Reclamation to defer these decisions means that the impacts of the WaterFix 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, at p. 2, October 30, 2015).

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[6] Our previous comments to the BDCP/Water Fix agencies including our Friends of the River comment letter of May 21, 2014, our joint May 28, 2014 and joint September 4, 2014 comment letters focused on the failure of the BDCP Draft plan and Draft EIR/EIS to identify and evaluate a range of reasonable alternatives that are the declared "heart" of both the NEPA and CEQA required EISs and EIRs. A detailed evaluation of the Draft EIR/EIS's inadequate alternatives analysis was provided by the EWC in its comment letter of June 11, 2014, accessible online at http://ewccalifornia.org/reports/bdcpcomments6-11-2014-3.pdf.

[7] Though the Delta Water Tunnels alternative is a broad policy alternative, the Tunnels alternative is infeasible in terms of being actually adopted because it is not permissible under the ESA, Clean Water Act, Delta Reform Act and the public trust doctrine. Consequently, Alternative 4, DWR's original preferred alternative, and new Alternative 4A, Reclamation and DWR's new preferred alternative, are not actually feasible because they are not lawful. What is puzzling at this Draft EIR/EIS stage of the NEPA and CEQA process is why would the BDCP agencies refuse to consider lawful alternatives increasing Delta flows while both considering and giving preferred alternative status to alternatives that are at least arguably unlawful? As the RDEIR/SDEIS admits, " Many commenters argued that because the proposed project would lead to significant, unavoidable water quality effects, DWR could not obtain various approvals needed for the project to succeed (e.g., approval by the State Water Resources Control Board of new points of diversion for North Delta intakes)." (RDEIR/SDEIS ES-2).

In other words, the environmental impacts of the project have not been evaluated and there has not been a consideration of alternatives based upon the evaluation of project environmental impacts.

Deliberate Agency Refusal to Consider Alternatives Increasing Delta Flows

The BDCP/Water Fix omission of alternatives reducing exports to increase flows has been deliberate. A claimed purpose of the BDCP is "Reducing the adverse effects on certain listed [fish] species due to diverting water." (BDCP Draft EIR/EIS Executive Summary, p. ES-10). "[H]igher water exports" are among the factors the RDEIR/SDEIS admits "have stressed the natural system and led to a decline in ecological productivity." (RDEIR/SDEIS 1-10). "There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta." (Draft EIR/EIS ES-10*;* RDEIR/SDEIS ES-6). The new RDEIR/SDEIS admits that "the Delta is in a state of crisis" and that "Several threatened and endangered fish species . . . have recently experienced the lowest population numbers in their recorded history." (RDEIR/SDEIS ES-1). Alternatives reducing exports are the obvious direct response to claimed BDCP purposes of "reducing the adverse effects on certain listed [fish] species due to diverting water" and "to improve the conditions for threatened and endangered fish species within the Delta." The way to increase Delta flows is to take less water out.

Either the Board or Reclamation and DWR must develop and consider an alternative that would increase flows by reducing exports in order to satisfy federal and California law. The Delta Reform Act establishes that "The policy of the State of California is to *reduce reliance on the Delta in meeting California's future water supply needs* through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Cal. Water Code § 85021 (emphasis added). The Act also mandates that the BDCP include a comprehensive review and analysis of "A reasonable range of flow criteria, rates of diversion, and other operational criteria . . . necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses." Cal. Water Code § 85320(b)(2)(A). And, the Act requires: "A reasonable range of Delta conveyance alternatives, including through-Delta," as well as new dual or isolated conveyance alternatives. Cal. Water Code § 85320(b)(2)(B). In addition, the Act mandates that "The long-standing constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." Cal. Water Code § 85023.

Reclamation and DWR [8] have now marched along for over four 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. Four 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

[8] BDCP Applicants include San Luis Delta Mendota Water Authority, Westlands Water District, Kern County Water Agency, Zone 7 Water Agency, Metropolitan Water District of Southern California, and Santa Clara Valley Water District.

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).

More than three years ago, on April 16, 2012, the Co-Facilitators of the EWC transmitted a letter to then-Deputy Secretary of the California Natural Resources Agency Gerald Meral. The letter stated EWC's concerns with BDCP's current approach and direction of the [BDCP] project. (Letter, p. 1). Most of the letter dealt with the consideration of alternatives. The penultimate paragraph of the letter specifically states:

> *The absence of a full range of alternatives,* including an alternative which would reduce exports from the Delta. It is understandable that the exporters, who are driving the project, are not interested in this kind of alternative; however, in order to be a truly permissible project, an examination of a full range of alternatives, including ones that would reduce exports, needs to be included and needs to incorporate a public trust balancing of alternatives. (Letter, p. 2).

The EWC provided its "Reduced Exports Plan" to BDCP agency officers back in December 2012 and again in person on February 20, 2013. EWC Co-Facilitator Nick DiCroce stated in his December 2012 message to Deputy Secretary Meral that:

> Now that the project is nearing its EIR/EIS stage, we feel it is important to formally present it [Reduced Exports Plan] to you and request that you get it on the record as an alternative to be evaluated. . . . As you know, CEQA and NEPA both require a full range of reasonable alternatives to be evaluated. (December 15, 2012 email DiCroce to Meral).

On November 18, 2013, FOR submitted a comment letter in the BDCP process urging those carrying out the BDCP to review the "Responsible Exports Plan," an update of the previous "Reduced Exports Plan" proposed by the EWC:

> as an alternative to the preferred tunnel project. This Plan calls for reducing exports from the Delta, implementing stringent conservation measures but no new upstream conveyance. This Plan additionally prioritizes the need for a water availability analysis and protection of public trust resources rather than a mere continuation of the status quo that has led the Delta into these dire circumstances. Only that alternative is consistent with the EPA statements indicating that more outflow is needed to protect aquatic resources and fish populations. The EWC Responsible Exports Plan is feasible and accomplishes project objectives and therefore should be fully analyzed in a Draft EIS/EIR. (FOR November 18, 2013 comment letter at p. 3, Attachment 4 to FOR January 14, 2014 comment letter).

All of the so-called project alternatives set forth in the Draft Plan, Draft EIR/EIS, and new RDEIR/SDEIS create a capacity to divert more water from the Delta far upstream from the present diversion, which will undoubtedly decimate Delta-reliant species already on the brink of extinction, including the Delta smelt, chinook salmon, steelhead, San Joaquin kit fox, and tricolored blackbird, among dozens of others. The differences among the alternatives are slight. "The 15 action alternatives are variations of conservation plans that differ primarily in the location of

intake structures and conveyance alignment, design, diversion capacities (ranging from 3,000 to 15,000 cfs), and operational scenarios of water conveyance facilities that would be implemented under CM1." (Draft EIR/EIS, ES p. 26).

The new diversion point for the Water Tunnels would divert enormous quantities of water from the Sacramento River near Clarksburg--waters that presently flow through designated critical habitats for the host of imperiled species in the Sacramento River and sloughs to and through the Bay-Delta. Should the Tunnels be completed, these waters would instead be exported through the northern intakes upstream from the Delta. And this would be done contrary to ESA Section 10 (prohibiting reduction of the likelihood of survival and recovery of listed species), ESA Section 7 (prohibiting federal agency actions that are likely to jeopardize the continued existence of any endangered species or that "result in the destruction or adverse modification of [critical] habitat of [listed] species" 16 U.S.C. § 1536 (a)(2)), and California Water Code Section 85021 (requiring that exporters reduce reliance on the Delta for water supply).

The Board Must Consider Alternatives That Will Increase Delta Flows

We yet again request development of a range of reasonable alternatives increasing Delta flows and reducing exports. The Board must take this opportunity as part of preparing a new, legally sufficient, Draft EIR that incorporates actions called for by the Responsible Exports Plan (attached to our previous comment letters and also posted at http://www.ewccalifornia.org/reports/responsibleexportsplanmay2013.pdf). These actions include: reducing exports to no more than 3,000,000 acre-feet in all years in keeping with State Water Resources Control Board (SWRCB) 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 request that the range of reasonable alternatives include reducing exports both more and less than the 3,000,000 acre feet limit called for by the Responsible Exports Plan. [9]

Responsible Exports Plan Alternatives could vary by how much time is allotted to phase in export reductions over time. For instance, they could range from 10 to 40 years, which would comparatively span the same range of timelines provided for Tunnels construction.

The RDEIR/SDEIS admits the existence of paper water, "quantities totaling several times the average annual unimpaired flows in the Delta watershed could be available to users based on the face value of water permits already issued." (RDEIR/SDEIS 1-11). The Water Fix agencies

[9] EWC's new *A Sustainable Water Plan for California* (May 2015) is an updated EWC alternative to the BDCP California Water Fix Delta Tunnels. The features of the new plan are similar in pertinent part to the previous Responsible Exports Plan recommendations and features set forth above. The new plan is at http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf.

misuse the Delta Reform Act's definition of the coequal goals: "' Coequal goals' means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem . . ." Cal. Water Code § 85054. Providing "a more reliable water supply" means real water actually available, not paper water, and reflecting water available for export while meeting the needs for Delta water quantity, quality, freshwater flows, fisheries, public trust obligations, the ESA, the Clean Water Act, and senior water rights holders. It does not mean moving the exporters who are junior water rights holders-- including 1.3 million acres of drainage impaired lands-- to the front of the line ahead of everyone and everything else. It also does not mean putting the exporters in the front of the line during a lengthy extreme drought, crashing fish populations, and reductions in water use being made by millions of Californians.

The estimated $15 billion cost of the Water Tunnels--which in reality will amount to $30 billion or more including capital cost (and costs normally being greater than when under estimated by self-interested project consultants)--represents an "opportunity cost." The enormous sums spent on the Water Tunnels would be opportunity lost to making modern water quality and quantity improvements including recycling, conservation, and technical improvements such as drip - irrigation. In other words, the sums spent on outdated concepts – the Water Tunnels--would be lost to effective modern measures actually increasing water availability. The only true benefit cost study prepared on the Water Tunnels concluded that the costs are 2 to 3 times higher than the benefits. Dr. Jeffrey Michael, *Benefit-Cost Analysis of Delta Water Conveyance Tunnels* (Eberhardt School of Business, University of the Pacific, July 12, 2012). Now that the project has dropped the features of habitat conservation while keeping only the Water Tunnels the exporters would not have the benefit of 50 year permits and virtually guaranteed water deliveries. That change, in addition to worsening the adverse environmental impacts of the Water Tunnels, also increases the already negative cost benefit ratio. The change also leaves the taxpaying public to be stuck with all costs to mitigate the adverse impacts of the Water Tunnels.

The Board Must Meaningfully Present and Evaluate Alternatives that will Increase Delta Flows in order to Comply with CEQA

Instead of sharply defining the issues and providing a clear basis for choice among options, the BDC/Water Fix consultants have now produced 48,000 pages of conclusory Water Tunnels advocacy.

The failure to include a range of reasonable alternatives 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). A new Draft EIR is 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. Moreover,

there has been complete failure to identify and make the required findings of infeasible as to environmentally superior alternatives.[10]

The RDEIR/SDEIS concedes that the project would have a number of significant and unavoidable adverse environmental impacts. (RDEIR/SDEIS Table ES-9, ES-41 through ES-105; Appendix A, Ch. 31, Table 31-1, 31-3 through 31-8). When the project would have significant adverse environmental effects, agencies are "required to consider project alternatives that might eliminate or reduce the project's significant adverse environmental effects." *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal.App.4th 859, 873 (2003). Instead of complying with CEQA by considering such alternatives, the lead agencies have refused to do so. So, the Board must do require the doing of what the Water Fix agencies have not done.

With respect to the ESA, we have repeated several times in 2013 and 2014 that the failure of the federal agencies to prepare the ESA required Biological Assessments and Opinions concerning the U.S. Bureau of Reclamation's activities with the BDCP violates both the ESA Regulations (50 C.F.R. § 402.14(a) "at the earliest possible time" requirement and the NEPA Regulations (40 C.F.R. § 1502.25(a) "concurrently with" and "integrated with" requirements. (FOR January 14, 2014 comment letter and its four attachments). The Biological Assessments and Biological Opinions, still missing (RDEIR/SDEIS 1-15), are essential to any meaningful public review and comment on a project claimed to be responsive to declining fish populations.

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. Reclamation and DWR have ignored the EWC's alternative that was handed to them on a silver platter back in December 2012, almost three years ago.

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS, Chapter 9 of the BDCP plan and the RDEIR/SDEIS have led to NEPA and CEQA documents

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[10] Before an agency "may approve a project with a significant environmental impact, it is required to make findings identifying … the specific … considerations that make infeasible the environmentally superior alternatives *…" Flanders Found. v. City of Carmel-by-the-Sea,* 202 Cal.App.4th 603, 620-21 (2006). The statute provided a definition of "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Cal. Pub. Res. Code §21061.1. As to a project's economic feasibility, "the fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." *Pres. Action Council v. City of San Jose,* 141 Cal.App.4th 1336, 1352 (2012).

"so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." 14 Code Cal. Regs § 15088.5(4).

Expert Federal and California Agencies have also Found the Current BDCP Alternatives Analysis Deficient

There is more. As discussed above, on August 26, 2014, the U.S. Environmental Protection Agency (EPA) issued its 40-page review of the Draft BDCP EIS finding in BDCP's case that:

> operating any of the proposed conveyance facilities . . . would contribute to increased and persistent violations of water quality standards in the Delta, set under the Clean Water Act, measured by electrical conductivity (EC) and chloride concentrations. We recommend that the Supplemental Draft EIS include one or more alternatives that would, instead, facilitate attainment of all water quality standards in the Delta. Specifically, we recommend that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedances of water quality objectives, and that would address the need for water availability and greater freshwater flow through the Delta. Such an alternative should result in a decrease in the state and federal water projects' contributions to the exceedance of any water quality objectives in the Delta. (*Id.*, p.2).

