

de la Guerra, Sheila

Public Comment

#3

From: Roger Moore <rbm@landwater.com>
Sent: Monday, February 1, 2021 4:48 PM
To: sbcob
Cc: Carolee Krieger
Subject: Letter to Board of Supervisors Re : Amendments 20 and 21 {February 2 agenda}
Attachments: CWIN letter to SBC-BOS 2-1-21.pdf

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The attached letter is submitted on behalf of the California Water Impact Network (CWIN).

Respectfully,

Roger B. Moore
Attorney for CWIN

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LAND, WATER AND ENVIRONMENTAL LAW

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ADMITTED IN CALIFORNIA

February 1, 2021

Santa Barbara County Board of Supervisors
105 East Anamapu Street
Santa Barbara, CA 93101
Via email: sbcob@countyofsb.org

Re: Due to Serious Legal, Financial and Environmental Risks, Approval of State Water Project Contract Amendment 20 (Contract Extension Amendment) and Amendment 21 (Water Management Amendment) Must Be Denied, or At Minimum Delayed [Item 3, File No. 21-00088]

To the Clerk and Members of the Santa Barbara County Board of Supervisors:

Due to serious legal, financial and environmental risks ignored in letters from sponsor Central Coast Water Authority (CCWA) and other advocates, the California Water Impact Network (CWIN), on whose behalf this letter is submitted, urges the Board of Supervisors to deny State Water Project Contract Amendments 20 and 21 if those matters are brought to a vote. If it does not deny these amendments outright, the Board must delay final decision pending further study to avoid irreversible risks that would otherwise follow for the county and its constituents, both in the short-term and for decades into the future.

Having addressed proposed State Water Project (SWP) contract amendments and CCWA's risky misstatements for more than a quarter-century, CWIN's members and its counsel respect the need noted in the Agenda Letter to "alleviate" problems with SWP debt and to "reduce costs associated with the SWP." Letter, p. 3. As proposed, Amendments 20 and 21 would thwart the county's current authority to prudently extend its SWP contract term, while weakening its SWP leverage and compounding risks from SWP debt and insolvency. Acceding to these amendments at this time would open a Pandora's Box of unintended consequences, making the county an unwitting pawn in five pending lawsuits addressing financial and environmental dangers. Despite transfer of ordinary *financial* responsibility to CCWA, the County--the entity ultimately accountable to taxpayers, ratepayers, and voters as SWP contractor—must here assert its own voice to speak for them.

The Misnamed “Contract Extension” Amendments Would Leave the County More, Not Less, Vulnerable to State Water Project Risks and Indebtedness

Despite their benign label, the contract extension amendments, as proposed, are a wolf in sheep’s clothing. Parroted by CCWA as a way to relieve SWP debt pressure, they were conceived and would operate to reinforce the dominance of the largest SWP contractors. They would greatly compound risks of burdening the SWP with massive new debt, with the multi-billion dollar proposed Delta tunnel only the beginning, not the end, of their potential mischief over six decades. Much as housing contracts prior to the 2008 financial crisis often hid their bundling of toxic assets, CCWA’s letters fail to disclose how Amendment 20 would not simply extend contract length, but lay the groundwork for risky expansion of SWP debt.

Beyond extending the length of the county’s SWP contract from 2038 through 2085, Amendment 20 would redefine the “facilities” eligible for revenue bond debt, removing the provision in current Article 1(hh)(8) excluding new SWP facilities, including but not limited to the Delta tunnel. This is hardly a secret to the Department of Water Resources (DWR) and other major contractors. Discussing a precursor of the current Delta conveyance project, DWR’s own counsel in 2014 acknowledged it was “not on the list of approved projects that are eligible for funding, including through bond financing.” *See, e.g.*, Letter from Jake Campos, STIFEL, to Mary Lou Cotton, SWPCA at 4 (March 19, 2014, included as Exhibit A to DEIR comments of Planning and Conservation League, et al. Without Amendment 20, that would remain the case.

Amendment 20 would also make it easier for the largest contractors to impose new facilities debt over opposition from other SWP contractors and members of the public. Even when outside the list of eligible projects, the amendments could be used to impose debt despite opposition from up to twenty percent of the affected contractors—and regardless of public opposition.

Approval now would be particularly misplaced in light of CCWA’s failure (and DWR’s similar failure in its challenged Final EIR) to confront the county’s own prescient questions about how reckless framing of the SWP contract extension could entrench and worsen SWP debt problems. A September 30, 2014 memorandum from County Public Works requested DWR to include “an analysis of the economic and legal impacts and implications relative to the continued pre-Prop 13 taxing authority with the Contract Extension Project; i.e., what are the impacts of assuming an extension of pre-Prop 13 taxing authority. The county is concerned that if a contractor default should occur, the County would be liable for covering the default without taxation ability that exists under the current contract because of its pre-Prop 13 legal status.” In a December 15, 2014 letter to DWR’s project manager for the SWP contract amendment, County Public Works noted DWR’s unsatisfactory response to the “many occasions” the county had raised

inquiries related to its taxing authority, and raised concern about the County FCD's "financial responsibilities" if the then-current BDCP were implemented "as part of the District's contract" with DWR. Rather than ending this evasiveness, DWR's Final EIR and approval portrayed these concerns as off-topic and not needing a response. The county and its communities it serves deserve far better.

The Delta Tunnel Is, and Remains, A Major Elephant in the Room

CCWA, echoing DWR in its challenged Final EIR, insists Amendment 20 is unrelated to DWR's Delta Conveyance Project. That is not only wishful thinking, but demonstrably false. Similar denials for the project's precursor, California WaterFix, based on the same proposed amendments, were thoroughly discredited during 2018 legislative hearings on the SWP contract extension."¹

Following questioning from Senator Richard Pan at the September 11, 2018 hearing of the Joint Legislative Budget Committee, DWR Director Karla Nemeth conceded that DWR plans to "use these amendments to finance WaterFix." Rachel Ehlers of the Legislative Analyst's Office testified at the same hearing that the contract extension amendments would "affect and facilitate" the proposed conveyance. Other testimony at that hearing, including that of the undersigned attorney and that of Congressional Representative Jerry McNerney, elaborated on

¹ See, e.g., the following links for analysis and written and oral testimony:
<https://mavensnotebook.com/wp-content/uploads/2018/12/Letter-re-contract-extension-12-11-18-no-exhibits.pdf>
<https://mcnerney.house.gov/media-center/press-releases/rep-mcnerneys-statement-on-waterfix-project-at-the-california-joint>;<https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>
<https://www.senate.ca.gov/media/joint-legislative-budget-committee-20180911/audio>;
https://www.senate.ca.gov/sites/senate.ca.gov/files/jlbc_hearing_agenda_9_11_18.pdf;
<https://sntr.senate.ca.gov/content/2018-informationaloversight-hearings>;
<https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>

this close relationship. Four members of Congress, noting “it is clear that DWR’s request for a contract extension is rooted in its desire” to fund the then-current Delta conveyance, warned against proceeding to finality while unresolved issues of validity remained pending.

In 2018, critics throughout California, from Plumas County and the Delta Counties Coalition to San Diego County, criticized DWR’s efforts to finalize the contract extension without integrated review of all DWR’s proposed amendments related to Delta conveyance, including the Water Supply Contract Amendments still awaiting public comment and completion of review. The Legislative Delta Caucus warned that the proposed extension, with its concealed connections to the conveyance, was “backroom dealing” fostering “mistrust” in California’s elected leaders.²

The central role of Amendment 20 is no different for DWR’s current Delta Conveyance Project. Helping to facilitate billions in new debt for the Delta conveyance and other future projects, Amendment 20 under the guise of risk reduction is likely to force a risky escalation of indebtedness. Although DWR has long referenced a potential “opt-out” provision with later conveyance-specific amendments, which to this day await completion and environmental review, that alone cannot contain all the damage from changes that adversely affect the long-term fiscal responsibility and viability of the SWP.

Moreover, such assurances cannot allay specific risks from approval now, including the amendments’ impact on county taxing obligations under Article 34(a) of its SWP contract and Water Code section 11652, as well as “post-Proposition 13 limitations” on imposing taxes to finance new projects without a popular vote. Agenda Letter, p. 3. Commenters on the contract extension amendments, sharply criticizing DWR’s lack of transparency, compared them to a time machine.³ Not only would they pave the way for attempts to impose debt for new SWP facilities on unwilling contractors and the public; they would do so under the fiction that those new facilities could be retroactively deemed part of the original State Water Project approved by voters in 1960, thereby circumventing newer constitutional limitations that would otherwise require a vote of the people.

² See <https://a11.asmdc.org/press-releases/20180907-delta-caucus-urges-postponement-tunnel-hearings>

³ <https://www.ocregister.com/2018/08/07/the-bullet-train-has-almost-nothing-on-browns-twin-tunnels/>

Approving the Contract Extension Amendments Would Make the County an Unwitting and Unrepresented Pawn in Multiple Pending Lawsuits

This would be an especially reckless time for county supervisors to accede to the pending version of contract extension amendments. The provisions in Amendment 20, reviewed and approved by DWR as lead agency in late 2018, are the subject of three related court actions pending in Sacramento Superior Court. These actions are only now nearing completion of record and evidentiary development, through a stipulated process in which more than 67,000 pages of documents have been disclosed so far. Following completion of that process, these actions will next proceed to resolution on the merits.

These pending court actions include DWR's direct validation action (Case 34-2018-00246183) and two CEQA actions against DWR's actions as lead agency, including one brought by CWIN and co-petitioners (Case No. 34-2019-80003047, Case No. 34-2019-80003053.) In addition to CWIN, the challengers also include multiple counties, California water districts, state water contractors, fishermen's associations, other environmental organizations, and a Native American tribe. The counties are not parties to these actions, and have no realistic expectation of being able to enter them. For example, the due date for answering the validation action (Code Civ. Proc., § 862), set in DWR's summons, passed in February 2019. However, DWR has signaled that it plans to include subsequent approval resolutions of SWP contractors in its validation case record.

Collectively, CWIN and other challengers have raised more than a dozen legal objections, identifying major environmental and financial risks from the amendments and their deeply flawed review by DWR. Should it help to guide further consideration, CWIN is separately submitting an Appendix providing several of pleadings filed by challengers, including CWIN, as well as a sampling of relevant letters and documents.

Even if the county wishes to extend its SWP contract, nothing would be gained by acceding now to Amendment 20, which buries the details of its risky transformation of the SWP. Doing so would not accelerate whatever ability may later exist to lawfully implement contract extension amendments. Worse, if the County were to sign now, only to have DWR advance positions against the county's interest when it litigates the merits—for example, making expansive arguments about its authority to force tax payments for new facilities debt on unwilling contractors—the county would likely be powerless to assert its own independent voice. The more secure course is to defer approval of any final set of amendments unless and until the county can safely protect its interests.

Approving the Contract Extension Amendments Would Thwart the County's Ability to More Securely Extend its SWP Contract Under its Evergreen Clause

Despite DWR's and CCWA's deceptive packaging, accepting the current misnamed "contract extension" amendments is unnecessary for the county to safely extend its SWP contract on terms better protecting the county. Article 4 of the county's current SWP contract contains what is commonly known as the Evergreen Clause. That clause enables any SWP contractor, at least six months before SWP contracts are set to expire, to elect to receive continued service for an extended period, and sets forth the procedure in which DWR is to honor the request, including specific conditions noted "unless otherwise agreed to." The conditions, unless "otherwise agreed to," are:

- (1) Service of water in annual amounts up to and including the Agency's maximum annual entitlement hereunder.
- (2) Service of water at no greater cost to the Agency than would have been the case had this contract continued in effect.
- (3) Service of water under the same physical conditions of service, including time, place, amount and rate of delivery, as are provided for hereunder.
- (4) Retention of the same chemical quality objective provision as is set forth herein.
- (5) Retention of the same options to utilize the project transportation facilities as are provided for in Articles 18(c) and 55, to the extent such options are then applicable.

The Evergreen Clause also provides that "[o]ther terms and conditions of the continued service shall be reasonable and equitable and shall be mutually agreed upon."

In a nutshell, Article 4 enables the County FCD, as SWP contractor, to request and receive continued service under their existing SWP contract as long as it acts at least six months ahead of February 28, 2038, when the current county contract expires. It sets a default set of conditions, but also allows contractors the flexibility to negotiate "otherwise agreed to" conditions. Better used, the Evergreen Clause would allow the county either to request continuation of the contract essentially on current terms, or to negotiate and "otherwise agree" to terms more protective for the county than the current ones. By contrast, county capitulation to Amendment 20 would do the unnecessary and unthinkable: it would, for no good reason, "otherwise agree" to contract terms that are substantially worse and less protective than the county's current contract terms.

Unless the county prematurely relinquishes the flexibility it provides by signing onto Amendment 20 now, the Evergreen Clause provides a more secure way

to work toward a contract extension that that unlike it, does not needlessly add risks of unbearable new debt and cost overruns, to the detriment of SWP operation and maintenance of existing project facilities. Likewise, other asserted features of Amendment 20 referenced in the Agenda Letter (page 3), such as changes in the maximum amount of “rate management credits” or revising the Project Interest Rate, could if desired accompany agreed-upon amendments under Article 4 that do not include the risky features noted by CWIN. Among other examples, the 2017 Oroville Dam crisis underscores the importance of listening to independent voices willing to ask difficult questions of DWR and other state water contractors needed to address the SWP’s long-term problems, including operation, maintenance as well as environmental and economic risks.

Although Amendment 20 would not literally remove the Evergreen Clause from Article 4, accepting it now would squander the opportunity the county otherwise would have to invoke it, if desired, on more favorable terms for the period extending through 2085.

The “Water Management” Amendments are Concededly Premature for Final Decision-Making, But Must Be Rejected if a Decision is Made

CCWA’s letter in support of Amendment 21 (Water Management), which incorrectly questions the County’s continued ability to impose conditions needed to protect its interests, also concedes that this matter is not ready for final consideration at the Board’s February 2, 2021 meeting. CWIN agrees that Amendment 21 should not now proceed to final consideration. Before that occurs, CWIN respectfully requests the opportunity to respond to the additional analysis of Amendment 21 CCWA indicates it will later provide.

Should the Board nonetheless proceed now to final decision-making, Amendment 21 must be rejected as unlawful. Beyond the subject of further protective conditions raised by county staff, approving Amendment 21 as proposed would also be unlawful on other grounds. Those amendments cannot be lawfully approved based upon an asserted exemption from CWIN—indeed, the referenced changes depend upon an underlying EIR prepared by DWR that is already the subject of two pending CEQA actions in Sacramento County Superior Court, including one in which CWIN a co-petitioner (Case 34-2020-80003492 [CWIN and AquAlliance]; Case 34-2020-80003491 [North Coast Rivers Alliance, et al].) These petitions highlight major unresolved environmental and other risks associated with the proposed amendments.

Conclusion

For all the reasons described above, Amendments 20 and 21 should be denied if finally considered. If not finally denied, the matters should at minimum be delayed

pending further consideration, including consideration of the all the problems identified in this letter.

Respectfully submitted,



By: _____
ROGER B. MOORE

Attorney for California Water Impact
Network

de la Guerra, Sheila

From: Roger Moore <rbm@landwater.com>
Sent: Tuesday, February 2, 2021 1:04 AM
To: sbcob
Cc: Carolee Krieger
Subject: Re: Letter to Board of Supervisors Re : Amendments 20 and 21 (February 2 agenda)
Attachments: CWIN Appendix-Part 1.pdf

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In case it is helpful to guide any further consideration by the Board of Amendments 20 and 21, CWIN is submitting its appendix of documents mentioned in its letter submitted on February 1, 2021. To prevent any errors from large file size, CWIN is emailing this Appendix in four parts. Attached is Part 1 of 4.

Thanks,

Roger B. Moore
Attorney for CWIN

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Attachments area

On Mon, Feb 1, 2021 at 4:47 PM Roger Moore <rbm@landwater.com> wrote:
The attached letter is submitted on behalf of the California Water Impact Network (CWIN).

Respectfully,

Roger B. Moore
Attorney for CWIN

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**CALIFORNIA WATER IMPACT NETWORK'S APPENDIX OF DOCUMENTS
RELATING TO PROPOSED STATE WATER PROJECT CONTRACT
AMENDMENTS 20 (CONTRACT EXTENSION) AND 21 (WATER
MANAGEMENT)**

[Reference: February 2, 2021 Agenda, Item 3, File No. 21-00088; California Water Impact's February 1, 2021 Letter to Santa Barbara County Board of Supervisors]

Amendment 20

Letter of San Joaquin County, et al. to Department of Water Resources dated December 11, 2018 (including exhibits 1-6)

Verified Answer of Public Interest Groups to Complaint for Validation, filed February 25, 2019, Sacramento County Superior Court Case No. 34-2018-00246183

Verified Answer of Public Agencies to Complaint for Validation, Sacramento County Superior Court Case No. 34-2018-00246183

Verified Answer of North Coast Rivers Alliance, et al. to Complaint for Validation, filed February 25, 2019, Sacramento County Superior Court Case No. 34-2018-00246183

Verified Petition for Writ of Mandate of Planning and Conservation League, et al., filed January 10, 2019, Sacramento County Superior Court Case No. 34-2019-80003053

Verified Petition and Complaint of North Coast Rivers Alliance, et al., filed January 8, 2019, Sacramento County Superior Court Case No. 34-2019-80003047

Amendment 21

Letter of California Water Impact Network to Department of Water Resources, dated August 27, 2020

Verified Petition for Writ of Mandate of California Water Impact Network, et al., filed September 28, 2020, Sacramento County Superior Court Case No. 34-2020-80003492

Verified Petition and Complaint of North Coast Rivers Alliance, et al., filed September 25, 2020, Sacramento County Superior Court Case No. 34-2020-80003491

LAW OFFICE OF ROGER B. MOORE

LAND, WATER AND ENVIRONMENTAL LAW

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ADMITTED IN CALIFORNIA

December 11, 2018

Karla Nemeth, Director
California Department of Water Resources
1416 9th Street, Room 1115
Sacramento, CA 9581

via email (Janiene.Friend@water.ca.gov)

Re: Prematurity of Final Decision By Lead or Responsible Agencies to Authorize
DWR's Proposed "Contract Extension" Amendments

Dear Ms. Nemeth:

We represent counties and other agencies from the Delta region and northern Sacramento Valley in the coordinated proceeding in Sacramento County Superior Court on DWR's proposed California WaterFix project (JCCP 4942), including the Counties of San Joaquin, Contra Costa, Solano, Yolo, Butte, and Plumas, as well as Central Delta Water Agency, Contra Costa County Water Agency, Plumas County Flood Control and Water Conservation District, and Local Agencies of the North Delta. In DWR's pending WaterFix validation action in JCCP 4942, these public agencies, among others, dispute DWR's authority to impose billions of dollars in revenue bond debt for California WaterFix under the State Water Project (SWP) contracts and other laws.

DWR's efforts to impose binding debt for the Delta Tunnels project (a.k.a. "WaterFix") also relate closely to its proposed "contract extension" amendments to SWP contracts set to expire starting in 2035. The beleaguered and massively expensive Delta Tunnels project is and remains, the proverbial elephant in the room. The amendments not only extend the contracts through 2085; they also propose to remove existing constraints on covered "facilities" that would otherwise prevent imposing revenue bond debt for WaterFix, and potentially other costly projects opposed by some contractors and the public. Four members of Congress, noting that "it is clear that DWR's request for a contract extension is rooted in its desire to bond the cost of WaterFix," recently warned that making "such a significant and costly decision" would be premature and risky prior to determination of the validation action (Exhibit 1). Moreover, proceeding to final approval

Karla Nemeth, Director
California Department of Water Resources
December 11, 2018
Page 2

would piecemeal consideration of the extension amendments from a second set of “water supply” contract amendments facilitating WaterFix, for which Draft EIR comments are not due until January 9, 2019.

When DWR certified its Contract Extension Final EIR on November 13, 2018, it did not make a final project decision, and instead indicated that the State Water Project Analysis Office and Office of Chief Counsel would first issue a “follow-on” memorandum and recommendation. Metropolitan Water District of Southern California (MWD) and Santa Clara Valley Water District (SCVWD) appear to have improperly calendared the contract extension for consideration as responsible agencies without even waiting for the lead agency’s evaluation and project decision, much less any opportunity for public review and discussion. To avoid a high potential for confusion, uncertainty, and prejudice, decisions must clearly inform the public of the timing of any Notices of Determination under CEQA, and any final authorizations subject to the requirements of the validation statute (Code Civ. Proc., §§ 860, et seq.).

