



January 6, 2020

Erin.mellan@water.ca.gov via email

Erin Mellon, Assistant Director
Public Affairs Office, Department of Water Resources

LTO@water.ca.gov via email

Re: Written Comments on DWR's Draft EIR for Long-Term Operation of the SWP
(State Clearinghouse No. 2019049121)

Dear Assistant Director Mellon and Department of Water Resources:

By this letter our public interest organizations comment, pursuant to the California Environmental Quality Act (CEQA), on the Department of Water Resources (DWR) Draft Environmental Impact Report (Draft EIR) for Long-Term Operation of the State Water Project (SWP).¹ Our public interest organizations object to approval of the project and object to certification of a Final EIR for the project.

Our Table of Contents is on the next page:

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

TABLE OF CONTENTS

Introduction	3
Alternatives Reducing Reliance on the Delta are Required by the Delta Reform Act	4
Public Trust Doctrine Analysis Will be of Critical Importance in Doing the Quantification Work Required by the Delta Reform Act	5
DWR Must Prepare and Recirculate a new Draft EIR Including the Required Range of Reasonable Alternatives in order to Proceed in the Manner Required by CEQA	6
A New Draft EIR Must be Prepared and Recirculated for Public Review and Comment for DWR to perform CEQA-Required Full Environmental Disclosure	8
<i>Absence of Quantification</i>	8
<i>Failure to Disclose and Analyze DWR's Delta Water Tunnel Project</i>	9
This Draft EIR Process Must be Integrated with DWR's Other Related Processes	12
DWR Must Not Segment Environmental Analysis	13
DWR Must Analyze the Impacts of Providing Water to the Entire Project	13
DWR Must Accurately Evaluate Cumulative Environmental Impacts	14
DWR Must Disclose and Evaluate Project Growth-Inducing Impacts	17
DWR Must Disclose and Analyze the Significant Adverse Environmental Impacts of the Project	17
DWR Must Evaluate the Reality that DWR's Federal Partner is Committed to Maximizing Exports Regardless of the Environmental Consequences	19
DWR Must Evaluate SWP Long-Term Operations in light of Climate Change	21
DWR Must Disclose and Assess the future Reduction in Claimed Needs for SWP Exports as a result of New Technologies and Curtailed Exports	22
DWR Must Include an Accurate, Stable, and Finite Project Description	24
DWR's Draft EIR Substitutes Argument, Speculation, and Unsubstantiated Opinion for Substantial Evidence	25
Conclusion	25

Introduction

SWP operations have numerous and enormous environmental impacts on California’s rivers and the San Francisco Bay-Delta estuary (Delta.) “The SWP includes water, power, and conveyance systems, moving an annual average of 2.9 million acre-feet of water.” (Draft EIR 2-1.)²

DWR released the Draft EIR for public review on November 21, 2019. 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.)³ DWR must, therefore, prepare a new Draft EIR.

“A feasible project alternative” “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.” (CEQA Guidelines, § 15088.5(a)(3.) Reducing exports has always been an obvious alternative that would increase needed freshwater flows through the Delta. Moreover, reducing reliance on the Delta is *required* by the Delta Reform Act. The project instead *increases* reliance on the Delta. Again, a new Draft EIR is required.

“A new significant environmental impact would result from the project” and “A substantial increase in the severity of an environmental impact would result” from the project. (CEQA Guidelines, § 15088.5 (a) (1) and (2.) Though the project would have many severe adverse environmental impacts, *the Draft EIR claims it would have none*. As just one example, the danger posed to people by the worsening algal blooms in the Delta *is not even mentioned in the Draft EIR*. Yet again, a new Draft EIR is required.

The astonishing number and seriousness of the omissions and deficiencies in the Draft EIR were avoidable. Our organizations advised DWR what was necessary in order to comply with CEQA in our May 28, 2019, comment letter on the Notice of Preparation (NOP) and scoping.

Preparation and recirculation of a new, adequate Draft EIR for public review and comment is required by CEQA, including CEQA Guidelines § 15088.5(a.)⁴

² In each citation to the Draft EIR, the first number refers to the section of the document and the second number refers to the page number within the section.

³3 The CEQA Guidelines are codified at 14 Code Cal. Regs, § 15000 et seq.

⁴ Cases involving water issues and requiring recirculation of environmental documents under CEQA include *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447-449 and *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120.

Alternatives Reducing Reliance on the Delta are Required by the Delta Reform Act

The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) is codified at Water Code § 85000 et seq. Water Code section 85021 establishes the 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.” The Delta Reform Act establishes co-equal goals meaning, “the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Water Code § 85054.)

The Sacramento River and San Joaquin River watersheds remaining flows, flow into the Delta prior to portions being diverted for export to regions south of the Delta by SWP and federal Central Valley Project (CVP) operations. “The sustainability of California’s water resources depends on the environmental health of the Sacramento-San Joaquin Delta.” (Draft EIR 1-1.) “Reclamation and DWR propose to use the Sacramento River, San Joaquin River, and Delta channels to transport water to export pumping plants located in the South Delta.” (Draft EIR 3-30.)

“DWR, in coordination with Reclamation, proposes to operate the SWP in a manner that maximizes exports while minimizing direct and indirect impacts on state and federally listed fish species.” (Draft EIR 3-18.) DWR admits “the Proposed Project has the potential to increase average annual water supply yields, . . .” (Draft EIR 1-10.) Other versions of the admission include “the Proposed Project would increase the potential delivery of water from the Delta, . . . (Draft EIR 4-324, also 4-322, 323.) DWR admits, “Increasing or decreasing SWP or CVP exports can achieve changes to Delta outflow immediately.” (Draft EIR 3-12.)

“The Proposed Project would continue DWR’s ongoing, long-term SWP operations consistent with applicable laws, contractual obligations, and agreements. DWR proposes long-term operation of the SWP that will allow DWR to continue to store, divert, and convey water, in accordance with its existing water rights, to deliver water pursuant to water contracts and agreements up to full contract quantities. DWR is seeking to optimize water supply and improve operational flexibility while protecting fish and wildlife.” (Draft EIR 1-3; also 3-1.)