EPA further stated that "Data and other information provided in the Draft EIS indicate that all CM1 [Tunnels project] alternatives may contribute to declining populations of Delta smelt, Longfin smelt, green sturgeon, and winter-run, spring-run, fall-run and late-fall run Chinook salmon." (p. 10). "We recommend that the Supplemental Draft EIS consider measures to insure freshwater flow that can meet the needs of those [declining fish] populations and ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance." (*Id.*). "Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta." (*Id.* p. 3).

EPA explained that: "Other reasonable alternatives could be developed by incorporating a suite of measures, including water conservation, levee maintenance, and decreased reliance on the Delta. Such alternatives would be consistent with the purpose and need for the project, as well as with the California Bay-Delta Memorandum of Understanding among federal agencies and the Delta Reform Act of 2009." (*Id.* at p. 13). EPA noted that "The 'Portfolio Approach' developed by a diverse set of stakeholders is one attempt to place Delta water management into the larger context of facilities investments and integrated operations." (*Id.*, p. 13 fn. 20).[11]

[11] The BDCP agencies had unlawfully dismissed consideration of the Portfolio Approach in a Draft EIR/EIS appendix claiming "Although there is much merit in this Portfolio-Based Proposal" such things as water recycling and conservation to improve water supply reliability in areas that use water diverted from the Delta are "beyond the scope of the BDCP." (Draft EIR/EIS appendix 3A at p. 81). The lead agencies simply ignore the Delta Reform Act including Water Code § 85021 and the EPA as well as the alternatives requirements of NEPA and CEQA.

In addition, EPA concluded that "The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated. We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts." (*Id.* p.3).

On July 29, 2014, the SWRCB issued its 38 page review of the Draft BDCP EIS/EIR. The SWRCB declared that the "environmental documentation prepared for the project must disclose the significant effects of the proposed project and identify a reasonable range of interim and long-term alternatives that would reduce or avoid the potential significant environmental effects." (Letter, comment 9 pp. 11-12). Further, "The justification for this limited range of Delta outflow scenarios is not clear given that there is significant information supporting the need for more Delta outflow for the protection of aquatic resources and the substantial uncertainty that other conservation measures will be effective in reducing the need for Delta outflow. For this reason a broader range of Delta outflows should be considered for the preferred project." (*Id.* comment 10 p. 12).

On July 16, 2014, the Army Corps found that: "the EIS/EIR is not sufficient at this time in meeting the Corps' needs under the National Environmental Policy Act (NEPA) . . . in particular with regard to the incomplete description of the proposed actions, alternatives analysis . . . and impacts to waters of the United States and navigable waters, as well as the avoidance and minimization of, and compensatory mitigation for, impacts to waters of the United States." (Letter p. 1). Additional Corps comments include the absence in the EIR/EIS of "an acceptable alternatives analysis" (comment 4), no showing on which alternative may contain the Least Environmentally Damaging Practicable Alternative (LEDPA) for section 404, Clean Water Act purposes (Comment 5), "the document needs a clear explanation of a reasonable range of alternatives and a comparison of such, including a concise description of the environmental consequences of each" (comment 19), and "new conveyance was not a part of the preferred alternative for CalFed. Does this EIS/EIR describe why the reasons for rejecting new conveyance in CalFed are no longer valid?" (Comment 22).

Now, the Corps states in its public notice posted September 9, 2015 under Alternatives, that: "The applicant is in the process of developing information to support the analysis of alternatives pursuant to the Section 404(b)(1) Guidelines. All reasonable project alternatives, in particular those which may be less damaging to the aquatic environment, will be considered."

Finally, Reclamation and DWR had to drop the attempt to deceive the public that the Water Tunnels are part of a habitat conservation plan because of the refusal of U.S Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) scientists to falsely find that the Water Tunnels would not be harmful to endangered species of fish and their habitat. The RDEIR/SDEIS calls this "difficulties in assessing species status and issuing assurances over a 50 year period . . ." (RDEIR/SDEIS 1-2). In fact, the federal scientists have been issuing "red flag" warnings that the Water Tunnels threaten the "potential extirpation of mainstem Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit" for more than three years.

Alternatives Conclusion

Reclamation and DWR in their RDEIR/SDEIS have ignored what the EPA, SWRCB, Army Corps, USFWS and NMFS had to say, just as they have ignored the National Academy of Sciences and the EWC for the past four years. If the Board proceeds to evidentiary hearing, it must prepare and issue, or require DWR to so do, for public review and comment and decision-maker review a new Draft EIR that includes the required range of reasonable alternatives.

THE PROJECT WOULD ADVERSELY MODIFY DESIGNATED CRITCIAL HABITAT AND JEOPARDIZE ENDANGERED AND THREATENED FISH SPECIES

Summary

The BDCP/Water Fix Delta Water Tunnels project is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify critical habitat for at least five endangered and threatened fish species.

To summarize, ***first,*** the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. Likewise, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA.[12] ***Second***, the reaches of the Sacramento River, sloughs, and the Delta that would lose significant quantities of freshwater flows through operation of the proposed Water Tunnels are designated critical habitats for each of these five listed endangered and threatened fish species. ***Third***, no Biological Assessment has been prepared and transmitted to the U.S. Fish and Service (USFWS) or National Marine Fisheries Service (NMFS) by Reclamation with respect to the Water Tunnels project. ***Fourth***, ESA Section 7 consultations have not occurred and no Biological Opinion has been prepared by the USFWS or NMFS with respect to the effects of the operation of the Water Tunnels on the five federally listed species of fish or their designated critical habitats.[13] ***Fifth,*** because of Reclamation's failure to prepare Biological Assessments and failure to initiate ESA consultation, no "reasonable and prudent alternatives" (RPAs) have been developed or suggested by the USFWS or NMFS to avoid species jeopardy or adverse modification of designated critical habitat.

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[12] Each of these species is listed under the California Endangered Species Act as well, with most of them considered threatened. Bay Delta Conservation Plan, Section 1.4.3, *Covered Species*, Table 1-3, p. 1-24. This table shows that under the California Endangered Species Act, Delta smelt is listed as threatened; however, the BDCP species account for Delta Smelt states that the California Fish and Game Commission elevated delta smelt to the status of endangered on March 4, 2009. (BDCP, Appendix 2A, section 2A.1.2, p. 2A.1-2, lines 21-24.) Longfin smelt is considered threatened, winter-run Chinook salmon is considered endangered, spring-run Chinook salmon threatened, fall- and late fall-run Chinook salmon are considered species of special concern; and green sturgeon (southern DPS) is also considered a species of special concern. Longfin smelt is at this time a candidate species for listing under the federal Endangered Species Act.

[13] Apparently, Reclamation has finally initiated consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, as the lead federal agency, pursuant to Section 7 of the Endangered Species Act.

Approval of the Water Tunnels project in the form of preferred Alternative 4A or otherwise would violate the substantive prohibitions of Section 7 of the ESA by adversely modifying designated critical habitat as well as by jeopardizing the continued existence of the endangered and threatened fish species.

Approval of the Water Tunnels project would violate the procedural requirements of the ESA because Reclamation has not evaluated its proposed action "at the earliest possible time" to determine whether its action may affect listed species or critical habitat and has not completed formal consultation with USFWS and NMFS.

Approval of the Water Tunnels project would violate the procedural requirements of NEPA because the BDCP Draft EIR/EIS and Water Fix RDEIR/SDEIS have not been prepared "concurrently with and integrated with" Biological Assessments and Biological Opinions required by the ESA. Again, the Biological Assessments and Biological Opinions, though required, do not exist.

The Board must prepare a new Draft EIR to be circulated for public review and comment. The new public Draft EIR document must include the range of reasonable alternatives including alternatives increasing flows by reducing exports as set forth above. The new public Draft NEPA document must also be prepared concurrently with and integrated with the ESA required Biological Assessments, Biological Opinions, and include reasonable and prudent alternatives, developed by the USFWS and NMFS. The required reasonable and prudent alternatives would include alternatives increasing flows through the Delta to San Francisco Bay by reducing exports.

The Water Tunnels Threaten Jeopardy and Adverse Modification of Designated Critical Habitat of Endangered and Threatened Fish Species

The Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA. 50 C.F.R. § 17.11. Critical habitat for the species was designated to include the Sacramento River extending from River Mile 0 near the Delta to River Mile 302, which is far north of the proposed BDCP diversion near Clarksburg. 50 C.F.R. § 226.204.The Water Tunnels project would divert enormous quantities of freshwater from the Winter-Run Chinook Salmon's designated critical habitat. The four threatened fish species mentioned above would likewise lose enormous quantities of freshwater from their designated critical habitats because of diversion of water for the Tunnels.[14]

[14] The Central Valley Spring-Run Chinook Salmon is listed as a threatened species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0612, Long -121.7948, near Mile 0, upstream to Elk Slough (38.4140, -121.5212) in Clarksburg, California. 50 C.F.R. § 226.211(k)(5)(i).

The Central Valley Steelhead is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0653, Long -121.8418, near Mile 0, upstream to Elk Slough in Clarksburg. 50 CFR § 226.211(l)(5).

"The ESA provides 'both substantive and procedural provisions designed to protect endangered species and their habitat.'" *San Luis & Delta-Mendota Water Auth. v. Jewell (Jewell)*, 747 F.3d 581, 596 (9th Cir. 2014), *cert. denied,* 135 S.Ct. 948 and 950 (2015). Pursuant to the commands of Section 7 of the ESA, each Federal agency "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." 16 U.S.C. § 1536(a)(2). "Actions" include "actions directly or indirectly causing modification to the land, *water*, or air." 50 C.F.R. § 402.02 (Emphasis added). "ESA section 7 prohibits a federal agency from taking any action that is 'likely to jeopardize the continued existence' of any listed or threatened species or 'result in the destruction or adverse modification' of those species' critical habitat." *San Luis & Delta- Mendota Water Auth. v. Locke* (*Locke*), 776 F.3d 971, 987 (9th Cir. 2015).

The BDCP itself identifies stressors and threats to each of the five species. Common threats and stressors to the five species include habitat loss due to the operation of water conveyance systems, increasing water temperatures and predation hotspots. By installing gigantic diversion intakes in at least three locations between Clarksburg and Courtland, and by diverting massive amounts of water from the Sacramento River, the Water Tunnels project will literally reduce the amount of aquatic habitat available to these five species in their critical habitats. Additionally, the massive diversion will reduce flow in the critical habitat and contribute to a further increase in water temperature. The Effects Analysis chapter (Chapter 5) of the Draft BDCP Plan (November 2013) admits that significant adverse effects could result from the Water Tunnels on the covered fish and their habitat including: "Change in entrainment of fish in water diversions. Change in predation as a result of new structures. Modification of river flow. Change in habitat. Change in food and foraging. Permanent indirect and other indirect losses. Disturbances related to construction and maintenance." (Plan, ch. 5, 2-13).

The BDCP identifies key hydrologic and hydrodynamic changes that reduce or adversely modify habitat of these listed fish species. (See below) These changes will exacerbate threats and

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The Southern Distinct Population Segment of North American Green Sturgeon is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for this species is designated to include the Sacramento–San Joaquin Delta including all waterways up to the elevation of mean higher high water within the area defined in California Water Code Section 12220. 50 CFR § 226.219(a)(3). The National Marine Fisheries Service's website provides a map displaying Green Sturgeon critical habitat: <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/greensturgeon.pdf>. The map indicates that the critical habitat includes the Sacramento River from Mile 0 near the Delta to upstream beyond the proposed intake site near Clarksburg.

The Delta Smelt is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include "all contiguous waters of the legal Delta." 50 CFR § 17.95–e–Fishes–Part 2. The US Fish and Wildlife Service's website provided a map displaying some of the Delta Smelt's critical habitat: <http://www.fws.gov/sfbaydelta/maps/delta_smelt_critical_habitat_map.pdf>. The map indicates that the Delta Smelt's critical habitat includes the Sacramento River near Mile 0 upstream to the proposed BDCP intake site near Clarksburg.

stressors already known to affect these fish. BDCP modeling in the RDEIR/SDEIS finds that through-Delta survival rates of winter-run, spring-run, and fall-run Chinook salmon all decrease relative to the No Action Alternative from Water Tunnels operation. (RDEIR/SDEIS Tables 11-4A-23, 51, and 74).

Specifically, the BDCP identifies reduced habitat due to water storage and water conveyance systems as a stressor and threat to Winter- Run Chinook Salmon. BDCP EIR-EIS Administrative Draft, 11A-47 (March 2013). There will be adverse effects on juvenile winter-run Chinook salmon including near-field (contact with screens and aggregation of predators) and far-field (reduced downstream flows (Plan, ch. 5, 5.3-23; RDEIR/SDEIS p. 4.3.7-48), reduced Sacramento River attraction flows for migrating adult winter-run Chinook salmon (Plan, ch. 5, 5.3-29), possible reduction of survival of juvenile winter-run Chinook salmon during downstream migration and possible negative effect on upstream migration of adult winter-run Chinook salmon by changing attraction flows/olfactory cues. (Plan, ch. 5, 5.3-32). The BDCP also admits that "A potential adverse effect of the BDCP on adult winter-run Chinook salmon will be the reduction in flow downstream of the north Delta diversions on the Sacramento River, reducing river flow below the north Delta intakes." (Plan, ch. 5, 5. 3-45; BDCP Appendix 5C, Tables C.A-41 and C.A-42; RDEIR/SDEIS Figures 4.3.2-7 and 4.3.2-8.) The reduced outflow along with the possible change in olfactory signals due to change in the flow mixture "could affect upstream migration." (*Id*.). The RDEIR/SDEIS states: "when compared to the CEQA baseline, [Alternative 4A, the Water Tunnels], including climate change, would substantially reduce the quantity and quality of spawning and egg incubation habitat for winter-run Chinook salmon relative to existing conditions." (RDEIR/SDEIS, 4.3.7-58.)[15]

The BDCP likewise identifies similar threats and stressors to the Spring-Run Chinook Salmon, Steelhead, Green Sturgeon, and Delta Smelt that would result from the Water Tunnels.