As detailed below, it is both premature and risky for DWR as lead agency, or any responsible agencies, to finally authorize DWR’s proposed contract extension amendments at this time. First, deficiencies in the record preclude final determination by both lead and responsible agencies under CEQA. Absent from the documents referenced in DWR’s November 13, 2018 certification memorandum and the responsible agency agenda items are the complete hearings, oral and written testimony (including testimony from one of the undersigned counsel attached in written form as Exhibit 2), and correspondence from closely related legislative hearings on DWR’s proposed contract extension. Hearings before the Senate Natural Resources and Water Committee (SNRWC) on July 3, 2018 and the Joint Legislative and Budget Committee (JLBC) on September 11, 2018, bear directly on the environmental review for the contract extension.¹ This includes the foundational issue of the extension project’s relationship to the Delta Tunnels and the separately reviewed Water Supply Contract Amendments—yet this critically important relationship is not analyzed in DWR’s Final EIR and certification.²

¹ See, e.g., DWR’s Water Supply Contract Extension web page, including all linked documents (<https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>); SNRWC’s web page, including all linked documents for July 3, 2018 hearing and web link to video recording of hearing (<https://sntr.senate.ca.gov/content/2018-informationaloversight-hearings>); JLBC’s web page, including all linked documents for September 11, 2018 hearing and cancelled August 30, 2018 hearing (<https://www.senate.ca.gov/legislativebudget>); video link to September 11, 2018 JLBC hearing on proposed SWP contract extension (http://calchannel.granicus.com/MediaPlayer.php?view_id=2&clip_id=5820).

² See, e.g., SNRWC Background Brief to July 3, 2018 hearing, p. 17 (referencing the recognition of SWP contractors and DWR that the proposed contract extension amendments are “a necessary, but not sufficient condition to incorporate WaterFix into

Second, 2018 comments, mainly referenced to legislative hearings, underscore the prematurity of final approval. Public agency critics throughout California, from Plumas County and the Delta Counties Coalition to San Diego County, criticized DWR's efforts to finalize the contract extension without integrated review of all DWR's proposed amendments related to the Delta Tunnels, including the Water Supply Contract Amendments still awaiting public comment and completion of review. (Exhibit 3.) The Legislative Delta Caucus observed that these "poorly defined" amendments would have "potential adverse impacts far beyond their apparent scope. There is much that remains unknown regarding the extensive changes to the SWP contracts that are being proposed and how the changes will impact property taxes, water rates, the fiscal integrity of the SWP and General Fund." (Exhibit 4.) Following the 2018 legislative hearings, more than a dozen organizations identified numerous changed circumstances requiring additional environmental review since public comment closed in October 2016, only to have DWR, in its November 13, 2018 certification memo, respond with the *non-sequitur* that the general issue areas were discussed in 2016 (Exhibit 5). Commentary in major newspapers criticized the defective process and lack of transparency surrounding the contract extension, as well as DWR's attempts to leverage WaterFix indebtedness without adequate review and debate (Exhibit 6).

Third, testimony at the September 11, 2018 JLBC hearing undermines the premise of independence from WaterFix upon which DWR's separate Contract Extension Final EIR is founded. That includes your own testimony on DWR's behalf, following questioning from Senator Richard Pan, that DWR plans to "use these amendments to finance WaterFix," and the testimony of Rachel Ehlers of the Legislative Accounting Office that the contract extension amendments would "affect and facilitate" WaterFix.³ Facilitation of WaterFix through the contract extension amendments is also addressed in the testimony of Congressman McNerney and of Roger Moore at the same hearing.

Fourth, DWR sidesteps meaningful analysis of a major project element. (See, e.g., *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 904-920 (requiring CEQA analysis prior to amending contract provision).) As addressed in the legislative testimony of Roger Moore, echoing commenters on the Draft EIR (Exhibit 2), DWR's extension amendments would eliminate limitations on covered "facilities" under article 1(hh)(8) of current SWP contracts that would otherwise render WaterFix ineligible for revenue bond financing. The Final EIR fails to address public comments on impacts that would reasonably result from such a change in language. (See, e.g., PCL, et al.'s October 16, 2016 EIR Comments, p. 6, and Ex. A, p. 4.) By contrast, DWR's assurance that projects facilitated by the contract

the SWP," and the contention of many organizations that contract amendments remain premature while WaterFix issues are unresolved).

³ Video link to September 11, 2018 JLBC hearing, *op cit.*; see also Exhibit 5, pp. 2, 5, fn. 2, 16-17 (quoting DWR Director's testimony) and p. 13, fn. 46 (referencing testimony of Roger Moore).

Karla Nemeth, Director
California Department of Water Resources
December 11, 2018
Page 4

extension will be covered by separate CEQA review (e.g., FEIR 2-10, 134) ring hollow. DWR's Delta Tunnels EIR and project approval neither admitted nor analyzed dependence on a subsequent SWP contract amendment. Critically, CEQA review of later-approved projects would come too late to address the consequences of redefining covered "facilities," because the current contract language would already be eliminated.

Fifth, the FEIR undermines its premise that the contract extension amendments proposed by DWR have independent utility as a "separate, independent project" addressing debt compression problems. (FEIR, 2-9.) Debt compression is based on the comparatively short maturity dates of existing SWP contracts. (*id.*) And the FEIR recognizes that the Evergreen Clause in Article 4 of the SWP contracts already provides a way to extend these dates. (E.g., FEIR, 2-3 to 2-5, 2-33.) DWR has not shown its version of the amendments, including the proposed facilities redefinition, to be necessary to ensure continued water deliveries or responsibly address operation and maintenance needs. By facilitating the issuance of potentially billions of dollars to construct the Delta Tunnels project, and perhaps other projects not currently eligible, DWR may under the guise of risk reduction force a risky escalation of indebtedness.

Sixth, as addressed in the written testimony of Roger Moore and the comments of the Delta Counties Coalition (Exhibits 2, 3), Water Code prerequisites for proceeding to finality on the extension amendments (Wat. Code, §§ 147, 147.5) still have not been met.

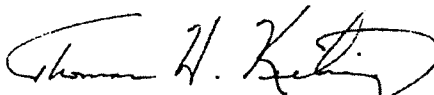
Lastly, to avoid the piecemealing problem discussed in Plumas County's letter (Exhibit 3), all DWR's proposed amendments must be reviewed and considered together prior to finality, including the proposed extension amendments and Water Supply Contract Amendments.

Respectfully,

Roger B. Moore
Law Office of Roger B. Moore



Thomas H. Keeling
Freeman Firm, a PLC

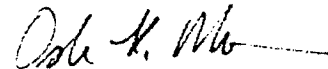


Attorneys for Public Agencies County of
San Joaquin, Central Delta Water Agency,
County of Contra Costa, Contra Costa
County Water Agency, County of Solano,

Karla Nemeth, Director
California Department of Water Resources
December 11, 2018
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County of Yolo, County of Butte, County of
Plumas, and Plumas County Flood Control
and Water Conservation District

Osha Meserve
Soluri Meserve, a Law Corporation



Attorney for Local Agencies of the North
Delta

cc: Metropolitan Water District of Southern California
Santa Clara Valley Water District
State Water Contractors, Inc.

EXHIBIT 1

Congress of the United States
Washington, DC 20515

September 10, 2018

The Honorable Toni Atkins
California Senate President pro Tempore
State Capitol, Room 205
Sacramento, CA 95814

The Honorable Holly Mitchell
Chair, Joint Legislative Budget Committee
State Capitol, Room 5080
Sacramento, CA 95814

The Honorable Anthony Rendon
California Assembly Speaker
State Capitol, Room 219
Sacramento, CA 95814

The Honorable Phil Ting
Vice Chair, Joint Legislative Budget Committee
State Capitol, Room 6026
Sacramento, CA 95814

RE: Hearing on Department of Water Resources: Proposed Water Supply Contract Extensions & Amendments

Dear Pro Tem Atkins, Speaker Rendon, Chair Mitchell, and Vice Chair Ting:

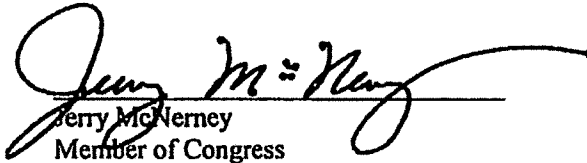
As Californians and Members of Congress, we are writing to request that the Joint Legislative Budget Committee ("Committee") hearing, which was originally scheduled for August 30th and postponed until September 11th, be canceled pending a ruling by the Sacramento County Superior Court on the Department of Water Resources' (DWR) validation action for the California WaterFix project. In its validation action, DWR is asking the court to affirm that it has the legal authority to issue bonds to pay for the \$17 billion twin tunnels project.

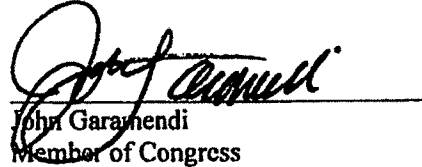
By holding this hearing, the Committee would take the first step towards extending the State Water Project (SWP) contract through 2085. It is our view that this step is premature, as the current SWP contract does not expire for an additional seventeen years. It is clear that DWR's request for a contract extension is rooted in its desire to bond for the cost of WaterFix as it is unlikely that DWR will find lenders to issue bonds that will mature beyond the life of its contract, which in this case, is seventeen years. Such a bond would have higher financing costs than a thirty-year bond. Until there is a determination on DWR's validation action, the Committee lacks the information needed to make such a significant and costly decision.

Additionally, we are deeply concerned about the exorbitant cost of this project and the lack of transparency throughout this process. Should the hearing be held, and the project move forward, Californians would be saddled with billions of dollars in debt without further input from the state legislature or the public.

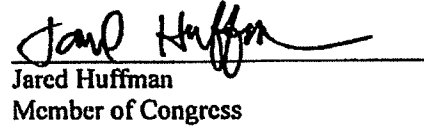
Until the court rules on the validity of DWR's claim, the Committee is pushing this project forward with insufficient information, and we strongly urge the cancellation of this hearing.

Sincerely,


Jerry McNerney
Member of Congress


John Garamendi
Member of Congress


Mark DeSaulnier
Member of Congress


Jared Huffman
Member of Congress

CC: Senator Patricia Bates
Senator Jean Fuller
Senator Ricardo Lara
Senator William W. Monning
Senator Jim Nielsen
Senator Richard Pan
Senator Nancy Skinner
Assemblymember Dr. Joaquin Arambula
Assemblymember Richard Bloom
Assemblymember Rocky J. Chavez
Assemblymember Kevin McCarty
Assemblymember Melissa Melendez
Assemblymember Jay Obernolte
Assemblymember Dr. Shirley Weber

Reps. McNerney, Garamendi, DeSaulnier & Huffman Urge California State Legislature to Cancel WaterFix Hearing

Sep 10, 2018 | Press Release

Holding Tomorrow's Joint Legislative Budget Committee Hearing Would Move the Tunnels One Step Closer

Washington, DC – Today, California Congressmen Jerry McNerney (CA-09), John Garamendi (CA-03), Mark DeSaulnier (CA-11) and Jared Huffman (CA-02) sent a letter to members of the California State Legislature, urging the cancellation of the Joint Legislative Budget Committee's informational hearing on the Department of Water Resources' proposed contract extension and amendments (https://www.senate.ca.gov/sites/senate.ca.gov/files/jlbc_background_9_11_18.pdf) – which includes provisions to push forward with the controversial California WaterFix project.

In their letter, the Congressmen argue that the Committee lacks sufficient information to make such a costly decision, citing the pending legal decision in the Department of Water Resources (DWR) validation action. They write:

"As Californians and Members of Congress, we are writing to request that the Joint Legislative Budget Committee ("Committee") hearing, which was originally scheduled for August 30th and postponed until September 11th, be canceled pending a ruling by the Sacramento County Superior Court on the Department of Water Resources' (DWR) validation action for the California WaterFix project. In its validation action, DWR is asking the court to affirm that it has the legal authority to issue bonds to pay for the \$17 billion twin tunnel project."

By holding this hearing – which is scheduled for September 11th at 10 AM – the Committee would take the first step towards extending the State Water Project (SWP) contracts through 2085, folding in the WaterFix proposal as part of the long-ago approved SWP.

"This is a backroom tactic to force through Governor Brown's controversial and wildly unpopular twin tunnels proposal," said **Congressman McNerney**. "Californians have already made it known that they do not want this project to move forward, but the state legislature is determined to push this through, despite lacking essential information regarding the validity of DWR's claim. This short-sighted water grab would saddle Californians with billions of dollars of debt for generations, and holding this hearing would prevent further input from the state legislature or the public."

"The Budget Committee doesn't have any reason to renew the State Water Project contract right now, except to try to allow cheaper financing for an exorbitant project that doesn't even have the authority to receive any yet. That's putting the cart before the horse," said **Congressman Garamendi**. "The disastrous Twin Tunnels project is the death knell for the Delta, and the Budget Committee shouldn't be helping it at all. But if they're going to, the least it can do is wait until the courts can validate its authority to issue bonds in the first place."

"Tomorrow's hearing is not in the best interest of California taxpayers. Any action by the Committee without resolution on the validation action is premature and presumptuous. Anything else is both financially and environmentally irresponsible, just like the WaterFix project itself," said **Congressman DeSaulnier**.

"Holding a hearing on the controversial Waterfix proposal is part of a deliberate attempt to approve financing for the project before its full cost and impact can be evaluated by the public," said **Congressman Huffman**. "From the get go, the tunnels plan was a grossly oversized, overreaching proposal that would cost too much, violate state and federal law, and threaten to do great harm to Northern California's fishing and farming industries, as well as to tribal communities. Now, the Joint Legislative Budget Committee is trying to jam this project through without even obtaining legal authority to issue bonds to pay for the tunnels. This project needs a reality check and the Committee should cancel this hearing until the courts have affirmed its legality."

The letter was sent to the Joint Legislative Budget Committee Chair, Senator Holly Mitchell, and Vice Chair, Assemblymember Phil Ting, as well as California Senate President pro Tempore Toni Atkins, California Assembly Speaker Anthony Rendon, and all members of the Joint Legislative Budget Committee.

The full letter can be read here ([/sites/mcnerney.house.gov/files/JLBC%209.11%20Hearing%20Letter.pdf](https://sites/mcnerney.house.gov/files/JLBC%209.11%20Hearing%20Letter.pdf)).

###

Rep. Jerry McNerney proudly serves the constituents of California's 9th Congressional District that includes portions of San Joaquin, Contra Costa, and Sacramento Counties. For more information on Rep. McNerney's work, follow him on Facebook (<https://www.facebook.com/jerrymcnerney>) and on Twitter @RepMcNerney (<https://twitter.com/RepMcNerney>).

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

MEMORANDUM FOR THE DIRECTOR
FROM THE SAC, NEW YORK
SUBJECT: [Illegible]

On [illegible] at [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

[Illegible text]

[Illegible text]

[Illegible text]

EXHIBIT 2

LAW OFFICE OF ROGER B. MOORE

LAND, WATER AND ENVIRONMENTAL LAW

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ADMITTED IN CALIFORNIA

September 10, 2018

The Honorable Holly Mitchell
Chair, Joint Legislative Budget Committee
California State Senate
State Capitol, Room 5080
Sacramento, CA 95814

**Re: The Joint Legislative Budget Committee Hearing Set for September 11, 2018,
Cannot Lawfully Serve as the Legislative Hearing Required Before DWR
Finally Approves Amendments Extending its Water Supply Contracts**

Dear Senator Mitchell:

Critics throughout California have wisely called for postponement of the prematurely rescheduled Joint Legislative Budget Committee hearing set for September 11. To the Department of Water Resources, this hearing will tripwire an end to legislative oversight over its misnamed "contract extension" amendments, which propose risky redefinition of the State Water Project facilities eligible for bond financing. These amendments are structured to include financing of the Delta tunnels and make it easier to impose debt for other risky projects through 2085. They would bundle major new risks and costs into the State Water Project under the misleading rubric of an "extension," making it harder, not easier, to address problems of debt compression and responsibly cover operation, maintenance and repairs of the existing project.

This letter focuses on an even more basic problem. DWR is including the Committee in a risky gamble that the draft amendments DWR furnished to the Committee on May 10, 2018 meet DWR's duty under Water Code 147.5 to present to the Legislature "the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts." Nothing in the history of section 147.5 suggests anything other than what these terms say. The "terms and conditions" must be the operative ones providing this template, not drafts subject to modification after responding to comments and completing review of related terms. But DWR's draft extension amendments, which failed consensus even among the state water contractors and have garnered an outpouring of still-unanswered public criticism across the state, are far from ready for prime time.

To borrow a soccer analogy, if DWR relies on the Committee's scheduled September 11 hearing, even if held, to fulfill its duties under Water Code section 147.5, it would amount to the legal equivalent of scoring an own goal. As confirmed in the Committee's background paper for the September 11 hearing (page 3), DWR has no plans to complete the final EIR "until after the hearing has taken place"—an event DWR understands as ending Legislative oversight over any of its proposed amendments related to the Delta tunnels. But DWR's own actions belie the urgency it attributes to completing "extension" of contracts that start to expire in 2035. Although DWR closed the public comment period on its Contract Extension Draft EIR in October 2016, DWR has yet to respond to these comments, and omitted them from its website and background documents for the legislative hearings. ([https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension.](https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension))¹

Nothing in Water Code section 147.5, or any other law entitles DWR to schedule the required hearing without responding to comments and completing required review. Indeed, to suggest otherwise would stand the CEQA process on its head. As DWR has conceded, the still-unreleased Final EIR must "serve as the basis for DWR and the individual contractors to determine whether to approve the Extension Amendment." ([https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension.](https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension))

No extension amendments can be adopted until after DWR later completes this process under CEQA and other requirements. Basing the Committee's required hearing on the current draft would serve no purpose, other than to foment an avoidable legal dispute over whether any eventual "terms and conditions" match current ones. Relying on a premature hearing could also prejudice CEQA review, creating a disincentive to make constructive changes reducing environmental and financial risks in response to public comments. As DWR has learned the hard way after approving earlier contract amendments, the EIR must serve as the "heart and soul" of CEQA's "meticulous process designed to ensure the environment is protected." (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911.)

Other requirements of law also must be met before holding the required Legislative hearing. As outlined in the Delta Counties Coalition's June 11, 2018 letter requesting hearing postponement, DWR has failed to complete disclosures and financial analysis required under Water Code 147, and piecemealed assessment of its two related sets of contract amendments. (http://www.delta.saccounty.net/content/Documents/2018-06-11%20Letter%20to%20Joint%20Legislative%20Committee%20Re%20DWR.PDF_)

¹ For examples of significant comments with extensive supporting documents, see, e.g., Comments of Planning and Conservation League, PCFFA and Environmental Water Caucus, dated October 17, 2016, <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>; Comments of Center for Food Safety, dated October 17, 2016; https://www.centerforfoodsafety.org/files/2016-10-17-water-supply-contract-extension-project-comments--final--reduced-1_70236.pdf.

DWR seeks to rush through the contract extension without confronting the elephant in the room, already challenged in pending litigation by water contractors, counties and cities, and environmental critics: whether DWR lacked authority to impose the costs of the WaterFix tunnel project without reaching agreement to modify the water supply contracts. (See Delta Counties Coalition letter, *op cit.*) The Committee's background paper (page 3) reports DWR's latest attempt to avoid the elephant: "[t]he department believes that Article 1(ap) of the existing contracts, which defines 'Water System Facilities' for which revenue bonds may be sold, already authorizes the sale of bonds to finance construction of Water Fix facilities."

This statement needs deciphering. In the current contracts, Article 1(ap) does not exist. "Water system facilities" are defined in Article 1(hh).² The importance of this would have been clearer if DWR had disclosed and addressed comments on the 2016 Contract Extension Draft EIR. Commenters warned that DWR's "extension" amendments would remove Article 1(hh)'s major obstacle to covering revenue bonds for the Delta tunnels. (See, e.g., PCL, et al.'s October 17, 2016 comments on Contract Extension Draft EIR , p. 6.)³ DWR knew what this meant. The March 19, 2014 STIFEL memo, Exhibit A to PCL's comments, page 4, noted that "DWR's legal counsel has concluded that BDCP is not on the list of approved projects that are eligible for funding, including through bond financing."

DWR did not simply conjure Article 1(ap). That is where the expanded definition of "water system facilities" appears in DWR's markup of the SWP contract to include its proposed extension amendments.⁴ The provision describes the authority DWR wished it already had. In short, rather than providing a sounder financial footing, DWR's proposed amendments weaken accountability, offering contractual cover to make the State Water Project more risky and costly for taxpayers and ratepayers. We should only be at the beginning, not the end, of legislative oversight.

Respectfully,


Roger B. Moore

² <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/The-Metropolitan-Water-District-of-Southern-California/Files/MWDSC-CC.pdf?la=en&hash=94D08E5487EED0E12E0119EA2D5C2EC0365C1FEF>.

³ <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>.

⁴ <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/CalWaterFix-contract-amendment/Files/Cont-Ext---Model-ConsolidatedContract-Final-for-Leg-4-10-18.pdf?la=en&hash=C90B58FD840FE055F7ADD5F9E3DBC9223B3827DF>.

