



Friends of the River
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May 22, 2017

Delta Independent Science Board Members **via Email**

Re: Absence of Required Range of Reasonable Alternatives issue in Delta Independent Science Board California Water Fix Final EIR/IS Review, and in proposed Delta Stewardship Council Plan Amendment on Conveyance, Storage, and Operations of Both

Dear Chair Jay Lund and all Delta Independent Science Board Members:

By this letter to you, our coalition of 10 public interest organizations¹ follow up on the range of reasonable alternatives issue that was discussed at your meeting at the Ryde Hotel in the

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

Delta on May 11, 2017. The issue came up during Item 7, “Update on California Water Fix Final EIR/S Review.”

We submit that the Water Fix EIR/S fails to include the required range of reasonable alternatives required by law. The Water Fix proponent public agencies continue to refuse to include in either the Draft or Final environmental documents the threshold, foundational alternative of maintaining through-Delta conveyance and finally beginning to increase freshwater flows through the Delta by reducing exports. Instead, they persist in confining alternatives to various construction projects that would reduce freshwater flows through the Delta by diverting freshwater flows upstream for export south.

Our Table of Contents is on the next page.

TABLE OF CONTENTS

SUMMARY	4
THE REQUIRED RANGE OF REASONABLE ALTERNATIVES INCLUDING MAINTAINING THROUGH-DELTA CONVEYANCE AND INCREASING THROUGH DELTA FLOWS BY REDUCING EXPORTS ARE ABSENT	5
ALTERNATIVES THAT WOULD MAINTAIN THROUGH-DELTA CONVEYANCE AND BEGIN TO INCREASE FRESHWATER FLOWS THROUGH THE DELTA BY REDUCING EXPORTS ARE REQUIRED BY LAW	7
<i>The Delta Reform Act requires Alternatives that would maintain through-Delta conveyance and begin to increase freshwater flows through the Delta by reducing exports</i>	7
<i>The Water Fix FEIR/S fails to include the Range of Reasonable Alternatives required by CEQA and NEPA</i>	9
<i>The Collapsing Delta Ecosystem further Evidences the Need for Alternatives increasing freshwater flows through the Delta</i>	12
<i>There are reasonable alternatives that have been ignored</i>	13
<i>A new Draft EIR/EIS including the required Range of Reasonable Alternatives must be Prepared and Circulated for Public Review</i>	15
IT IS IMPORTANT FOR YOU TO ADDRESS THE SUBJECT OF ALTERNATIVES IN YOUR WATER FIX FEIR/S REVIEW	15
IT IS ALSO IMPORTANT FOR YOU TO ADDRESS THE SUBJECT OF ALTERNATIVES IN A WRITING TO THE DELTA STEWARDSHIP COUNCIL	16
CONCLUSION	17

SUMMARY

The primary purposes of an Environmental Impact Report (EIR) prepared under the California Environmental Quality Act (CEQA) and an Environmental Impact Statement (EIS) prepared under the National Environmental Policy Act (NEPA) are not to generate large volumes of paper. Instead, as most recently explained by the California Supreme Court, “*Evaluation of project alternatives and mitigation measures is ‘the core of an EIR.’*” *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918, 937 (2017)(Emphasis added). Moreover, “The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account.” *Banning Ranch Conservancy*, 2 Cal.5th 918, 941 (Internal citations and quotations deleted).

“The San Francisco Bay Delta watershed covers more than 75,000 square miles and includes the largest estuary on the West coasts of North and South America. It also contains the only inland Delta in the world.” (EPA website). Most people who have thought about it recognize that the Delta needs more freshwater flowing through it, not less. Presently, water for export is diverted from the south Delta. As a result, Delta public health, agriculture, water quantity, water quality and fisheries benefit by the fact that freshwater flows through the Delta before being diverted. This is called “through-Delta conveyance.” But the proposed California Water Fix Delta Water Tunnels project would worsen the existing crisis in the Delta by diverting massive quantities of freshwater upstream from the Delta. The flows diverted upstream would no longer provide any benefits by first flowing through the already impaired Delta.

It is important to not miss the forest for the trees. There are at least two obvious foundational alternatives. The first would be to maintain the existing through-Delta conveyance thereby maintaining the environmental benefits provided by freshwater flows before they are diverted after flowing through the Delta. Coupled with that would be finally considering the alternative of beginning to increase freshwater flows through the Delta by reducing exports. The second foundational alternative would be to benefit the exporters but not the Delta by diverting enormous quantities of freshwater for the exporters upstream from the Delta. The Water Fix Tunnels are one variant of such dual or isolated new conveyance alternatives.