The BDCP identifies several threats and stressors to the Central Valley Spring-Run Chinook Salmon, which include flow reductions causing increased water temperature and habitat elimination or degradation due to water conveyance systems. (BDCP EIR-EIS Administrative Draft, 11A-83, 11A-76 (March 2013)). The BDCP Plan admits that adverse effects of the proposed north Delta diversions on juvenile Spring-Run Chinook Salmon include near-field (physical contact with the screens and aggregation of predators) and far-field (reduced downstream flows). (Plan, ch. 5, 5. 4-16; see also RDEIR/SDEIS, p. 4.3.7-79, lines 15-17). "Plan Area flows have considerable importance for downstream migrating juvenile salmonids and will be affected by the proposed north Delta diversions . . . Because of the north Delta diversions, salmonids migrating down the Sacramento River generally will experience lower migration flows compared to existing conditions. . . As with winter-run Chinook salmon, it was assumed with high certainty that Plan Area flows have critical importance for migrating juvenile spring-run Chinook salmon." (Plan, ch. 5, 5. 4-17; BDCP Appendix 5C, Tables C.A-41 and C.A-42; see also RDEIR/SDEIS, Figures 4.3.2-7 and 4.3.2-8). Other admitted adverse effects caused by opera-

[15] *See* Erica Goode, Troubled Delta System Is California's Water Battleground, N.Y. Times, 6/24/15, *available at* **http://www.nytimes.com/2015/06/25/science/troubled-delta-system-is-californias-water-battleground.html** (discussing, inter alia, how increased river temperatures killed 95% of California salmon eggs in 2014, and pointing out that California's salmon population has dropped precipitously over the last several decades).

tions of the north Delta diversions include reduced attraction flows in the Sacramento River for migrating adult spring-run Chinook salmon. (Plan, ch. 5, 5. 4-19). "Lower river flow downstream of the north Delta intakes under the BDCP may reduce survival of juvenile spring-run Chinook salmon during downstream migration along the Sacramento River and also could negatively affect upstream migration of adult spring-run Chinook salmon by changing attraction flows/olfactory cues." (Plan, ch. 5, 5. 4-20). The RDEIR/SDEIS again delivers bleak prospects for the survival of this federally-protected species: "Under Alternative 4A (including climate change effects), there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality rates and overall reduced habitat conditions for spawning spring-run and egg incubation." (RDEIR/SDEIS, 4.3.7-98).

The BDCP states that threats and stressors to the Steelhead include water storage and conveyance systems as well as flow reductions contributing to increased water temperatures. (BDCP EIR-EIS Administrative Draft, 11A-129, 11A-133 (March 2013)). The Plan admits near-field (physical contact with the screens and aggregation of predators) and far-field (reduced downstream flows leading to greater probability of predation) effects of the north Delta diversions on juvenile Sacramento River Region Steelhead. (Plan, ch. 5, 5. 6-11; see also RDEIR/SDEIS, p. 4.3.7-199, lines 1-6). The plan also admits that "Sacramento River attraction flows for migrating adult Sacramento River region steelhead will be lower from operations of the north Delta diversions under the BDCP." (Plan, ch. 5, 5. 6-13; BDCP Appendix 5C, Tables C.A-41 and C.A-42; see also RDEIR/SDEIS, Figures 4.3.2-7 and 4.3.2-8). The Plan admits that with respect to the Feather River, "the reduction in flows in the high-flow channel due to BDCP would reduce conditions in an already unsuitable habitat." (Plan, ch. 5. 6-16). The RDEIR/SDEIS states: "In general, Alternative 4A would degrade the quantity and quality of rearing habitat for steelhead relative to Existing Conditions." (RDEIR/SDEIS, 4.3.7-22).

The BDCP identifies increased water temperatures and habitat loss as threats and stressors to the Green Sturgeon. BDCP EIR-EIS Administrative Draft, 11A-162 – 65 (March 2013). With respect to admitted adverse effects, the Plan admits that flow changes will reduce transport and migration flows in the Feather River and Plan area. (Plan, ch. 5. 8-17 through 8-24). "As such [reduction in early fall releases], average in stream flows during some months of the three periods identified above (June-September, August-October, August-June) are expected to substantially decline in the Feather River at Thermalito and moderately decline in the Sacramento River at Verona under the BDCP, especially for the LOS [low-outflow scenario] (Appendix 5.C, flow, passage, salinity, and turbidity, section 5.C.5.3.3, High Outflow and Low Outflow Scenarios)." (Plan, ch. 5. 5. 8-18). Also, the plan admits that "there is [on the Feather River] the potential for appreciable change in the Feather River as a result of operational differences between the BDCP scenarios and future conditions without the BDCP (EBC2_LLT)." (Plan, ch. 5, 5. 8-24). The RDEIR/SDEIS states: "In general, Alternative 4A would reduce the quantity and quality of rearing habitat for larval and juvenile green sturgeon relative to Existing Conditions." (RDEIR/SDEIS, 4.3.7-296).

The BDCP identifies several threats and stressors to the Delta Smelt, including water exports and increased water temperature. (BDCP EIR-EIS Administrative Draft, 11A-8–11 (March 2013)). Admitted adverse effects caused by the BDCP north Delta intakes include reducing the quantity of sediment entering the Plan Area thus increasing water clarity and negatively affecting delta smelt. (Plan,

ch. 5, 5. 1-30; see also RDEIR/SDEIS, p. 4.3.7-26, 4.3.7-29). Greater water residence time from changes in water operations will likely increase the toxic blue-green alga Microcystis having both direct and indirect effects on the smelt. (Plan, Chapter 5, 5. 1-32; BDCP, Appendix 5C, p. 5.4-14; RDEIR/SDEIS, Chapter 8, Table 8-60a). North Delta intakes' operations will introduce and increase entrainment and impingement of Delta smelt as well as introduce and increase predation hotspots in and around the new intakes (RDEIR/SDEIS, p. 4.3.7-24, lines 4-7).

In 2013, NMFS reiterated its previous "Red Flag" comment that the Water Tunnels project threatens the "potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit . . . ." (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013). As we pointed out above, the EPA has called for alternatives addressing "the need for water availability and greater freshwater flow through the Delta." (EPA Letter, August 26, 2014, p. 2). Likewise, the Corps, SWRCB and NMFS and USFWS scientists also raised concerns regarding the BDCP's impacts on water agencies were ignored. In April 2015, the claimed habitat conservation elements of the BDCP have been dropped or drastically pared back in the switch from the BDCP to the "California Water Fix." As just one example, the plan to provide "*65,000 acres* of tidal wetland restoration" has been eviscerated to merely "*59 acres* of tidal wetland restoration." (RDEIR/SDEIS ES–17 (emphasis added)). Consequently, the current Water Tunnels project is *even more of a threat* to fish species and their habitat compared to the previous version that resulted in the concerns raised then by the EPA, Army Corps, SWRCB, and NMFS and USFWS scientists.

"The goal of the ESA is not just to ensure survival but to ensure that the species recover to the point it can be delisted." *Alaska v. Lubchenko,* 723 F.3d 1043, 1054 (9th Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004). Pursuant to the commands of the ESA, each Federal agency "shall. . . insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered or threatened species *or result in the destruction or adverse modification of [critical] habitat of such species* . . . ." 16 U.S.C. § 1536(a)(2) (emphasis added). "[T]he purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary to the species' survival but also essential for the species' recovery." *Gifford Pinchot*, 378 F.3d 1059, 1070. Also, "existing or potential conservation measures outside of the critical habitat cannot properly be a substitute for the maintenance of critical habitat that is required by Section 7 [of the ESA, 16 U.S.C § 1536]." *Gifford Pinchot*, 378 F.3d 1059, 1076.

Taking the fresh water flows and safe refuge away from the endangered and threatened fish species would neither insure their survival nor insure their recovery and delisting. On-the-ground habitat restoration is not a lawful substitute under the ESA for maintaining the critical habitat of and in the waters of the Sacramento River, sloughs, and Delta. The reduction of water and flows, increased residence times of water, and increased water temperature are adverse modifications of their critical habitat. Approval of the permit would violate the ESA. The Water Tunnels project is thus not permissible under the ESA.[16]

[16] We have brought the impermissibility of the Water Tunnels project given the substantive prohibitions of the ESA and the related procedural ESA and NEPA violations to the attention of Reclamation and DWR on numerous occasions for more than two years now. These prior communications include the FOR letters of June 4, September 25

The Board Must Issue a Draft EIR/EIS Concurrently with and Integrated with ESA Required Biological Assessments and Biological Opinions

Extinction is forever. Fortunately, the ESA obligates federal agencies "to afford first priority to the declared national policy of saving endangered species," *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 185 (1978). Despite that, Reclamation has failed to prepare a Biological Assessment pertaining to its action and has failed until recently to initiate consultation with USFWS and NMFS even though Biological Assessment preparation and initiation of consultation are required by the ESA. (See RDEIR/SDEIS 1-15 (under "Section 7 of the Endangered Species Act")). The RDEIR/SDEIS concedes that "formal consultation under ESA Section 7" will be necessary. (*Id.*).

Section 7 of the ESA (16 U.S.C. § 1536(a)(4) requires that "Should the agency find that its proposed action *may* affect a listed species or critical habitat, it must formally or informally consult with the Secretary of the Interior, or his or her delegee [USFWS and/or NMFS]." *Jewell,* 747 F.3d 581, 596 (emphasis in decision). "Formal consultation is required when the acting agency or consulting agency determines that the proposed action is *likely* to adversely affect a listed species or critical habitat. 50 C.F.R. §§ 402.13, 402.14. Formal consultation requires the consulting agency. . , to issue a biological opinion stating whether the proposed action is likely to jeopardize such species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14." *Jewell,* 747 F.3d at 596 (emphasis in decision).

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 Ninth Circuit Court of Appeals has repeatedly held that: "Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement." *Western Watersheds Project v. Kraayenbrink,* 620 F.3d 1187, 1210 (9th Cir. 2010). *Accord, Karuk Tribe,* 681 F.3d 1006, 1027; *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.,* 575 F.3d 999, 1018 (9th Cir. 2009).

Even the ardent advocates for the Water Tunnels project who prepared the 48,000 pages of BDCP Water Fix advocacy documents do not contend that taking large quantities of water away from the Sacramento River, sloughs, and Delta will not have "any possible effect, whether beneficial, benign, adverse or of an undetermined character" on the endangered and threatened fish species or their habitat. Not surprisingly, no preposterous claim of "no possible effect" is made in the Draft EIR/EIS or RDEIR/SDEIS. But instead of reviewing the proposed Water Tunnels at the earliest possible time, Reclamation has delayed ESA review for about 9 years now.

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and November 18, 2013, January 14, March 6, May 21, and July 29 (including pp. 10-11), 2014, EWC letter of June 11, 2014 (including pp. 29-30) and our recent joint letters of July 16 (requesting an extension of time to comment), and July 22 (alternatives), 2015. We also addressed these issues in our meeting with federal agency representatives in Sacramento on November 7, 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). "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).')." *Jewell*, 747 F.3d 581, 648. "ESA compliance is not optional," and "an agency may not take actions that will tip a species from a state of precarious survival into a state of likely extinction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 929-30 (9th Cir. 2008). Consequently, against this threat of extinction, conducting the draft EIS public review and comment stage without Biological Assessments or Biological Opinions leaves the public in the dark and violates both the ESA and NEPA. In the absence of the ESA required analyses, a draft EIS would be "so inadequate as to preclude meaningful analysis" in violation of NEPA. 40 C.F.R. § 1502.9(a).[17] The same is true under CEQA. Under CEQA, "potential substantial impact on endangered, rare, or threatened species is per se significant." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Retro Cordova* (2007) 40 Cal.4th 412, 449.

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 now the REDIR/SDEIS 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.

The public now has what it does not need: unsupported advocacy from the consultants speculating that the adverse effects will be offset or that the effects will not really be all that adverse. *The public does not have what it does need*: the federal agency Biological Assessments and Biological Opinions required by the ESA and NEPA.[18]

The evasion of ESA obligations by Reclamation is both extreme and deliberate. Reclamation has on August 26, 2015 joined with DWR in submitting a petition to the State Water Resources Control Board for a change in the point of diversion necessary for the Water Tunnels. The petition recites that "The proposed project reflects the culmination of a multiyear planning process that began in 2006 . . "(Petition cover letter, p. 1). The passage of nine years makes a mockery of the ESA requirement to commence ESA review "at the earliest possible time."

Red flag comments and the Record so far have made it clear that there is at minimum significant uncertainty about whether the Water Tunnels project is even permissible under the

[17] 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).

[18] "The ESA requires an agency to use 'the best scientific and commercial data available' when formulating a Bi-Op." *Locke*, 776 F.3d 971, 995. "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.

ESA. This critical issue cannot be resolved until the Biological Assessments and Opinions have been prepared. Reclamation has not obtained the determination pursuant to ESA-required consultation whether the "preferred alternative"— the Water Tunnels— is even lawful or feasible.