A central issue in a legally sufficient Draft EIR would be consideration of the trade-offs between delivery of full contract quantities, and reduction of deliveries in order to improve water quantities and quality in California’s rivers and the Delta.

DWR virtually ignores the Delta Reform Act, simply mentioning it in two sentences. (Draft EIR 4-105.) Yet DWR admits under the heading “areas of controversy”

that “Issues raised by the public and other agencies [in comments on the Notice of Preparation (NOP) and scoping] include: Alternatives that incorporate actions to reduce demand for water from the Delta.” (Draft EIR 1-10.)

A new Draft EIR must be prepared and recirculated for public review and comment because the document fails to comply with State policy established by the Delta Reform Act by failing to include alternatives that would reduce reliance on the Delta.

Public Trust Doctrine Analysis Will be of Critical Importance in Doing the Quantification Work Required by the Delta Reform Act

The Delta Reform Act (Water Code § 85023) mandates,

The longstanding 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.

The California Natural Resources Agency, CalEPA, and the California Department of Food & Agriculture released the Draft Water Resilience Portfolio (Draft Portfolio) on Friday afternoon, January 3, 2020. The Draft Portfolio admits,

Improved understanding is needed about the amount of water that must stay in rivers and streams to protect fish, wildlife, habitat, and water quality, and further actions are needed to support the availability of water for these needs.

Drastic loss of fish and wildlife habitat makes it important to restore and connect habitat where feasible. (Draft Portfolio 13.)⁵

Moreover,

The projected statewide water needs of California fish, wildlife, and natural ecosystems have not been quantified, given the diversity of the state’s river systems and evolving understanding of both the biological needs of species and future climate-driven conditions. However, it is clear that each river system requires adequate season-by-season water flow to protect the natural functions fish and wildlife need. Such flows also support healthy water quality and temperatures and should be complemented by adequate habitat and removal of invasive species to enable fish and wildlife to thrive. (Draft Portfolio 15.)

Public Trust Doctrine analysis is of critical importance here. A real public trust analysis of the 26 rivers of the Delta watershed needs to be done in performing the

⁵ The number in citations to the Draft Portfolio refers to the page number cited.

quantification work required to make informed, rational decisions about SWP Long-Term operations. Having a real public trust analysis that includes all non-market public trust resources, including clean water, healthy flowing rivers, healthy abundant fish, and recreational opportunities, is also critical information for an alternatives analysis.

DWR Must Prepare and Recirculate a new Draft EIR Including the Required Range of Reasonable Alternatives in order to Proceed in the Manner Required by CEQA

“Evaluation of project alternatives and mitigation measures is ‘the core of an EIR.’” (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 937.) 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.” 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).

Section 5 of the Draft EIR sets forth the discussion of alternatives including the “no project alternative,” and four additional alternatives. No alternatives are included that would reduce reliance on the Delta as required by the State policy established by the Delta Reform Act. No alternatives are included that would increase freshwater flows through the Delta and protect California’s rivers by reducing exports. The Draft EIR instead simply starts and ends with a given being to maximize exports. No “hard look” is taken at trade-offs between maintaining or increasing exports as opposed to reducing exports to protect the Delta and California’s rivers.

The founders of our nation and our State created governments of laws not rulers. Whether California Executive Branch officers wish to consider real alternatives to the proposed SWP Long-Term operations project, is not the standard. The standard is set by CEQA, the Delta Reform Act, and the public trust doctrine. Such alternatives, including ones reducing exports, must be included and considered in a new Draft EIR to be recirculated for public review and comment.

Real alternatives must be included in the new Draft EIR to be prepared and recirculated, including alternatives that would increase freshwater flows through the Delta and improve Delta water quality by reducing SWP exports. For example, the Governor’s *Executive Order N-10-19* (April 29, 2019) calls for a water resilience portfolio that will do such things as “embrace innovation and new technologies” and “incorporate successful approaches from other parts of the world.” Implementing such

modern water measures would reduce the claimed need for SWP exports and thus improve water quality in California's rivers and the Delta.

As an example of such alternatives, our organizations presented *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015) attached to our May 28, 2019 comment letter on the NOP and scoping that is part of DWR's Record. By way of brief summary, the *Sustainable Water Plan* alternative includes reducing exports out of the Delta to 3,000,000 acre-feet, or other variants on that quantity. Also included are: spending funds on such modern water measures as water conservation, water recycling, groundwater treatment and desalination and agricultural water conservation including conversion to drip irrigation in export areas, annual crops in export areas that can be fallowed in drought years, and staged removal from production of drainage-impaired lands in export areas that worsen water quality by such consequences as selenium discharge.

The Ninth Circuit Court of Appeals reversed a district court decision denying environmental plaintiffs' summary judgment because the challenged environmental document issued by the Bureau of Reclamation under NEPA (National Environmental Policy Act), "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*, 655 Fed.Appx. 595, 2016 WL 3974183*3 (9th. Cir., No. 14-15514, July 25, 2016) (Not selected for publication).) "Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion and the agency did not adequately explain why it eliminated this alternative from detailed study." (*Id.* at *2.) Reclamation's "reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts." (*Id.* at *3.)

The requirement under NEPA, also true under CEQA, to consider the alternative of reducing exports to increase flows through the Delta is so obvious that the Ninth Circuit's decision was not selected for publication because no new legal analysis was required to reach the decision. The decision pertained to interim two-year contract renewals. If the alternative of reducing exports must be considered during renewal of two-year interim contracts, it most assuredly must be considered during the course of DWR's EIR on Long-Term operations of the SWP.

Alternatives reducing exports must be considered pursuant to CEQA and under the mandates of the Delta Reform Act. (Water Code § 85000 et seq). Again, the Delta Reform Act establishes the 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.)

DWR must comply with CEQA, by developing and including real alternatives in a new Draft EIR recirculated for public review and comment, which would improve Delta and river water quantities and quality by reducing SWP exports. (CEQA Guidelines § 15088.5(a)(3.)