Despite the requirements of laws including the Delta Reform Act (DRA), CEQA and NEPA, the earlier Bay Delta Conservation Plan (BDCP) Draft EIR/EIS’s and present Water Fix Final EIR/EIS have persistently, we would say also deliberately, avoided seeing the forest for the trees. These documents have always put the cart before the horse by simply producing a range of various new upstream conveyance alternatives. Peas out of the same pod; a similar conveyance project dressed up in different outfits.

Your previous Reviews of BDCP and Water Fix Draft environmental documents have been important. A conclusion in your September 30, 2015, Review found: “the Current Draft

sufficiently incomplete and opaque to deter its evaluation and use by decision-makers, resource managers, scientists, and the broader public.” (DISB Review, p. 1). We believe that the inadequacies result from the failure to develop and consider a range of reasonable alternatives, including alternatives that the Tunnels proponents do not want. We submit that as part of your pending Water Fix Final EIR/S review it is appropriate for you to address whether the required range of reasonable alternatives has been intelligibly prepared and presented for public and decision-maker review. We do offer for you our views on whether what is required has been done.

First, we explain that the required range of reasonable alternatives has not been presented in the subject environmental documents prepared by the Water Fix proponent public agencies. Those agencies are the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation.

Second, we summarize the requirements for inclusion of alternatives that would maintain through-Delta conveyance and finally begin to increase freshwater flows through the Delta by reducing exports. This includes requirements set forth in the DRA, CEQA and NEPA, and also made apparent by recent developments.

Third, we briefly explain why we believe it both appropriate and important for you to address the subject of alternatives in your review.

Finally, we also briefly explain why we believe it both appropriate and important for you to address the subject of alternatives to the Delta Stewardship Council (DSC) in its current consideration of a proposed Delta Plan amendment on conveyance, storage, and operations of both.

THE REQUIRED RANGE OF REASONABLE ALTERNATIVES INCLUDING MAINTAINING THROUGH DELTA CONVEYANCE AND INCREASING THROUGH DELTA FLOWS BY REDUCING EXPORTS ARE ABSENT

DWR and Reclamation have now marched along for six 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. Six years ago the National Academy of Sciences declared in reviewing the then-current version of the draft BDCP that: “[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan.” (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011). Expert Federal and State agencies have also commented on the deficiencies of the alternatives analyses over the past few years. Examples include the August 26, 2014, review by the EPA; the July 29, 2014, review by the State Water Resources Control Board; and the July 16, 2014, comment letter by the U.S. Army Corps of Engineers.²

² Our organizations that commented repeatedly to DWR and Reclamation over the years on the failure to include the required range of reasonable alternatives including alternatives that would increase freshwater flows through the

The alternatives section (Chapter 3) of the Draft EIR/EIS and the ESA-required Alternatives to Take section (Chapter 9) of the BDCP Draft Plan failed to include even one alternative that would increase water flows through the San Francisco Bay-Delta by reducing exports, let alone the NEPA, CEQA, and Endangered Species Act required range of reasonable alternatives. Instead, all Water Fix alternatives including Recirculated Draft EIR (RDEIR)/ Supplemental Draft EIS (SDEIS) alternatives 4 modified, 4A, 2D and 5A would do the opposite of increasing flows, by reducing flows through the Delta by way of new upstream diversion of enormous quantities of water for the proposed Water Tunnels. These intentional violations of law require going back to the drawing board to prepare a new Draft EIR/EIS that would include a range of real alternatives, instead of just replicating the same conveyance project dressed up in different outfits. To be clear, 14 of the so-called 15 “alternatives” in the Draft EIR/EIS, 10 of the so-called 11 “take alternatives” in the Draft Plan (Chapter 9) and the 4 “alternatives” in the RDEIR/SDEIS were all peas out of the same pod. They would create different variants of new upstream conveyance to divert enormous quantities of freshwater away from the lower Sacramento River, sloughs, and San Francisco Bay-Delta for export south.

The differences among the alternatives are slight. “The 15 action alternatives are variations of conservation plans that differ primarily in the location of intake structures and conveyance alignment, design, diversion capacities (ranging from 3,000 to 15,000 cfs), and operational scenarios of water conveyance facilities that would be implemented under CM1.” (Draft EIR/EIS, ES p. 26).