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ADMITTED IN CALIFORNIA

July 1, 2018

The Honorable Hannah-Beth Jackson
California State Senate
State Capitol, Room 2032
Sacramento, CA 95814

Re: Memorandum for July 3, 2018 Informational Hearing: Opposing Premature Curtailment of Legislative Oversight Over DWR's Risky Proposal to Redefine the State Water Project Under the Premise of "Contract Extension"

Dear Senator Jackson:

As background for the informational hearing scheduled for the Senate Natural Resources and Water Committee on July 3, 2018, this memorandum, prepared at the request of the California Water Impact Network (CWIN), analyzes the need for careful and probing legislative oversight over proposals of the Department of Water Resources (DWR) to amend and redefine key elements of the State Water Project (SWP) applying through 2085 under the benign-sounding premise of a "contract extension." The full scope of proposed changes to long-term SWP contracts remains unknown, and environmental and fiscal reviews remain far from complete. Nonetheless, DWR abruptly requested on May 10, 2018 that the Joint Legislative Budget Committee (JLBC) schedule the *final* legislative hearing required under Water Code section 147.5 prior to approving renewal or extension of SWP contracts.¹ This analysis, focusing on several legal and practical problems, should be reviewed along with the attached June 26, 2018 letter submitted jointly by CWIN and 16 other organizations opposing DWR's request, which explains the fiscal and policy risks in greater detail.

A contrived sense of urgency accompanies DWR's request, which in essence asks the Legislature to exercise oversight over major changes meant to govern the SWP for more than six decades by ending it just as it begins. A child born this week will reach adulthood before the SWP contract held by the Santa Barbara Flood Control and Water

¹ DWR's request is at <https://www.water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>.

Conservation District (Santa Barbara FCD) expires on February 26, 2038. All of the 29 SWP contracts are not scheduled to expire until 2035 to 2042.² All SWP contractors long before then may choose whether to seek renewal of contracts on current terms or agree to revisions. Any proposed changes demand careful consideration of long-term needs and risks. Despite reaching a non-binding “agreement in principle” (AIP) with most, but not all, of the SWP contractors in 2014, and releasing a 2016 Draft EIR, DWR has neither reached consensus on binding contract terms nor completed environmental review.

Far from ensuring responsible legislative oversight, moving quickly to the JLBC hearing under Water Code section 147.5 will more likely end it, emboldening DWR after a minimum of only sixty days to move, without further legislative review, toward “final approval of the renewal or extension” of water supply contracts with SWP contractors.³ Curtailing legislative oversight over DWR’s proposed changes would shortchange legal, environmental and fiscal accountability over some of the foremost changes proposed in the SWP’s history. This review highlights several problems:

- **Incompleteness and Prematurity:** DWR has not released a Final EIR or responses to comments, despite major criticisms before DWR closed public comment on the Draft EIR in October 2016, and lacks consensus on complete and final amendments.
- **Facilitation of Delta Tunnels and Other Risky Projects:** DWR’s contract extension amendments, despite their label, would remove timing and facilities limitations on revenue bond debt for the Delta tunnels (CaliforniaWaterFix), and would make it easier for DWR and the largest SWP contractors to impose further debt for other costly and risky projects.
- **Piecemealing of Proposed Contract Terms:** Oversight of the proposed contract extension must include integrated consideration of all DWR’s proposed SWP amendments, including additional pending WaterFix SWP amendments lacking an EIR.
- **Compounding the SWP’s “Too Big to Fail” Problem:** DWR’s proposed extension amendments, including the redefinition of SWP facilities, are neither necessary nor helpful to ensure continued SWP water deliveries, extend the contract maturity dates, or responsibly address operation and maintenance needs. On the contrary, the

² See the list of execution and termination dates posted on DWR’s website: http://wdl.water.ca.gov/swpao/watercontractextension/docs/00024-Copy%20of%20Water_Supply_Contracts_Termination_Dates.pdf.

³ Wat. Code, § 147.5 provides, in pertinent part, that “[a]t least 60 days prior to the final approval of the renewal or extension of a long-term water supply contract between the department and a state water project contractor, the department shall present at an informational hearing before the Legislature the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts.”

amendments could result in costly escalation of SWP indebtedness, belying their ostensible purpose to make costs for repairs and retrofits of SWP facilities more manageable.

- **Continuing Use of “Paper Water” and Unsustainable Delta Exports:** DWR’s extension amendments avoid chronic problems still facing the SWP, which climate change will likely worsen in the decades ahead: inability to deliver all but half or less of the “paper” amounts referenced in Table A of the SWP contracts, and unsustainable exports of water out of the Delta despite legal mandates to reduce that reliance.

These concerns reflect my independent review of primary documents, legal research, and experience reviewing SWP contracts for more than two decades. I have closely followed and studied the roles and responsibilities of DWR and SWP contractors since 1995, when I represented petitioners in their successful challenge to environmental review of the Monterey Amendments.⁴

The points raised here, however, are not simply tied to concerns of critics of those earlier amendments, or of the Delta tunnels. The SWP ultimately serves the people of California rather than any individual contractor.⁵ Supporters as well as detractors of California WaterFix and other projects are united by the need to ensure that over next 67 years, SWP operation proceeds consistently with other laws, including those protecting other water users, areas of origin, the Delta, and the environment, and that any revised SWP contract terms realistically address the needs of the 21st century rather than an “aura of unreality.”⁶ Legislative oversight over DWR’s proposed contract extension, and avoiding premature termination of that oversight, can assist in ensuring that any changes in SWP contract terms, as well as other laws, match with these modern needs.⁷

Incompleteness and Prematurity

Water Code section 147.5 requires disclosure of the “terms and conditions” of DWR’s proposed amendments. Here, those terms remain incomplete and subject to substantial revisions or additions. DWR has still not finished the environmental review it recognizes as required for the contract extension. Although DWR released its Water Supply Contract Extension Draft EIR in August 2016, it has yet to release its Final EIR. DWR’s Executive Summary supporting its request for legislative hearing recognizes that

⁴ See *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal. App. 4th 892 (*PCL v. DWR*).

⁵ See, e.g., Wat. Code, § 12931.

⁶ *PCL v. DWR*, 83 Cal.App.4th at 912.

⁷ See, e.g., A. Rossmann, *Bring Us Laws to Match Our Rivers*, California Law and Policy Reporter 18:4 (January 2008), <http://landwater.org/wp-content/uploads/2014/02/Bring-Us-Law-To-Match-Our-Rivers.pdf>.

the Final EIR is the document that will “serve as the basis for DWR and the individual contractors to determine whether to approve the Extension Amendment,” and that DWR does not plan to release the Final EIR until after the JLBC holds its statutory hearing.⁸

Holding the final hearing before DWR has even completed its operative EIR would undercut the very point of Water Code section 147.5, making it impossible to know whether DWR’s “terms and conditions” will match what may eventually govern the contract extension. The eventual terms cannot be deemed a foregone conclusion in the absence of that EIR, which must serve as the “heart and soul” of CEQA’s “meticulous process designed to ensure the environment is protected.”⁹ CEQA requires an “interactive process of assessment and responsive project modification that must be genuine.”¹⁰

Here, the “terms and conditions” DWR proposes for the SWP contracts will not only affect the environment in a narrow sense, but also the public accountability and financial integrity of a water project serving millions of Californians. Moreover, CEQA is just one of numerous laws and legal precedents that did not yet exist when the original SWP contracts were executed. In any extended contract period, DWR and the SWP contractors must also exercise caution to ensure that contracts meet the requirements of other laws, including the foundational doctrines of public trust and reasonable use and the statutory mandate to “reduce reliance on the Delta.”¹¹ Accordingly, it also matters that the still-incomplete EIR process protects “informed self-government” as well as the environment.¹²

DWR’s hearing request and supporting documents fail to address comments on the contract extension amendments. Missing from DWR’s supporting materials are detailed comments, some with hundreds of pages of exhibits, which should be posted on

⁸ DWR, March 9, 2018, Executive Summary, p. 4, posted at <https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>.

⁹ *PCL v. DWR*, 83 Cal.App.4th at 911.

¹⁰ *County of Inyo v. City of Los Angeles* (VI) (1984) 160 Cal.App.3d 1178, 1185.

¹¹ Wat. Code, § 85021 (“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”); Wat. Code, § 85023 (the constitutional principle of reasonable use and the public trust doctrine are “foundations of state water management policy” that are “particularly important and applicable to the Delta”).

¹² *Laurel Heights Improvement Assn. v. Regents* (1988) 47 Cal.3d 376, 392.

DWR's website and made available to committee members before any further hearings are held. Commenters identified still-unstudied project impacts and alternatives, and criticized DWR's continuing failure to ensure that its approach to the SWP contracts realistically conforms to the physical, environmental and legal constraints the SWP will face in the decades ahead.¹³ They also noted how the amendments proposed by DWR, including its expanded definition of facilities, could negatively affect the financial integrity of the SWP, increasing the likelihood of subjecting taxpayers and ratepayers to costly new debt obligations for projects such as the Delta tunnels.

DWR has also failed to address other major concerns about the proposed contract extension predating these 2016 EIR comments. For example, during the scoping process for the contract extension nearly four years ago, Santa Barbara County Public Works requested DWR to "include in the EIR an analysis of the economic and legal impacts and implications relative to the continued pre-Prop 13 taxing authority with the Contract Extension Project; i.e., what are the impacts of assuming an extension of pre-Prop 13 taxing authority. The county is concerned that if a contractor default should occur, the County would be liable for covering the default without taxation ability that exists under the current contract because of its pre-Prop 13 legal status."¹⁴ DWR has yet to provide the economic and legal analysis requested, and has also still not addressed other substantial criticisms raised in scoping comments.¹⁵

Facilitation of Delta Tunnels and Other Risky Projects

DWR's effort to portray its proposed contract extension amendments as a prudent attempt to keep SWP costs reasonable largely hinges on its often-repeated claim that "the proposed project is separate and independent from the California WaterFix project."¹⁶ In DWR's portrayal, the contract extension amendments are unrelated to the Delta tunnels,

¹³ For examples of significant comments with extensive supporting documents, see, e.g., Comments of Planning and Conservation League, PCFFA and Environmental Water Caucus, dated October 17, 2016, <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>; Comments of Center for Food Safety, dated October 17, 2016; https://www.centerforfoodsafety.org/files/2016-10-17-water-supply-contract-extension-project-comments--final--reduced-1_70236.pdf.

¹⁴ Santa Barbara County's comments are among the scoping comments posted at <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension/Files/Appendix-BNotice-of-Preparation-and-Comment-Letters-Received.pdf>.

¹⁵ *Id.* (see, e.g., scoping comments of Central Delta Water Agency, PCL, and NRDC, among others).

¹⁶ Contract Extension Draft EIR, p. 6-3.

and can be considered and acted on without waiting for a separate bundle of contract amendments that are expected, when completed, to reflect DWR's ongoing negotiations with SWP contractors on California WaterFix issues.

However, DWR's claim that its contract extension amendments are independent of California WaterFix is misleading and demonstrably wrong. In fact, DWR has long been aware that revenue bonds could not be issued covering expenditures for the Delta tunnels without enacting contract amendments. That is partly because financing for this multibillion-dollar tunnels project could not realistically fit within the current expiration dates of 2035 to 2042.

Beyond the time frame for repayment, facilities limitations in the existing SWP contracts would otherwise prevent the coverage of the Delta tunnels project, including California WaterFix or earlier variants such as BDCP. That existing contractual limitation on covered facilities, included in article 1(hh)(8) of the SWP contracts,¹⁷ is specifically proposed for removal in DWR's contract extension amendments. Through the "extension" amendments, DWR proposes new authorization for "SWP revenue bonds to be issued to: (1) finance repairs, additions, and betterments to most facilities of the SWP without regard to whether the facilities were in existence prior to January 1, 1987, which is the current Contract requirement in Article 1(hh)(8); and (2) finance other capital projects (not already in the list in Article 1(hh) for which revenue bonds could be sold) when mutually agreed to by DWR and at least 80 percent of the affected Contractors."¹⁸ When discussing revenue bonds in connection with the proposed Delta tunnels project, then called BDCP, "DWR's legal counsel" concluded that "BDCP is not on the list of approved projects that are eligible for funding, including through bond financing."¹⁹

Put another way, by enabling the financing and addition of new SWP facilities not meeting this earlier facilities limitation, the contract extension amendments would tangibly facilitate addition of the Delta tunnels to the SWP, and also make it easier for DWR and the most powerful SWP contractors to add further debt to finance other costly new facilities of their choosing. The prospect of enabling approximately additional \$17 billion in initial capital costs and \$47 billion in further financing costs for the Delta

¹⁷ See, e.g., Santa Barbara County Flood Control and Water Conservation District's SWP contract (Santa Barbara SWP Contract), art. 1(hh)(8), <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Santa-Barbara-County-Flood-Control-and-Water-Conservation-District/Files/Santa-Barbara-CC.pdf?la=en&hash=50978D6A89B5D21854ECA6CC160E3CAB9B9BFFAE>.

¹⁸ Contract Extension Draft EIR, p. 4-5.

¹⁹ See, e.g., Letter from Jake Campos, STIFEL, to Mary Lou Cotton, SWPCA at 4 (March 19, 2014, included as Exhibit A to PCL's EIR comments, supra fn. 13).

tunnels alone²⁰ belies DWR's claim of fiscal prudence, and is likely to come at odds with more responsible and productive investments in 21st century water reliability and sustainability. Functioning as a wolf in sheep's clothing, the neutral sounding "contract extension" amendments, as currently proposed, add to rather than reduce the costs and risks associated with the SWP, and SWP contractors will foreseeably seek to have taxpayers absorb those costs.²¹ Rather than placing the SWP on "sounder financial footing going forward," as DWR claims,²² these amendments weaken accountability, offering contractual cover to make the SWP even more risky and costly for taxpayers and ratepayers.

Piecemealing of Proposed Contract Terms

Rushing forward to the final legislative hearing would also facilitate piecemealed decision-making, at odds with CEQA and prudent planning. Doing so would frustrate integrated consideration of the Delta tunnels in the context of further California WaterFix-specific contract amendments under negotiation lacking even draft environmental review. These further proposed amendments, tied to ongoing efforts to revive the foundering financing for the troubled Delta tunnels project, are likely to propose new transfer provisions, among others, compounding the cumulative risks of proceeding with the contract extension. Legislative oversight over the contract extension should continue to allow for an integrated understanding of all the related contract amendments proposed to govern SWP contracts in the decades ahead.

Compounding the SWP's "Too Big to Fail" Problem

The statewide concern about DWR's contract amendments redefining project facilities to enable indebtedness for the Delta tunnels and other projects raises particular concerns in Santa Barbara County. C-WIN has elsewhere documented its concerns that the SWP has not delivered water to Santa Barbara County's South Coast water districts and cities "in a cost-effective and reliable manner," and that new SWP indebtedness for the Delta tunnels "could result in vast economic hardship and financial turmoil" for the county's agencies and ratepayers while diverting resources that could be better spent on

²⁰ Goldman and Sachs, *Water Fix Financing Strategies*, p. 5 (March 17, 2017).

²¹ See, e.g., *Wat. Code*, § 11652 (SWP contractors "shall, whenever necessary, levy upon all property in the state agency not exempt from taxation, a tax or assessment sufficient to provide for all payments under the contract"); article 34 of SWP *Water Supply Contracts*.

²² DWR, *Executive Summary* (March 9, 2018), p. 2, posted at <https://www.water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>.

local efforts to improve water supply reliability.²³ As other letters have discussed as well, the Delta tunnels project remains seriously deficient in project definition and in its lack of a viable financing plan in compliance with laws.

DWR nonetheless argues that its proposed contract amendment extension is needed to spread payments past 2035 to 2042, and thereby avoid higher annual costs, for repairs and improvements in dams and other existing project facilities. This argument, however, is untenable on several grounds. First, the argument does not justify the broad amendments facilitating the Delta tunnels that DWR has actually proposed. Had DWR's priority been stabilizing expenses for operation and maintenance, it could have proposed narrower extension language, but did not.

Second, the claim that any of the SWP contractors, the Legislature or the public need to uncritically accept DWR's proposed extension language is not supported by the facts or by the language of the existing SWP project contracts. Article 4 of the current SWP contracts contains what is commonly known as the Evergreen Clause. That clause enables any SWP contractor, at least six months before SWP contracts are set to expire, to elect to receive continued service for an extended period, and sets forth the procedure in which DWR is to honor the request, including specific conditions noted "unless otherwise agreed to."²⁴

The Evergreen Clause provides that "[o]ther terms and conditions of the continued service shall be reasonable and equitable and shall be mutually agreed upon. In the event that said terms and conditions provide for continued service for a limited number of years only, the Agency shall have the same option to receive continued service here provided for upon the expiration of that and each succeeding period of continued service."²⁵ This provision helps establish that to receive continued water service or ensure workable periods to cover expenditures for SWP operation and maintenance, SWP contractors—and the Legislature—need not hastily accede to DWR's proposed extension

²³ See, e.g., C-WIN, *The Unaffordable and Unsustainable Twin Tunnels: Why The Santa Barbara Experience Matters* 7, 9, 18 (July 2016); ECONorthwest, *California WaterFix: Potential Costs to Santa Barbara County* (July 2016).

²⁴ See, e.g., Santa Barbara SWP contract, *supra*, article 4, at p. 12. The conditions, unless "otherwise agreed to," are:

(1) Service of water in annual amounts up to and including the Agency's maximum annual entitlement hereunder. (2) Service of water at no greater cost to the Agency than would have been the case had this contract continued in effect. (3) Service of water under the same physical conditions of service, including time, place, amount and rate of delivery, as are provided for hereunder. (4) Retention of the same chemical quality objective provision as is set forth herein. (5) Retention of the same options to utilize the project transportation facilities as are provided for in Articles 18(c) and 55, to the extent such options are then applicable.

²⁵ *Id.*

provisions, including those that could make the SWP more costly and risky. And although SWP contracts are substantially uniform, it is notable that two of the SWP contracts have retained pre-Monterey Amendments contract language.

Lastly, DWR's argument that costly improvements are needed for repairs, seismic retrofitting and the like is poorly matched with an extension proposal that, as discussed above, may end up weakening accountability over DWR and others seeking costly expansion of new facilities within the SWP. Although DWR mentions repairs needed at Oroville, the recent dam crisis at Oroville hardly seems like a sound basis to weaken oversight over DWR, as well as other contractors, when they wish to add costly new facilities that may even crowd out available resources for operation and maintenance. Rather, the Oroville crisis underscores the importance of listening to independent voices willing to ask difficult questions of DWR and other state water contractors needed to improve economic and environmental sustainability.²⁶ In a recent article focusing on hydropower issues and water projects, Professor Joshua Viers noted that "[l]arge scale water management systems in general, and California's water management system in particular, provide a good analogue to the financial system."²⁷ As was the case when financial systems appeared to some "too big to fail," a prudent system manager should not respond to crises by making it easier to add indebtedness on expensive new facilities, potentially at the expense of constructive steps to better manage existing ones.

Notably, the Delta tunnels project has prompted major criticisms and rethinking of "water reliability" paradigms from unexpected sources. In a recent op-ed piece, the mayor of Los Angeles warned that "we cannot rely solely on 20th century engineering for our 21st century water needs." Mayor Garcetti called for a new "Mulholland moment" focused upon local supplies and sustainability.²⁸

"Paper Water" and Unsustainable Delta Exports

In *PCL v. DWR*, the Court of Appeal rejected CCWA's attempt, with DWR's acquiescence, to stand in for DWR in reviewing the Monterey Amendments. The court criticized CCWA for neglecting water contractors and members of the public "not invited

²⁶ See, e.g., Independent Forensic Team report, *Oroville Dam Spillway Incident* (2018), https://drive.google.com/file/d/15fmj836-EnyYgPg7_a_JloK0N8J-mZE/view; R. Stork, et al., *The Oroville Dam 2017 Spillway Incident* (2017), https://drive.google.com/file/d/15fmj836-EnyYgPg7_a_JloK0N8J-mZE/view.

²⁷ J. Viers and D. Nover, *Too Big to Fail: Limiting Public Risk in Hydropower Licensing*, 24 *Hastings Environmental L.J.* 143, 144 (2018).

²⁸ <https://www.dailynews.com/2018/03/03/los-angeles-new-mulholland-moment-for-safe-and-adequate-water-eric-garcetti/>.

to the table” and for failing to analyze elimination of a safeguard against reliance on “paper water” contract entitlements “worth little more than a wish and prayer.”²⁹

Effective legislative oversight, rather than a hasty final hearing, should assist in ensuring that through any extended contract period, DWR finally, if belatedly, addresses seriously two continuing and systemic problems within the SWP. The first is the wide gap that continues to exist between Table A amounts in the SWP contracts and reliable water deliveries.³⁰ The second is that California has thus far failed, and in many respects barely begun, to fulfill the mandate of the 2009 Delta Reform Act and other laws requiring reliance on reduced water supplies from the Delta. When the California Supreme Court narrowly upheld the 2000 CALFED EIR, it candidly observed that the CALFED program was premised on the “unproven” theory that it was “possible to restore the Bay-Delta’s ecological health while maintaining and perhaps increasing Bay-Delta water exports through the CVP and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced.”³¹

Respectfully,

/s./

Roger B. Moore

²⁹ *PCL v. DWR*, 83 Cal.App.4th at 905, 914-915.