A New Draft EIR must be Prepared and Recirculated for Public Review and Comment for DWR to perform CEQA-Required Full Environmental Disclosure

Absence of Quantification

“While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can.” (Guidelines, § 15144.)” (*Banning Ranch Conservancy*, 2 Cal.5th 918, 938). A primary goal of CEQA is “transparency in environmental decision-making.” (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136.) “CEQA requires full environmental disclosure.” (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88.)

As explained above, the Draft EIR simply takes maximizing exports and deliveries up to full contract quantities as givens. There is no real quantification of real water available for export and the adverse environmental impacts of maximizing exports.

The Water Resilience Portfolio referenced above, would require the subject agencies to “first inventory and assess” eight subjects, including, “Existing demand for water on a statewide and regional basis and available water supply to address this demand.” (*Executive Order N-10-19 ¶ 2a.*) Other required subjects include “projected water needs in coming decades for communities, economy and environment” (¶ 2c), and “anticipated impacts of climate change to our water systems, . . . (¶ 2d.)

We understood the State plan had been to release the Draft Portfolio around the end of 2019. Sierra Club California, requested extension of the public comment period on the Draft EIR of at least one month, to afford the public the opportunity to comment on the Draft EIR informed by the information expected in the Portfolio. (Letter request, December 17, 2019.) That request was denied. DWR has failed to provide water availability and demand information in the Draft EIR. DWR has refused to extend the public comment period to allow the public to have the benefit of the information provided in the Portfolio. Again, the State agencies released the Draft Portfolio on Friday afternoon, January 3, 2020. That was 1/2 business day before comments were due on this Draft EIR on Monday, January 6, 2020. The State agencies have denied the public reasonable time to review the Draft Portfolio before closure of the public comment period

on this Draft EIR. DWR has violated its full environmental disclosure duties and has failed to use its best efforts to find out and disclose all that it reasonably can.

Failure to Disclose and Analyze DWR's Delta Water Tunnel Project

There is more. The Draft EIR in addition to its omissions also misleads and amounts to environmental concealment. *The Draft EIR does not even mention the ongoing Delta Water Tunnel project.* The Tunnel 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.

In fact, there is an ongoing Delta Conveyance Design and Construction Authority (DCDCA) process (Delta Water Tunnel process) involving DWR, the Metropolitan Water District of Southern California (MWD) and several other exporters. Pursuant to the Delta Water Tunnel process, over \$300 million is being spent between May 2019 and June 2022 on engineering, fieldwork, property access, property acquisition, and power, roads, and utilities for the previously selected Water Tunnel alignment.

Under the previous Administration, an amended and restated joint exercise of powers Agreement was entered into between DWR and several SWP contractors including MWD making up the DCDCA on October 26, 2018. The DCDCA had been created by a Joint Powers Agreements including MWD and several other export contractors on May 14, 2018.

The Amendment No. 1, amended and restated Joint Exercise of Powers Agreement of June, 2019, defines in Section 2(a), “Conveyance Project,”

For the purposes of the Planning Phase, “Conveyance Project” shall mean the planning, environmental documentation, permitting, and other preconstruction activities associated with the evaluation and development of a proposal and, as appropriate, alternatives for new Delta water conveyance facilities to be owned and operated by DWR, that would convey water from the Sacramento River north of the Delta directly to the existing SWP and, potentially, CVP pumping plants located in the south Delta.

Amendment No. 1 included a revised exhibit B, the Planning Budget and Schedule. That shows expenditures of \$348,100,000 from May 2019 through June 2022. That includes \$173,200,000 for engineering, \$56,000,000 for field work, \$19,900,000 for property access and acquisition services, and \$30,600,000 for power, roads, and utilities.

We understand that geotechnical work began at 19 sites in San Joaquin, Sacramento, and Contra Costa counties on June 10, 2019, including borehole drilling 150-200 feet down, to the depths of the previously proposed Delta Tunnels.

There is still more. The SWP Contract Amendment negotiation process defines the Delta Conveyance Facility (DCF) as,

Delta Conveyance Facility (DCF) shall mean those facilities of the State Water Project consisting of a water diversion intake structure, or structures, located on the Sacramento River in the northern Delta and connected by facilities to Banks Pumping Plant in the southern Delta with a single tunnel that will, in whole or in part, serve the purposes of this AIP.

DWR refers to this process as “the Contract Negotiations Concerning Water Supply Contract Cost and Benefit Allocation of Delta Conveyance Facilities of the State Water Project.” (DWR Preface to Sixth Offer, December 20, 2019.) (A copy of DWR’s Preface and Sixth Offer is attached.)

The “First Offer” submitted by the State Water Contractors to DWR on July 24, 2019, calls for the negotiation process to result in an Agreement-in-Principle (AIP.) The Contractors proposed that the AIP include a definition of the proposed new conveyance project, meaning Delta Water Tunnel, to include (First Offer, p. 5),

Project objectives
Capacity
General configuration (alignment, number of intakes, tunnels, pump stations, etc.) (First Offer, p. 5.)

DWR’s Sixth Offer of December 20, 2019, says “It is the Department’s continued belief that a Delta conveyance facility is in the best interests of the state, the PWAs [public water agencies], and the Delta.” (DWR’s Preface, p.1 of 1, December 20, 2019.) The Sixth Offer recites,

This Agreement in Principle is by and between the undersigned State Water Project Public Water Agencies and the State of California by and through the Department of Water Resources for the purpose of providing a mechanism for amending the State Water Project Water Supply Contracts that will address cost and benefit allocation of *Delta Conveyance Facilities of the State Water Project with an assumed State Water Project capacity of 6000 cubic feet per second.* (DWR’s Sixth Offer, p.2, December 20, 2019)(Emphasis added.)

DWR’s Sixth Offer includes the definition,

Delta Conveyance Facility (DCF) shall mean those facilities of the State Water Project consisting of a water diversion intake structure, or structures, located on the Sacramento River and connected by facilities to Banks Pumping Plant in the southern Delta with a single tunnel that will serve the water supply purposes of the State Water Project. (DWR's Sixth Offer, p.3, December 20, 2019.)