The Final Water Fix EIR/EIS (December 2016) did nothing to cure the failure to include the required range of reasonable alternatives in the previous Drafts that had been issued for public and decision-maker review and comment. As explained by the Final EIR/S:

The 18 action alternatives are variations of alternative water conveyance plans and restoration actions or Environmental Commitments that differ primarily in the location, design, conveyance capacity, and rules that would determine the operation of water conveyance facilities. For instance, the alternatives range from the proposed construction of one 3000-cubic feet per second (cfs) intake to five such intake facilities, representing a range of north Delta conveyance capacities from 3000 cfs to 15,000 cfs. (Water Fix Final EIR/S, Vol. I, Chapter 3, Alternatives, p. 3-2).

It is as if there were no DRA, CEQA, or NEPA establishing legal requirements governing the process. Review was limited to what the project proponents want as opposed to what the law and common sense require before embarking upon this enormous project having profound environmental and economic consequences for our future.

Delta by reducing exports. These efforts include presentations in May and December 2012 and February 2013; letter of November 18, 2013; letters of May 21, May 28, June 11, and September 4, 2014, letters of July 22 and October 29, 2015; letter of August 18, 2016; and letter of January 27, 2017.

ALTERNATIVES THAT WOULD MAINTAIN THROUGH-DELTA CONVEYANCE AND BEGIN TO INCREASE FRESHWATER FLOWS THROUGH THE DELTA BY REDUCING EXPORTS ARE REQUIRED BY LAW

The Delta Reform Act requires Alternatives that would maintain through-Delta conveyance and begin to increase freshwater flows through the Delta by reducing exports

The Superior Court Ruling determining the Delta Plan to be invalid (May 18, 2016, pp. 26, 38) includes ordering the DSC to revise the Delta Plan and any applicable regulations to:

Include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act.

Having lost the case, the DSC appealed. The appeal lacks merit. The DRA requires that the Delta Plan “*Include quantified or otherwise measurable targets* associated with achieving the objectives of the Delta Plan.” DRA § 85308(b).³ (Emphasis added). The DRA establishes State policy to: “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” § 85020(c). Moreover, “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. . .” § 85021. (Emphasis added). “The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem” including: “viable populations of native resident and migratory species” “reduced threats and stressors on the Delta ecosystem” and “conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.” § 85302 (c)(1), (4), and (5). “[S]ubgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan” including “*restore Delta flows* and channels to support a healthy estuary and other ecosystems” and “improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.” § 85302(e)(4) and (5). (Emphasis added).

The Trial Court carefully read the DRA and handed down Rulings enforcing that law. As shown by the above paragraph, *the language in the Court ruling* requiring “quantified or otherwise measurable targets associated with achieving reduced reliance on the Delta” and “restoring more natural flows” *comes right out of the express language of the DRA*.

In other words, consideration of alternatives that would reduce reliance on the Delta and restore more natural flows is required by the DRA. One readily apparent way that alternatives could do that is by maintaining through-Delta conveyance and increasing through-Delta freshwater flows by reducing exports, as opposed to adding new upstream conveyance in the form of the Water Fix Tunnels.

The DRA includes very specific requirements for comprehensive review of specific subjects for the BDCP in § 85320 (b)(2):

³ The Delta Reform Act is codified in the California Water Code. The section numbers provided here are the Water Code section numbers.

(A) *A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in [subdivision \(a\) of Section 2820 of the Fish and Game Code](#), and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.*

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

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

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

[deletions]

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

Maintaining through-Delta conveyance is thus a mandatory alternative under the DRA as set forth in subsection B, above. Under subsection A, above, the required task is to determine “the flows necessary for recovering the Delta ecosystem and restoring fisheries.” That in turn “will identify the remaining water available for export and other beneficial uses.” Those are the required tasks established by the governing DRA. Instead of simply proceeding to take more freshwater flows away from the Delta upstream the required task is to start by identifying the remaining water available for export after determining the flows necessary to recover the Delta ecosystem and restore fisheries.

Pursuant to DRA § 85054:

‘Coequal goals’ means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

Providing a more reliable water supply means ceasing to base export goals on the “paper water” that far exceeds real water available, factoring in future reductions because of climate change including declining snowpack and runoff, and meeting the needs for fisheries, Delta agriculture, and other human uses of Bay-Delta water. Protecting, restoring, and enhancing the Delta ecosystem, means what it says. The only way to do that is to reduce exports and increase freshwater flows through the Bay-Delta. That is the opposite of creating new conveyance--a massive new diversion upstream from the Delta-- taking away freshwater flows before they can perform essential benefits for the Delta ecosystem. This view of the “*coequal goals*” is also consistent with DRA § 85320(b)(2), discussed above, providing that water available for export means water remaining *after* determining the flows necessary to recover the Delta ecosystem and restore fisheries.