Against this threat of extinction from known stressors and negative effects on the critical habitat, conducting the NEPA environmental draft process prior to and in a vacuum from the ESA consultation process would violate the ESA command to carry out the ESA process "at the earliest possible time" and would violate the NEPA command to conduct the NEPA and ESA processes "concurrently" and in an "integrated" manner. This also constitutes unlawful piecemealing or segmenting of the NEPA process from the ESA required analyses of the jeopardy and habitat threats posed by the proposed Water Tunnels.

Reclamation has not Obtained the "Reasonable and Prudent Alternatives" that Must be Developed and Identified pursuant to the ESA

We set forth above the CEQA and NEPA violations resulting from the failure of the BDCP/Water Fix documents including the Draft EIR/EIS and the new RDEIR/SDEIS to include a range of reasonable alternatives increasing freshwater flows through the Delta by reducing exports and not including new upstream conveyance. We pointed out how Reclamation and DWR have ignored repeated warnings and suggestions made to them over the years by public agencies including the EPA, Army Corps, and SWRCB, by the National Academy of Sciences and by the Environmental Water Caucus (EWC).

Beyond ignoring the CEQA alternatives mandate, expert government agencies, the Academy and the EWC, Reclamation and DWR have also ignored the crystal clear prohibitions and mandates of the ESA.

Under Section 7 of the ESA, 16 U.S.C. § 1536(b)(3)(A), after consultation "If it appears that an action may affect an endangered or threatened species, the consulting agency must provide a biological opinion to the action agency explaining how the action 'affects the species or its critical habitat.' *Id.* § 1536(b)(3)(A). When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest 'reasonable and prudent alternatives [RPA].' *Id.*" *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015). *Accord, Jewell*, 747 F.3d 581, 596; *Locke*, 776 F.3d 971, 988. The consulting agency "in the course of proposing an RPA, must insure that the RPA does not jeopardize the species or its habitat." *Jewell*, 747 F.3d 581, 636.

We pointed out above that Reclamation and DWR had to drop the attempt to sell the Water Tunnels as part of a habitat conservation plan. The USFWS and NMFS scientists were unwilling to find falsely that the Water Tunnels would not be harmful to endangered species of fish and their habitat. The RDEIR/SDEIS calls this "difficulties in assessing species status and issuing assurances over a 50 year period . . ." (RDEIR/SDEIS, 1-2). In fact, for more than three years, the federal scientists have been issuing "Red Flag" warnings that the Water Tunnels threaten the "potential extirpation of mainstem Sacramento River populations of winter-run and

spring-run Chinook salmon over the term of the permit," contrary to publicity claims made for the project.

The Draft EIR/EIS and RDEIR/SDEIS alternatives and alternatives analyses are of no value whatsoever to either decision-makers or the public. This appears to be a deliberate effort on the part of Reclamation and DWR to unlawfully evade the obligation to develop in a Draft EIR/EIS for public review and comment a range of reasonable alternatives including alternatives that would increase freshwater flows through the Delta by reducing exports and that would not include new upstream conveyance. A central feature of this intentional violation of the procedural requirements of both CEQA and the ESA is premature issuance by Reclamation of the Draft EIR/EIS and RDEIR/SDEIS on the one hand, while with the other hand, Reclamation has deliberately failed to prepare a Biological Assessment and delayed initiation of formal ESA consultation with USFWS and NMFS.

As a result of these violations, *reasonable and prudent alternatives* have not been prepared by USFWS and NMFS and are not available to the public or decision makers at this time. Reclamation and DWR wish to construct the Water Tunnels *in spite of* their adverse impacts on Delta water quality and quantity and on endangered and threatened fish species. In contrast, the ESA requires that the project *must not* jeopardize endangered species or their habitat. In essence, the current Water Tunnels project/Water Fix is an unlawful attempt by Reclamation and DWR to present their Petition in a vacuum, in the absence of reasonable and prudent alternatives that they wish to avoid but which are required by the ESA. Reasonable and prudent alternatives are also necessary to provide the CEQA required analysis of a range of reasonable alternatives. The range of *reasonable alternatives* required by CEQA will necessarily include the *reasonable and prudent alternatives* required by the ESA. We are pleased to offer EWC's *A Sustainable Water Plan for California*, discussed in our July 22, 2015 letter, as one example of a reasonable and prudent alternative to the Water Tunnels.[19]

One remedy for this unlawful process is for Reclamation to proceed to prepare a Biological Assessment and then issue a new Draft EIR/EIS for public review and comment concurrently with and integrated with the resulting Biological Opinions prepared under the ESA. The only other lawful remedy open to Reclamation and DWR is also eminently sensible: drop the Water Tunnels proposed action and focus on intelligent 21st century water solutions such as recycling, drip-irrigation, conservation, and retirement of drainage impaired lands in the San Joaquin Valley from production. In the absence of intelligent and lawful actions by Reclamation and DWR, the Board must prepare a Draft EIR on the permit application integrated with and concurrently with the Biological Opinions yet to be prepared by NMFS and USFWS.

ESA Conclusion

In the absence of answers to basic questions including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, the Draft BDCP EIR/EIS and RDEIR/SDEIS are not sufficient for informed review of the permit application by the public and the decision-makers. It will be necessary at minimum under the ESA, NEPA and CEQA for the Board to prepare, issue, and circulate for public review a *new Draft* EIR/EIS con-

[19] http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf.

currently with and integrated with Biological Assessments and Biological Opinions. 40 C.F.R. §§ 1502.9(a); 1502.25(a) (NEPA); 14 Cal. Code Regs., §§ 15065(a)(1); 15088.5(a)(CEQA). Then, and only then, would the public and the decision-makers have the opportunity to engage in meaningful analysis of a preferred project alternative and informed comparison with other alternatives, including the reasonable and prudent alternatives required by the ESA.

THE BOARD MUST COMPLY WITH THE CWA

Summary

As a result of this massive new diversion ("Water Tunnels project"), enormous quantities of freshwater which now flow through the Sacramento-San Joaquin Delta before being diverted would never even reach the Delta. *The BDCP Delta Water Tunnels project is not a permissible project under the federal Clean Water Act (CWA) because it would degrade water quality in the San Francisco Bay-Delta Estuary. This in turn will adversely impact numerous recognized beneficial uses and public health. The Water Tunnels project will require a Clean Water Act Section 401 certification, it cannot legally be given one since it will not comply with established water quality standards.* We addressed above the failure of the BDCP/Water Fix agencies to develop and consider a range of reasonable alternatives increasing Delta flows by reducing exports

To summarize[20], ***first***, the Delta Water Tunnels project will violate water quality standards. ***Second***, because the state cannot issue a 401 certification to a Water Tunnels Project that does not meet water quality standards and objectives, the Corps of Engineers cannot legally issue a 404 permit regulating dredge and fill in waters of the United States. ***Third***, the Water Tunnels project has no defensible antidegradation analysis in either the Draft EIR/EIS or the RDEIR/SDEIS, which is required for compliance with the CWA. And the lack of an adequate antidegradation analysis is yet another reason the State will be unable to issue the 401 certification. ***Fourth***, the Water Tunnels project threatens to dictate water quality objectives and prejudice ongoing State Water Resources Control Board's (SWRCB) Bay-Delta Water Quality Control Plan Phase 1 and 2 processes, in violation of the Clean Water Act.[21] ***Finally,*** the proposed project fails to meet the Clean Water Act's requirement for the Least Environmentally Damaging Practicable Alternative (LEDPA).

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[20] This section draws on previous comments in letters submitted timely on the Bay Delta Conservation Plan by Earth Law Center, July 28, 2014, accessible at http://www.friendsoftheriver.org/site/DocServer/xBDCP_Comments_Aug_2014_0003949.pdf?docID=9362; California Sportfishing Protection Alliance, No. 2 on Water Quality, July 28, 2014, accessible at http://www.friendsoftheriver.org/site/DocServer/xBDCP_Comments_Aug_2014_0002679.pdf?docID=9241; and Environmental Water Caucus, June 11, 2014, accessible at http://www.friendsoftheriver.org/site/DocServer/xBDCP_Comments_Aug_2014_0006165.pdf?docID=9585, as well as preliminary review of the Bay Delta Conservation Plan/California WaterFix 2015 RDEIR/SDEIS.

[21] The Petition on one hand, seeks approval for the new diversion for the north Delta intakes of the Tunnels Project, including gaping exemptions from water quality standards that undermine beneficial uses that should be protected by the water quality control plan. On the other hand, the Tunnels project will prejudice the Phase 1 and 2 processes with premature diversion and 404 permit requests, potential Delta island purchases by the Metropolitan Water District of Southern California, as well as the inadequate Tunnels environmental review process.

It deserves special mention that four million people in the five Delta counties depend on good water quality in the Delta for their livelihoods and quality of life. Nearly one million Delta residents depend on the Delta as their primary drinking water supply. To improve the Delta as a fishable, swimmable, drinkable, and farmable region will require protecting and enhancing the Estuary's water quality, pure and simple. If we are to leave generations to come an Estuary with sustained and diverse ecological fertility, the Estuary deserves and needs more flowing water, cleansed of the pollutants that now plague it, and state and federal rejection of the Water Tunnels Project will help in realizing this goal.

The Board must conduct CEQA scoping and prepare a Draft EIR and ultimately Final EIS on the Petition if the Board continues to proceed to consider the Petition addressing the water quality and Clean Water Act issues raised by the proposed project.

The Diversion Change will violate water quality standards for flow and other parameters, preventing necessary Clean Water Act Section 401 certification

Historically, the Bay-Delta Estuary has been enormously productive, a magnet for many aquatic species to reproduce in and migrate through. Its native species evolved to take advantage of the Estuary's annual and seasonal variations in water quality and flow. As the seasons change, the Bay Delta Estuary cycles through such ecological roles as aquatic nursery, restaurant, and crossroads. The Delta's communities and economy were built on this ecological foundation. The health of this diverse ecosystem depends on having variable and good water quality that benefits each of these roles.

Development and implementation of the Water Tunnels project must be accountable to the CWA. Sound planning dictates that implementation of the CWA's requirements should begin ***now***, to prevent violations by the Water Tunnels project. One CWA requirement that will arise during Water Tunnels project implementation is CWA Section 401 certification, which is necessary for any "[f]ederal license or permit to conduct any activity … [that] may result in any discharge into navigable waters."[22]

DWR filed an application for a CWA Section 404 dredge and fill permit with the Army Corps on August 24, 2015, and they filed an application for a 401 certification on September 23, 2015 with the State Water Resources Control Board (SWRCB).[23] The 404 permit will be needed from the Army Corps because construction of the Water Tunnels project will result in discharges of dredge or fill material into waters of the United States.[24] Section 401 requires that the SWRCB certify that the Corps' Section 404 permit meets CWA requirements before the permit

[22] 33 U.S.C. § 1341(a)(1).
[23] Accessed September 15, 2015, at http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Article/616568/spk-2008-00861-california-waterfix-project.aspx.
[24] "Many of the actions that will be implemented under the Water Tunnels project will result in the discharge of dredged or fill materials into waters of the United States and will need to be authorized by USACE."Public Draft Plan § 1.3.7.1 (Nov. 2013), available at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_Chapter_1_-_Introduction.sflb.ashx. This is no less true of intake construction of the "California WaterFix" version (Alternative 4A) of the Water Tunnels project.

may be legally issued.[25] State and federal agencies have long recognized the importance of this requirement, meeting several times to discuss it in the context of the preparation of the Water Tunnels project EIR/EIS.[26]

The project reduces Delta freshwater flow conditions in violation of CWA requirements to fully protect the most sensitive beneficial uses

The inadequate flow proposals of the Water Tunnels project EIR/EIS alternatives will ensure that its implementation trips over mandatory compliance with the CWA. Flow regimes that fully protect Delta ecosystems and aquatic species are necessary to avoid this result.

CWA regulations dictate that adopted criteria must protect the "most sensitive" beneficial use.[27] The SWRCB's August 2010 flow criteria report used science to identify the *minimum* amount of unimpaired flow that would protect Delta fish species and habitats. That report thus reflects flows needed to comply with CWA mandates. A new Bay-Delta Plan adopting the Water Tunnels project's proposed flow regimes would fall significantly short of this benchmark, and thereby would fail to protect the most sensitive beneficial uses as required by the CWA.

Indeed, instead of improving flow conditions in the Delta, the Water Tunnels project will actually *increase* average exports[28] and *reduce* already inadequate Delta outflow in many months. Specifically, on average for February through June, the Water Tunnels project would *decrease* Delta outflow by about 1,000 cubic feet per second and also *decrease* the median Delta outflow by about 2,000 cfs.[29] For the period of January through June (the time period during which the August 2010 Flow Criteria from the SWRCB called for an increase of outflow to 75 percent of unimpaired Delta outflow), the BDCP *decreases* outflow. Water Tunnels project modeling shows that long-term average Sacramento River flows below the north Delta intake diversions would *decrease* between 6 to 38 percent from current and future flows without the Tunnels

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[25] "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." 33 U.S.C. § 1341(a)(1).

[26] As reflected by U.S. EPA in its comments on these discussions: "[a]lthough there is no statutory requirement that the NEPA document prepared for an HCP under the Endangered Species Act be used as the basis for permits and certifications required under CWA §404 to authorize and implement the project, EPA recognizes the importance of coordination in federal review. Toward this end, EPA and the Corps have met with the project proponent on numerous occasions over the past several years in the interest of using the BDCP EIS/EIR to inform the Corps' 404 regulatory decisions. Despite these efforts, significant unresolved issues remain about the scope of analysis for the proposed project, the level of detail required to trigger the consultation process and federal permitting, and the structure of a comprehensive permitting framework for the proposed project." U.S. EPA, "EPA's Comments on BDCP ADEIS," p. 6 (July 03, 2013), available at: www2.epa.gov/sites/production/files/documents/july3-2013-epa-comments-bdcp-adeis.pdf.