The previous Bay-Delta Conservation Plan (BDCP)/Water Fix project does not exist as the approval was rescinded by DWR on May 2, 2019. There is no EIR for the previous project because certification of the previous EIR was set aside by DWR on May 2, 2019.

The claimed purpose for DWR's single Tunnel project is to improve SWP water export conveyance and deliveries. The Tunnel will be a SWP facility. Since SWP Long-Term operations are the reason for DWR's single Tunnel project, omitting the Delta Tunnel process from the Draft EIR, renders it "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines, § 15088.5(a)(4).)

The Draft EIR includes affirmative misrepresentations,

The Proposed Project would not include any of the following:

- New construction of water facilities, infrastructure, or other land disturbance
- Construction of new facilities or modification to existing facilities that could increase the capacity of the SWP (Draft EIR 4-321.)

The truth is that DWR is in the process right now of planning the Delta Water Tunnel project for the very purpose of maximizing SWP water exports. The truth is that DWR is continuing its ongoing negotiations with water exporters over the cost and benefit allocation of Delta Conveyance Facilities of the SWP, meaning the Delta Water Tunnel. The truth is that the Proposed Project does include construction of the Delta Water Tunnel project.

The Draft EIR says, "Reclamation and DWR propose to use the Sacramento River, San Joaquin River, and Delta channels to transport water to export pumping plants located in the South Delta." (Draft EIR 3-30.) That is false. The truth is that DWR proposes to develop, construct, and use an enormous, more than 30 miles long, underground Tunnel to transport water to export pumping plants located in the South Delta.

DWR's deception includes *omitting* the Delta Water Tunnel project from its list of more than 40 cumulative water supply, management, and quality projects and actions in the Draft EIR. (Draft EIR, Table 4. 6-1a, List, following page 4-294.)

There is still more. The just released Draft Portfolio admits,

The Administration is advancing a single-tunnel conveyance project under the Delta, . . . The project is undergoing environmental review and includes significant public engagement to design a project to limit Delta impacts and provide local benefits. (Draft Portfolio 16, also 7, 22 proposal 19.1, 113, unnumbered online page 143.)

The Draft EIR provides the opposite of CEQA-required full environmental disclosure. The Draft EIR instead provides concealment, deception, and misrepresentations.

This Draft EIR Process Must be Integrated with DWR’s Other Related Processes

CEQA Guidelines § 15124(d)(1)(C) requires that the EIR project description include “A list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies.” The second sentence in that subsection goes on to require, *“To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.”* (Emphasis added.) CEQA’s policy is to conduct integrated review. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 939, 942.) Moreover, “Lead agencies in particular must take a *comprehensive* view in an EIR.” (*Banning Ranch Conservancy*, 2 Cal.5th 918, 939, citing Public Resources Code § 21002.1(d).)

As shown above, instead of integrated CEQA review, key environmental review processes are going ahead separately, each in its silo. With one hand, DWR is proceeding to plan the design of the Delta Water Tunnel. With another hand, DWR is negotiating cost allocations with the water exporters for the Delta Water Tunnel. With an extra hand, DWR issued the subject Draft EIR that conceals instead of reveals the Delta Water Tunnel project and its causal relationship with SWP Long-Term operations.

This “silo” approach is puzzling given that the just released Draft Portfolio emphasizes that addressing new challenges such as climate change requires reflection, innovation, communication, and coordination. *“This cannot take place in silos but must be integrated within and across regions.”* (Draft Portfolio 25.) (Emphasis added.)

To proceed in the manner required by CEQA, DWR must prepare a new, honest Draft EIR and recirculate it for public review and comment. An accurate water availability and needs analysis, quantification, and disclosure and analysis of the Delta Water Tunnel project and its causal relationship with SWP Long-Term operations must be central focuses of the new Draft EIR.

DWR Must Not Segment Environmental Analysis

Guidelines § 15378(a) in pertinent part defines a “project” to be:

‘Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following . . . (Emphasis added.)

Guidelines § 15378(c) adds that:

The term ‘project’ refers to the activity which is being approved and which may be subject to several discretionary approvals by government agencies. The term ‘project’ does not mean each separate governmental approval. (Emphasis added.)

CEQA prohibits the piecemealing or segmentation of environmental analysis. A lead agency must not piecemeal the analysis of several smaller projects that are part of a larger project. Piecemealing is prohibited in order to ensure “that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.” (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.)

DWR and the exporters are designing the construction and operations of a Tunnel project in the absence of any CEQA compliance whatsoever. They are likewise negotiating an agreement in principle for the specific project. The Draft EIR on Long-Term SWP operations conceals rather than reveals and analyzes those ongoing DWR activities. Instead of dealing with the whole of the action as required by CEQA, these processes are all being done separately and segmented from each other. DWR is failing to proceed in the manner required by CEQA. DWR must prepare a new Draft EIR and recirculate it for public review and comment in order to correct these deficiencies.

DWR Must Analyze the Impacts of providing Water to the Entire Project

Pursuant to CEQA an EIR,

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

Moreover,

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

The inventory and assessment and water resilience portfolio required by the Governor’s *Executive Order* are also the type of information required by CEQA to be in an EIR. There is no such information in the Draft EIR and therefore no foundation for determining SWP Long-Term operations. Consequently, a new Draft EIR and recirculation are necessary.

DWR Must Accurately Evaluate Cumulative Environmental Impacts

The Draft EIR concludes “the Proposed Project would have no impacts on aesthetics, agricultural resources, air quality, terrestrial biological resources, cultural resources, energy, geology and soils, greenhouse gas emissions, hazards and hazardous materials, land-use and planning, mineral resources, noise, population and housing, public services, recreation, transportation, tribal cultural resources, utilities and service systems, and wild fire; and therefore, it would not contribute to potential cumulative impacts on these resource topics.” (Draft EIR 4-294.) This conclusory error will be addressed later.

The Draft EIR then states, “Thus, the cumulative impacts analysis in this DEIR is limited to the potential of the project to contribute to potentially significant cumulative impacts related to the topics of hydrology, surface water quality, aquatic resources and tribal cultural resources.” (Draft EIR 4-294.)