But for the purpose of your review of the Water Fix FEIR/S, it is not necessary to determine or take a position on what basic foundational alternative should be *adopted*. What is clear is that nothing has changed from the National Academy of Sciences review six years ago. The FEIR/S continues to put the cart before the horse by jumping to the conclusion to further reduce freshwater flows through the Delta by developing massive new upstream conveyance in the form of the Water Fix Tunnels. There has not been the required development and consideration of alternatives that would instead maintain through-Delta conveyance and finally began to increase freshwater flows through the Delta by reducing exports.

Your recent *Review of Research on the Sacramento-San Joaquin Delta as an Evolving Place* (Delta Independent Science Board, April 2017) sheds important light on the meaning of the “coequal goals” established by the DRA. Your *Review* explains that “decisions about human use of the Delta and its waters require far greater understanding of the values listed in the Delta Reform Act and of the social and natural processes that underlie them.” (*Id.* p. 9). Your conclusion is that:

Little has been established about the unique values of Sacramento-San Joaquin Delta as an evolving place and the social and environmental processes supporting those values. Research in this area is sorely needed if those values are to be protected and enhanced as decisions are made to meet the co-equal goals of reliable water supplies and restored ecosystems. (*Id.* p. 10).

The starting point for attempting to carry out the coequal goals would be good faith development and consideration of a range of reasonable alternatives consistent with the DRA as opposed to simply jumping to the conclusion to develop some form of new upstream conveyance that would further reduce freshwater flows through the Delta.

The Water Fix FEIR/S fails to include the Range of Reasonable Alternatives required by CEQA and NEPA

Again, “Evaluation of project alternatives and mitigation measures is ‘the core of an EIR.’” *Banning Ranch Conservancy*, 2 Cal.5th 918, 937. State policy declared by the Legislature in CEQA is that: “Environmental impact reports omit unnecessary descriptions of projects and emphasize feasible mitigation measures and feasible alternatives to projects.” Public Resources Code § 21003(c). The NEPA Regulations require that an EIS “present the environmental impacts of the proposal and the alternatives in comparative form, *thus sharply defining the issues and providing a clear basis for choice among options* by the decision-maker and the public.” 40 C.F.R. 1502.14. (Emphasis added). Instead of emphasizing and presenting alternatives to the Water Fix and “sharply defining the issues”, the public is supposed to wade through more than 80,000 pages of environmental documents that do not include any, let alone the required range of, reasonable alternatives to the Water Fix Tunnels project. That basic, foundational alternative discussed above of maintaining through-Delta conveyance while finally beginning to increase freshwater flows through the Delta by reducing exports, is ignored.

On October 30, 2015, the EPA gave the Supplemental Draft EIS for the BDCP/California Water Fix (CEQ# 20150196) its failing grade of “3” (*Inadequate*)” (p. 4).⁴ EPA review was required by Section 309 of the Clean Air Act. EPA’s *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (10/3/84) explains what its failing grade means in section 4(b) of that document entitled “Adequacy of the Impact statement.”

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

Instead of requiring revision and circulation for public review, the EPA expected that the missing information will be “supplied as later regulatory processes proceed.” (EPA Letter, p. 4). “[P]ending actions by the State Water Resources Control Board” was one of the future processes that the EPA expected “will supply the missing pieces necessary to determine the environmental impacts of the entire project.” (*Id.*). The EPA findings about missing information are consistent with the 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.” (Water Board Letter, p. 2).

The EPA concluded that deferral of water flow management decisions means:

that the impacts of the Water Fix project on the Delta ecosystem cannot be fully evaluated at this time, and that any attempt to describe the environmental impacts of the project is necessarily incomplete. Once those decisions, described below, are concluded, the evaluation of possible impacts and consideration of alternatives can be completed. (EPA Letter, p. 2).

The EPA also noted that the State Water Resources Control Board (Water Board):

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

⁴ October 30, 2015 letter from Jared Blumenfeld, EPA Region IX Administrator to David Murillo, Regional Director, Reclamation, Mid-Pacific Region. A copy of the EPA letter was attached to the Friends of the River, Restore the Delta, Environmental Water Caucus letter of November 18, 2015 to the DSC.

altered environmental and water supply impacts that have not been analyzed in the SDEIS. (October 30, 2015 EPA Letter, p. 3 – 4).

The Water Board, however, rejected the many requests to update the Bay-Delta standards before proceeding to consider the Petition to change the points of diversion. (February 11, 2016 Ruling, pp. 4 – 5). Consequently, there were no updated standards upon which to base conclusions in the Final EIR/EIS.