³⁰ See, e.g., DWR, SWP Delivery Capacity Report, p. 21 (Dec. 15, 2017).

³¹ Wat. Code, § 85021 (state policy of reducing Delta exports); see also *In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2000) 43 Cal.4th 1143, 1168.

EXHIBIT 3

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**PLUMAS COUNTY
FLOOD CONTROL & WATER CONSERVATION DISTRICT**

C/O PLUMAS COUNTY DEPARTMENT OF PUBLIC WORKS
1834 EAST MAIN STREET • QUINCY, CA 95971 • (530) 283-6268 • FAX (530) 283-6135

Jeff Engel, Chair, Governing Board

Robert A. Perreault, Jr., P.E., Director of Public Works and Manager, District

E-mailed on August 9, 2018 to ContractAmendment_comments@water.ca.gov

**RE: Notice of Preparation (NOP) Environmental Impact Report for the
Proposed State Water Project (SWP) Water Supply Contract Amendment for
Water Management and California Water Fix (CWF)**

August 7, 2018

The Plumas County Flood Control and Water Conservation District (Plumas) appreciates the opportunity to comment on the above-referenced NOP. Plumas is a State Water Project (SWP) Contractor and a Public Water Agency (PWA).

Plumas has been actively involved in both Agreements in Principle (AIPs) for the proposed projects. Plumas is one of four SWP PWAs that have not signed the 2014 Contract Extension Agreement in Principle (CE AIP). Plumas is prepared to bring the California Water Fix Agreement in Principle (CWF AIP) to the Governing Board for the Plumas Flood Control and Water Conservation District, pending some further clarification of assignments of power costs to Plumas for the proposed CWF project.

General Comments:

Plumas previously submitted comments on the 2016 SWP Contract Extension Draft Environmental Impact Report (DEIR). In those comments, Plumas provides an alternative that decouples existing debt from new debt for undefined future SWP storage and conveyance projects, suggests alternatives for allocating debt for future SWP capital facilities projects that were not in existence prior to January 1, 1987, and for financing other capital projects not already listed in the contract for which water system facilities revenue bonds could be sold. Plumas also proposes an "opt out" provision for Contractors that are not beneficiaries of new SWP projects and that represent only a fraction of 80% of Table A, or 80% of "participating Contractors." After the DEIR comment period closed, DWR suspended the CEQA process until July, 2018. The Plumas DEIR comments are incorporated herein by reference since DWR has not yet posted DEIR comments on the DWR website.

From the NOP:

- The proposed project has been identified as the California Water Fix.
- The proposed geographic scope is displayed in Figures 1 and 2 in the NOP. The Figure 1 map of California displays the Primary State Water Project Delivery Facilities and the rivers and conveyance that connects them. The Figure 2 map of California displays the service areas for the 29 SWP PWAs.
- Water management actions and approval processes have been proposed in the CWF AIP for South of Delta (SOD) Public Water Agencies (PWAs) (a/k/a SOD Contractors).
- North of Delta (NOD) PWAs are exempt from costs for CWF unless NOD PWAs transfer their Table A water through CWF facilities to SOD PWAs.
- The CWF AIP proposes that PWAs take responsibility for complying with CEQA below SLR.
- A CEQA checklist has been provided for commenters to frame environmental effects associated with the proposed CWF AIP.
- Both the Contract Extension AIP and the California Water Fix AIP enable the development and financing of new SWP projects “when mutually agreed to by Department of Water Resources (DWR) and at least 80% of the affected Contractors provided the approving affected Contractors’ Table A amounts also exceed 80% of all affected Contractors”.
- Neither the CE AIP nor the CWF AIP nor the NOP address NOD water management issues upstream of San Luis Reservoir (SLR).

Plumas recommends that the DWR now begin the disclosure and environmental analysis for water management of NOD SWP storage and conveyance facilities above the SLR and how changes in the management of those NOD facilities could affect SWP deliveries to SOD PWAs and the environments in their service areas.

The NOP scope of analysis for water management above SLR, based on NOP Figures 1 and 2, includes diversions of SWP water from the Bay-Delta upstream to the releases of stored water in SWP facilities located within in the Sacramento and San Juaquin subwatersheds of the Bay-Delta watershed.

Plumas appreciates that this NOP does describe the California Water Fix (CWF) as the proposed project and that the AIP for the CWF includes the exemption of the five (5) North of Delta (NOD) Contractors, including Plumas, from apparently all costs associated with the design, permitting, implementation, mitigation, and operation (including variable power costs) for the CWF. Plumas appreciates the enhanced level of transparency about the proposed CWF project and the genuine effort by DWR and the PWAs to engage in publicly negotiating the cost allocation and water management process for the CWF as stipulated in the Settlement Agreement for the Monterey SWP Contract Amendments.

The Project Objectives proposed for the NOP include improving water management within the SWP service area and providing a fair and equitable approach to cost of CWF. Absent a stated objective for the proposed project about inputs to the SLR, the NOP appears to assume that inputs to the SLR will be unchanged by the proposed project or other factors.

Plumas recommends that the NOP expand the proposed project objectives to include the disclosure and analysis of “default” Bay Delta inflows and outflows that are proposed in the State Water Resources Control Board’s (Water Board) July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan. The Water Board Framework clearly states that absent

collaborative water management agreements with upstream and senior water rights holders in the Bay Delta watershed, the Water Board will mandate that higher “default” inflows be released from upstream SWP reservoirs and that SWP diversions in the Bay-Delta will be reduced for higher outflows from the Bay Delta to the ocean. Assumption of unchanged inputs to SLR no longer appears to be a reasonable CEQA baseline for analyzing the proposed project. DWR’s assumption of unchanged inputs to SLR no longer appears to be a reasonable CEQA baseline for analyzing the proposed project now that the Water Board has initiated a water rights proceeding in order to revise flows in the Bay Delta watershed. DWR is the Lead Agency for CEQA compliance for SWP water management. Now that the State Water Resources Control Board has released the July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan, DWR must now undertake its “upstream of SLR” water management responsibilities and integrate an analysis of changes proposed by the Water Board to existing SWP reservoir operations NOD and for SWP diversions from the Bay Delta to comply with the Water Board’ proposed mandatory default flows. The CEQA for the CWF is the appropriate venue for this analysis because the cost-effectiveness and the environmental effects of the CWF will be affected by the new flow regime mandated by the Water Board for the Bay Delta watershed. The Water Board proposes to begin mandating new flows in late 2018 which makes this CEQA a timely process for analyzing costs and environmental effects of the CWF over a 50 year future period from an appropriate CEQA baseline for future SWP water management above and below the San Luis Reservoir.

DWR’s “Statement for the July 3, 2018 Informational Hearing on this NOP before the California Legislature” includes a discussion of the CEQA baseline for the CWF. DWR proposes to rely on the “July 2017 certification for the Final EIR, including Findings of Fact, a Statement of Overriding Considerations, a MMRP and issued a Notice of Determination approving the California Water Fix as an updated version of the Bay-Delta Conservation Plan (BDCP)” as the CEQA baseline for this NOP. Parties legally challenging the Validation of the now certified BDCP/CWF EIR note that the BDCP/Delta tunnels/CWF are already the subject of numerous pending legal actions challenging compliance with CEQA, state laws protecting the Delta, the public trust doctrine, federal and state laws protecting endangered species, and the existing system of water rights in California whereby the SWP is a junior water rights holder to water rights users upstream and tributary to the Bay-Delta, including the areas of origin, tribes with unexercised but reserved water rights, and water necessary to secure the viability of Bay-Delta watershed-dependent fish and wildlife species and their habitats. The Water Board proposes to significantly change existing water management in the Bay Delta watershed this year to begin addressing issues brought forward by the parties litigating the BDCP/CWF EIR.

For example, the Water Board’s July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan states:

“Existing regulatory minimum Delta outflows are too low to protect the ecosystem and without additional regulatory protections, existing flows will likely be reduced in the future as new storage and diversion facilities are constructed, and as population growth continues.” (P.6.)

“Under the current requirements, flows are completely eliminated or significantly at certain times in some streams in the Sacramento/Delta watershed, and a significant portion of the inflows that are provided to the Delta are exported without contributing to Delta outflows.” (Ibid.) “The information summarized in the Science Report specifically establishes the need for new and modified inflow and cold water habitat, Delta outflow, and interior Delta flow requirements that work together in a comprehensive framework with other complimentary actions to protect the Bay-Delta ecosystem.” (P.7)

"Implementation of the cold water habitat objective would require reservoir owners/operators to develop and implement a long term strategy and annual plans for maintaining downstream temperatures. The strategies and plans would be developed in coordination with the State Water Board, fisheries agencies, and other appropriate entities." (P.26) "In the absence of voluntary tributary plans, reservoir operators would be immediately subject to the narrative and be required to comply with the implementation provisions described above." (P.27)

And finally, "The Projects would bear a significant portion of that responsibility since they are the largest, most junior diverters in the watershed and have diversions at the end of the watershed that significantly affect outflows. However, they would not bear the entire responsibility because flows are necessary on all of the tributaries to achieve ecological benefits." (P.27)

Plumas County joined the Validation litigation with other NOD Counties and Districts to ensure that the CEQA analysis is not piecemealed, that senior water rights holders in the Bay-Delta watershed are protected from unmitigated and non-voluntary diversions of water supplies upstream of the Bay-Delta for new SWP Projects that benefit of 80% of Contractors where the Metropolitan Water District (MWD) and Kern County Water Agency KCWA, both SOD SWP Contractors, account for 72% of SWP Contractors/Table A Contract Allocations. The ongoing confusion among some SWP Contractors and other parties about the Constitutional supremacy of executed Contracts over CEQA, the California water rights priority system, the California Public Trust Doctrine, and California Water Code's prevention of wasteful and unreasonable uses of water, and ongoing legislative oversight and review is of great concern to Plumas. The timing of executed SWP Contracts in relation to these other aforementioned authorities and including ongoing legislative oversight over SWP financing and regulatory compliance, is already being discussed in some SWP PWA public meetings as a way to circumvent the changes to SWP water management that the Water Board is proposing in the 2018 Framework.

Without disclosure and analysis by DWR as the Lead Agency for this EIR about the relationship of the new SWP contracts to the Water Board's Framework, this EIR may be infected with fatal omissions related to DWR using the wrong baseline for the CWF EIR. Based on the Plumas experience with the Monterey Amendments litigation, the new "Monterey Plus" EIR and the Monterey Settlement Agreement; the new SWP contracts should not be executed and proceed while legal challenges to this EIR languish for over a decade awaiting resolution by the Courts. The CWF AIP appears to Plumas to rely heavily on the assumption that Kern Fan litigation over the Monterey "Plus" EIR will be unsuccessful or delayed so long that it becomes irrelevant once the new SWP contracts are executed. This approach to be sued and proceed for years and years down the new SWP contract water management path risks real harms to NOD SWP PWAs and the environments in their service areas. This EIR is timely and the timing of the EIR in relation to the execution of new SWP contracts is a crucial part of the EIR analysis.

Comments and Recommendations:

Plumas submits comments and recommendations with the hope and expectation that DWR will define the scope of this EIR broadly enough to address the analysis of the following alternatives:

1. Develop an alternative in this EIR that describes how DWR will comply with the Water Boards' Framework for the Sacramento/Delta Update for the Bay-Delta Plan as a junior water rights holder before the new SWP Contracts are executed.
2. Develop an alternative in this EIR that utilizes the successful public negotiation framework for the CWF AIP as a framework for proposing a process for DWR to identify voluntary Water Board compliance opportunities with NOD PWAs and other upstream tributary diverters in the Bay Delta watershed to meet proposed mandatory SWP inflow and outflow flow requirements before the new SWP Contracts are executed.
3. Develop an alternative in the this EIR that enhances the financial soundness of the SWP by prioritizing, decoupling, and committing SWP financing for the estimated over 1.9 billion dollars in repairs needed for existing SWP storage and conveyance infrastructure after the SWP Capital Facilities Plan is released and before the new SWP Contracts are executed.
4. Develop an alternative in this EIR that allows small NOD and SOD SWP Contractors to "opt out" of new SWP projects that provide no direct benefits to their service areas and that may even indirectly harm senior water rights holders and disadvantaged communities and tribes before the public transparency and accountability for negotiating cost allocations for new SWP projects expires with the certification of the CEQA for the Proposed SWP Water Supply Contract for Water Management and California Water Fix.
5. Develop a schedule for the release of this EIR that includes delaying DWR's current request for the final Joint Legislative Budget hearing required under Water Code section 147.5 until after EIR alternatives have been developed and analyzed in this EIR and the draft EIR is circulated to the public, the SWP PWAs, and the Bay Delta watershed's water rights holders and diverters for review and comment for at least 60 days. DWR can thereby, or alternatively, by a clear statement from DWR legal counsel that executing new SWP Contracts before the EIR is circulated for review does not undermine CEQA or legislative and agency authorities. This avoids the perception by many parties that DWR is preempting existing water management laws and authorities by prematurely executing new SWP Contracts

Specific Comments on the scope and substance of the EIR for the Proposed SWP Water Supply Contract for Water Management and California Water Fix (CWF):

Plumas requests that DWR include explanatory language in the EIR to address the following issues of importance to Plumas and some of the other PWAs:

Describe how existing Monterey Settlement Agreement obligations such as the final payment to the Monterey Plaintiffs and the Plumas Contract Amendment will be addressed before the new SWP Contracts are executed.

Describe how the Evergreen clause in the existing contracts will be addressed in the new contracts and describe how PWAs that extend their existing SWP contract under the Evergreen clause will be exempted from new SWP debt for new SWP projects and including being exempted from new project mitigation costs and power costs being assigned to the Delta Water Charge or the Delta Transportation Charge or the Variable and/or Embedded Power charge for new SWP projects that currently all Contractors pay through their existing contracts.

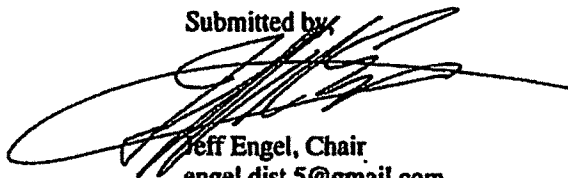
Or stated differently, how will existing debt for the SWP and new debt for new SWP projects, including unforeseen environmental mitigation costs or project development and O&M cost overruns for new SWP projects be allocated for PWAs who extend their existing contracts and who also are not participating PWAs for new SWP projects?

Describe how costs related to the design and development of the CWF and other new SWP projects will be refunded to non-participating PWAs once the participating PWAs have been identified.

Identify and distinguish the PWAs in the new SWP contract that are exempt from being required to obtain majority votes from customers in their service areas from PWAs that must obtain majority votes from customers to raise fees for new water projects serving their service areas. This taxing authority distinction is important for disclosing how the SWP maintains fiscal integrity if the PWAs without "blank check" taxing authority are unsuccessful in securing the financing needed to pay for new SWP projects. DWR's assurances that the participating PWAs will fully cover the costs of defaulting PWAs are unsupported unless the "blank check" PWAs are identified and unless they commit to financing defaults by other PWAs, even in the face of declining SWP water reliability and rising SWP water costs.

Thank you for the opportunity to provide comments on the Notice of Preparation (NOP) Environmental Impact Report for the Proposed State Water Project (SWP) Water Supply Contract Amendment for Water Management and California Water Fix (CWF). Plumas looks forward to the draft EIR and the opportunity to work closely with DWR and the other SWP PWAs on an environmentally sustainable and fiscally sound future for the SWP.

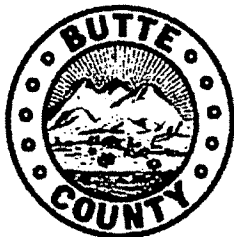
Submitted by



Jeff Engel, Chair
engel.dist.5@gmail.com

Governing Board
Plumas County Flood Control and Water Conservation District
and
Plumas County Board of Supervisors

- cc. Board of Supervisors, County of Plumas – pcbs@countyofplumas.com
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- cc. Bob Perreault, Manager, Plumas County Flood Control and Water Conservation District – bobperreault@countyofplumas.com
- cc. Randy Wilson, Director, Plumas County Planning Department – randywilson@countyofplumas.com
- cc. Craig Settlemyre, County Counsel, County of Plumas – csettlemyre@countyofplumas.com
- cc. Honorable Ted Gaines, Senator, District 1 – senator.gaines@senate.ca.gov
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Paul Gosselin, Director

July 9, 2013

Revised BDCP Objective

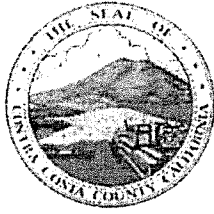
Original Objective

Butte/Plumas Objective (4/29/13): To ensure that contractors shall have the option and right to opt out of the cost and burdens and benefits of the Bay Delta Conservation Plan and any implementing and related projects.

Revised Objective

Objective 4: BDCP and DHCCP Participation

The Department and some State Water Project contractors are directly participating in the development of the Bay Delta Conservation Plan (BDCP) and the associated Delta Habitat Conservation and Conveyance Program (DHCCP). The details of the financing and repayment, specifically how the Department will charge each SWP contractor for future costs for implementation of the BDCP and DHCCP, has not been determined. Each contractor's participation in the implementation and financing of the BDCP and DHCCP should be voluntary. The Agreement in Principle and subsequent contract amendments should limit each contractor's obligation to fund any implementing and related BDCP and DHCCP projects to only those contractors that agree to participate in those projects. Butte and Plumas shall not be responsible for any costs incurred by the Department for the BDCP and DHCCP unless each of them agrees to pay for such costs in the Agreement in Principle and subsequent contract amendments to the Statement of Charges.



Delta Counties Coalition

Contra Costa County · Sacramento County · San Joaquin County · Solano County · Yolo County
"Working together on water and Delta issues"

June 11, 2018

The Honorable Holly Mitchell, Chairwoman
Joint Legislative Budget Committee
State Capitol, Room 5019
Sacramento, CA 95814

The Honorable Phil Ting, Vice Chairman
Joint Legislative Budget Committee
State Capitol, Room 5019
Sacramento, CA 95814

Re: Request to Postpone Joint Legislative Budget Committee Hearing on State Water Project Contract Extension

Dear Chairwoman Mitchell and Vice Chairman Ting,

The Delta Counties Coalition (comprised of the Counties of Contra Costa, Sacramento, San Joaquin, Solano and Yolo) requests that the Joint Legislative Budget Committee ("Committee") postpone scheduling a hearing regarding the California Department of Water Resources' ("DWR") proposed extension of the State Water Project ("SWP") contracts. This ensures appropriate Legislative oversight of the proposed extension of the SWP contracts, particularly given their relation to the California WaterFix project ("WaterFix").

On May 11, 2018, DWR requested that the Committee schedule a hearing regarding the proposed SWP contract extension, which would extend the terms of the existing SWP contracts by 50 years, until the year 2085. According to DWR's website, the purpose of the contract extension is to lower borrowing costs by providing a longer term over which to "finance SWP capital expenditures."

There is little question that the primary impetus for this contract extension is the California WaterFix project, which is estimated to cost SWP contractors tens of billions of dollars in the coming decades.

DWR claimed that the contract amendment is unrelated to the California WaterFix project, but WaterFix is plainly the largest capital improvement to the SWP under consideration. Indeed, some SWP contractors asserted that under the current SWP contracts, SWP contractors must either pay for the California WaterFix project, forfeit their SWP contract, or find another SWP contractor willing to pay their share of the costs of constructing and operating WaterFix. Several SWP contractors, including the Kern County Water Agency, filed answers in DWR's WaterFix bond validation lawsuit (Sacramento Superior Court Case No. JCCP 4942) challenging DWR's authority to impose the costs of WaterFix without their agreement to modifications of SWP contracts.

June 11, 2018

Page 2

Specifically, we request that DWR provide the information required by Section 147 of the Water Code, which is provided here for your reference:

(a) On or before January 10, 2010, and annually thereafter, the department shall prepare and submit to the chairpersons of the fiscal committees of the Legislature a report with regard to the budget for the State Water Resources Development System.

(b) The department shall include in the report all of the following information:

(1) A description of the expenditures made, or projected to be made, as applicable, on behalf of the State Water Resources Development System, by program and fund, and of the total revenues expended, or projected to be expended, as applicable, for that system, including each fund source.

(2) A description of the positions within the department that carry out functions related to the State Water Resources Development System, and the total number of those positions.

(3) A description of any funds, other than funds generated by the State Water Resources Development System, that are expended, or projected to be expended, as applicable, for the State Water Resources Development System, including those funds used for cost-sharing purposes.