The Draft EIR concludes, “*the contribution of the Proposed Project to Delta water quality would not be cumulatively considerable*” because “DWR operates the SWP in accordance with obligations under D-1641.” (Draft EIR 4-308.) (Emphasis added.) The Draft EIR reaches the same conclusion, that the cumulative impact of the Proposed Project is less than significant as to aquatic biological resources, again, because of the existing regulatory framework. (Draft EIR 4-316, 317.) The plan for the Project is to “Comply with D- 1641 and USACE Permit 2100” “Existing Regulatory Requirements.” (Draft EIR 1-5, Table 1-1 a; also, 3-15, Table 3-3a .) The “Action Goal or Objective” is “Continue to comply with existing limits and permit requirements to protect water quality for the beneficial uses of fish and wildlife, agriculture and urban uses.” (Draft EIR 1-5, Table 1-1 a; also, 3-15, Table 3-3a.)

The Water Quality Control Plan for the San Francisco Bay-San Joaquin - Sacramento Delta Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended without substantive changes in 2006. The Water Board is in the

process of a periodic update of the WQCP, which is occurring in phases. The statement in the Water Board February 11, 2016 Ruling (on DWR’s Petition for a point of diversion change, p.4) reflecting reality is that: “The appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may well be more stringent than petitioners’ preferred project.”

D-1641 is now a quarter century out of date. 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 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 2017, the Water Board found that: “it is widely recognized that the Bay-Delta ecosystem is in a state of crisis.” (Final Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows, at 1-4). The water management infrastructure including the Central Valley Project (CVP) and State Water Project (SWP) ‘have been accompanied by significant declines in nearly all species of native fish, as well as other native and non-native species dependent on the aquatic ecosystem. Fish species have continued to experience precipitous declines since last major update and implementation of the Bay-Delta Plan in 1995 that was intended to halt and reverse the aquatic species declines occurring at that time. 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. Simultaneously, natural production of all runs of Central Valley salmon and steelhead remains near all-time low levels.” (*Id.*). According to the Water Board, the best available science indicates that existing “requirements are insufficient to protect fish and wildlife.” (*Id.* at 1 – 5).

The Draft EIR admits,

on December 12, 2018, through State Water Board Resolution No. 2018-0059, the State Water Board adopted the Bay-Delta Plan amendments establishing the lower San Joaquin River flow objectives and revised Southern Delta salinity objectives. However, the SWRCB did not assign responsibility to any water right holders to meet these new and revised objectives. In addition, the amendments are being

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, Susuin Marsh, and the bay-- ecosystem is collapsing.

legally challenged and have not yet been implemented through a water rights decision. The SWRCB continues to work on proposed amendments for the Sacramento River, its tributaries and the Delta. (Draft EIR 4-108, 109.)

The just released Draft Portfolio admits,

State and federal laws enacted to protect against reduced river flows and loss of habitat have been unevenly applied and only partially successful. . . . As ecological stressors mount, existing approaches to protecting fish and wildlife must be modernized to protect and restore natural systems that support our state's celebrated bio diversity. (Draft Portfolio 12.)

The Draft Portfolio also admits, of course water diversions have significant adverse environmental impacts,

Over the last 200 years, human engineering to capture and divert flows has altered the natural functions of most major rivers in the state. . . . These changes have impaired our overall resilience as a state and impacted fish and wildlife, threatening the existence of several native fish species including distinct runs of salmon and steelhead.

Reduced stream flows, increased temperatures, lack of habitat, and proliferation of invasive species have impacted many fish species across the state. Native fish and wildlife evolved to cope with drought, and dry periods are increasingly stressful given reduced habitat and river flow in recent decades. . . . Pollution compounds the stress. Many species are declining, and the number of fish species considered highly vulnerable to extinction rose from nine in 1975 to 31 species today. (Draft Portfolio 12.)

It is unreasonable to conclude that SWP Long-Term operations complying with the outdated and insufficient standards in D-1641 will not result in cumulatively considerable adverse impacts on Delta water quality and aquatic biological resources.

Again, also, the Draft EIR fails to reveal and evaluate the impacts of the cumulative Delta Water Tunnel project which is a result of SWP Long-Term operations. An EIR must discuss a related project when “it [is] reasonable and practical to include the project and...without [its] inclusion, the severity and significance of the cumulative impacts” could not be adequately stated. *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1127. An “EIR must contain facts and analysis, not just the bare conclusions of the agency.” *Gray*, 167 Cal. App. 4th at 1109. EIRs require detail for a very commonsense reason. Without a complete understanding of a project, decision-makers cannot determine whether it would make sense.

The omission of the Delta Water Tunnel project renders the Draft EIR so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment on direct, indirect, and cumulative environmental impacts of the project are precluded.

DWR Must Disclose and Evaluate Project Growth-Inducing Impacts

The Draft EIR concludes “the Proposed Project is not growth-inducing and would not induce secondary impacts of growth.” (Draft EIR 4-326.) Nothing could be further from the truth. It is the Long-Term operation of the SWP that is the reason for DWR’s ongoing processes to develop and approve the Delta Water Tunnel project. A new Draft EIR and recirculation are required in order to fully and accurately disclose and evaluate the growth inducing impacts of SWP Long-Term operation and the Delta Water Tunnel project.

DWR Must Disclose and Analyze the Significant Adverse Environmental Impacts of the Project

The SWP moves “an annual average of 2.9 million acre-feet of water.” (Draft EIR 2-1.) DWR is pursuing the Delta Water Tunnel project to facilitate SWP Long-Term operations. Yet the Draft EIR concludes *“the proposed project does not result in significant effects, . . .”* (Draft EIR 5-1; also, 4-294, 308, 316, 317) (Emphasis added.)