[27] 40 CFR § 131.11 ("For waters with multiple use designations, the criteria shall support the most sensitive use"); see also 40 CFR §131.6.

[28] *See* Public Draft Plan, App. 5B, Fig. 5.B.4-4, available at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_EIREIS_Appendix_5B_-_Responses_to_Reduced_South_of_Delta_Water_Supplies.sflb.ashx. See also BDCP/California WaterFix, RDEIR/SDEIS, 2015, Section 4.3.1, Figures 4.3.1-15, -16, -18, -19, -20, and -21.

[29] *See* Public Draft Plan, App. 5C, Attachment 5.C.A, Table C.A-41, available at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_Appendix_5C_-_Part_5_-_Flow_Passage_Salinity_and_Turbidity.sflb.ashx.

project, and in wet years river flows would decrease between 7 and 42 percent. Overall, monthly lower Sacramento River flows are projected by "California WaterFix" to decrease between 20 and 24 percent. (See Attachments 1, 2, and 3 to this letter.)[30]

Decreased flows and increased residence times will cause the designated beneficial uses of migratory and rare fish species to decline, according to Water Tunnels Project RDEIR/SDEIS modeling results. Through-Delta survival rates of the juvenile and smolt life stages of winter-run, spring-run, fall-run and late-fall-run Chinook salmon are all expected to decrease relative to both existing conditions and the No Action Alternative. These fish species are "rare and endangered species" beneficial uses as well as "migration of aquatic organisms" beneficial uses. These reduced flows will decrease the size of critical open water estuarine habitat beneficial uses for state and federally-listed species like Delta smelt and longfin smelt, both of which count also as rare and endangered beneficial uses under the current Bay-Delta Water Quality Control Plan.[31] The EPA expressed serious concerns about the EIR/EIS Administrative Draft's (ADEIS) proposed decrease in outflow "despite the fact that several key scientific evaluations by the federal and State agencies indicate that *more* outflow is necessary to protect aquatic resources and fish populations."[32] The Water Tunnels project's flow regime will violate the beneficial uses of affected waterways and therefore violate water quality objectives. DWR and the Bureau of Reclamation must drop the Water Tunnels project to protect all designated beneficial uses.

The project increases Delta contamination, resulting in violations of pollutant criteria.

Reduced through-Delta flows will stagnate water conditions and cause Delta water quality to deteriorate badly. RDEIR/SDEIS modeling documents find that the project will violate standards for boron, bromide, chloride, electrical conductivity, nitrate, dissolved organic carbon, mercury, and selenium.[33] While these constituents' concentrations will *increase* in western and central Delta locations, as well as Contra Costa Water District's Pumping Plant No. 1, their concentrations are expected to *decrease* in export waters of the North Bay Aqueduct in Barker Slough, and Jones Pumping Plant and Banks Pumping Plant in the south Delta. These results hold for both changes compared with existing conditions as well as the No Action Alternative, the latter of which factors out most sea level rise and climate change impacts.

Because it cannot meet water quality standards, the Water Tunnels Project cannot obtain the required Clean Water Act 401 Certification it needs for a 404 permit to build the project.

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[30] Estimates derived by Restore the Delta from graphical analysis interpolating data in Figures 4.3.2-7 and 4.3.2-8 from the Recirculated Draft EIR/EIS, Section 4.3. See Attachment 1 to this letter. See also Appendix B, Tables B.7-28 (downstream of north Delta intakes), B.7-30 (Sacramento River at Rio Vista), B.7-32 (Delta outflow), and B.7-34 (San Joaquin River at Vernalis), pp. B-357 to B-370. These tables show that most changes are *decreases* in flow of 5 percent or more compared with Existing Conditions ***and*** the No Action Alternative (especially along the Sacramento River downstream of the north Delta intakes). Only slight improvements occur in just a handful of months and water year types. Most San Joaquin River flows at Vernalis between February and September in most water year types decrease greater than 5 percent relative to existing conditions as well.

[31] State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, December 13, 2006, p. 9.

[32] U.S. EPA, "EPA Comments on Administrative Draft EIR/EIS, III Aquatic Species and Scientific Uncertainty, Federal Agency Release," p. 4 (July 18, 2013) (emphasis added), available at: http://www2.epa.gov/sites/production/files/documents/july3-2013-epa-comments-bdcp-adeis.pdf.

[33] RDEIR/SDEIS, Appendix B.

To obtain CWA Section 401 certification, the project at issue must meet several CWA requirements, including the requirement to meet water quality standards under CWA Section 303.[34] If these requirements are met, then either the Regional Water Quality Control Boards (RWQCB) or the SWRCB may grant Section 401 certification.[35]

As implementing EPA regulations assert,[36] Section 401 certification "shall" include "a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."[37] In other words, the state *cannot* grant Section 401 certification to a project if there is no reasonable assurance that it will meet water quality standards. The examination of whether a project violates water quality standards does not include "balancing" factors such as economic considerations – a project either meets water quality standards, or it does not.[38] Furthermore, as confirmed by the 1994 U.S. Supreme Court decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (*PUD No. 1),* CWA Section 401 certification considers the impacts of the *entire* activity – not just impacts of any particular discharge that triggers Section 401.[39] For the Water Tunnels project to receive Section 401 certification, the *entire project* must show it can be built and operated so as to meet all water quality standards. This it will not do because water quality standards cannot be met under the currently-proposed Water Tunnels project flow regimes and related effects on estuarine water quality and beneficial uses.

The CWA states that water quality standards "shall consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses."[40] In other words, "a project that does not comply with a designated [*i.e.*, beneficial] use of the wa-

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[34] 33 U.S.C. § 1341(a)(1), (d). A state agency may also condition, deny or waive certification under certain circumstances. See also 33 U.S.C. § 1341(a)(1)- (2), and 33 U.S.C. § 1341(d). According to § 401(d), certification "*shall* set forth any effluent limitations and other limitations … necessary to assure that any applicant" complies with certain provisions of the CWA. The Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* held that this includes CWA §303, since § 301 incorporates it by reference. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, at 713-715 (1994) (PUD No. 1).

[35] In California, the Regional Water Quality Control Boards are responsible for granting water quality certification, unless the project occurs in two or more regions, in which case the SWRCB is responsible. *See* SWRCB, "Instructions for Completing the Clean Water Act Section 401 Water Quality Certification Application" (Jan. 2005), available at:www.swrcb.ca.gov/centralcoast/water_issues/programs/401wqcert/docs/instruct_401_wq_cert_app.pdf.

[36] The Supreme Court held that the EPA's interpretation is consistent with the CWA in *PUD No. 1*.

[37] 40 CFR § 121.2(a)(3); *PUD No. 1* at 712.

[38] 40 CFR § 131.11 ("For waters with multiple use designations, the criteria shall support the most sensitive use"); see also 40 CFR §131.6. As noted by the state Supreme Court, Porter-Cologne "cannot authorize what federal law forbids"; that is, California cannot allow for the "balancing away" of the most sensitive beneficial uses in a reliance on Porter-Cologne rather than the Clean Water Act. *City of Burbank v. State Water Resources Control Bd*., 35 Cal.4th 613, 626, 108 P.3d 862 (2005).

[39] *PUD No. 1*, 511 U.S. 700 (1994). *PUD No. 1* established that so long as there is a discharge, the state can regulate an activity as a whole under §401. *PUD No. 1* at 711-712.

[40] 33 U.S.C. 1313(c)(2)(A) (emphasis added); *PUD No. 1* at 704. In addition to the uses to be protected and the criteria to protect those uses, water quality standards include an antidegradation policy to ensure that the standards are "sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation." *PUD No. 1* at 705; 33 U.S.C. 1313(d)(4)(B); 40 CFR § 131.6. EPA regulations add that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR §131.12.

ter does not comply with the applicable water quality standards."[41] This fundamental CWA mandate does not change when the impact on beneficial uses arises from altered flow. The CWA was established specifically to "restore and maintain the chemical, *physical*, and biological integrity of the Nation's waters" – not solely to regulate "pollutants."[42] The U.S. Supreme Court addressed this issue directly in *PUD No. 1*, stating that:

> Petitioners also assert more generally that the Clean Water Act is only concerned with water 'quality,' and does not allow the regulation of water 'quantity.' This is an artificial distinction.[43]

The Court specifically took note of CWA Sections 101(g) and 510(2), which address state authority over the allocation of water as between users. The Court found that these provisions "do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."[44] This conclusion is supported by the "except as expressly provided in this Act" language of Section 510(2), which conditions state water authority; and by the legislative history of Section 101(g), which allows for impacts to individual water rights as a result of state action under the CWA when "prompted by legitimate and necessary water quality considerations."[45] Accordingly, these CWA provisions are not impediments to California's implementation of its CWA mandate to ensure compliance with water quality standards, *including* within the context of flows.

As noted above, in its August 2010 flow criteria report, the SWRCB found that "[t]he best available science suggests that current flows are insufficient to protect public trust resources," and that "[r]ecent Delta flows are insufficient to support native Delta fishes for today's

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[41] *PUD No. 1,* 511 U.S. at 715. *See also* 40 CFR § 131.3(b) (U.S. EPA stating that "[w]hen criteria are met, water quality will *generally* protect the designated use," [emphasis added] indicating that numerical criteria do not always by themselves protect a designated use). Recognized beneficial uses in the Bay-Delta Estuary include, but are not limited to, agricultural supply (AGR), groundwater recharge (GWR), Water Contact Recreation (REC-1), Non-Contact Water Recreation (REC-2), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), Estuarine Habitat (EST), and Rare, Threatened, or Endangered Species (RARE).

[42] 33 U.S.C. § 1251(a). Emphasis added.

[43] *PUD No. 1,* 511 U.S. at 719. In *PUD No. 1*, the U.S. Supreme Court took up the question of whether Washington state had properly issued a CWA Section 401 certification imposing a minimum stream flow requirement to protect fish populations. The Supreme Court held that conditioning the certification on minimum stream flows was proper, as the condition was needed to enforce a designated use contained in a state water quality standard. *Id.* at 723. In reaching this decision, the court noted that the project as proposed did not comply with the designated use of "[s]almonid [and other fish] migration, rearing, spawning, and harvesting," and so did not comply with the applicable water quality standards. *Id*. at 714.

[44] *Id*. at 720.

[45] *Id*. "See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 532 (1978) ('The requirements [of the Act] may incidentally affect individual water rights. . . .It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations')." *See also* Memorandum from U.S. EPA Water and Waste Management and General Counsel to U.S. EPA Regional Administrators, "StateAuthority to Allocate WaterQuantities – Section 101(g) of the Clean Water Act" (Nov. 7, 1978), available at: http://water.epa.gov/scitech/swguidance/standards/upload/1999_11_03_standards_waterquantities.pdf.

habitats."[46] However, flow regimes proposed by the current Water Tunnels project rely on water quality (including flow) objectives that have been failing to protect Delta ecosystem and aquatic species beneficial uses for the last 15 years or more. These include: Water Right Decision 1641 (D-1641)[47]; the 2006 San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan; the 2009 NMFS Biological Opinion (BiOp); and the 2008 USFWS BiOp.

Further, the Water Tunnels project notably incorporates "bypass flows" that ostensibly establish the minimum amount of water that must flow downstream of the planned north Delta intake. Rather than protecting Delta flow, the Water Tunnels project reduces average annual Sacramento River flow downstream of the North Delta intakes.[48] Reduced flows downstream of the north Delta intakes extend all the way past Rio Vista as well.[49] Because it fails to put needed flows back into failing waterways, the Water Tunnels project will violate water quality standards by failing to protect sensitive beneficial uses. These include "rare, threatened or endangered species habitat," "estuarine habitat," "spawning, reproduction, and/or early development," and other sensitive beneficial uses.[50] Chinook salmon, Central Valley steelhead, sturgeon and lamprey all migrate and spawn in this area, with Delta smelt and longfin smelt likely spawning in the lower Sacramento River, or in hydraulically connected adjacent channels. Factoring out climate change effects, juvenile and salmon smolt survival rates through the Delta to Chipps Island decrease for each run of salmon under the flow regimes put forward by proponents of the Water Tunnels project.[51] The Water Tunnels Project will thus fail as a set of flow regimes that could support Section 401 certification for necessary Section 404 permits.

Actions that "reasonably protect"[52] rather than "protect" the beneficial use are insufficient. If multiple beneficial uses are at stake, adopted flow criteria must protect the *most sensitive*

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[46] SWRCB, 2010 Delta Flow Criteria Report, pp. 2, 5. Accessible at http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

[47] D-1641 requires the SWP and CVP to meet flow and water quality objectives, including specific outflow requirements, an export/import ratio, spring export reductions, salinity requirements, and, in the absence of other controlling restrictions, a limit to Delta exports of 35 percent total inflow from February through June and 65 percent inflow from July through January.

[48] See Attachment 1 in this letter, above, and Public Draft Plan § 5.3.1.1, available at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_Chapter_5_-_Effects_Analysis.sflb.ashx. See Also BDCP Draft EIR/EIS Chapter 3, *Description of Alternatives*, Table 3-17, p. 3-186.

[49] See RDEIR/SDEIS, 2015, Appendix B, Table B.7-30, pp. B-361 to B-362.

[50] State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta*, December 13, 2006, p. 9.

[51] By "factoring out climate change effects," we refer to the Water Tunnels project proponents' preference for environmental impact comparisons between the No Action Alternative and Alternative 4A (either Scenarios H3 or H4). This comparison reflects the future migration prospects of these fish with and without the proposed Water Tunnels Project. Even by their preferred comparison of the Water Tunnels project with the No Action Alternative, juveniles and smolts have lower survival rates through the Delta to Chipps Island.