The alternative of increasing flows through the imperiled Delta by reducing exports is so obvious that the Ninth Circuit Court of Appeals in July of 2016 reversed in part a district court decision denying environmental plaintiffs summary judgment because the challenged environmental document issued by Reclamation under NEPA “did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities.” *Pacific Coast Federation of Fishermen’s Assn’s v. U.S. Dept. of the Interior*, __Fed.Appx.__, 2016 WL 3974183 *3 (9th Cir., No. 14-15514, July 25, 2016)(Not certified for publication). “Reclamation’s decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study.” *Id.* at *2. Reclamation’s “reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts.” *Id.* at *3.

The requirement under NEPA for Reclamation to consider the obvious alternative of reducing exports to increase flows through the Delta is so obvious that the Ninth Circuit’s decision was not certified for publication because no new legal analysis was required to reach the decision.⁵ The decision pertained to interim two-year contract renewals. If the alternative of reducing exports must be considered *during renewal of two-year interim contracts* it most assuredly must be considered *during the course of deciding whether to spend billions of dollars and 15 years building the Water Tunnels having the capacity to divert 15,000 cfs of freshwater flows away from the Delta that presently first flow through the Delta before being diverted.*

Here, “competing objectives” such as “maximizing water supply” on the one hand, and “protecting threatened fish species” on the other hand are recognized in some of the DSC

⁵ In *California v. Block*, 690 F.2 753, 765-769 (9th Cir. 1982), the project at issue involved allocating to wilderness, non-wilderness or future planning, remaining roadless areas in national forests throughout the United States. The court held that the EIS failed to pass muster under NEPA because of failure to consider the alternative of increasing timber production on federally owned lands currently open to development; and also because of failure to allocate to wilderness a share of the subject acreage “at an intermediate percentage between 34% and 100%.” 690 F.2d at 766. Like the situation here involving a trade-off between water exports and Delta restoration, the Forest Service program involved “a trade-off between wilderness use and development. This trade-off however, cannot be intelligently made without examining whether it can be softened or eliminated by increasing resource extraction and use from already developed areas.” 690 F.2d at 767. Here, likewise, trade-offs cannot be intelligently analyzed without examining whether the impacts of alternatives reducing exports can be softened or eliminated by increasing water conservation, recycling, and eventually retiring drainage-impaired agricultural lands in the areas of the exporters from production. *Accord, Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1122-1124 (9th Cir. 2010) (EIS uncritical alternatives analysis privileging of one form of use over another violated NEPA). Here, the Water Fix FEIR/S alternatives unlawfully privilege water exports over protection of Delta water quality, water quantity, public trust values, and Endangered Species Act values.

materials. (Agenda Item 12, Information Item, p. 7; Attachment 3, p. 2, February 23, 2017). The materials also recognize that “Drinking water quality for exports can be improved by moving diversion locations, but doing so has the potential to degrade water quality for in-Delta uses.” (*Id.* Attachment 3, p. 3). CEQA and NEPA are similar laws. What has been demonstrated so far is an unlawful privileging of one form of use— water exports, over other forms of use-- protecting Delta water quality and quantity and in-Delta uses. This is as true under CEQA as the Ninth Circuit found it to be under NEPA.

The Collapsing Delta Ecosystem further Evidences the Need for Alternatives increasing freshwater flows through the Delta

In September 2016 the Water Board determined that under its new flow proposal for the San Joaquin River and its tributaries it would be necessary to “decrease the quantity of surface water available for diversion for other uses compared to the current condition (water supply effect).” (Evaluation of San Joaquin River Flow and Southern Delta Water Quality Objectives and implementation, Executive Summary at (ES) -21). As the Water Board pointed out: “The Bay-Delta is in ecological crisis. Fish species have not shown signs of recovery since adoption of the 1995 Bay-Delta Plan objectives intended to protect fish and wildlife.” (*Id.* at ES -1).⁶

In October 2016 the Water Board again noted that: “it is widely recognized that the Bay-Delta ecosystem is in a state of crisis.” (Working Draft Scientific Basis Report for New and Revised Flow Requirements on the Sacramento River and Tributaries, Eastside Tributaries to the Delta, Delta Outflow, and Interior Delta Operations, at 1-3). The water management infrastructure including the Central Valley Project (CVP) and State Water Project (SWP) “have been accompanied by declines in nearly all species of native fish. Fish species have not shown signs of recovery since adoption and implementation of the 1995 Bay-Delta Plan intended to protect fish and wildlife. In the early 2000s, scientists noted a steep and lasting decline in population abundance of several native estuarine fish species that has continued and worsened during the recent drought. Likewise, Central Valley salmon and steelhead have not recovered, and natural production of all runs remains near all-time lows.” (*Id.*). According to the Water Board, the best available science indicates that existing “requirements are insufficient to protect fish and wildlife.” (*Id.* at 1 – 4). The Report includes recommendations “for increased Delta outflow requirements” to protect native estuarine and anadromous fish species.” (*Id.* at 1 – 13).