The conclusions in the Draft EIR are not supported by substantial evidence. They are simply based on speculation and argument. Just as compliance with the quarter century old D-1641 does not mean the project will not have significant adverse cumulative environmental impacts; the same is true with respect to direct and indirect impacts of the project. In addition, as shown above, DWR’s Delta Water Tunnel project is underway and is intended to facilitate SWP Long-Term operations. The Tunnel would cause numerous adverse environmental impacts including reducing freshwater flows through the already impaired Delta as a result of a new, large upstream diversion for the Tunnel. The Draft EIR admits “estimated changes to Delta outflow could affect the surface water quality or aquatic resources, . . .” (Draft EIR 4-14.) The Draft EIR obscures, in the process of admitting, the Delta is already impaired, not meeting water quality standards, including the pollutants chlorpyrifos and diazinon, DO, mercury and methylmercury, pathogens, pesticides, organochlorine pesticides, salt and boron, and selenium. (Draft EIR 4-104.)

Again, the just-released Draft Portfolio admits the obvious; reducing river flows by diversions adversely impacts fish species. (Draft Portfolio 12, 13.)

As an example of an adverse impact, the Draft EIR contains a brief two paragraph discussion of environmental toxins, confined to exposure of Delta Smelt to toxins

including toxic blue-green cyanobacteria (*Microcystis*.) (Draft EIR 5-101, 102.) The Draft EIR ignores the danger to people. On September 1, 2019, Bay City News Service reported,

A buildup of blue-green algae (cyanobacteria), commonly called an algae bloom, along the Sacramento-San Joaquin River Delta has prompted a safety warning from Contra Costa Environmental Health Services.

The department is advising people out for holiday weekend recreation on the Delta that contact with blooms can make people and pets very sick. Cyanobacteria create a green, blue-green, white or brown coloring on the surface of slow-moving waterways.

Advisory notices have been posted at the kayak launch and around the fishing dock at Big Break Regional Shoreline in Oakley after cyanobacteria was detected in the water.

It warns users to stay out of the water, and do not touch algae scum in the water or on the shore, do not use the water for drinking, cleaning or cooking; do not let pets or livestock enter or drink the water; and do not eat fish or shellfish from the water.

A caution advisory has also been posted near the boat ramp around the mouth of Mormon Slough by the California State Water Resources Control Board.

Stockton urban waterways are stagnant and thick with algal scum and toxins. Algae blooms are regularly found from Stockton to Discovery Bay with smaller ones becoming visible in sloughs between the cities. Increasing or even maintaining exports combined with climate change will reduce freshwater flows and increase the buildup of these dangerous algal blooms.

According to the EPA (

<https://www.epa.gov/nutrientpollution/harmful-algal-blooms>),

Harmful algal blooms can:

- Produce extremely dangerous toxins that can sicken or kill people and animals
- Create dead zones in the water
- Raise treatment costs for drinking water
- Hurt industries that depend on clean water

According to the Draft Portfolio, “A warmer climate provides optimal conditions for worsening harmful algal blooms, which can force the closure of beaches, rivers, and lakes due to health risks for people and pets.” (Draft Portfolio 13.) Moreover, “Waterways are becoming increasingly prone to harmful algal blooms and low dissolved oxygen levels. (Draft Portfolio 13.)

We incorporate by reference the written comments submitted by Restore the Delta (submitted January 6, 2020.) Those comments go into much greater detail on several important subjects including water quality, harmful algal blooms, and climate change.

DWR must prepare and recirculate a new Draft EIR to accurately and honestly disclose and evaluate the numerous, serious adverse environmental impacts caused by increasing or even maintaining current SWP export levels. Producing or increasing dangerous toxins that can kill or sicken people, create dead zones in the water, and raise treatment costs for drinking water are examples of the serious adverse environmental impacts caused or worsened by SWP Long-Term operations. These serious impacts are ignored in the Draft EIR.

DWR Must Evaluate the Reality that DWR’s Federal Partner is Committed to Maximizing Exports Regardless of the Environmental Consequences

In the real world, the governing political landscape has changed. As has been said as to other issues, “hope is not a plan.” Until recently, the hope was that federal and state agencies would act in good faith to work together to protect water quality while operating the SWP in the case of the State, and the Central Valley Project (CVP) in the case of the U.S. Bureau of Reclamation. “DWR operates the SWP in coordination with the CVP, under the Coordinated Operation Agreement (COA) between the federal government and the State of California (authorized by Public Law 99-546).” (Draft EIR 1-3.) There is no longer any basis for such hope with respect to the federal government. It is a critically important issue when two partners in an operation, in this case the State, and the federal executive branch, are in foundational and fundamental disagreement.

Former Secretary of the Interior Ryan Zinke issued his August 17, 2018, memorandum to his staff on the subject “California Water Infrastructure.” The Memorandum stated, within 15 days, the Assistant Secretaries “shall jointly develop and provide to the Office of the Deputy Secretary an initial plan of action that must contain options for: maximizing water supply deliveries; . . .” That same memorandum included a directive to develop a plan of action for “preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people; . . .”

On October 19, 2018, the president issued the *Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West.* (83 Fed.Reg. 53961, October 25, 2018.) The *Presidential Memorandum* in Section 2(a)(ii) ordered the

Secretary of the Interior and the Secretary of Commerce to within 30 days designate one official to,

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

On March 28, 2019, the federal government brought two lawsuits against the Water Board seeking to divert more water for the CVP, challenging the Water Board’s new flow requirements set forth in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta estuary.⁷ The Draft EIR mentions that the Water Board’s “amendments are being legally challenged” but fails to disclose that one of the challengers is the federal government. (Draft EIR 4-107, 108.)

The Draft EIR fails to include significant new information. It states “When the new USFWS [United States Fish and Wildlife Service] and NMFS [National Marine Fisheries Service] Biological Opinions are issued, they will include incidental take statements (ITS) for Delta Smelt, Winter-run Chinook Salmon, Spring-run Chinook Salmon, Green Sturgeon, and steelhead. DWR will comply with the ITS in accordance with federal law in addition to state requirements.” (Draft EIR 3-14.)

In fact, the new federal biological opinions have already been issued. They were issued back on October 21, 2019. On July 1, 2019, NMFS biologists had concluded in a 1123-page biological opinion that Reclamation’s plan would likely jeopardize listed salmon and steelhead, along with Southern Resident killer whales, and would be likely to destroy or adversely modify critical habitat, all in violation of the federal Endangered Species Act.⁸ The federal government subsequently replaced the biologists with political appointees, and the October 21, 2019 NMFS biological opinion concluded Reclamation’s plan was not likely to jeopardize the continued existence of the subject species or destroy or adversely modify their critical habitats. Also on October 21, 2019, the USFWS issued a biological opinion concluding Reclamation’s plan was not likely to jeopardize the continued existence of Delta Smelt or destroy or modify its critical habitat.