[52] SWRCB, "Comments on the Second Administrative Draft Environmental Impact Report/Environmental Impact Statement for the Bay Delta Conservation Plan," p. 1 (July 05, 2013), available at: baydeltaconservation-plan.com/Libraries/Dynamic_Document_Library/State_Water_Resouces_Control_Board_Comments_on_BDCP_EIR-EIS_7-5-2013.sflb.ashx (emphasis added).

beneficial use (*i.e*., they cannot "balance" away uses) and must be based on science.[53] As the state Supreme Court found, Porter-Cologne balancing provisions[54] that provide only "reasonable" protection "cannot authorize what federal law forbids." [55] The more protective CWA water quality standard requirements take precedence over weaker Porter-Cologne language; ecosystem and species needs cannot—and must not—be balanced away.

EPA commented last year on the Bay Delta Conservation Plan and its draft EIR/EIS that "[b]ecause the location of X2 [the estuarine habitat water quality objective] is closely tied to freshwater flow through the Delta, the proposed project would have a strong influence on this parameter, yet the Draft EIS does not analyze each alternative's impacts on aquatic life in the context of this relationship."[56] The Bay-Delta Water Quality Control Plan's estuarine habitat water quality objective will likely be violated by the Water Tunnels Project as well. In the RDEIR/SDEIS and the Draft EIR/EIS there is no modeling of how changes in X2, the Delta's estuarine habitat water quality objective may affect a variety of estuarine species. X2, which measures the approximate center of the estuary's low salinity zone relative to the Golden Gate, was shown last year in BDCP modeling to migrate upstream under the Tunnels' influence relative to existing conditions and the No Action Alternative.[57] The modeled upstream migration of X2 means that critical habitat for estuarine species will shrink, especially relative to the No Action Alternative. Species abundance and X2 are negatively related: when X2 moves further from the Golden Gate, species abundances typically decrease as the size of the Low Salinity Zone decrease (with lower flows), with few exceptions.[58] This remains true of the RDEIR/SDEIS, in which no new modeling is conducted.

The SWRCB has indicated tentative interest in designating subsistence fishing as a beneficial use statewide, including in the Delta.[59] We would certainly welcome such a beneficial use designation in the Delta as elsewhere because protection of the most sensitive ecological and estuarine beneficial uses will also protect subsistence fishing as a beneficial use. Humans are connected to these other beneficial uses, no less so in the Bay-Delta Estuary.

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[53] EPA regulations state that "criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." *See* 40 CFR §131.11; *see also* 40 CFR §131.6.

[54] Calif. Water Code § 13000.

[55] *City of Burbank v. State Water Resources Control Bd*., 35 Cal.4th 613, 626, 108 P.3d 862 (2005) (citing the Supremacy Clause).

[56] USEPA, "Draft Environmental Impact Statement for the Bay Delta Conservation Plan, San Francisco Bay Delta, California (CEQ# 20130365), August 26, 2014, p. 5. Accessible at http://www.friendsoftheriver.org/site/DocServer/8-26-14_EPA_Cmmnt_on_BDCP.pdf?docID=9539.

[57] See Figure 7, p., 66 of Environmental Water Caucus comments on Bay Delta Conservation Plan, June 11, 2014; accessible online at http://ewccalifornia.org/reports/bdcpcomments6-11-2014-3.pdf.

[58] Panel Summary Report on Workshop on Delta Outflows and Related Stressors, May 5, 2014. Accessible online at http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Outflows-Report-Final-2014-05-05.pdf. This report identifies "key papers" in which the relationships of X2, Delta outflow, and species abundances are anchored.

[59] Email from Esther Tracy of State Water Resources Control Board, Office of Public Participation, to Andria Ventura, Clean Water Action, "State Water Resources Control Board Beneficial Uses," May 6, 2014, forwarded to Colin Bailey of Environmental Justice Coalition for Water, thence to Tim Stroshane, Environmental Water Caucus consultant. Tracy's message primarily concerns subsistence fishing by California Indian Tribes.

The Water Tunnels Project will also violate numerous pollutant criteria mentioned above with drastic consequences for public health and vitality of the region's ecosystems and water-dependent economic sectors like tourism, recreation, agriculture, and subsistence fishing. On this score, the Water Tunnels Project will further violate water quality standards, precluding the SWRCB from certifying the project under Clean Water Act Section 401.

In summary: implementation of the Water Tunnels project will require a CWA Section 404 permit from the Army Corps, which it cannot receive unless the state issues a CWA Section 401 certification. The certification in turn cannot be legally issued unless the project as a whole (*i.e.*, rather than the individual discharge mandating the 404 permit) meets water quality standards, which includes meeting beneficial uses designed to protect Delta species and ecosystems. The Water Tunnels project fails across the board.

There is no defensible anti-degradation analysis

A cornerstone of the State Water Board and Regional Water Board's regulatory authority is the Antidegradation Policy (Resolution 68-16), which is included in the Basin Plans as an appendix. However, the Water Tunnels project Draft EIR/EIS and RDEIR/SDEIS fail to discuss or analyze constituents which will "degrade" water quality. These documents do not evaluate whether the designated beneficial use is degraded and what it means for CWA compliance.

Section 101(a) of the CWA, the basis for the antidegradation policy, states that the objective of the Act is to "restore and maintain the chemical, biological and physical integrity of the nation's waters." Section 303(d)(4) of the CWA carries this further, referring explicitly to the need for states to satisfy the antidegradation regulations at 40 CFR § 131.12 before taking action to lower water quality. These regulations (40 CFR § 131.12(a)) describe the federal antidegradation policy and dictate that states must adopt both a policy at least as stringent as the federal policy and implementing procedures.

The CWA requires the *full* protection of identified beneficial uses. The Federal Antidegradation Policy, as required in 40 CFR 131.12 states, "The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following: (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." The Delta is classified as a Tier II, "high quality," waterbody by US EPA and the SWRCB. EPA Region 9's guidance on implementing antidegradation policy states, "All actions that could lower water quality in Tier II waters require a determination that existing uses will be fully maintained and protected." [60]

California's antidegradation policy is described in the State Antidegradation Guidance, SWRCB Administrative Procedures Update 90-004, 2 July 1990 ("APU 90-004") and EPA Region IX, ("Region IX Guidance"), as well as Water Quality Order 86-17. [61]

California's Antidegradation Policy (Resolution 68-16) requires that:

[60] EPA, Region 9, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12, page 7.
[61] "Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12" (3 June 1987).

(5)Existing high quality water will be maintained until it has been demonstrated that any change will be with the maximum benefit to the people of the State.
(6)The change will not unreasonably affect present and anticipated beneficial uses.
(7)The change will not result in water quality less than prescribed in the policies.
(8)Any activity which produces a waste or increased volume or concentration will be required to meet waste discharge requirements using the best practicable treatment or control of the discharge necessary to assure that neither pollution nor nuisance will occur and the highest water quality with maximum benefit to the people of the state will be maintained.

While California's Antidegradation Policy requires that, "[t]he change will not unreasonably affect present and anticipated beneficial uses and the change will not result in water quality less than prescribed in the policies," the Federal Antidegradation Policy requires a "determination that existing uses will be fully maintained and protected."[62]

The Water Tunnels project will reduce flows and result in poorer water quality for a number of constituents, including boron, bromide, chloride, electrical conductivity, nitrate, organic carbon, some pesticides, mercury and selenium. The Delta is currently impaired for many of the constituents that will increase under the proposed alternative. Several water quality constituents are detailed in Attachment 5 where degradation is expected should the Water Tunnels project be constructed and operated.

Even if DWR and the Bureau of Reclamation provide an adequate antidegradation analysis of the Water Tunnels project, the point remains that they cannot move forward on a 401 certification from the SWRCB if any water quality standards are not met. The antidegradation analysis is supposed to ensure they comply with any and all water quality standards, but there is clear evidence they cannot and will not do so.

Water Tunnels project operational modeling criteria scenarios prejudice potential new water quality objectives for the Bay-Delta Estuary from the State Water Resources Control Board

A large but wholly implicit assumption through the Water Tunnels project and its Draft EIR/EIS is that any one of these alternatives would require wholesale revision to how water quality is regulated in the Bay Delta estuary, in order for the Water Tunnels project to move forward. The setting sections of Chapter 5, 6, 7, and 8 (comprising water supply, surface water, groundwater, and water quality) contain no descriptions of the existing water quality objectives as they apply to flow and operational actions by the state and federal water facilities in the Delta. The Draft EIR/EIS Executive Summary last year only hints at this matter, titling one section "New Rules for North Delta Diversions," but does not address this matter, making no mention of the regulatory regime change that would apparently be required of the SWRCB.[63] This year, the RDEIR/SDEIS announces "proposed new flow criteria" for north and south Delta SWP and CVP export facilities, and the proposed new head of Old River operable barrier.[64]

[62] Draft BDCP EIR/EIS, 2013, page 8-408.
[63] Bay Delta Conservation Plan, Draft EIR/EIS, November 2013, *Executive Summary*, Section ES.9.1.4, "New Rules for North Delta Diversions," pp. ES-52 to ES-53.
[64] RDEIR/SDEIS, Section 4.1, pp. 4.1-11 through 4.1-13.

Such changes to Delta flows and hydrodynamics must be evaluated through public review before the SWRCB, the only state body authorized to change water quality standards. We are concerned that the Tunnels proponents hope to circumvent the process by making Tunnels operational criteria seem inevitable and necessary; they are neither, and must be the subject of careful and critical review in the Board's Bay-Delta Plan update process, *before* the Water Tunnels Project receives permit approvals for new diversions. Put simply: water quality policy must come before plumbing decisions are made. What is best for the Bay-Delta Estuary, and the Delta's economy and communities comes first.[65]

Further complicating this picture is the role and regulation by SWRCB of "Real-Time Operations [RTOs]."[66] Water Tunnels proponents acknowledge that RTOs cannot be modeled.[67] Not only can they not be modeled, RTOs themselves will be difficult, if not impossible to regulate and monitor by state authorities when the most sensitive beneficial uses have admittedly uncertain threshold conditions that should not be exceeded.

But the Water Tunnels proponents push use of RTOs as "silver bullets" for gaps in mitigation that ought to protect listed fish species but which come up short. This implies that project operators will be given broad discretion over project operations to make "short-term adjustments"—possibly to the usurpation of established laws and regulations in the name of optimizing or maximizing Delta exports relative to Delta inflows, water quality objectives, and Delta outflow, and potentially contrary to the SWRCB's role as the sole body with authority to change and enforce water quality objectives.

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[65] This stance is also consistent with the Delta Protection Act of 1959.

[66] Real-time operational decisions "are expected to be needed during at least some part of the year at the Head of Old River gate and the north and south Delta diversion facilities." *RDEIR/SDEIS,* p. 4.1-13, lines 17-18. Real-time operations are defined in Conservation Measure 1 of the Bay Delta Conservation Plan, November 2013, Section 3.4.1.4.5, *Real-Time Operational Decision-Making Process*, p. 3.4-26, lines 14-18: "[R]eal-time operational decision-making process (real-time operations [RTOs]) allows for short-term adjustments in operations within the range of CM1 [that is, Water Tunnels operating] criteria..., in order to maximize water supply for SWP and CVP relative to the [BDCP] Annual Operating Plan and its quarterly updates subject to providing the necessary protections for covered species." The Water Tunnels project's documents expect retention of BDCP's use of RTO teams focused on each Delta facility and coordinating with each other. We note that the RDEIR/SDEIS does not specify that post hoc descriptions of RTOs would be made public through such an Annual Operating Plan.

[67] This is most explicitly noted in BDCP Appendix 5.C, Attachment 5C.A, *CALSIM II and DSM2 Modeling Results for the Evaluated Starting Operations Scenarios*, pp. 5C.A-157 to 162. Old and Middle River flow real-time operations are an example, p. 5C.A-157, lines 31-44. "The magnitude of the export restrictions [relating to Old and Middle River flows] cannot be simulated accurately with CALSIM because the limits will be adaptively specified by the USFWS smelt working group, based on real-time monitoring of fish and turbidity and temperature conditions. The assumed restrictions provide a representative simulation compared to D-1641 conditions without any OMR restrictions." Moreover, real-time operations pose dramatic uncertainties for South Delta export operations with real-time adaptive operations in place. "If the least restrictive OMR flow of -5,000 cfs were allowed for 6 months (January-June), a maximum of 1,800 taf per year could be pumped (assuming the San Joaquin River diversion to Old River satisfied the 35% of the net Delta depletion that is south of the OMR flow stations. But because of the 1,500 cfs limit on exports in April and May (2009 NMFS BiOp), the maximum exports would be 1,400 taf per year. If the OMR restriction was reduced to -2,500 cfs for the 6 months (with 1,500 cfs in April and May), a total of 780 taf could be pumped from the South Delta. This is a very dramatic reduction for the CVP and SWP exports which historically have exported about half (45%) of the total exports during these months. This uncertainty in the potential south Delta exports is a consequence of the adaptive management framework for the 2008 USFWS BiOp and 2009 NMFS BiOp actions regarding OMR flow." Since BDCP contemplates real-time operations in several other Delta and Yolo Bypass locations, uncertainties will compound for planning operations, exports, and outflows.

For example, real-time operations and modeling were employed in 2014 and 2015 along the upper Sacramento River by the Bureau of Reclamation to manage and control temperature conditions, but failed to prevent large scale losses of winter-run and spring-run Chinook salmon while SWRCB staff and officials could only stand by helplessly. Real-time operations can create situations in which project operators can behave as they see fit, and apologize later. That is unacceptable now that listed fish species are so close to extinction. We doubt that real-time operations will have sufficient margins of error to prevent catastrophe.