On January 18, 2017, the EPA issued its review of the Water Fix FEIS.⁷ EPA explained: “To date, none of the regulatory processes mentioned in our SDEIS letter have been completed.” The EPA also concluded that:

. . . the FEIS continues to predict that water quality for municipal, agricultural, and aquatic life beneficial uses will be degraded and exceeds standards as the western Delta becomes more saline. Significantly, the FEIS’ conclusions regarding impacts to aquatic life remain unchanged from those in the SDEIS, predicting substantial declines in

⁶ Also in September 2016, The Bay Institute published its report, *San Francisco Bay: The Freshwater-Starved Estuary*. Basically, water taken from the rivers is reducing water flowing from the rivers feeding the estuary so that the estuary--the Sacramento-San Joaquin River Delta, Suisun Marsh, and the bay-- ecosystem is collapsing.

⁷ Letter, Kathleen H. Johnson, Director, Enforcement Division, EPA Region IX to David Murillo, Regional Director, Bureau of Reclamation (January 18, 2017).

quantity and quality of aquatic habitat for 15 of 18 fishes evaluated under Water Fix preferred operations.

There are reasonable alternatives that have been ignored

We presented *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015) during the RDEIR/SDEIS public review period as a reasonable alternative to the Water Tunnels.⁸ The plan is at: <http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf>. A copy of *A Sustainable Water Plan for California* is also attached hereto. The actions called for by this alternative include: reducing exports to no more than 3,000,000 acre-feet in all years in keeping with State Water Board Delta flow criteria (for inflow as well as outflow); water efficiency and demand reduction programs including urban and agricultural water conservation, recycling, storm water recapture and reuse; reinforced levees above PL 84-99 standards; installation of improved fish screens at existing Delta pumps; elimination of irrigation water applied on up to 1.3 million acres of drainage-impaired farmlands south of the Bay-Delta; return the Kern Water Bank to State control; restore Article 18 urban preference; restore the original intent of Article 21 surplus water in SWP contracts; conduct feasibility study for Tulare Basin water storage; provide fish passage above and below Central Valley rim dams for species of concern; and retain cold water for fish in reservoirs. We also requested that the range of reasonable alternatives include reducing exports both more and less than the 3,000,000 acre feet limit called for by this alternative.

A Sustainable Water Plan for California is a carefully conceived modern, 21st-century Plan B. It should be Plan A. DRA § 85021 calls for reducing reliance on the Delta by such measures as “improved regional supplies, conservation, and water use efficiency” as well as “water recycling” and “advanced water technologies.” But it is not necessary for you to decide what alternative is best now. What is clear is that reasonable alternatives based on the DRA have been handed to DWR and Reclamation on a silver platter but such alternatives have been ignored.

Under NEPA Regulations, “This [alternatives] section is the heart of the environmental impact statement.” The alternatives section should “sharply” define the issues and provide a clear basis for choice among options by the decision-maker and the public. 40 C.F.R. § 1502.14. Moreover, if “a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.” § 1502.9(a). *A Sustainable Water Plan for California* and variants on it must be among those alternatives in a new Draft EIR/EIS for the Water Fix that helps to disclose, sharpen and clarify the issues.⁹

⁸ We have repeatedly presented earlier versions of this alternative since May 2012. DWR and Reclamation continue to ignore such alternatives.

⁹ The EIS alternatives section is to “Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” § 1502.14(a).

The failure to include a range of reasonable alternatives also violates CEQA. An EIR must “describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” 14 Code Cal. Regs (CEQA Guidelines) § 15126.6(a). “[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” § 15126.6(b).