(4) An itemization of all contracts related to the Bay-Delta Conservation Plan financed, or projected to be financed, as applicable, in full or in part with funds generated by the State Water Resources Development System, including the dollar amount of those contracts and a brief description of the purposes of those contracts.

(c) The department shall include in each report information relating to three fiscal years that include the two completed fiscal years that immediately precede the year in which the report is due, along with applicable information for the fiscal year in which the report is due. The department shall prepare the first report required under subdivision (a) for the 2007–08, 2008–09, and 2009–10 fiscal years.

(Added by Stats. 2009, 4th Ex. Sess., Ch. 11, Sec. 27. Effective July 28, 2009.)

Equally important, DWR is currently negotiating additional amendments to the SWP contracts regarding the WaterFix. Those amendments would allow permanent transfers of water between SWP contractors, to allow urban SWP contractors like the Metropolitan Water District of Southern California to permanently purchase water from agricultural SWP contracts like the Kern County Water Agency in exchange for paying more of the costs of WaterFix. Piecemeal analysis of these contract amendments is inefficient and undermines appropriate Legislative oversight.

Once the Committee's oversight hearing is held, DWR is legally authorized to finalize the SWP contract extension, potentially foreclosing additional legislative oversight regarding the terms of these contracts. (See Cal. Water Code § 147.5.) We, therefore, request that the Committee seek additional written information from DWR in advance of holding a hearing on the SWP Contract extension, and delay holding this hearing until the completion of the DWR contract amendments relating to WaterFix, in order to ensure adequate legislative oversight of the SWP and WaterFix.

On May 30, 2018, Assembly Members Eggman and Frazier, as a follow-up to the recent oversight hearing regarding WaterFix, sent a letter to DWR Director Karla Nemeth requesting specific information regarding WaterFix and related matters (attached). It is imperative that the Committee oversight hearing regarding the contract extensions take place after the information requested in

June 11, 2018

Page 3

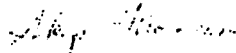
that letter is received and reviewed by Assembly Members Eggman and Frazier and to their satisfaction.

The DCC concurs with the points made by the Natural Resources Defense Council and others in their May 18, 2018 letter to the Joint Legislative Budget Committee (attached). Thank you for your attention to this matter.

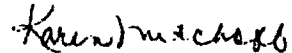
Sincerely,



Don Nottoli
Supervisor, Sacramento County



Skip Thomson
Supervisor, Solano County



Karen Mitchoff
Supervisor, Contra Costa
County



Oscar Villegas
Supervisor, Yolo County



Chuck Winn
Supervisor, San Joaquin County

Attachments

cc: Assembly Member Eggman
Assembly Member Frazier

President pro Tempore Toni Atkins
Assembly Speaker Anthony Rendon
July 31, 2018
Page 2

While WaterFix is being implemented to restore and stabilize export water supplies – similar to the objectives of the Peripheral Canal – the Water Authority has recently learned that DWR and the SWP contractors have reached agreement to redefine WaterFix cost allocation as a stand-alone cost category – leaving each individual SWP contractor to characterize the purpose of the facility in its rates and charges. While it is unclear how this recharacterization of the project purpose may impact every SWP contractor, it could have substantially different impacts on San Diego ratepayers. Because of the Water Authority’s reliance on MWD to transport a significant amount of its independently-obtained Colorado River water supply, the manner in which MWD allocates WaterFix costs could have a significant and unique impact to San Diego ratepayers. These impacts range from fairly modest impacts on monthly household water rates, to a water rate impact as much as \$21/month per household.

Even though DWR and SWP contractors are finalizing the Agreement in Principle on WaterFix cost allocation (including the identification of WaterFix as a stand-alone category), these important contract amendments on WaterFix financing and cost allocation are not part of the current SWP contract extension package and therefore will not be presented to the Legislature for its review – unless the Joint Legislative Budget Committee postpones the hearing until *all* contract amendments can be presented together.

The Water Authority’s objectives in seeking deferral of the Joint Legislative Budget Committee hearing regarding the SWP contract amendments is solely to ensure adequate time and opportunity is provided for a full public disclosure and dialogue related to the entire scope of SWP contract amendments that will be necessary to understand the financing, operations, and cost allocation considerations related to the WaterFix project. This request is consistent with the Water Authority’s proposed conditional support for the WaterFix project.

Existing law – Water Code Section 147.5 – requires, “*prior to the final approval of the renewal or extension of a long-term water supply contract*” between the Department of Water Resources (DWR) and the SWP contractors, that DWR shall present “*the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts to the Joint Legislative Budget Committee and relevant policy and fiscal committees of both houses, as determined by the Speaker of the Assembly and the Senate Committee on Rules.*” DWR and the state water contractors have been in negotiations over a number of substantive and material changes to the SWP long-term water supply contracts, including:

- Extension of the term of the contracts to 2085
- Financial compression that has affected ability of contractors to incur debt
- WaterFix-related amendments addressing facilities, operations, and cost-allocation

While only the extension of contract term (length) and amendments to address the financial compression issue have been presented as being within the purview of the Legislature at this time, the state water contractors and DWR have reached an Agreement in Principle relative to **additional contract amendments** that will be necessary to address WaterFix issues. Those amendments are not presently before the Legislature, and yet they will address the allocation to California taxpayers and water ratepayers of nearly \$17 billion in capital costs for the twin tunnels project. While there are 29 state water contractors throughout the state, there are actually

President pro Tempore Toni Atkins
Assembly Speaker Anthony Rendon
July 31, 2018
Page 3

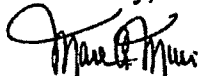
hundreds of water agencies and millions of California water ratepayers and taxpayers receiving water from those state water contractors – none of whom have a direct seat at the table to negotiate contract amendments nor have an understanding of the financing and cost allocation features of the contract amendments.

With respect to the manner in which the state water contracts address WaterFix, there is concern regarding the lack of clarity associated with the financial arrangements, fiscal impacts on ratepayers and taxpayers, and cost allocation issues. Additionally, there should be a comprehensive evaluation related to the effect on local water resources development as a result of any costs that will be obligated on state water contractors, and their member agencies, through the term of the state water contracts (2085). There has not been a thorough or rigorous analysis undertaken under the purview of the Legislature regarding the effect on local water supply investment as a result of the financial obligations and commitments that will soon be passed through by the state water contract amendments.

At this time, there is no urgency for the Legislature to proceed with the examination of the contract extension without considering the full scope of contract amendments. We encourage the Legislature to postpone the SWP contract amendment review to allow DWR more time to present a complete package of proposed contract amendments for the Legislature to comprehensively assess and review. Once the Joint Legislative Budget Committee holds the Water Code Section 147.5 hearing, the Legislature will lose oversight of additional amendments to the state water contracts. If adopted, the proposed state water contract amendments relating to WaterFix will impose far-reaching financial impacts on water ratepayers and property taxpayers. Those policy implications should be appropriately reviewed by the Legislature.

Please don't hesitate to contact me at (858) 522-6781, or Glenn Farrel, the Water Authority's Government Relations Manager, at (916) 216-1747, if you have any questions regarding this request.

Sincerely,



Mark Muir, Chair
Water Authority Board of Directors

cc: Senator Holly Mitchell, Chair – Joint Legislative Budget Committee
Assemblymember Phil Ting, Vice Chair – Joint Legislative Budget Committee
Members, Joint Legislative Budget Committee
San Diego Legislative Delegation
Water Authority Board of Directors

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EXHIBIT 4

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Jim Frazier

CHAIR, ASSEMBLY TRANSPORTATION COMMITTEE
ASSEMBLYMEMBER, ELEVENTH DISTRICT

COMMITTEES
CHAIR: TRANSPORTATION
ACCOUNTABILITY AND ADMINISTRATIVE REVIEW
INSURANCE
VETERANS AFFAIRS

California Legislature

September 7th, 2018

The Honorable Toni Atkins
California Senate President pro Tempore
State Capitol, Room 205
Sacramento, CA 95814

The Honorable Holly Mitchell
Chair, Joint Legislative Budget Committee
State Capitol, 5080
Sacramento, CA 95814

The Honorable Anthony Rendon
California Assembly Speaker
State Capitol, Room 219
Sacramento, CA 95814

The Honorable Phil Ting
Vice Chair, joint Legislative Budget
Committee
State Capitol, Room 6026
Sacramento, CA 95814

**RE: Hearing on Department of Water Resources: Proposed Water Supply Contract
Extension & Amendments**

Dear Pro Tem Atkins, Speaker Rendon, Chair Mitchell, and Vice Chair Ting:

We, the undersigned members of the Legislative Delta Caucus, are writing to urgently request the Joint Legislative Budget Committee postpone scheduling a hearing of the Committee regarding the California Department of Water Resources' (DWR) proposed extension and amendments to the State Water Project contracts. It is much too early to take this step. It is imperative and in the best interests of the state as a whole that these decisions be made at a future time when we can ensure appropriate Legislative oversight of these proposed extensions, particularly given their relation to the California WaterFix project.

At present, the proposed amendments are poorly defined and explained and have potential adverse impacts far beyond their apparent scope. There is much that remains unknown regarding the extensive changes to the SWP contracts that are being proposed and how the changes will impact property taxes, water rates, the fiscal integrity of the SWP and General Fund. Neither the proposed SWP Contract Extension amendments nor the WaterFix Contract amendments have fully completed the California Environmental Quality Act (CEQA) requirements. The lack of analysis and transparency of these amendments creates a fog of complexity for the public and the Legislature to conduct appropriate Legislative oversight.

Equally important, DWR is currently negotiating additional amendments to the SWP contracts regarding the California WaterFix project. Those amendments would allow permanent transfers of water between SWP contractors, in order to allow urban SWP contractors, such as the Metropolitan Water District of Southern California, to permanently purchase water from agricultural SWP contracts, such as the Kern County Water Agency, in exchange for paying more of the costs of the WaterFix project.

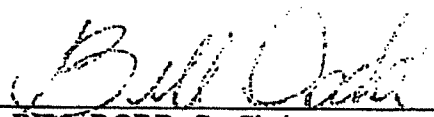
Once the required Water Code § 147.5 hearing is held, the Legislature will lose oversight of additional amendments to SWP contracts. If adopted, the proposed SWP Contract amendments will impose far-reaching financial impacts on ratepayers and property taxpayers, and devastating impacts to the environment.

We respectfully request that the Committee seek additional written information from DWR in advance of holding a hearing on the SWP Contract extension and amendments, and postpone this hearing until the completion of the DWR contract amendments relating to WaterFix.

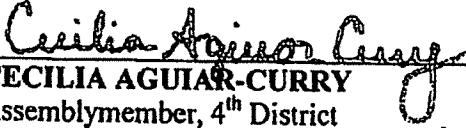
Sincerely,



JIM BRAZIER, Co-Chair
Assemblymember, 11th District



BILL DODD, Co-Chair
Senator, 3rd District



CECILIA AGUIAR-CURRY
Assemblymember, 4th District



CATHLEEN GALGIANI
Senator, 5th District




KEVIN McCARTY
Assemblymember, 7th District

RICHARD PAN
Senator, 6th District

JIM COOPER
Assemblymember, 9th District



STEVEN GLAZER
Senator, 7th District



SUSAN TALAMANTES EGGMAN
Assemblymember, 13th District

HEATH FLORA
Assemblymember, 12th District



TIMOTHY GRAYSON
Assemblymember, 14th District

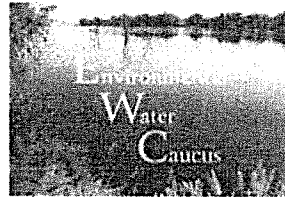
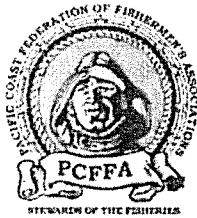


CATHERINE BAKER
Assemblymember, 16th District

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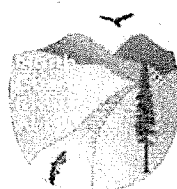
EXHIBIT 5



CENTER FOR FOOD SAFETY



CA Save Our Streams Council



September 25, 2018

Ted Alvarez
State Water Project Analysis Office
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236
watercontractextension@water.ca.gov

Cassandra Enos-Nobriga
Executive Advisor, State Water Project
Department of Water Resources
1416 Ninth Street, Room 1148-3
Sacramento, California 95814
ContractAmendment_comments@water.ca.gov

Cc: ted.alvarez@water.ca.gov; cwf_amendment@water.ca.gov & hand delivered.

Re: Additional Comments Regarding the DEIR SWP Contraction Extension Amendments¹ and the Need for a Subsequent EIR to Disclose and Assess Substantial New Information.

¹ <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension/Files/Draft-Environmental-Impact-Report.pdf> Draft Environmental Impact Statement, Natural Resources Agency, Department of Water Resources, August 2016

Dear Mr. Alvarez and Ms. Enos-Nobriga,

Since the close of public comment on the Draft EIR (DEIR) for the SWP Contract Extension on October 17, 2016, significant changes and new information regarding the SWP Contract Extension project have come to light. As a result, CEQA requires that DWR issue a revised and updated subsequent DEIR for public review and comment. This is required because of the substantial changes in the project, the substantial changes with respect to the circumstances under which the project is being undertaken, and because of new information that was not known and could not have been known at the time the original Draft EIR was completed on August 17, 2016, or before DWR closed the public comment period on October 17, 2016. Proceeding to certify the EIR and make a final project decision after reviewing only long-closed comments on the outmoded 2016 DEIR would violate the California Environmental Quality Act (CEQA), Public Resources Code § 21000 et seq. Following, we summarize specific events related to changes in project conditions and new information, and highlight several fundamental shortcomings of the current DEIR in light of both the new events and previously identified short-comings of the current DEIR.

Changes In Project Conditions and New Information Since the 2016 DEIR

Significant and substantive changes over the last two years include, but are not limited to:

1. **September 11, 2018**, DWR Director Nemeth testified before the Joint Legislative Budget Committee and stated that the contract extension amendments project is necessary and will be used to finance the WaterFix project² [referred to at various times as the Delta Tunnels, Cal WaterFix, Bay Delta Conservation Plan (BDCP), and/or the Delta Habitat Conservation Conveyance Program (DHCCP)]. Since 2013, the Planning and Conservation League along with numerous other conservation, Native American and fishing groups have requested that the environmental impacts of the Delta Tunnels project and other projects to be financed with the contract extensions be disclosed.³ To date DWR has ignored these requests and suggested that the 50-year extensions to financing would not be used to fund the Delta Tunnels project, despite the direct statement to the contrary by Director Nemeth. Now it is time to fully disclose the projects that will be enabled by this 50-year extension of contract terms and address them a subsequent DEIR.
2. **September 5, 2018**, DWR reported that the cost for the SWP 2017 Oroville Spillway Disaster and Recovery project soared to \$1.1 billion from the original estimated price tag for repair of damage to the dam's spillway of between \$100 million and \$200 million, the second time in a year that the reported cost of the spillway incident had jumped by 25 percent or more. These are major costs to be added to the SWP contracts along with as yet

² September 11, 2018 the Joint Legislative Budget Committee held an information hearing regarding the State Water Project Contract Extension Amendments. See the exchange between Senator Pan and DWR Director Karla Nemeth starting 1:10:27 to 1:13:43: *Senator Pan: "I do not hear an answer to my question." Director Nemeth, "Yes, we will use these amendments to finance WaterFix...We have a category in our existing contracts that describes the ability of the Department to fund projects in the Delta including delta facilities and that would include WaterFix."*

<https://www.senate.ca.gov/mediarchive/default?title=&startdate=09%2F11%2F2018&enddate=&Search>

³ <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>

undisclosed financial liabilities and mitigation costs.⁴ None of the costs associated with fixing the spillway or associated environmental damages are disclosed in the DEIR documents. SWP contractors and their ratepayers and taxpayers could be on the hook to pay for the damages that keep rising. As DWR Director Bill Croyle testified at a 2017 legislative hearing, FEMA could reject reimbursement if the agency believed the crisis was caused by poor maintenance.⁵ The Oroville Spillway Disaster and Recovery project is one key example of a major cost that has not been factored into the balance to be funded by the proposed contract extensions.

3. **August 17, 2018**, the Bureau of Reclamation ("Reclamation") served DWR its Notice of Negotiation, instigating a renegotiation of the Coordinated Operation Agreement (COA) contract through which they jointly operate the State Water Project ("SWP") and the federal Central Valley Project ("CVP").⁶ A probable outcome of the renegotiation of the COA will be that the SWP will see further limitations on water available for export from the Delta. Reductions in availability of water for export to the SWP caused by changes to the COA will have impacts on long-term financial stability of the SWP and the viability of specific projects, and thus are reasonably foreseeable impacts related to extending the contracts for fifty years. And yet, DWR has failed to consider these impacts, or to propose and analyze alternatives that include reasonably foreseeable changes to the SWP contracts that may result from changes to the COA in its Contract Extension DEIR. DWR must evaluate the impacts of renegotiation of the COA in its Contract Extension DEIR because the COA contract influences revenue, financial viability of the SWP and how it is operated to meet legal requirements including water quality requirements.
4. **July 27, 2018**, the Delta Conveyance Finance Authority, in a letter to EPA to advance financing for the WaterFix, noted the critical importance of the COA federal-state contract to the operations of both the federal and state water projects.⁷ The Letter of Intent (LOI) describes the organizational structure as consisting of DWR and certain SWP contractors. (LOI, pp. 4-6.) And yet the project also proposes to divert federal Central Valley Project ("CVP") water permitted for diversion by the Bureau of Reclamation ("Reclamation") in the Delta. In addition to the uncertainty surrounding the COA, no information has been provided about the agreement referenced between DWR and Reclamation concerning how

⁴ Oroville Suits Against DWR Move to Court <https://www.chicoer.com/2018/09/14/oroville-dam-lawsuits-against-dwr-moving-along-in-court/> September 14, 2018; January 17, 2018, Oroville Suit Against DWR alleges discrimination and corruption <https://www.chicoer.com/2018/01/17/city-of-oroville-suit-against-dwr-alleges-discrimination-corrupt-culture/> Oroville Dam: Butte County files suit against DWR over road repairs, other damages <https://www.mercurynews.com/2018/08/30/oroville-dam-butte-county-files-suit-against-dwr-over-road-repairs-other-damages/> August 30, 2018.

⁵ May 11, 2017 Assembly Oversight Hearing: The Assembly Water, Parks, And Wildlife Committee and the Accountability And Administrative Review and Budget Subcommittee No. 3 On Resources And Transportation held a joint informational and oversight hearing on Oroville Dam. <https://aaar.assembly.ca.gov/sites/aaar.assembly.ca.gov/files/Oroville%20Dam%20AAR%20Background.pdf>

⁶ *Western water honchos secretly huddle on tunnels, fish* <https://www.eenews.net/stories/1060095217> & https://www.eenews.net/assets/2018/08/24/document_gw_03.pdf

⁷ Delta Conveyance Finance Authority (Finance Authority) July 27, 2018 letter to EPA Andrew Wheeler, Letter of Interest for Water Infrastructure Finance and Innovation Act (WI FIA) program. <http://www.restorethedelta.org/wp-content/uploads/IPA.pdf> pg 23.

possible impacts to CVP operations will be avoided. (LOI, p. 23.) For example, MWD General Manager Kightlinger testified that under the WaterFix, " *If one set of contractors are entirely pumping from the South Delta and one set of contractors are having dual conveyance both south and north, and making the COA, the Consolidated Operating Agreement, effective and working, we think, we think we'd just be, it become a real nightmare.*"⁸

The LOI glosses over possible effects on operational viability (LOI, p. 23), given the complexity of CVP and SWP interoperation, as well as the differing service areas and water demands. One would be hard pressed to imagine a world in which there are no such effects. These impacts need to be fully disclosed by the updated subsequent DEIR.