Instead, adjustments to water quality flow objectives should err on the side of precaution. Designated beneficial uses should be protected as required under the CWA and its implementing regulations. The most sensitive of them will be endangered further by Water Tunnels project operating criteria that reduce and reverse Sacramento River flows, and bring more polluted San Joaquin River water to Delta channels. The precautionary principle must come to the fore in state and federal fisheries and water project operations management.[68] *Sound policy preventing extinction and restoring and enhancing the integrity of Bay-Delta Estuary waters must come before new plumbing and south of Delta export deliveries.*

The Water Tunnels project as proposed would put plumbing and exports first, which is not an acceptable, lawful or reasonable prioritization.

The Proposed Project is not the Least Environmentally Damaging Practicable Alternative (LEDPA)

Finally, the Tunnels Project also fails to meet another Section 404 requirement, "[t]he requirement [under CWA § 404(b)(1)...that the project proponent must demonstrate that the project is the [Least Environmentally Damaging Practicable Alternative] LEDPA."[69] "A proposed action is not the LEDPA simply because a federal agency is a partner and chooses that proposed action as its preferred alternative."[70] The Tunnels Project appears to be the *most* environmentally damaging alternative possible. It most definitely is not the least damaging, and therefore, it is not the LEDPA.

Over two years ago, EPA pointed out that "Chapter 8 of the [Administrative Draft EIS] ADEIS indicates that, as proposed, all project alternatives of the BDCP would result in adverse effects to one or more beneficial uses within the affected water bodies."[71] EPA also explained that "The DEIS should sharply distinguish between alternatives and evaluate their comparative merits, consistent with 40 CFR 1502.14(b)."[72]

Over one year ago, EPA explained to state agencies that:

[68] Peter Montague, accessed online 11 September 2015 at http://www.precaution.org/lib/pp_def.htm.
[69] USEPA, Preliminary Administrative Draft Comments for the Bay Delta Conservation Plan DEIR/S p. 2, April 26, 2012.
[70] EPA, BDCP DEIS Corrections and Additional Editorial Recommendations, p. 1, August 27, 2014.
[71] EPA's Comments on BDCP ADEIS, p. 3, July 3, 2013.
[72] *Id.* p. 2.

> Other reasonable alternatives could be developed by incorporating a suite of measures, including water conservation, levee maintenance, and decreased reliance on the Delta. Such alternatives would be consistent with the purpose and need for the project, as well as with the California Bay-Delta Memorandum of Understanding among Federal Agencies and the Delta Reform Act of 2009.[73]

There must be a new Draft EIR before the evidentiary hearing commences including a range of reasonable alternatives starting with not adding the new upstream diversion while including positive measures to such as water conservation, recycling, drip irrigation, taking poisoned lands out of agricultural production and reducing exports.

The "alternatives" of the Water Tunnels project presented in the Draft EIR/EIS and the RDEIR/SDEIS are nothing more than peas out of the same pod. As we explained above, there has been a complete failure on the part of the Water Tunnels proponents to develop and consider a reasonable range of alternatives. That failure also includes refusal to consider and develop the Environmental Water Caucus *Responsible Exports Plan*, updated to *A Sustainable Water Plan for California*, that the Caucus provided to Water Tunnels proponents on a silver platter almost 3 years ago—as well as failure to consider and develop "The 'Portfolio Approach' developed by a diverse set of stakeholders . . . one attempt to place Delta water management into the larger context of facilities investments and integrated operations."[74]

There is more. As we explained above, there has been a complete failure on the part of Water Tunnels proponents to obtain and present the Reasonable and Prudent Alternatives (RPA) required under the ESA.

Operation of the Water Tunnels would have enormous adverse environmental impacts causing and worsening violations of water quality standards. We understand that the exporters and their supporters wish to take enormous quantities of water away from the Delta upstream. But we have a government of laws, not of persons. It is time either to drop this horrendously damaging and expensive project or follow the law whether certain interests want to do so or not. If the project is not dropped, it is time to prepare a new Draft EIR/EIS for public and decision-maker review that presents some actual—alternatives—that would not include the Water Tunnels and that would finally began to increase flows through the Delta. The range of reasonable alternatives required by NEPA in the new Draft EIR/EIS must include the Reasonable and Prudent Alternatives (RPA) produced pursuant to the ESA and the Least Environmentally Damaging Practicable Alternative (LEDPA) pursuant to the CWA.

CWA Conclusion

The long-term decline of the San Francisco Bay Delta Estuary is a story of our lost connection with nature. Once a pristine ecosystem and the West Coast's largest estuary—a rich, biodiverse habitat of unspoiled grasslands, riparian forests, willow thickets, and other features, with an abundance of native fish species such as salmon—the Delta has suffered tremendously from

[73] EPA Detailed Comments on the Draft Environmental Impact Statement for the Bay Delta Conservation Plan; August 26, 2014, p. 13.
[74] *Id.*

the misguided belief that nature can be endlessly exploited and degraded. As a first step towards recovery, we must enhance flow, which is essential for aquatic species populations, the larger health of the Delta, and Delta communities.

The Water Tunnels project instead reinforces the objective of increasing Delta exports, while reducing Delta outflow and San Francisco Bay inflow. As such, it fails to achieve its purpose of conserving the Delta ecosystem and recovering threatened and endangered species. The Water Tunnels project also will violate the CWA, by harming designated beneficial uses of water (especially the most sensitive uses like migrating and spawning rare fish) and violating pollutant numeric criteria. The Water Tunnels will lead to the degradation of water for human use by millions in the region of the San Francisco Bay-Delta Estuary.

Fortunately, we can still restore and enhance the integrity and health of the Bay-Delta Estuary by adopting (at a minimum) sufficient flows to support healthy fish species and Delta habitats. Moreover, the time is overdue to establish a comprehensive instream water rights program that ensures the longevity of the Delta ecosystem and species, and serves as a model for the state as a whole.

The Board must conduct CEQA scoping to enable it to prepare an adequate and informative Draft EIS for public and decision-maker review of the Petition

THE REFUSAL OF THE LEAD AGENCIES TO DISCLOSE IN THE BDCP/WATER FIX DRAFTS OBVIOUS SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS ON WATER QUALITY, WATER QUANTITY, FISH, FISH HABITAT AND PUBLIC HEALTH IS ARBITRARY AND RENDERS THE DRAFTS USELESS FOR INFORMING THE PUBLIC ABOUT THE ADVERSE IMPACTS OF THE DIVERSION CHANGE

Summary

The Delta Water Tunnels would divert enormous quantities of freshwater that presently flow through the Sacramento River, sloughs, and the Delta 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, and public health by flowing through the Delta would instead flow through massive Tunnels no longer providing benefits within the lower river, sloughs, and the Delta. *This is obvious.*

But the RDEIR/SDEIS actually claims there would be no adverse impacts under NEPA or CEQA from the Delta losing all that freshwater flow on water supply or water quality (with almost no exceptions), or on fish and aquatic resources. (RDEIR/SDEIS Table ES-9, pp. ES-41-60; Appendix A, ch. 31, Table 31-1, pp. 31-3 through 31-8). The BDCP/Water Fix Drafts are supposed to be environmental full disclosure documents. Whether from project-consultant bias or orders from above, it is arbitrary and unreasonable to falsely claim that taking significant quantities of freshwater flows away from the Delta does not have significant adverse environmental impacts on Delta water supply, water quality, fish, and fish habitat. The freshwater *is* the

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

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

Denial of the adverse impacts of taking freshwater flows away from the Delta for the Water Tunnels is absurd. *Fish need water*.

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

An interested person or organization, or decision-maker has been furnished 48,000 pages of documents with central features being the false, arbitrary, and unreasonable denial instead of honest admission of obvious environmental impacts resulting from Water Tunnels operations on Delta water quality, water quantity, fish, and fish habitat. Earlier sections of these comments have summarized some of the adverse impacts on water quality, water quantity, endangered fish species, and fish habitat either admitted in other portions of the environmental documents or pointed out by expert public agencies such as the EPA and environmental organizations.

CEQA defines "significant effect on the environment" to mean "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, *water* . . .flora, fauna . . . and objects of historic or aesthetic significance." CEQA Guidelines, 14 Cal. Code Regs §15382. To anyone but a self-interested project booster or one following orders from above, taking away substantial freshwater flows from a Delta already in crisis is an adverse change in the physical conditions within the area affected by the project.

Also under CEQA, "substantial evidence" does not include: "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate . . ." 14 Cal. Code Regs § 15384. In addition to the false RDEIR/SDEIS findings being obviously argument and clearly inaccurate, there have also been such findings as the EPA expert determination that the Water Tunnels "would not protect beneficial uses for aquatic life, thereby violating the Clean Water Act. Total freshwater flows will likely diminish in the years ahead as a result of drought and climate change. Continued exports at today's prevailing levels would, therefore, result in even lower flows through the Delta in a likely future with less available water." (EPA Review of Draft BDCP EIS at p. 2, August 26, 2014). There is only argument, narrative, and clearly inac-

curate statements in the RDEIR/SDEIS about these impacts. There is not the supporting substantial evidence required by law.

Under CEQA, "Decision-makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* 40 Cal.4th 412, 432 (2007). Here, in violation of law, the decision-makers and also the public have been provided with claimed pros but virtually none of the cons involved in supplying the enormous amounts of water that would be diverted away from the Sacramento River and Delta into the Water Tunnels.

The NEPA Regulations provide guidance 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.

As just two of many examples of truthful, contrary information in chapter 4 of the RDEIR/SDEIS, the Water Tunnels "would degrade the quantity and quality of rearing habitat for steelhead relative to Existing Conditions" and "would reduce the quantity and quality of rearing habitat for larval and juvenile green sturgeon relative to Existing Conditions." (ch. 4, 4.3.7-22; 4.3.7-296). As just two of many examples of truthful, contrary information in chapter 5, "Effects Analysis" of the BDCP Draft Plan (December 2013), "Sacramento River attraction flows for migrating adult winter-run Chinook salmon will be lower from operations of the north Delta diversions under the BDCP" and "Plan Area flows have considerable importance for downstream migrating juvenile salmonids and will be affected by the proposed north Delta diversions . . . Because of the north Delta diversions, salmonids migrating down the Sacramento River generally will experience lower migration flows compared to existing conditions . . . As with winter-run Chinook salmon, it was assumed with high certainty that Plan area flows have critical importance for migrating juvenile spring-run Chinook salmon." (Plan, ch. 5, 5.3-29; 5, 5.4-17).

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. These ten subsections are addressed as follows:

"Impacts that may be both beneficial and adverse . . ." § 1508.27(b)(1). The claim that developing the new northern conveyance would reduce adverse impacts from the existing southern pumps on fish furnishes no excuse to evade disclosing the significant adverse impacts of the new conveyance on water quality, water quantity, fish, and fish habitat.

"The degree to which the proposed action affects public health or safety." § 1508.27(b)(2). As shown above in the Clean Water Act/water quality portion of these comments, the worsening of CWA violations would adversely affect public health and safety.

"Unique characteristics of the geographic area such as proximity to . . . prime farmlands, wetlands . . . or ecologically critical areas." § 1508.27(b) (3). The taking away of significant quantities of freshwater flows upstream from the Delta would pull in greater salinity from San Francisco Bay adversely impacting the prime farmlands of the Delta. The Delta has already been declared to be an ecologically critical area and, again, consists of designated critical habitats for no fewer than five endangered and threatened fish species. California has determined by law in the Delta Reform Act that the Delta is "in crisis and existing Delta policies are not sustainable." Water Code, § 85001(a).

"The degree to which the effects on the quality of the human environment are likely to be highly controversial." § 1508.27(b)(4). The Water Fix Delta Water Tunnels are the most controversial public works project in the history of the state of California. This project in its previous form as the "peripheral canal" was voted down by a statewide referendum in June 1982. One reason the environmental documents falsely deny obvious adverse environmental impacts, hide alternatives increasing flows by reducing exports, and refuse to post contrary information and views from the public and other public agencies is *because* this project is so controversial.

"The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." § 1508.27(b)(5). The experts, for example, of the Delta Independent Science Board have commented extensively on the degree of uncertainty in the environmental documents.

"The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." § 1508.27(b) (6). Whether the Delta Tunnels are approved will in significant part determine future CVP and SWP operations and also represents a decision in principle that flows through the Delta will not be increased by reducing exports. Billions of dollars would not be spent to build the massive Water Tunnels unless the intent is to use them for the purpose for which they are intended.

"Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided determining an action temporary or by breaking it down into small component parts." § 1508.27(b) (7). In other words, the impacts resulting from the Water Tunnels must be considered together with impacts resulting from future CVP and SWP operations.

"The degree to which the action . . . may cause loss or destruction of significant scientific . . . resources." § 1508.27(b)(8). Endangered species are addressed in the next paragraph. One does not know ahead of time what species may contain a cure for cancer or other disease.

"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."[75] The Court required recirculation of the Draft EIR. We have summarized above in the ESA and CWA/water quality portions of these comments some of the impacts Water Tunnels operations would have on at least five endangered or threatened fish species and their designated critical habitats. Of course these impacts are significant adverse impacts. Yet the Executive Summary falsely concludes 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).[76] 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). Yet impacts previously either determined to be adverse or undetermined are now determined to not be significant or adverse. What has happened is that with NMFS and USFWS no longer being co-lead agencies, Reclamation and DWR have not been restrained from turning out environmental documents filled with false denials of numerous significant adverse environmental impacts.

"Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." § 1508.27(b)(10). As shown above, the action threatens violation of several laws imposed for protection of the environment including the ESA, CWA, and the Delta Reform Act.