There could be myriad examples of the adverse consequences of the failure here to have an alternatives section “sharply” defining the issues as required by law. One such example of the results of failing to include alternatives maintaining through-Delta conveyance and increasing freshwater flows through the Delta by reducing exports, is the failure to focus on whether freshwater flows lost to the Water Fix Tunnels would or could somehow be replaced and if so what the environmental consequences of such replacement would be. If the Water Fix Tunnels with the capacity to take 15,000cfs from the Sacramento River are developed and operated, that would establish the capacity to drain almost 2/3 of the Sacramento River’s average annual flow of 23,490 cfs at Freeport. Internal communication from the Department of the Interior indicates that the purchase of approximately 1.3 MAF was being contemplated as one means to try to partially make up for some of the flows that would be removed from the Sacramento River by the Tunnels.¹⁰ It would be essential to disclose the source of any such replacement waters and the environmental consequences of making such replacement whether from Sacramento Valley groundwater or other source. If the FEIR/S included the alternative of maintaining through-Delta conveyance and beginning to increase freshwater flows through the Delta by reducing exports, the fact that no such replacement and resulting environmental consequences would be necessary would be one of many important subjects in comparing the alternatives. But no such comparisons are made because alternatives increasing freshwater flows by reducing exports are not included in the FEIR/S and were not included in the previous Drafts.

The RDEIR/SDEIS conceded 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). The same is true of the Final EIR/EIS. (Executive Summary, Table ES – 8, pp. ES 57 – 146; Ch. 31, Table 31 – 1, pp. 31 – 9 – 15). 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.

¹⁰ Email from Letty Belin, Counselor to the Deputy Secretary, Department of the Interior, to Jim Waldo, David Zippin, Mark Cowin [then Director, DWR], Bonham, Chuck@wildlife [Director, Calif. Dept. of Fish and Wildlife], William Stelle, King Laura Moon (February 25, 2014)(including “Establish and fund an effort to acquire 1.3MAF for environmental benefit not to exceed \$3.5B).

A new Draft EIR/EIS including the required Range of Reasonable Alternatives must be Prepared and Circulated for Public Review

CEQA Guideline section 15088.5 (14 Cal. Code Regs. § 15088.5) requires that a new Draft EIR will have to be prepared both to develop a range of reasonable alternatives to increase Delta flows by reducing exports and to accurately disclose and analyze water supply, water flow, and water quality degradation issues. The courts have explained the need for an adequate *Draft* environmental document which cannot be cured by subsequent preparation of an adequate *Final* Environmental document:

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 in the CEQA discussion." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 447-448 (2007) (Internal citations and quotation marks deleted).

As explained in *Mountain Lion Coalition v. Fish & Game Com.*, 214 Cal.App.3d 1043, 1052 (1989), only when the draft environmental document is circulated do the public and outside agencies have the opportunity to analyze a proposal and submit comment. To evaluate the draft environmental document in conjunction with the final environmental document would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more detailed analysis to the final environmental document that is insulated from public review. (*Id.*).¹¹

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS, Chapter 9 of the BDCP plan and the RDEIR/SDEIS have led to NEPA and CEQA documents "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." 40 C.F.R. § 1502.9(a); 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4).

IT IS IMPORTANT FOR YOU TO ADDRESS THE SUBJECT OF ALTERNATIVES IN YOUR WATER FIX FEIR/S REVIEW

It has been important to point out that previous BDCP and Water Fix Drafts have been deficient in terms of the ability of scientists, let alone members of the general public, to comprehend and meaningfully use the documents to evaluate the pros and cons of the proposed project. But to get to the heart of the matter, the real point of requiring environmental impact reports and statements is to require the identification, development, and consideration of real alternatives to the proposed project in order to contribute to better environmental decision-making. Here, contrary to the DRA, CEQA, and NEPA, DWR and Reclamation have simply put the cart before the horse by skipping the first step of analyzing what should be done during the course of complying with the DRA.

¹¹ See *Gray v. County of Madera* (2008) 167 Cl.App.4th 1099, 1120 ("Given that there was no analysis done on whether the option to build a water system is a feasible mitigation measure, we conclude that the portion of the EIR addressing water concerns should have been recirculated.")

Whether true alternatives have been developed and considered is an appropriate subject for an independent science board. That is evidenced by the National Academy of Sciences, determination in their early report that scientific reasons for not considering alternative actions had not been presented in the early versions of the BDCP plan. (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011). Nothing has changed. Except that subsequent Drafts and now the Final EIR/S have grown ever larger in volume, now over 80,000 pages. Rambling and incoherence are a result of failing to succinctly and directly address the fundamental issue at hand. That fundamental alternatives issue would be “sharply defining the issues and providing a clear basis for choice among options” including maintaining through-Delta conveyance and increasing freshwater flows by reducing exports, as well as the DWR and Reclamation desired option of creating new upstream conveyance to the benefit of the exporters but the detriment of the Delta by instead further reducing freshwater flows through the Delta.