5. **July 13, 2018**, DWR released a Notice of Preparation (NOP)⁹, notifying the public of DWR's intent to prepare an Environmental Impact Report (EIR) on the proposed WaterFix contract amendments. PCL et. al. on May 7, 2018, adopted here by reference, requested that DWR analyze all the contract amendments to avoid a segmented and piecemeal approach to the CEQA analysis.¹⁰ Plumas County Flood Control and Water Conservation District (Plumas County) issued comments on August 7, 2018 adopted here by reference.¹¹ Plumas County provides an alternative to the proposed contract amendments that decouples existing debt from new debt for undefined future SWP storage and conveyance projects, suggests alternatives for allocating debt for future SWP capital facilities projects that were not in existence prior to January 1, 1987, and provides alternatives for financing other capital projects not already listed in the contract for which water system facilities revenue bonds could be sold. These project alternatives need to be analyzed along with the associated environmental impacts to ensure the various contract amendments and the contract amendment extension project are not segmented and the impacts piecemealed.
6. **March 27, 2018**, Metropolitan Water District of Southern California (MWD) announced, but did not disclose to the public, a new contract with DWR, called a "master agreement", seeking to give MWD the exclusive right to an additional 33% of the capacity of WaterFix above their allotted Table A amounts.¹² MWD also passed resolutions at its July 10, 2018 meeting adding to its potential role and financial stake in WaterFix, addressed in a pending legal challenge.¹³ The potential ripple effects of MWD's majority control of WaterFix

⁸Op.Cit.https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/CDWA%20et%20al/part2rebuttal/sdwa_316.pdf pg 25

⁹ <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/CalWaterFix-contract-amendment/Files/Final-NOP-071318.pdf?la=en&hash=993C33E4D237F45E35DD65178449A89C0A4517B7>

¹⁰ <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2018/09/2-PCL-et-al-Cmts-SWP-Contract-Amendments-5-7-18-Updated-5-8-18.pdf> & <http://www.deltatunnelsboondoggle.com/overview-of-the-proposed-contract-amendments-between-the-department-of-water-resources-and-state-water-project-contractors/>

¹¹<http://www.deltatunnelsboondoggle.com/plumas-county-flood-control-water-conservation-district/>

¹² http://mwdh2o.granicus.com/MediaPlayer.php?view_id=12&clip_id=6670 for the video and pg 9 of the transcript.https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/CDWA%20et%20al/part2rebuttal/sdwa_316.pdf

¹³ https://www.centerforfoodsafety.org/files/2018-9-10-mwd-waterfix-validation-complaint-final_04832.pdf

capacity on extended contract terms and expanded scope (not only SWP projects) must be addressed in an updated subsequent EIR.

7. **July 21, 2017**, DWR authorized the sale of \$11 billion in revenue bonds to pay for WaterFix¹⁴, but the general bond resolution for its authorization relies on repayments from the SWP contractors over the next 70 years. That assumption is incompatible with the repayment periods in the existing SWP contracts, which expire between 2035 to 2042. Nonetheless, DWR's general bond resolution attempts to finesse the ineligibility of WaterFix for revenue bonds by prospectively defining "water supply contracts" to include subsequent amendments. Numerous challenges to the validity of DWR's revenue bonds are pending in DWR's validation action, including challenges to DWR's misuse of its authorizations to circumvent restrictions in the existing SWP water contracts. Since DWR is presently attempting to proceed with validating its revenue bond resolutions without the contract extension amendment, it, and other alternatives to the extension amendment, need to be assessed in an updated subsequent DEIR.
8. **September 21, 2017**, DWR notified State Water Contractors that it had issued Project Order No. 40, adopted on July 21, 2017, which summarily attempted to redefine project facilities known as the California WaterFix to be considered as units of the State's Central Valley Project referenced in California Water Code Sections 11100.¹⁵ Although Project Order No. 40 was not included in the WaterFix CEQA review or its Notice of Determination, and was not disclosed in advance, DWR's notice to SWP contractors confirmed that it was signed by DWR's director "immediately after" signing the Notice of Determination. The lawfulness of DWR's actions with respect to Project Order No. 40, which DWR relied on its general bond resolution, has been disputed by answering parties in DWR's pending validation action. Nonetheless, as Director Nemeth testified¹⁶, undoubtedly this "Project Order" was designed to define the WaterFix water export tunnels under a category in the existing DWR SWP contracts so those funds could help finance the proposed \$19.8 billion tunnel project.¹⁷ This is another major change in financing conditions enabled by the proposed contract extensions, which must be addressed in an updated (subsequent) DEIR.
9. **January 17, 2017**, EPA rated the Federal EIS for the tunnel project (Cal Water Fix, BDCP, DHCCP) inadequate because analyses of the project continued to predict significant adverse

¹⁴ http://www.californiawaterfix.com/wp-content/uploads/2017/10/CWF_Validation_Complaint.pdf

¹⁵ See: <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Files/17-07-P-Project-Order-No-40.pdf> 'Pursuant to Water Code § 11260 and 11500, the Sacramento-Sa Joaquin Delta features of the Central Valley Project, as authorized by Water Code § 11260 and 11500 and as described in the publications referenced in Water Code §11260, are hereby further modified to include the following facilities, as they may be designed and revised as the project proceeds (collectively, the "California WaterFix")'

¹⁶ See September 11, 2018 Joint Legislative Budget Committee Informational hearing -DWR Proposed Water Supply Extension Contract --DWR Director Nemeth and Senator Pan @ 1:12:13 to 1:13:09 <https://www.senate.ca.gov/mediaarchive/default?title=Joint+Legislative+Budget+Committee&startdate=09%2F11%2F2018&enddate=09%2F11%2F2018&=Search>

¹⁷ See JBLC Hearing September 11, 2018 @ 1:11:39 to 1:13:55 & <https://mavensnotebook.com/2018/09/20/news-worth-noting-congressman-garamendi-sends-letter-to-epa-regarding-wifia-letter-of-interest-submitted-by-the-delta-conveyance-finance-authority-report-integrating-water-efficiency-into-long-term/> Congressman Garamendi Letter to EPA Wheeler Re WaterFix WIFIA Loan, September 19, 2018.

impacts to the Delta and the factual information and background materials provided as part of the EIS were not adequate for a complete evaluation of environmental impacts. Such impacts must be addressed for the adoption of contract changes that will fund and enable a major project that EPA has found will degrade water quality for municipal, agricultural, and aquatic life beneficial uses. The project will cause violation of water-quality standards as the western Delta becomes more saline. Documents also show there will be substantial declines in quantity and quality of aquatic habitat for 15 of 18 fishes evaluated under WaterFix.¹⁸

10. **October 21, 2016**, the 2013 Delta Plan was set aside as “invalid” by the Sacramento Superior Court¹⁹ because WaterFix was found to be inconsistent with the Delta Plan and because it violated the Delta Reform Act. The impacts of these proposed contract amendments, which would enable financing of the WaterFix water export tunnels along with other undisclosed projects over the next 50 years, must be assessed and disclosed. The subsequent DEIR must address the environmental impacts of failing to achieve state policy that requires meeting the coequal goals of restoring the Delta’s ecosystem along with water supply reliability.

These events since the review period for the 2016 DEIR are significant changes in conditions of the project and related matters that substantially impact the financial and physical health of the State Water Project. DWR, in effect, is retroactively seeking to use the contract extension amendments to enable funding of WaterFix and other projects outside the original scope of the SWP and also to change project operations in order to increase water exports and avoid complying with the existing requirements for protecting the already impaired Delta. Moreover, these DWR-driven changes are in addition to Reclamation’s new policy to maximize exports regardless of the consequences for the Bay-Delta environment.

Regarding effects on environmental conditions in the Bay-Delta, DWR has repeatedly failed to disclose or analyze the environmental impacts of the proposed contractual changes on the State Water Project operations, maintenance, and long-term cumulative impacts that likely will result in less investment in conservation, fish and wildlife mitigation and recreation and other beneficial uses and users. These conservation and mitigation projects are needed to meet existing legal requirements and to protect endangered species and areas where additional surface and groundwater supplies will be taken like the fragile San Francisco Bay-Delta Estuary and northern rivers.²⁰

The fiscal changes associated with the contract extensions will cause significant physical impacts. For example, while the existing DEIR fails to disclose or analyze a single project that necessitates the extension of the SWP contracts for fifty years on top of the existing 75 year term, documents

¹⁸ <https://www.epa.gov/sites/production/files/2017-01/documents/waterfix-feis-2017-01-18.pdf> EPA comments on FEIS January 18, 2017.

¹⁹ *North Coast Rivers Alliance v. Delta Stewardship Council*, JCCP No. 4758 at 2, ¶ 2. See also Superior Court, County of Sacramento, Judicial Council Coordination Proceeding No. 4758, Dept. 31, Judge Michael Kenny, on November 23, 2016, Granting Peremptory Writ of Mandate against the DSC.

²⁰ See also Fish and Game Code Section 5937, that provides protection to fisheries by requiring that the owner of any dam allow sufficient water to pass downstream to keep in good condition any fisheries that may be planted or exist below the dam.

show, in contrast, that the costs of the WaterFix project will require this extension²¹ and will more than double the entire SWP project costs to date.²²

CEQA Guideline § 15378(b) sets forth a list of what the term “project” does *not* include. Guideline § 15378(b)(4) in the list exempts from being a “project,” The creation of government funding mechanisms or other government fiscal activities, which do *not* involve *any* commitment to *any specific project* which may result in a potentially significant physical impact on the environment. (Emphasis added.)

The government's fiscal activities involved here do involve commitment to a specific project, in fact a number of projects. It is clear under the CEQA Guidelines including § 15378(b)(4) that “the creation of government funding mechanisms or other government fiscal activities” which involve commitment to a specific project or projects which may result in a potentially significant physical impact on the environment, is an activity, a “project,” which must be preceded by preparation of a legally sufficient EIR. CEQA must “be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”

The economic impacts of the WaterFix tunnels project in the heart of the San Francisco Bay Delta Estuary on the communities in and surrounding the affected areas also are not included in analysis in the current Draft EIR for the contract extensions or the FEIR for the tunnels project. Furthermore, the reasonably foreseeable environmental impacts indirectly caused by the economic changes and potentially excessive ratepayer debt needed to fund this project, such as the lack of funds to invest in local solutions and conservation mitigation, are necessarily subject to CEQA analysis. The Draft EIR has failed to analyze or disclose these impacts.²³ For example, even the positive economic changes predicted by DWR from continuing to fund the massive spillway rehabilitation and expenditures to remove sediment and erosion debris from downstream of Oroville Dam must be analyzed.²⁴

CEQA also requires agencies to 'consider qualitative factors as well as economic and technical factors and long-term benefits and costs' when evaluating projects²⁵ and it requires a general description of the project's 'technical, economic, and environmental' characteristics.²⁶

²¹ Bond underwriters have acknowledged that SWP contract extension is required before DWR can issue the WaterFix bonds: Morgan Stanley: “We understand that DWR's water supply contracts are in the process of being extended, likely to 2085, or 50 years from 2035 when most expire. Clearly, in order to finance the substantial costs associated with CM1 in the BDCP [now, WaterFix], the extension of these contracts is essential to allow for the amortization of financing payments over a long period of time.” Stifle: “DWR's legal counsel has concluded that BDCP [now, WaterFix] is not on the list of approved projects that are eligible for funding, including through bond financing.” <https://nnavensnotebook.com/wp-content/uploads/2018/07/PCI-et-al.-SWP-Contract-Amnds-July-31rd-Senate-Nat-Res-Info-Hearing.pdf>

²² See pgs 34-35 Series AW Bonds October 20, 2016 <https://emma.msrb.org/EP554312-EP370213-EP831557.pdf>

²³ Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1204

²⁴ CEQA Guidelines § 15126.2(d)

²⁵ Pub. Res. Code § 21001(g)

DWR's DEIR has failed to consider a range of direct environmental impacts, indirect impacts, and cumulative impacts of the proposed contract extension amendments, including a failure to consider the indirect impact of the growth-inducing effects of the contract extension amendments. Omission of these indirect impacts is especially important since delivery of maximum water supplies under the proposed contract amendments is the proposed goal of the project.

Truth in Lending--DWR does not disclose all the costs and finance charges under the proposed Contract Extension--just like buying a house, consumers have a right to know.

SWP contractors are required to repay DWR's costs of building and operating facilities for collecting, storing, and distributing water, and those facilities by law must be paid for regardless of whether contractors receive water in any given year.²⁷ Just like a mortgage, ratepayers and property taxpayers have been on the hook for decades, paying off this mortgage under a specified term and definition. Ratepayers bought a well-defined "house" (SWP)--one in existence prior to 1987--and they have been paying off over a 75-year term. They did not agree to finance an undefined "mansion" as set out under the proposed new 50-year term SWP contract extension amendments, which enables funding of the WaterFix and other major projects that were not part of the original SWP.²⁸

Terms, Conditions And Debt Are Not Disclosed, Including Resulting Physical Environmental Impacts.

Under the proposed SWP contract amendments, DWR and the SWP contractors want to extend the term of required payments for another 50 years, but the existing definition of the "house" and its "mortgage" is changed. All these changes are scheduled to occur without a vote of the ratepayers and property taxpayers who will be required pay. To date, the DEIR and CEQA analysis has failed to disclose the physical impacts of the projects proposed to be financed, nor has the analysis considered alternatives that would avoid such huge financial investments in previously undisclosed projects. And yet the debt that ratepayers will be forced to pay to cover the costs are extended another 50 years under terms that are not disclosed. Currently the definition of the SWP is limited

²⁶ Guidelines § 15124(c) As stated earlier, CEQA requires a subsequent EIR if substantial changes are proposed in the project or substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions of the EIR, or new information which was not known and could not have been known at the time the EIR was certified, becomes available. See Public Resources Code §21166(a), (b), and (c). The CEQA Guidelines are codified at 14 Code Cal Regs §15000 et seq.

²⁷ The California Water Resources Development Bond Act directs the Department of Water Resources to enter into contracts for the sale, delivery or use of water made available by the system. Changes in the water delivery contracts also contemplate changes to the bondholder's contract because of the anticipated changes in water delivery payments diminishing the revenues which would be used to fund the existing SWP project that by current definition include only those projects in existence prior to 1987. To the extent the SWP contract loosens the purse strings and expands the scope of the SWP project, existing bondholders' security interest is diminished. The Impacts of altering this contract also need to be addressed.

²⁸ On the parallels between risks in the housing-driven financial crisis and those associated with complex water infrastructure, see J. Viers and D. Nover, *Too Big to Fail: Limiting Public Risk in Hydropower Licensing*, 24 *Hastings Env'tl L.J.* 142 (2018).

to the scope that existed prior to 1987. Now this new contract would delete that limitation and make it a virtual blank check for new projects outside the original definition of the SWP. DWR in the DEIR does not list even one project to be funded for the added 50 years, despite their recent statements that the \$19.6 billion WaterFix tunnel project will be funded through the amended contracts.

In yet another undisclosed impact that raises serious legal questions, MWD claims they would be given exclusive control over the 33% of "unsubscribed" capacity of the WaterFix tunnels.²⁹ MWD now controls 47% of the SWP Table A capacity. Under the proposed, as yet undisclosed, master agreement MWD would also control an additional 33% of the CWF capacity.³⁰ The so-called 'master agreement' contract has not been publicly disclosed, including its environmental impacts, such as water quality impacts on the California Aqueduct from selenium and other contaminants discharged or industrial and municipal use if sold to Westlands Water District.³¹ There would also be impacts on housing developments if the additional capacity was sold, for example, to Tejon Ranch.³² This agreement would provide MWD's physical control over an additional 33% of the

²⁹ March 27, 2018 Metropolitan Water District of Southern California WaterFix Workshop pg 9 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/CDWA%20et%20al/part2rebuttal/sdwa_316.pdf

Patterson, "First and foremost, we believe, and DWR is agreeable, that if we purchased and financed the unsubscribed 33% of the project, we would have a new separate agreement with the Department of Water Resources here. We're calling it the Master Agreement. But the objectives of this contract would be to cover that acquisition, lay out the terms on what we can do with it, be very clear that DWR has assigned to us, Metropolitan, and any other investors the interest in the capacity at the 33% level. So that's ours to manage and make decisions on. And DWR would also agree to utilize that part of the project to maximize the benefits, so they wouldn't arbitrarily go, "Oh, we're going to leave. We have water there we could legally divert under the rules, but we're just not going to do it." No, if you can follow the rules, you got to divert it, because that's what generates the revenue associated with it."

³⁰ *ibid*, pg 30: "Dake: As a little follow-up, Roger described purchase and finance of the unsubscribed portion. I suspect it's more, it's not legal for the state to sell us that. Right? So it's not really a purchase. It's a contracting for, is that

Rightlinger: It would be an ownership interest conveyed to a contract, not actually having fee title to the tunnel, the 33% of the tunnel.

Dake: But what's your characterization of the risk if a governor came to office who was not interested in us having those contractual rights? How would that be managed?

Rightlinger: There's a constitutional provision about interference with contracts that, but perhaps our counsel might opine on that. Our actual practicing counsel.

Dake: We'd be vulnerable

Scully: Yeah. It depends of course on when the contracts were entered into, if the contracts were entered into before the administration changes. If the administration changes before there is a contract and the governor is directing resources to do something else, that's something we'd have to contend with."

³¹ See DWR data for Non-Project Water Pump-ins to the California Aqueduct. <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Water-Quality/Documents/Water-Quality-Assessment-of-NonProject-Turnins-to-the-California-Aqueduct-2013.pdf?la=en&hash=6D3E873C7F4B30D871240B15C4449FB0312543E3> & <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Water-Quality/Documents/Water-Quality-Assessment-of-NonProject-Turnins-to-the-California-Aqueduct-2015.pdf?la=en&hash=DF0AAD3515C7170683E17A4D5893207B66D44130>

³² <http://www.latimes.com/local/lanow/la-me-ln-tejon-ranch-planning-commission-20180829-story.html>
August 29, 2018 L.A. County planners recommend approval of Tejon Ranch development.

WaterFix capacity and the ability to manage the water and sell it to others, who in turn could use it to construct major housing and utility corridors.³³ No environmental analysis of this potential is provided and the impacts are not disclosed.

Some SWP contractors have asserted that under the current SWP contracts, SWP contractors must either pay for the California WaterFix project, forfeit their SWP contract, or find another SWP contractor willing to pay their share of the costs of constructing and operating WaterFix.³⁴ Several SWP contractors, including the Kern County Water Agency, have filed answers in DWR's WaterFix bond validation lawsuit (Sac. Superior Court Case No. JCCP 4942), challenging DWR's authority to impose the costs of WaterFix without their agreement to modifications of SWP contracts. DWR has publicly acknowledged that it is negotiating a second set of amendments to the SWP contracts to include terms that apportion the WaterFix costs and authorize permanent water transfers for those SWP contractors who decide not to pay for WaterFix.³⁵ Extending the contracts and amending the definition of facilities that can be funded segments and piece-meals the project. This would allow DWR to issue bonds for WaterFix without contract amendments that confirm how SWP contractors will repay the costs of WaterFix. This segmentation also allows DWR to proceed without analyzing the environmental impacts of the projects which, by definition, need the contract extension amendment to proceed.

The impacts of this virtual blank check contract extension will mine the property taxes and ratepayers who do not even receive water service from the project such as Los Angeles, San Fernando, and Palo Alto communities including areas of Compton, South Los Angeles and East Palo Alto will fall on the poor and lower income residents. None of these impacts have been analyzed or disclosed. Recent reports³⁶ also show the impacts of the proposed newly funded projects such as the WaterFix tunnels will also disproportionately impact lower income and the poor in communities from where the water will be exported from the Delta estuary.³⁷ Additionally the impacts on these same populations including the Tribes and others north of the Delta estuary will also bear the brunt of the environmental, economic and depletion of water supplies to serve other richer developments south of the Delta.

³³ For example Westlands Water District is creating "Solar Farms"
<https://efiling.energy.ca.gov/GetDocument.aspx?tn=210742>

³⁴ See, e.g., Metropolitan Water District of Southern California, Modernizing the System: California WaterFix Finance and Cost Allocation, available online at:
http://www.mwdh2o.com/DOCSVCsPubs/WaterFix/assets/cawaterfix_finance_costallocation_whitepaper_faclsheet.pdf at 7-8, 20-21

³⁵<https://www.water.ca.gov/Programs/State-Water-Project/Management/California-WaterFix-contractamendment>

³⁶ <https://www.restorethedelta.org/2018/09/18/icymi-highlights-from-rtds-ej-report-press-conference/>

³⁷ <https://www.restorethedelta.org/thefateofthedelta/>

The potential effects of climate change on the viability of extended contracts with greatly increased balances needs to be addressed.

Assumptions regarding the availability of water and the capability of the SWP to deliver that water have changed dramatically since the contracts were executed in the 1960s. By ignoring these changed circumstances, as it has currently done in the SWP Contract Extension DEIR, DWR has failed to analyze new and significant environmental impacts of changes in SWP operations that will be necessary during the term of the proposed fifty-year contract extension. It is irresponsible and inadequate under CEQA for DWR to fail to account for these changed circumstances (and associated foreseeable changes to the SWP Contracts) in its analysis of the impacts of extending the SWP Contracts.