We understand that the exporters want to take the water away from the Delta and that Reclamation and DWR, want to give them the water. But these desires afford no license to churn out Draft environmental documents under CEQA that arbitrarily, unreasonably, and falsely deny the numerous, severe, adverse impacts that diversion of water for the Water Tunnels would have on Delta water quality, water quantity, endangered and threatened fish species, designated critical habitat, water quality violations, and public health.

The Draft EIR/EIS and RDEIR/SDEIS with their arbitrary, unreasonable, and false denials of numerous, severe adverse environmental impacts resulting from Water Tunnels operations on the Delta are so inadequate as to preclude meaningful analysis. To comply with CEQA, the Board must conduct CEQA scoping and prepare or require the preparation of an adequate Drat EIR before commencing the evidentiary hearing

The CEQA guidelines require that:

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[75] 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).

81 CEQA requires that a lead agency of a project "should reduce paperwork by emphasizing the portions of the environmental impact report that are useful to decision-makers and the public and reducing emphasis on background material." 14 C.C.R. § 15006(s) (1983). The BDCP/Cal WaterFix is in excess of 48,000 pages and the entire report fails to explain the inconsistencies between the information provided in the detail explanatory sections (ie. Section 4.3.3) and the information produced on the information tables (ie. Table ES-9).

'Significant new information' requiring recirculation include, for example, a disclosure showing that:

(1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
(2) . . .
(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. 14 Code Cal. Regs. § 15088.5(a)(1), (3), and (4).

CEQA requires that unless the Water Tunnels project is dropped, a new Draft EIR sufficient to provide for meaningful public review and comment must be prepared and circulated.

Preclusion of Meaningful Public Review Conclusion

Extinction is forever. Environmental full disclosure is imperative here. Arbitrary false denials of adverse environmental impacts resulting from new upstream diversion of large quantities of freshwater flows from a Delta already in crisis and from listed fish species and their designated critical habitats are unacceptable. The Board must prepare and circulate an informative and honest Draft EIR that will afford a basis for meaningful public review and comment, decision-maker review, and development and consideration of a range of reasonable alternatives.

THE WATER FIX HAS NO FORCE OF LAW BEHIND IT

There is no rational reason for the State Water Board to begin an evidentiary hearing on the Water Fix at this time. The Water Fix is not a federally authorized project. Congress has not enacted legislation authorizing development and construction of the Water Tunnels. And, because of a recent change to the BDCP/Water Fix the Water Fix no longer has any recognition in State law.

As explained by the EPA, "In April 2015, Reclamation and DWR announced fundamental changes to the proposed project and changed its name from BDCP to the California Water Fix . . . The proposed federal action has changed from implementing a Habitat Conservation Plan under Section 10 of the ESA to modifying operations of the federal Central Valley Project (CVP) in order to accommodate new water conveyance infrastructure." (EPA Letter, pp. 1-2).

This was no mere name change. Until about April 2015, the claim being made in BDCP documents had been that while there would be adverse impacts from Water Tunnels operations, some of that would be mitigated by the provision of wetland restoration. As just one example of dropping conservation features to protect the Delta, the "65,000 acres of tidal wetland restoration" has been chopped down to "59 acres." (RDEIR)/SDEIS) p. ES-17).

The Delta Plan, developed by the Delta Stewardship Council, is, under the Delta Reform Act, to be "the comprehensive, long-term management plan for the Delta . . ." Water Code §

85059. If the BDCP had been kept going and been approved as a habitat conservation plan under the ESA and approved as a national community conservation plan under the CESA, its incorporation by the Delta Stewardship Council into the Delta Plan would have been mandatory under § 85320(e) of the Delta Reform Act if certain conditions were met. But because Reclamation and DWR dropped the habitat conservation plan and national community conservation plan, incorporation of the Water Fix into the Delta Plan is not mandatory. Moreover, the Water Fix has no recognition whatsoever under the Delta Reform Act. The Act definition is: "'Bay Delta Conservation Plan' or 'BDCP' means a multi-species conservation plan." Water Code § 85053. The Water Fix is not a multi-species conservation plan. The Water Fix, no longer being a habitat conservation or national community conservation plan, has no force of State law behind it.

The Water Fix, involving construction of massive new conveyance facilities to take water away from the Delta before it even reaches the Delta is contrary to State policy as declared by the Legislature. "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." Water Code § 85021. (emphasis added). Also, the Delta is to be restored, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem. Water Code § 85020(c). [77]

Again, all of what is required by the Delta Reform Act is lacking. The Draft environmental documents prepared for the Water Fix have been determined to be *inadequate* by the EPA. Beyond that, since the Water Fix is not a habitat conservation or national community conservation plan, its incorporation into the governing Delta Plan is not mandatory so that the Water Fix has no force of law behind it.

THE ORDER OF PROCEEDING PUTS THE CART BEFORE THE HORSE BY NOT COMPLETING PHASE 2 OF THE BAY-DELTA PLAN UPDATE BEFORE COMMENCING THE EVIDENTIARY HEARING ON THE

The State Water Board still proposes to review the Petition while conducting Phase 2 of the Bay-Delta Plan update concurrently, rather than awaiting completion of Phase 2 of the Plan update. (Notice of Petition, p. 7). The Board states:

> The decision on the application for water quality certification will not be based on future changes to water quality requirements that may result from the update to the Bay-Delta plan, but rather it must ensure that existing water quality requirements will be met. Similarly, the State Water Board is not required to know exactly what changes to flow and

[77] In addition, the Water Fix is not even eligible for state funding because it fails to meet the requirements of § 85320(b) of the Delta Reform Act. Because of the absence of an adequate Draft EIR/EIS, there has not been the compliance with CEQA required by § 85320(b)(2). Nor has there been the comprehensive review and analysis of: a reasonable range of " flows necessary for recovering the Delta ecosystem and restoring fisheries . . . which will identify the remaining water available for export and other beneficial uses" required by § 85320(b)(2)(A); "A reasonable range of Delta conveyance alternatives, including through-Delta . . ." required by § 85320(b)(2)(B); "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 . . ." required by § 85320(b)(2)(C); "the potential effects on migratory fish and aquatic resources" required by § 85320(b)(2)(D); or "The potential effects of each Delta conveyance alternative on Delta water quality." § 85320(b)(2)(G).

> water quality objectives will result from the update of the Bay-Delta Plan in order to process the change petition. (State Water Board Fact Sheet, p. 4).

From a planning standpoint, we disagree that this is a wise approach to either policy planning or Change Petition evaluation and permitting. The Staff Notice fails to disclose *how* it intends to process both at the same time and fails to justify in law this claim and explain why it would be a good idea to run the processes concurrently. What is the Board's authority for not having to know exactly what changes to flow and water quality objectives are needed for the Change Petition? In our view, the presumed virtues of the 1995 Water Quality Control Plan and its implementation vehicle, Water Rights Decision D-1641, are in tatters with the Board's recent treatment of its objectives during the 2014 and 2015 temporary urgency change petitions filed by the state and federal water project operators. Further confirmation of the inadequacy of existing water quality policy is that under this Plan and D-1641, Delta smelt and winter-run Chinook salmon are closer than ever to extinction, and other listed and candidate species (such as longfin smelt) are not far behind if present trends continue.

As set forth above, it is necessary to prepare an adequate Draft EIR/EIS before reviewing the Petition. In addition, the EPA pointed out in its October 30, 2015 RDEIR/SDEIS review letter that:

> 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 conditions in the Delta and reverse the declines in the fish species. (EPA Letter, p.4).

The EPA also pointed out that the new water intake and conveyance infrastructure would require authorization under CWA § 404. "Water quality and aquatic life analyses in the SDEIS show that the proposed project may cause or contribute to violations of state water quality standards and significant degradation of waters of the U.S. . ." (EPA Letter, p. 4). Moreover,

> the most essential decision for achieving the desired balance between water reliability and restoration of the Bay Delta ecosystem is how freshwater flows through the Delta will be managed. This key decision is not described in the SDEIS and is, instead, deferred to future regulatory processes administered by the State of California in consultation with federal resource and regulatory agencies. The decision by the State of California and Reclamation to defer these 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. (EPA Letter, p. 2).

The EPA letter established that the Delta is already in violation of water quality standards, and that the proposed Water Fix would contribute to worsening the violations.[78] It is also established that the impacts of the Water Fix on the Delta lack an adequate informational basis for analysis. The State Water Board indicates it will not be governed by the report it developed in 2010 as required by the Delta Reform Act, Water Code § 85000 et seq., developing flow criteria

[78] See also the Environmental Water Caucus comment letter in this regard, pp. 51-95, accessible at http://ewccalifornia.org//reports/comments-rdeir-dseis-10-30-2015.pdf.

for the Delta. The State Water Board distances itself from its own report calling it "narrowly focused on the flows needed in the Delta ecosystem if fishery protection was the sole purpose for which its waters were put to beneficial use . .." (Notice of Petition, p. 8). Regardless of whether fishery protection is normally the sole purpose, the undisputed facts are that the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA, 16 U.S.C. § 1531 *et seq.* Likewise, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA. The reaches of the Sacramento River, sloughs, and the Delta that would lose significant quantities of freshwater flows through operation of the Water Tunnels are designated critical habitats for each of these five listed and endangered fish species. "ESA section 7 prohibits a federal agency from taking any action that is 'likely to jeopardize the continued existence' of any listed or threatened species or 'result in the destruction or adverse modification' of those species' critical habitat." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9th Cir. 2015). So whatever might be the situation under other circumstances, the presence here of listed fish species and designated critical habitat does, under the ESA, elevate fishery protection to the top of the list.

At the same time as the State Water Board distances itself from its own 2010 report, the Board plans to commence review of the Petition, without having updated the Plan. *This is putting the cart before the horse.* It is necessary in any type of rational planning process for water quality policy in Phase 2 to be completed before a large-scale adjustment to flows and water quality is introduced to the estuary for consideration in light of newly adopted policies. Analogously this is done all the time in local planning and development project permitting. Phase 2 "involves other changes to the Bay-Delta Plan to protect beneficial uses not addressed in Phase 1, including Delta outflows, Sacramento River flows, export restrictions, DCC gate closure requirements and potential new reverse flow limits for Old and Middle Rivers." (Notice of Petition, p. 7). The State Water Board appears to be attempting to act untethered from governing law. The August 2010 flow criteria that the State Water Board now seeks to distance itself from has the force of law behind it, having been required by Water Code § 85086(c)(1). The Plan update is imperative because the Delta is in crisis violating water quality standards, and the existing standards need to be strengthened to protect Delta water quality.

We note as well that the "appropriate Delta flow criteria" that the Delta Reform Act requires it develops specifically for "a change in point of diversion of the State Water Project...from the southern Delta to a point on the Sacramento River" is ***in addition to*** its consideration of the Delta Flow Criteria report findings the Board approved in August 2010.[79]

[79] The specific "appropriate Delta flow criteria" language is from Water Code Section 85086(c)(2). While Water Code Section 85086(c)(1) states that the flow criteria the board develops under that provision of the Water Code "shall not be predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP," this same section does not limit its informational value from informing the Phase 1 and Phase 2 components of water quality control planning for the Bay-Delta Estuary. These flow criteria have the added virtue of having been developed in reliance on best available science, in compliance with Delta Reform Act policies. It is also unclear what the Water Code means by "predecisional." The notice seems to conflate these two sets of flow criteria.

The Plan update is necessary to determine whether the Water Fix would even be a lawful, let alone a reasonable, alternative.

The State Water Board must comply with law including the ESA, CEQA, NEPA, the CWA, the Delta Reform Act and the public trust doctrine. But even if that was not the case, there would be no rational reason to put the cart before the horse by conducting an evidentiary hearing without having an adequate Draft EIR/EIS and without having completed the Bay-Delta Plan update.

We presume that the State Water Board wishes to act lawfully. We presume that the State Water Board does not intend to prejudge the issues and hold an evidentiary hearing on the Petition in the absence of the adequate informational basis and reasonable range of alternatives that would be provided by an adequate Draft EIR/EIS and an updated Bay-Delta Plan. We presume that the State Water Board is not attempting to prejudge the issues by approving the Petition and then crafting the Bay-Delta Plan update to "fit the fix."

The fact that more time and more work are necessary before the Petition can be ready for evidentiary hearing is not the fault of the law, the EPA, the State Water Board, or Water Tunnels opponents.

Reclamation and DWR have failed to do what the law requires. The State Water Board now has the opportunity to comply with the law and rational planning by preparing or requiring the preparation of an adequate Draft EIR and by finishing the Bay-Delta Plan update prior to commencing any portion of the evidentiary hearing. At present, there is no adequate foundation in place for an evidentiary hearing on the Petition.

CONCLUSION

Extinction is forever. The law is the law. EPA has failed the RDEIR/SDEIS as being inadequate to serve as the basis for public and decision-maker review of the decisions to be made regarding the proposed Delta Water Tunnels.

Before commencing the evidentiary hearing, the Board must at the outset conduct scoping under CEQA. The Board must then proceed to prepare and circulate for public review and comment a Draft EIR adequate to serve as a basis for public and decision-maker review of the Petition. Moreover, the Draft EIR must be prepared and circulated concurrently with and integrated with the yet to be prepared Biological Opinions by NMFS and USFWS under the ESA.

The Draft EIR to be prepared must honestly disclose and discuss significant adverse environmental impacts of the diversion change on water quality, water supply, fish, fish habitat, and public health. The Draft EIR must also include a range of reasonable alternatives including alternatives that would increase freshwater flows through the Delta, Reasonable Prudent Alternatives (RPA) under the ESA and the Least Environmentally Damaging Practicable Alternative (LEDPA) under the CWA.