Several public interest organizations filed a complaint on December 2, 2019, in the United States District Court for the Northern District of California seeking to set aside the

⁷ One federal lawsuit seeks a writ of mandate in state court, the Superior Court, County of Sacramento, while the other federal lawsuit seeks declaratory and injunctive relief in federal court, in the Eastern District of California.

⁸ The July 2019 biological opinion is available at: <https://www.documentcloud.org/documents/6311822-NMFS-Jeopardy-Biop-2019-OCR.html>.

October 2019 biological opinions as being unlawful under the Administrative Procedure Act and the Endangered Species Act. The suit is entitled *Pacific Coast Federation of Fishermen's Associations et al. v. Wilbur Ross et al.*, Case No. 19-cv-07897.⁹

According to the Sacramento Bee, “Gov. Gavin Newsom’s administration said Thursday [November 21, 2019] it will sue the Trump Administration over its efforts to push more water through the Sacramento-San Joaquin Delta, saying the federal plan would harm the sprawling estuary and the fragile fish populations that live there.” (Ryan Saballow, *Newsom says California will sue Trump over Delta water, endangered fish*, Sacramento Bee, November 21, 2019.)

The federal government now claims it can override California environmental protection laws and Water Board water allocations and protections. The new federal policy is to maximize water exports regardless of the environmental damage and California’s water policies. The Draft EIR gives no hint of the new federal policies contrary to California’s laws and policies.

DWR must, pursuant to CEQA, disclose and analyze the fight that the federal government is now waging against the efforts of California state government to protect water quality. Long-Term SWP operations cannot be evaluated or determined in a vacuum from the federal efforts to maximize project exports.

The Court noted in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 941 that the governmental actions not only conflicted with CEQA obligations, “but also ignored the practical reality. . . .” The integrity of the process of decision under CEQA is to be ensured “by precluding stubborn problems or serious criticism from being swept under the rug . . . (*Banning Ranch Conservancy*, 2 Cal.5th 918, 940-41.) Again, CEQA is a full environmental disclosure statute. DWR must disclose and analyze the likely impacts of the new federal policies and how Long-Term SWP operations can be modified to prevent or mitigate the adverse impacts of the new federal policies to maximize exports. For example, increasing or maintaining instead of reducing SWP exports will further worsen water quality and watershed degradation given the new federal policies to maximize exports as well as reduced runoff and increasing salinity intrusion due to climate change. The new federal policies to maximize exports are a practical reality that cannot be covered up by the State in making decisions regarding Long-Term SWP operations and whether to develop a Water Tunnel project.

DWR Must Evaluate SWP Long-Term Operations in light of Climate Change

The Draft EIR evades the impacts of climate change in one page plus part of one sentence. (Draft EIR 4-3, 4.) The discussion includes misleading statements, saying that

⁹ The facts in this and the preceding paragraph are taken from the filed complaint.

“The Proposed Project is not expected to exacerbate any hazards, such as flood potential, because River flows and SWP pumping would remain within historical operating range. Thus, no further climate change analysis is required for this EIR.” (Draft EIR 4-3.) “No additional analysis or discussion of impacts of climate change on the environmental resources addressed in the DEIR is warranted.” (Draft EIR 4-4.)

In fact, the already impaired Delta is facing a quadruple whammy. There will be decreasing watershed runoff as a result of decreased snowfall due to climate change. That will reduce freshwater flows through the Delta. “Rising winter temperatures will reduce mountain snowpack in the Sierra Nevada and Cascade ranges by 65% on average by the end of the century, increasing flashy winter run off and flood risks while reducing spring and summer stream flow.” (Draft Portfolio 14.) Rising sea levels caused by climate change will result in greater salinity intrusion further into the Delta. “San Francisco Bay and the Sacramento-San Joaquin Delta will face salinity intrusion as sea level rises. (Draft Portfolio 14.) “Although the Delta is not one of the state’s ten major hydrologic regions, it plays a complex role in the water resilience of California and faces particularly acute climate risks.” (Draft Portfolio 110.) The new federal policy to maximize exports will further decrease freshwater flows. DWR’s Delta Water Tunnel will further reduce freshwater flows through the Delta. That means that maintaining or increasing SWP exports will further exacerbate the Delta’s poor freshwater flows and water quality.

These issues need to be dealt with in a, new, recirculated Draft EIR to allow informed development and consideration of alternatives responsive to the problems. That will include reducing exports to by that way increase freshwater flows through the Delta to compensate for declining watershed runoff and worsening salinity intrusion.

DWR Must Disclose and Assess the future Reduction in Claimed Needs for SWP Exports as a result of New Technologies and Curtailed Exports

The refusal of DWR to extend the public comment period so the public would be informed by the Draft Portfolio appears deliberate. Paragraph 3 of *Executive Order N-10-19* requires that the portfolio established by the State agencies embody seven principles including, “Utilize natural infrastructure such as forests and floodplains” (¶ 3(b); “Embrace innovation and new technologies” (¶ 3(c); and “Incorporate successful approaches from other parts of the world.” (¶ 3) (e.)” That type of information would be invaluable in lessening the future claimed need for water exports from the Delta. We understand, for example, the City of Los Angeles has a plan to reduce its imported water supply by 50% by the year 2025. According to Water Replenishment District President John Allen, “Water recycling is the wave of the future.” (Release, August 22, 2019.) “SB 606 and AB 1660 [signed into law May 31, 2018] emphasize efficiency and stretching existing water supplies in our cities and on farms.” (State Water Resources Control Board fact sheet.)

The Draft Portfolio informs,

More efficient use of water by communities and agriculture has stretched water supplies to meet demands, especially on urban landscapes.

Diverse water supply sources and reuse of water have helped many communities effectively weather drought. (Draft Portfolio 12.)