The findings from the Fourth Climate Change Assessment indicate that water supplies will continue to decline over the life of the proposed term of the extended SWP Contracts. Declining SWP water supplies has several implications that must be assessed in an adequate CEQA review, including, for example: how reduced net revenues will impact the ability to finance SWP facility construction and maintenance; how reduced net revenues will impact the financial stability of the SWP by limiting the ability to repay bonds; and how limited SWP water supplies would likely be shifted from one use to another, causing changes to the landscape in both the areas receiving water and those not receiving water. This will increase the likelihood that areas that can reliably charge more for water (and thus increase net revenues to pay for SWP infrastructure and operations) will receive more SWP water than they have historically. The findings from the Fourth Climate Change Assessment provide significant new information that DWR must consider and incorporate into its analysis of these likely impacts associated with extending the SWP Contracts for fifty years. The need to do so before extending the SWP Contracts is even more acute because DWR has had a long history of circumventing climate-adjusted analysis in addressing the future operation of the State Water Project's keystone Oroville Facilities, whose long-term operating license expired in 2007. More than a decade ago, PCL, and counties in and near the facilities called on DWR to perform that analysis in its Oroville Facilities Relicensing EIR, noting the strong scientific consensus supporting that request. Butte County's comments on the Draft EIR noted the failure to confront flood risks from the Oroville project, including the risk of "catastrophic flooding in and downstream of Oroville" from a "failure or uncontrolled spill" at Oroville dam, and other commenters also noted both the failure of DWR to account for climate change and its understatement of flood risks. Ignoring those recommendations, DWR refused to perform any climate change-adjusted analysis in its EIR for the proposed new 50-year license term, based on a premise its own scientists had already rejected—that the selective range of water conditions experienced in the twentieth century was "expected to continue for the foreseeable future."³⁸ Making matters worse, in still-pending CEQA litigation challenging its refusal to account for climate change, DWR recently shifted course and has joined in the State Water Contractors' attempts to deprive California courts of jurisdiction to review the EIR.

Under current contracts, debt can be issued only for projects and the operation and maintenance for those projects in existence prior to 1987. The new 50 year extension removes this limitation and would open ratepayers and property tax payers to charges for an undisclosed range of facilities

³⁸ http://www.water.ca.gov/orovillereicensing/FEIR_080722.cfm; see also <https://www.scientificamerican.com/article/california-dam-crisis-could-have-been-averted/>; <http://www.friendsoftheriver.org/wp-content/uploads/2017/09/The-Oroville-Dam-2017-Spillway-Incident-Lessons-from-the-Feather-River-Basin-Final.pdf>

that are likely to deliver even less water while more than doubling the principal costs paid from 1986-2016.³⁹

Spending billions to pour more concrete and build a massive tunnels project ignores climate changes, clings to out of date solutions, and steals funding needed to address looming shortages through conservation and local investments, which have already demonstrated they work and use less energy and cause less environmental damage. Adopting contract changes that launch building tunnels, more diversions, and dams will not address looming shortages. The inevitable impact of climate changes will result in even less water and higher costs to ratepayers and property tax payers who will be on the hook for these massive undisclosed projects, as well as potentially higher costs to safely operate Oroville Dam and other existing facilities.

No Public Access to DWR & Newly Created SWP Contractors' Finance Committee

The actual physical projects that will be funded through the contract extension amendment will be determined in part through a non-public process. The amendments set up a secret finance committee where SWP contractors have direct access to the DWR Director to determine how SWP revenues are to be spent. No public access or ratepayer representatives are provided for in the proposed Contract extension amendment changes. There is no Legislative oversight or transparency because all funding is off budget.

Shifting Recreation and Wildlife Operation and Maintenance Costs to the General Fund Jeopardizes Required Mitigation.

An aspect of the contract extension changes that has received little attention and yet has far reaching environmental and fiscal impacts has not been analyzed under the DEIR. As noted in the PCL et. al. comments on SWP contract extension amendments⁴⁰ the SWP contractors succeeded in getting the adoption of the existing Davis-Dolwig Act language⁴¹ into 50 year water supply contracts. Furthermore, SWP contractors also obtained additional provisions so that there would be no water supply contract charges for required regulatory permit costs along with operation and maintenance charges for these required fish and wildlife facilities and recreation facilities be charged to the contractors. The California State Legislative Analyst Office (LAO) has issued a series of reports indicating that approximately 10% of costs of the SWP are allocated to fish, wildlife and recreation.⁴² Many times, there are no such benefits. These costs are substantial. In addition,

³⁹ See pgs 34-35 Series AW Bonds October 20, 2016 <https://emma.msrb.org/EP554312-EP370213-EP831557.pdf>

⁴⁰ March 4, 2013 PCL et. al. Comment Letter <https://mavensnotebook.com/wp-content/uploads/2014/04/March-4th-PCL-et-al-SWP-Water-Supply-Contract-Extension-Comment-2.pdf>

⁴¹ California Water Code § 11900-11925

⁴² *LAO Policy Concerns and Recommendations Made in Past Years*. We have raised concerns in the past (again, see "[Funding Recreation at the State Water Project](#)," as well as our [analyses of the 2009-10](#) and [2010-2011](#) Governor's budgets) over DWR's practice of using SCR to calculate the state's share of SWP costs. Most importantly, the practical implication of the use of this methodology (as implemented by DWR) is that DWR assigns cost responsibility to the state for aspects of SWP that lack any direct recreational component.

See <http://www.lao.ca.gov/laoapp/budgetlist/PublicSearch.aspx?Yr=2011&KeyCol=401>

under the Governor's proposed WaterFix, such fish and wildlife costs along with operation and maintenance are likely to total billions of dollars. Adopting contract language that would shift these types of costs from the water supply contract charges to the taxpayers or General Fund would have serious consequences. The LAO has indicated, "*This allocation of costs without Legislative approval conflicts with the Legislature's exclusive constitutional authority to set its expenditure priorities by making appropriations.*"⁴³ Originally only "enhancements" to fish and wildlife were to be funded by the taxpayer and the General Fund.⁴⁴ Governor Ronald Reagan's DWR Director Gianelli explained the cost allocation this way, "*The mitigation of damages to fish and wildlife resources should be mentioned because it differs greatly from recreation and fish and wildlife enhancement. Requirements for preserving existing, or pre-project fish and wildlife resources, or for mitigation of damages to them, produce no new benefits. Water project funds are used for fish and wildlife mitigation facilities and operations. These costs are project costs and are reimbursable*" [emphasis added]⁴⁵

Compliance with Water Code 147.5 Has Not Been Achieved--Pre-Judging CEQA Is not Legal.

From DWR's May 10, 2018, hearing request, DWR contends holding the JLBC hearing on September 11, 2018, triggers a 60-day countdown under Water Code 147.5 so DWR can approve the proposed amendments. New terms would last through 2085, decades beyond current expiration dates (2035-2042). DWR has yet to release its Final EIR, or even to respond to major criticisms about the amendments' costs, risks and environmental impacts made during the public comment on the Draft EIR, which closed in late 2016. Key aspects of the amendments' financial consequences remain unstudied. Extensive analysis that DWR is required to provide under Water Code section 147 remains undone. In effect, DWR proposes a significant redefinition of the State Water Project under the label of a contract "extension." As attorney Roger Moore testified at the September 11, 2018 JLBC hearing⁴⁶, the contract extension amendments as currently proposed seek to remove a limitation on coverage of "water system facilities" in Article 1(hh) of the current contracts that would otherwise pose a major obstacle to covering revenue bonds for the Delta tunnels; moreover, the provision DWR cited to the JLBC as its source of authority, "Article 1(ap)," is a proposed provision not in the existing contracts. Without mentioning the Delta tunnels by name, the extension amendments are designed to overcome specific obstacles to including them in financing under the existing contracts. They seek to do that even without adding the separate set of tunnel-specific amendments DWR has been negotiating, which DWR doesn't believe require any legislative oversight, yet they pose additional environmental impacts.

⁴³ See <http://www.lao.ca.gov/laoapp/budgetlist/PublicSearch.aspx?Yr=2011&KeyCol=401>

⁴⁴ http://www.c-win.org/webfm_send/13. Originally, the General Fund paid the costs assigned to recreation, and fish and wildlife purposes. Since 1989, those costs not reimbursed by the General Fund offset an equal amount the SWP owes the California Water Fund. Recreation and fish and wildlife enhancement costs are non-reimbursable by SWP contractors. (However, contractors are responsible for reimbursing mitigation costs related to recreation, fish and wildlife.)

⁴⁵ DWR Bulletin 117 pg 8

⁴⁶ See Roger Moore's 9-11-18 testimony <https://www.restorethedelta.org/wp-content/uploads/RBM-letter-re-JLBC-9-10-18.pdf> and JLBC Hearing September 11, 2018 oral testimony starting at 2:13:30.

As we have described, DWR proposes to redefine “facilities” covered in the SWP contracts to create the illusion that financing the Delta tunnels, or other risky future projects favored by the largest contractors, can get bundled into the State Water Project approved in 1960. That’s why critics have aptly compared the proposed contract extension to a time machine. By changing the definition of covered facilities, they seek to transport the tunnels to an era before the California Constitution expressly required voter approval of property taxes for projects of this magnitude.

The unsubstantiated claim that the amendments proposed are necessary or helpful to ensure continued water deliveries or to address the State Water Project’s operation and maintenance needs without excessive financial burdens has not been analyzed nor the environmental impacts disclosed. As noted in our previous comments, the alternative of utilizing provisions under the existing current contracts, including the Evergreen Clause, has not been addressed. This viable alternative, exploring ways of addressing debt compression problems without including the risky redefinition of project facilities, needs to be analyzed. That will enable decision makers can see the financial issues going forward at the end of the existing 2035 debt term, such that they can be responsibly addressed without forcing ratepayers to accept the risky changes DWR proposes, which could result in a costly escalation of indebtedness. Alternatively, the debt term could be extended without giving DWR a blank check to issue debt for new projects.

It is doubtful DWR can lawfully represent it knows yet what the operative terms and conditions will be. DWR’s May 2018⁴⁷, hearing request admits it has no plans to release the final EIR for the contract extension amendments until after the JLBC holds its hearing—i.e., until after legislative oversight ends. And DWR’s legislative package on the contract extension doesn’t link to, or mention, critical comments still left unanswered on the Contract Extension Draft EIR. DWR provides some older scoping comments, but not the ones referred to above, and JLBC’s legislative staff didn’t know of anywhere they’ve been made available, to the committee or to the public.

Despite the urgency DWR is currently claiming about expediting the contract extension, DWR conspicuously did not respond to letters received before closing public comment in late 2016. Nor can those letters be considered off-point—they identify major, and still unanswered, concerns about legal, environmental and financial risks from the proposed amendments. For example, the October 17, 2016 comment letter from PCL et al.⁴⁸ makes many of the points. The comments challenge DWR’s EIR assertions that the contract extension amendments are “separate and independent” from WaterFix, and that they wouldn’t change SWP operations and facilities. The comments also challenge DWR’s dubious decision to piecemeal the “extension” amendments from the second set of water supply contract amendments (For those, DWR still has yet to prepare even a Draft EIR). Other comment letters on the Draft EIR, such as those from the Center for Food Safety and NRDC, also make a forceful case for the significant risks from the so-called “extension” amendments—and the implausibility of the notion that these amendments aren’t about WaterFix.

Currently there is an incomplete CEQA review. Thus, the language provided to the Legislature could not have contained “*the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts*” and complied with Water Code section 147.5. It is simply not legally possible because DWR has not reached a legal decision pursuant to CEQA as to the final project and final long term contract unless, it was prejudging the

⁴⁷ https://www.senate.ca.gov/sites/senate.ca.gov/files/083018_hearingagenda.pdf

⁴⁸ [October 17, 2016 comment letter from PCL et al.](#)

analysis. Such pre-judgment would be a classic CEQA error⁴⁹--a project definition that doesn't allow for CEQA's "interactive process" of comment and responsive modification. For the Legislature to accept DWR's submission as "the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts" would amount to DWR's CEQA review being a sham. DWR can't assume now that it knows what the contract extension amendment language will be after it completes CEQA review.

Conclusion: The DSEIR Must Be Set Aside, Substantially Redrafted And Re-Circulated To Address These Impacts.

All of these events will have significant impacts on the operations of the State Water Project, its contract revenues and associated construction and environmental mitigation. Further these events also have significant impacts on the existing mitigation of adverse impacts from the SWP operations and, hence, "will require major revisions in the environmental impact report." (Pub. Resources Code, § 21166.) Because the DEIR fails to address any of these events and any of these impacts, the DEIR must be set aside and substantially redrafted and re-circulated to address them.

Thank you for the opportunity to provide comment.



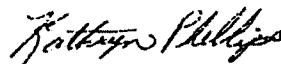
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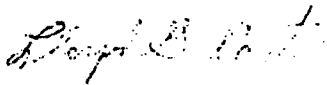
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⁴⁹ County of Inyo v. City of Los Angeles (II) (1976) 61 Cal.App.3d 91 (appellate jurisdiction and relief); (III) (1977) 71 Cal.App.3d 185 (Owens Valley groundwater management); (V) (1980) 124 Cal.App.3d 1 (groundwater management); (VI) (1984) 160 Cal.App.3d 1178 (dispute resolution); (VII) (1993) Cal. App. unpublished (appellate jurisdiction); (VIII) (1997) (final resolution and dismissal)



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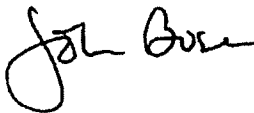
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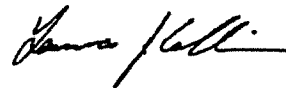


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Exhibit 1: CDs 1 & 2: September 11, 2018 Joint Legislative Budget Committee Informational Hearing DWR Proposed Water Supply Contract Amendments.

Exhibit 2

Recent Comment Letters

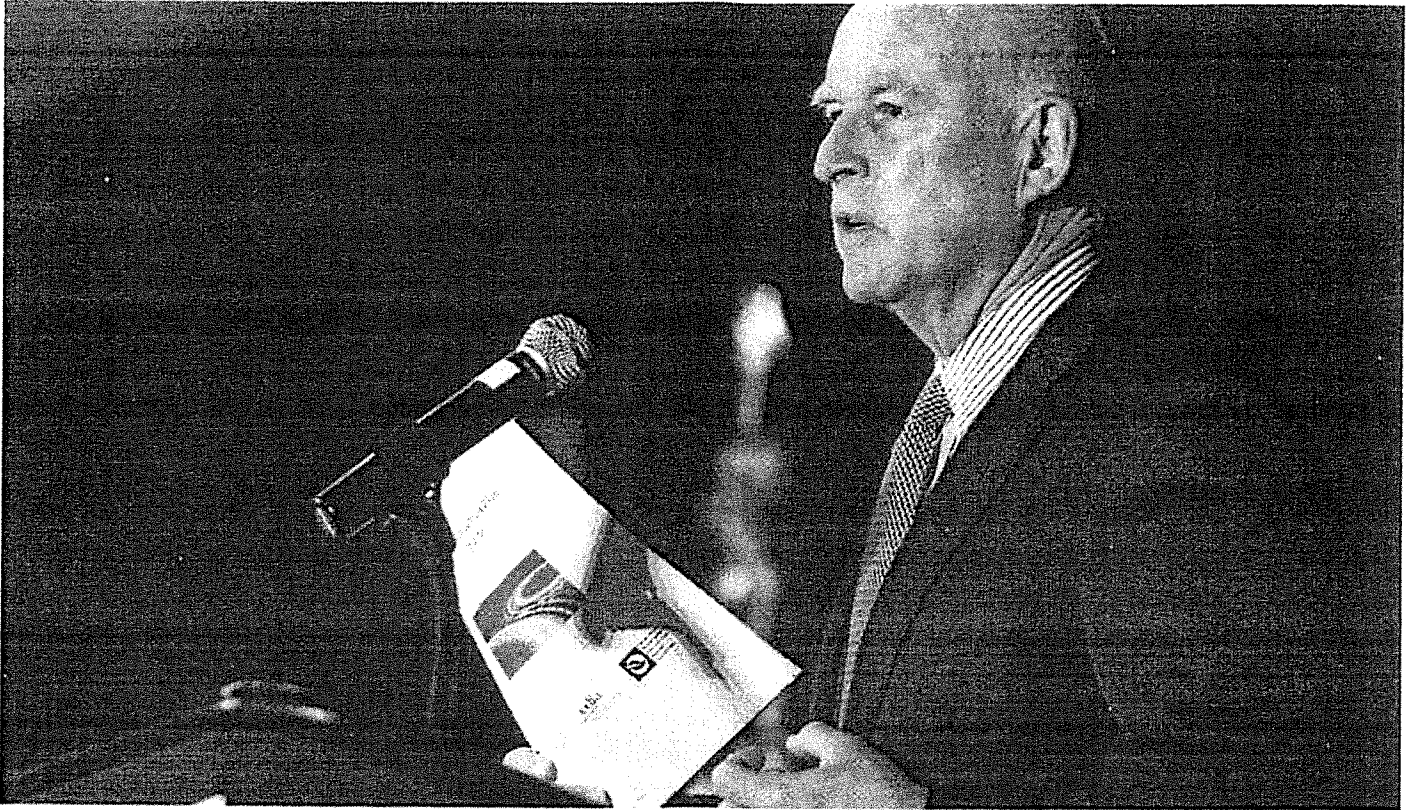
The following comment letters were received after the DEIR was circulated for public review:

- Natural Resources Defense Council, Institute for Fisheries Resources & Pacific Coast Federation of Fishermen's Associations, Defenders of Wildlife received by DWR on August 13, 2018
- Natural Resources Defense Council received by DWR on August 29, 2018
- Natural Resources Defense Council received by DWR on September 18, 2018
- Planning and Conservation League, Institute for Fisheries Resources, Save the American River Association, Sierra Club California, California Save Our Streams Council, Center for Food Safety, California Water Impact Network, Restore the Delta, Southern California Watershed Alliance, Friends of the River, California Sportfishing Protection, AquAlliance, Center for Biological Diversity, North Coast Rivers Alliance, Crab Boat Owners Association received by DWR on September 25, 2018

Under CEQA, a lead agency is required to consider comments on the DEIR and to prepare written responses, if a comment is received within the public comment period. (Pub. Resources Code, § 21091, subdivision (d); CEQA Guidelines, § 15088.) When a comment letter is received after the close of the public comment period, however, a lead agency does not have an obligation to respond. (Public Resources Code, § 21091, subdivision (d)(1); Pub. Resources Code, § 21092.5, subdivision (c) ("Nothing in this section requires the lead agency to respond to comments not received within the comment periods specified in this division, to reopen comment periods, or to delay acting on a negative declaration or environmental impact report.)) Nevertheless, DWR reviewed the comment letters received after the DEIR was circulated for public review and determined that the comments contained in the letters do not result in any new impact or in a change in the significance level of impacts disclosed in the DEIR; or require new mitigation, consideration of new alternatives, or any other substantial change to the DEIR. Therefore, recirculation of the DEIR or release of a supplemental DEIR is not required. In addition, the comment letters make comments that are similar to comments made within the comment period and addressed by DWR in the FEIR.

- August 13, 2018 letter. This letter makes a comment about the project description and alternatives analysis. The FIER considers these on pages 2-2 to 2-22.
- August 29, 2018 letter. This letter makes a comment about climate change and the coordinated operations between DWR and the Bureau of Reclamation. The FEIR considers climate change on pages 2-7 to 2-8, 2-116, 2-119, 2-177, and 2-233 to 234, and the coordinated operations between DWR and the Bureau of Reclamation on pages 2-21 to 2-22, 2-98, and 2-123.
- September 18, 2018 letter. This letter makes a comment about the materials that it believes should be part of the record and did not make a comment about the impacts of the project.
- September 25, 2018 letter. This letter makes a comment about the impacts of the project's financial changes and climate change. The FEIR considers the project's financial changes on pages 2-3 to 2-8, 2-14, 2-41 to 2-42, 2-95, 2-102, 2-106, 2-109, 2-162, 2-178, 2-225, and 2-233, and climate change impacts on pages 2-7 to 2-8, 2-116, 2-119, 2-177, and 2-233 to 2-234.

EXHIBIT 6



EDITORIALS

If this meeting isn't about financing Delta tunnels, then put it in writing

BY THE SACRAMENTO BEE EDITORIAL BOARD

September 10, 2018 01:50 PM

Updated September 10, 2018 05:08 PM

Clearly, Gov. Jerry Brown wants to cement the Delta tunnels as part of his legacy before leaving office.

But his administration shouldn't try to shove through this monumental, \$20 billion project without adequate review and debate.

Critics say that's precisely what is happening at a hearing Tuesday of the Joint Legislative Budget Committee. They say that a proposal to extend long-term contracts for the State Water Project for another 50 years will pave the way to financing the tunnels under the Sacramento-San Joaquin Delta.

This is the same meeting that was scheduled for the next-to-last day of the legislative session, and then canceled at the last minute after howls of protest. Now it's on again while the Legislature is in recess. It's a procedural hearing where the budget committee doesn't have to actually vote, only listen to the department's plan.

Opponents of the tunnels point to a proposed contract amendment that removes a restriction that bonds that get financed through the contracts cannot be used for any project built after 1987. They also cite a clause that deletes a requirement for consensus among water contractors to approve contracts, which they say could allow a majority to force others to pay for the tunnels. And they say the new contracts could obligate water districts and their ratepayers to raise property taxes if water rates don't bring in enough.

Not so, says the Department of Water Resources. It insists that extending the contracts does not obligate the state to pay for the tunnels and has "little to do" with the project at all.

If that's the case, then the department should put it in writing and erase any doubt.