No matter how many pages DWR and Reclamation generate, all those pages do here is miss the forest for the trees. All those pages do here is to continue to put the cart before the horse. If the Delta Independent Science Board determines that the Water Fix FEIR/S has failed to set forth and evaluate the reasonable range of alternatives required here by the DRA, CEQA and NEPA, it would be both appropriate and important for the Board to address that in its Review.

IT IS ALSO IMPORTANT FOR YOU TO ADDRESS THE SUBJECT OF ALTERNATIVES IN A WRITING TO THE DELTA STEWARDSHIP COUNCIL

The DSC is in a rush to make dual conveyance the preferred alternative and promoted option. The plan is to do that by adopting the proposed Delta Plan amendment on Conveyance, Storage, and the Operations of Both (CSO). This will be a discussion item at the May 25, 2017, DSC public meeting with the DSC likely to make it an action or adoption item at the June DSC meeting. The Meeting Notice for the May 25 DSC meeting shows the CSO Discussion as Agenda Item 10, and includes:

Panelists will discuss issues the Council and public have raised regarding the science and the possible effects of the Conveyance, Storage Systems, and the Operation of Both amendment.

We will discuss this here briefly. We had transmitted to the DISB through DSC staff our detailed letters of March 7, March 20, and April 24, 2017 to the DSC setting for the reasons why a Delta Plan amendment on conveyance should not be adopted at this time. The most basic reason is that DRA § 85320(b)(2) requires “comprehensive review and analysis” of “a reasonable range of Delta conveyance alternatives,” “including through-Delta, dual conveyance, and isolated conveyance alternatives. . .” As we have shown in earlier sections of this letter, the BDCP and Water Fix environmental documents have not developed and considered a reasonable range of Delta conveyance alternatives including through-Delta and including alternatives increasing freshwater flows through the Delta by reducing exports.

Likewise, the DSC did not do the required “comprehensive review and analysis” previously, when it adopted the Delta Plan back in 2013. The Final EIR on the Delta Plan stated:

the proposed Delta Plan does *not* make any recommendations regarding conveyance at this time because the Council has determined that the BDCP agencies are in the best position to complete the planning process, including defining acceptable ranges of exports and through-Delta flows. *Accordingly, the PEIR does not evaluate the potential environmental consequences of various BDCP options that DWR may be considering.* (FEIR, p. 3-15, May 2013) (emphasis added).

Nor has the DSC developed the “quantified or otherwise measurable targets associated with achieving reduced reliance on the Delta” and “restoring more natural flows” as required by the DRA and the Court Order. The law and common sense require setting those targets first, before deciding whether to promote the Water Fix Tunnels or other variants of dual-conveyance.

The DSC needs to perform the work required by the DRA and CEQA before attempting to choose dual conveyance as opposed to maintaining through-Delta conveyance and increasing rather than reducing freshwater flows through the Delta. It would be extremely important for the Delta Independent Science Board to point this out, now, to the DSC before that Water Fix Tunnels train leaves the station.

CONCLUSION

Reclamation and DWR need to hear from the Delta Independent Science Board now, before their Water Fix Tunnels train leaves the station. Reclamation and DWR must either drop the Water Tunnels project or finally prepare and issue for public review and comment and decision-maker review a new Draft EIR/EIS that includes the required range of reasonable alternatives. Alternatives including through-Delta conveyance and increasing Delta flows by reducing exports must be included.

The DSC also needs to hear from the Board now. The DSC needs to carry out the tasks assigned by the DRA before, not after, deciding whether to select dual conveyance as the preferred alternative and option. The DSC are supposed to be good stewards carrying out the DRA and CEQA. Their assignment is not to promote the Water Fix Tunnels project.

In America and California we have established governments of laws not rulers. Whether the Water Fix proponent public agencies wish to do so, the task in the Water Fix FEIR/S being reviewed by the DISB is to carry out the letter and the spirit of the law. The starting point for doing so is to do the alternatives analyses required by the DRA, CEQA, and NEPA, and required to fulfill the purposes of the DRA. But all the so-called Water Fix “alternatives” are simply variants of different ways to further reduce freshwater flows through the Delta by taking water for the exporters upstream from the Delta. The failing grade given the Water Fix environmental documents by the EPA was and is deserved. The deficiencies have not been corrected.

Should you have any questions, please contact Conner Everts, Facilitator, Environmental Water Caucus at (310) 804-6615 or connere@gmail.com, or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org.

Sincerely,



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Kyle Jones, Policy Advocate
Sierra Club California



Colin Bailey, Executive Director
Environmental Justice Coalition for Water



Jonas Minton, Senior Water Policy Advisor
Planning and Conservation League

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