Many Southern California water districts are building regional self-sufficiency but do not expect to be able to feasibly replace *all* water supply diverted from the Delta over the next couple of decades. (Draft Portfolio 113.) (Emphasis added.)

Moreover,

The most cost-effective, environmentally beneficial way to stretch water supplies is through better water use efficiency and eliminating water waste. . . . Recycled water is a sustainable, nearly drought-proof supply when used efficiently, and the total volume of water California recycles today could triple in the next decade. (Draft Portfolio 17.)

Water exports will be reduced. “The trade-off to manage salinity could reduce the amount of water available to support an ecosystem already under stress and for export from the Delta. Exports could be naturally curtailed by about 10% under mid-century climate projections, and by about 25% by 2100.” (Draft Portfolio 111.) By 2050 the amount of water used by agriculture is expected to decline, and decline the most in the San Joaquin and Tulare Lake regions. (Draft Portfolio unnumbered page, page 58 online.)

Utilizing natural infrastructure would mean continuing to use the Sacramento River and Delta channels for conveying water as opposed to diverting large river flows into an expensive underground Tunnel.

In the absence of any meaningful discussion of utilization of natural infrastructure, embracing innovation, and incorporating successful approaches from other parts of the world, the Draft EIR appears deliberately calculated to simply justify increasing or maintaining the existing levels of exports. The Draft EIR appears deliberately calculated to omit information and analysis that would be essential to an informed evaluation of the trade-offs between increasing or maintaining exports or instead finally beginning to reduce exports. As is true on every critical issue, the November 21, 2019 Draft EIR is so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

DWR Must Include an Accurate, Stable, and Finite Project Description

Pursuant to CEQA,

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

The Draft EIR, instead of providing the required accurate project description, uses such vague phrases as “operational flexibility” and “adaptive management” as a substitute for the legally required detail and quantification of the actual impacts of SWP Long-Term operations on the environment. (Draft EIR 1-2.)

The State and the federal government are in essence partners in operating the SWP and CVP and in creating new project facilities. The federal government has recently changed policies to maximize exports regardless of the consequences. The Governor recently threatened a lawsuit against the federal government as a result. The “Conveyance Project” is defined to include conveying water in addition to SWP pumping plants, to “potentially, CVP pumping plants located in the south Delta.” The existing Draft EIR failed to disclose and evaluate the new federal policies to maximize exports. It also failed to disclose and evaluate DWR’s Delta Water Tunnel project. These types of omissions look deliberate. The law, here CEQA, requires sounding the environmental alarm bell in Draft EIRs over serious issues. The Draft EIR project description is inaccurate, unstable, and not finite.

There are adverse environmental impacts from SWP exports, which would increase with a Water Tunnel, on other resources as well as endangered fish species, including Delta agriculture, freshwater flows, water supply, water quality, fisheries, growth-inducement, and cumulative impacts. The State’s EIR must also assess the impacts of Long-Term SWP operations under the public trust doctrine. Moreover, it is time also to evaluate SWP exports “through the Human Right to Water and environmental justice lenses to ensure that environmental justice communities are being included and treated as partners in water decision-making.” ([The Fate of the Delta: Impacts of Proposed Water Projects and Plans on Delta Environmental Justice Communities](#)) (at p. 94) (Restore the Delta, September 17, 2018.) For example, the Delta includes large environmental justice communities adversely impacted by SWP exports.

The *Fate of the Delta* document is a comprehensive and current explanation of Delta water issues. You can click on the report title, above, and get to this resource document.

A new, recirculated Draft EIR must present the case for stricter standards including reduction in SWP exports to increase freshwater flows, not just compliance with outdated D-1641.

DWR's Draft EIR Substitutes Argument, Speculation, and Unsubstantiated Opinion for Substantial Evidence

CEQA Guidelines § 15384(b) defines “substantial evidence” as including “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” “Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, . . . does not constitute substantial evidence.” (§ 15384(a.)

The word uncertain or one of its derivatives is used almost 200 times throughout the Draft EIR. The Draft EIR recites, “Project environmental commitments include facility operations, facility and habitat improvement actions, funding for studies that reduce uncertainty about SWP effects on Delta fishes, and an adaptive management framework that, individually and collectively are intended to minimize the effects of the Proposed Project and improve conditions for Delta fishes.” (Draft EIR 5-3.) Over and over again, impacts are uncertain or highly uncertain with respect to fish species.¹⁰ The repeated reference to uncertainties is a deliberate device to avoid admitting the truth; the project will have numerous, significant, adverse environmental impacts. DWR has failed to use its best efforts to find out and disclose all that it reasonably can.

The Draft EIR throughout substitutes speculation for substantial evidence, in reaching the clearly erroneous conclusion that SWP Long-Term operations have no significant adverse environmental impacts, and no significant cumulative impacts.

Conclusion

The Draft EIR issued November 21, 2019, is so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment have been precluded. Consequently, DWR must prepare and recirculate a new Draft EIR in order to proceed in the manner required by CEQA. (CEQA Guidelines, § 15088.5(a.)

Contacts for this comment letter are Conner Everts, Facilitator, Environmental Water Caucus (310) 804-6615 or connere@gmail.com, or Robert Wright, Counsel, Sierra Club California (916) 557-1104 or bwrightatty@gmail.com. We would do our best to answer any questions you may have.

¹⁰ A few examples include Draft EIR 3-50, 4-6, 4-116, 117, 120, 121, 132, 134, 145, 215, 5-38, 100.

Sincerely,



E. Robert Wright, Counsel
Sierra Club California



Kathryn Phillips, Director
Sierra Club California



Barbara Barrigan-Parrilla, Executive
Director, Restore the Delta



Conner Everts, Facilitator
Environmental Water Caucus



Jeff Miller, Senior Conservation
Advocate
Center for Biological Diversity



Carolee Krieger, Executive Director
California Water Impact Network



Barbara Vlamis, Executive Director
AquAlliance



Bill Jennings, Executive Director
California Sportfishing Protection
Alliance



Jonas Minton, Senior Water Policy
Advisor
Planning and Conservation League

Attachment:
DWR Preface and Sixth Offer