That reassurance would not get in the way of what the department says is the actual purpose of the contract extensions: To lower the cost of issuing revenue bonds to upgrade, repair and maintain aging infrastructure in the State Water Project, the 700-mile network of reservoirs, aqueducts and pumping plants that supplies water to more than 27 million Californians and irrigates about 750,000 acres of farmland. The repairs include rebuilding the damaged spillway at Oroville Dam.

The current contracts start expiring in 2035, and DWR says extending them will make borrowing less expensive – just like a monthly payment is lower on a 30-year mortgage than a 15-year home loan. Though the department says the current contracts already authorize bonds to build the tunnels if the project moves forward, that interpretation is also in dispute.

The contract extensions are supported by a coalition of more than 40 groups, including Southern California water districts, the California Chamber and Silicon Valley Leadership Group.

Critics, however, say a lot of questions need to be answered before moving ahead, including an environmental review of the contract amendments.

They also want Tuesday's hearing delayed until after a study is done on the impact of a proposed new allocation plan for water in the San Joaquin River, and one about to be released for the Sacramento River watershed, on water flows through the Delta and through the tunnels. And they want a new economic analysis based on that information to see whether the tunnels, known officially as California WaterFix, pencil out.

That certainly seems like information that is necessary before deciding how to proceed with the tunnels, even if those decisions must be made by the next governor and Legislature. As DWR points out, the project still requires state and federal permits — a lengthy process that will likely also be tied up in the courts.

As we've said, despite all the controversy surrounding the tunnels, there needs to be a much broader debate on how to secure California's water future in an era of climate change.

But unnecessary maneuvers like Tuesday's hearing only deepen distrust, harden opposition to the tunnels and get in the way of that needed discussion.

 COMMENTS 

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San Jose Mercury Editorial: Block outrageous effort to lock in Delta tunnels water grab

If an Aug. 14 hearing is held, the fix will be in for Gov. Brown's massive, \$17 billion twin-tunnels project

By MERCURY NEWS & EAST BAY TIMES EDITORIAL BOARDS |

PUBLISHED: August 8, 2018 at 6:15 am | UPDATED: August 8, 2018 at 6:28 am

<https://www.mercurynews.com/2018/08/08/editorial-water-2/>

Gov. Jerry Brown's administration is now trying to jam through a political deal that would enable construction of his \$17 billion Delta twin-tunnels project, the biggest public works project in state history, without the approval of the state Legislature, the voters or ratepayers who would be footing the bill.

Brown's state Department of Water Resources suddenly plans to extend State Water Project contracts, with amendments, for another 50 years. Fifty years! That would allow water contractors backing the twin-tunnels project to lock in water contracts for the Delta tunnels project before Brown leaves office at the end of this year.

The only way to stop it is if the Assembly's and state Senate's Joint Legislative Budget Committee refuses to hold a procedural hearing on the contracts that is currently scheduled for Aug. 14. Mind you, the joint committee has no approval authority, but its refusal to hold the required hearing could delay the process until after the November gubernatorial election. That's what the committee must do.

The future of California water and a project of this magnitude demands maximum transparency and public input. The hearing must be postponed until the Legislature, the next governor and the public have the opportunity to fully vet the proposal and its impact.

Otherwise, the fix will be in for Brown's so-called California WaterFix. Even if Gavin Newsom, Gov. Jerry Brown's likely successor, wanted to later kill the water grab that would send more Northern California water to Central Valley farmers and Southern California cities.

Without a public vote. Without complete information on the financing and cost allocation of the twin-tunnels project. Without sufficient analysis of how much water would be available to contractors.

Once the hearing has been held, state water experts say, the Department of Water Resources can execute the contract amendments. Period. Under existing law, the Legislature would have no oversight under future State Water Project contract amendments.

This is outrageous.

Twin-tunnel proponents are ignoring the July recommendations of the State Water Resources Control Board for significant increases in the water flowing through the Delta in order to preserve its long-term health. The recommendations raised significant questions about the viability of the twin-tunnel project, which won't pencil out unless it results in increased water flows from the Delta to Southern California.

It's essential that Californians let the committee know that this project should not move forward until the state has a clear understanding of its impact.

Cancel the hearing now

OPINION

The bullet train has (almost) nothing on Brown's twin tunnels



FILE – In this Feb. 23, 2016 file photo, people try to catch fish along the Sacramento River in the San Joaquin-Sacramento River Delta, near Courtland, Calif. (AP Photo/Rich Pedroncelli, File)

By SUSAN SHELLEY | letters@ocregister.com | Orange County Register

PUBLISHED: August 7, 2018 at 5:30 pm | UPDATED: August 8, 2018 at 6:31 am

If you thought the bullet train was a boondoggle designed to lift money from your wallet while

That's how Gov. Jerry Brown and the Department of Water Resources intend to pay part of the cost of the \$17 billion twin-tunnel project known as WaterFix. They have to get voters to approve the costly undertaking so property taxes can be raised to pay for it.

Here's the catch: The voters have to approve it in 1960.

That's because Proposition 13 was passed in 1978, when voters were so outraged over skyrocketing property taxes that they took control away from the Legislature and cut the property tax rate statewide to 1 percent. However, Prop. 13 allowed for the tax rate to be higher than 1 percent if needed to pay for debt that the voters had approved in prior years.

Voters approved the debt for the State Water Project in 1960. There's still an extra charge for the State Water Project on property tax bills today.

So the question that teams of government boondogglers are wrestling with now is how to make the proposed WaterFix project go back in time to 1960. Then they can say the voters already approved the debt for building the twin tunnels, and property taxes can be raised if needed to pay the WaterFix debt.

To do this, they're redefining WaterFix as part of the State Water Project. Under state law, specifically Water Code 147.5, the Department of Water Resources can finalize a long-term water contract 60 days after the Joint Legislative Budget Committee holds an informational hearing. The committee doesn't have to vote. The Legislature doesn't have to vote. All that's needed is the hearing.

The hearing has now been scheduled for Aug. 14.

Sixty days later, the new long-term contract will be finalized, extending the term through 2085 and setting the stage for WaterFix debt to be issued. The financing will be committed before the next governor takes office.

The full details of how much WaterFix will cost and who will pay are still to be determined, and the Department of Water Resources says more amendments to the contract will be finalized sometime in the future, after the CEQA requirements are met.

On July 3, following a hearing by the Senate Committee on Natural Resources and Water, the Delta Counties Coalition called for a halt to the contract extension process. The group cited the lack of basic planning and financial feasibility analyses, among other concerns.

For what it will cost, you'd think the WaterFix project would solve California's water problems. But it won't. WaterFix doesn't guarantee even one drop of additional water. It's an elaborate workaround for the environmental restrictions on pumping water from the California delta. WaterFix will transport water through two giant tunnels under the delta to new pumps, and then south.

But just as pumping from the delta has been throttled by lawsuits over species protection, the water from WaterFix could be shut down the same way.

We could end up with all the debt and none of the water.

This is why many of the State Water Project contractors have declined to participate in financing WaterFix, and why pressure tactics and tricks are being employed to push the huge cost onto taxpayers as well as ratepayers, who are, after all, the same people.

It's part of the contract that if the water agencies can't make their payments to the State Water Project, they are required to raise property taxes in their service area in order to come up with the money.

And that's how you'll end up paying for the boondoggle known as WaterFix. Your water rates will go up, and if that's not enough money, your property taxes will go up. And you'll still have to pay for other projects needed to increase the water supply.

Call Assembly Speaker Anthony Rendon and Senate President Pro Tem Toni Atkins and urge them to postpone the Joint Legislative Budget Committee Hearing until they can explain how much the WaterFix project is going to cost and how the state expects to pay for it.

Then set the time machine to "Time for a new governor."

Susan Shelley is a columnist for the Southern California News Group. Reach her at Susan@SusanShelley.com. Twitter: @Susan_Shelley.

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Susan Shelley

Susan Shelley is an editorial writer and columnist for the Southern California News Group, writing on local, state and national issues.

OPINION

How you can stop Sacramento from raising your water rates and property taxes



The dome of the state Capitol glows in the early evening Wednesday, Aug. 31, 2016, in Sacramento (AP Photo/Rich Pedroncelli)

By **SUSAN SHELLEY** | I

PUBLISHED: August 29, 2018 at 11:26 am | UPDATED: August 29, 2018 at 4:05 pm



Editor's note: Breaking views are thoughts from individual members of the editorial board on today's headlines.

On Thursday, August 30, at 8:00 a.m., an obscure committee in Sacramento will hold an

Under state law, the Department of Water Resources can finalize a long-term contract for water from the State Water Project through a unique process that doesn't require a vote of the Legislature or any legislative committee. The DWR simply sends over a copy of the contract, the Joint Legislative Budget Committee holds an informational hearing, and 60 days later, the contract can be finalized.

In this case, the DWR wants to extend contracts for water from the State Water Project all the way to the year 2085.

Why? Because a massive capital investment is needed to pay for the WaterFix twin-tunnel project, estimated to cost \$17 billion. The money will be borrowed from Wall Street investors by selling long-term bonds, and the state's contract for supplying water has to be extended far enough into the future so that the rates paid by water customers can be promised as security. The higher the level of borrowing, the longer the contract has to run to make the math work.

Unless that hearing on Thursday is postponed, the 2085 contract extension will be finalized before Gov. Jerry Brown leaves office, committing the next governor and the next three generations of Californians to pay the debt.

And the proponents of WaterFix have a trick up their sleeve that will commit taxpayers as well as ratepayers to cover any cost overruns that plague the twin tunnels. They're calling this future project an investment in "ongoing operations and maintenance" of the State Water Project.

That bit of verbal sleight-of-hand makes the debt for this future project part of the commitment taken on by voters in 1960, when the debt for the State Water Project was approved.

You see, there's a tiny little loophole in Proposition 13 that allows the property tax rate to be raised above 1 percent in order to pay for any debt approved by voters prior to the initiative's passage in 1978.

By calling the \$17 billion WaterFix "maintenance" of the State Water Project, the proponents are contending that the debt to build the new tunnels was approved by voters in 1960. The entire massive boondoggle squeezes through the loophole.

Harry Houdini would have paid a lot of money for that trick.

At one time, state water officials expected the cost of building WaterFix to be shared by all the contractors who receive water from the Delta, but then most of them refused, citing the high cost and the lack of a guarantee that they would actually receive water. However, the board of the Metropolitan Water District of Southern California voted to pick up the lion's share of the cost by itself. The MWD has explained that water rates will go up for customers in its service area to pay for WaterFix. But what they haven't explained is that they are required to raise property taxes if necessary to pay their commitments to the State Water Project.

From the website of the Department of Water Resources, here's the language in the contract, under "Obligation of District to Levy Taxes and Assessments":

"If in any year the District fails or is unable to raise sufficient funds by other means, the governing body of the District shall levy upon all property in the District not exempt from taxation, a tax or assessment sufficient to provide for all payments under this contract then due or to become due within that year."

What this means is that if water rates don't produce enough revenue to pay what the MWD owes the state, property taxes must be raised to pay for the water agency's financial obligation under its State Water Project contract.

And this is all going to happen on auto-pilot if that informational hearing is held by the Joint Legislative Budget Committee on Thursday morning. The DWR will finalize the extended water contracts. The long-term bonds will be sold to finance WaterFix. The principal and interest payments will be the obligation of ratepayers and taxpayers all the way out to 2085.

Adding to the foul smell is a gutted-and-amended bill by Assemblyman Richard Bloom. AB 2649 would change the process of approving State Water Project contracts, specifically "any potential amendment of a long-term water supply contract that is of projectwide significance with substantially similar terms intended to be offered to all contractors, or that would permanently transfer a contractual water amount between contractors."

What this means is that WaterFix-related amendments to the water contracts are planned but not yet written. The Joint Legislative Budget Committee is going to hold a hearing on Thursday morning that will commit all of us to higher water rates and higher property taxes to pay for WaterFix and they don't even know what's going to be in the final contract.

Can this be stopped?

Call Assembly Speaker Anthony Rendon at 916-319-2063. Call Senate Pro Tem Toni Atkins at 916-651-4039. Call Committee Chair Holly Mitchell at 916-651-4030. Tell them the extension of the State Water Project contracts to finance WaterFix must wait until the next governor takes office, or at least until the contracts are completely written. Urge them to call off the Thursday morning hearing of the Joint Legislative Budget Committee.

You can find the names and contact information for your own state representatives at findyourrep.legislature.ca.gov. Call them, too.

Susan Shelley is a columnist for the Southern California News Group. Susan@SusanShelley.com.
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Tags: **Editorials**



Susan Shelley

de la Guerra, Sheila

From: Roger Moore <rbm@landwater.com>
Sent: Tuesday, February 2, 2021 1:07 AM
To: sbcob
Cc: Carolee Krieger
Subject: Re: Letter to Board of Supervisors Re : Amendments 20 and 21 (February 2 agenda)
Attachments: CWIN Appendix-Part 2.pdf

Caution: This email originated from a source outside of the County of Santa Barbara. Do not click links or open attachments unless you verify the sender and know the content is safe.

Attached is Part 2 of 4 for CWIN's Appendix.

On Tue, Feb 2, 2021 at 1:04 AM Roger Moore <rbm@landwater.com> wrote:

In case it is helpful to guide any further consideration by the Board of Amendments 20 and 21, CWIN is submitting its appendix of documents mentioned in its letter submitted on February 1, 2021. To prevent any errors from large file size, CWIN is emailing this Appendix in four parts. Attached is Part 1 of 4.

Thanks,

Roger B. Moore
Attorney for CWIN

Law Office of Roger B. Moore

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Oakland, CA 94612

Office phone: 510-548-1401

Email: rbm@landwater.com

Attachments area

On Mon, Feb 1, 2021 at 4:47 PM Roger Moore <rbm@landwater.com> wrote:

The attached letter is submitted on behalf of the California Water Impact Network (CWIN).

Respectfully,

Roger B. Moore
Attorney for CWIN

Law Office of Roger B. Moore

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16 *Attorney for Defendant Friends of the River*

17 *(Additional counsel on subsequent page)*

18 **THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **IN AND FOR THE COUNTY OF SACRAMENTO**

20 CALIFORNIA DEPARTMENT OF WATER
21 RESOURCES,

22 Plaintiff,

23 vs.

24 ALL PERSONS INTERESTED IN THE
25 MATTER of the State Water Project Water
26 Supply Contract Amendments for Continued
27 Service and the Terms and Conditions Thereof
28 (the "Contract Extension Amendments"),

Defendants

Case No.: 34-2018-00246183

**VERIFIED ANSWER OF PUBLIC
INTEREST GROUPS TO COMPLAINT FOR
VALIDATION**

(Cal. Code Civ. Proc. §§ 860-870.5)

**DEPT.: 47
JUDGE: Hon. David De Alba**

Action Filed: December 11, 2018

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20 *Protection Alliance*

1 These answering Public Interest Groups, California Water Impact Network, AquAlliance,
2 California Sportfishing Protection Alliance, Center for Biological Diversity, Friends of the River, and
3 Planning and Conservation League (“Public Interest Groups”), respond to California Department of
4 Water Resources Complaint for Validation as follows:

5 **ANSWER TO COMPLAINT FOR VALIDATION**

6 **Nature of the Action**

7 1. Public Interest Groups admit the allegations in the first two sentences of Paragraph 1.
8 Answering the final sentence of paragraph 1, Public Interest Groups allege that this sentence contains
9 legal conclusions and that the law speaks for itself.

10 **The Parties**

11 2. Public Interest Groups admit the allegations in Paragraph 2.
12 3. Public Interest Groups admit the allegations in Paragraph 3.
13 4. Public Interest Groups admit the allegations in Paragraph 4. Public Interest Groups
14 further allege that they are all interested parties pursuant to California Code of Civil Procedure sec.
15 862. Public Interest Groups further allege the following facts:

16 a. Defendant CALIFORNIA WATER IMPACT NETWORK (“C-WIN”) is a California
17 non-profit public benefit organization with its principal place of business in Santa Barbara,
18 California. C-WIN’s organization purpose is the protection and restoration of fish and wildlife
19 resources, scenery, water quality, recreational opportunities, agricultural uses, and other natural
20 environmental resources and uses of the rivers and streams of California, including the Bay-
21 Delta, its watershed and its underlying groundwater resources. C-WIN has members who reside
22 in, use, and enjoy the Bay-Delta and inhabit and use its watershed. They use the rivers of the
23 Central Valley and the Bay-Delta for nature study, recreation, and aesthetic enjoyment.

24 b. Defendant AQUALLIANCE is a California public benefit corporation headquartered in
25 Chico, California. Its mission is to defend northern California waters and the ecosystems these
26 waters support and to challenge threats to the hydrologic health of the Sacramento River
27 watershed. This includes escalating attempts to divert and withdraw more water from the
28 hydrologic region. AquAlliance’s members include farmers, scientists, businesses, educators,

1 and residents all of whom have significant financial, recreational, scientific, aesthetic,
2 educational, and conservation interests in the aquatic and terrestrial environments that rely on
3 waters of the Sacramento River Watershed and Bay-Delta estuary. This hydrologic system
4 provides water for orchards, homes, gardens, businesses, wetlands, streams, rivers, terrestrial
5 habitat, and myriad species, which in turn allows AquAlliance members to live, fish, hunt,
6 cycle, photograph, camp, swim, and invest in northern California.

7 c. Defendant CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (“CSPA”) is a
8 California non-profit public benefit organization established in 1983 with its principal place of
9 business in Stockton, California. CSPA’s organizational purpose is the protection, preservation,
10 and enhancement of the public trust, fisheries and associated aquatic and riparian ecosystems of
11 California’s waterways. This mission is implemented through active participation in federal,
12 state and local agency processes, education and organization of the fishing community,
13 restoration efforts, and vigorous enforcement of environmental laws enacted to protect fisheries,
14 habitat and water quality. Members of CSPA reside along the Central Valley watershed and in
15 the Bay-Delta where they view, enjoy, and routinely use the ecosystem for boating, fishing, and
16 wildlife viewing. CSPA’s members derive significant and ongoing use and enjoyment from the
17 aesthetic, recreational, and conservation benefits of California’s rivers.

18 d. Defendant CENTER FOR BIOLOGICAL DIVERSITY (“The Center”) is a non-profit,
19 public interest organization with over 69,000 active members. The Center has offices in
20 Oakland, Los Angeles, and Joshua Tree, California, as well as offices in Arizona, Florida,
21 Oregon, Colorado, and Washington, D.C. The Center and its members are dedicated to
22 protecting diverse native species and habitats through science, policy, education, and
23 environmental law. The Center’s members reside and own property throughout California as
24 well as those areas to be served by the Project, and use the waters and lands affected by the
25 proposed Project for wildlife observation, recreation, scientific research, environmental
26 education, and aesthetic enjoyment.

27 e. Defendant FRIENDS OF THE RIVER (“FOR”) is a non-profit organization dedicated to
28 preserving and restoring California’s rivers, streams, and their watersheds as well as advocating

1 for sustainable water management. FOR accomplishes this goal by influencing public policy
2 and inspiring citizen action through grassroots organizing. FOR was founded in 1973 during
3 the struggle to save the Stanislaus River from the New Melones Dam. Following that
4 campaign, the group grew to become a statewide river conservation organization. FOR currently
5 has nearly 3,000 members. Members of FOR enjoy the scenic beauty of the Delta and the
6 Sacramento River and its tributaries and sloughs upstream from the Delta and raft, kayak, boat,
7 fish, and swim in these waters.

8 f. Defendant PLANNING AND CONSERVATION LEAGUE (“PCL”), a non-profit
9 advocacy organization whose headquarters in is Sacramento, California, is empowered to
10 protect and restore California's natural environment and to promote and defend the public health
11 and safety of the people of California, through legislative, administrative, and judicial action.
12 PCL was founded in 1965 and since then has advocated in all branches of California
13 government for a body of laws that remains at the forefront of environmental policy in the
14 United States. PCL’s staff undertakes extensive research and works closely with legislators to
15 promote laws that protect and improve California's environment.

16 **Jurisdiction and Venue**

17 5. Public Interest Groups allege that Paragraph 5 contains legal conclusions and that the
18 law speaks for itself. To the extent that Paragraph 5 may be deemed to contain statements of fact,
19 Public Interest Groups deny all such allegations

20 6. Public Interest Groups admit the allegations in Paragraph 6.

21 **The State Water Project and Water Supply Contracts**

22 7. Public Interest Groups admit the allegations in the first two sentences of Paragraph 7.
23 Answering the third and fourth sentences of paragraph 8, Public Interest Groups allege that these
24 sentences contain legal conclusions and that the law speaks for itself.

25 8. No response is required to Paragraph 8 because it calls for legal conclusions; to the
26 extent any facts are stated, Public Interest Groups deny each and every allegation set forth therein and
27 further respond that the referenced statutes speak for themselves.

28 9. Public Interest Groups allege that the contracts described in Paragraph 9 speak for

1 themselves. Public Interest Groups further allege that they lack sufficient knowledge to admit or deny
2 the allegations of Paragraph 9 and, on that basis, deny the allegations of Paragraph 9.

3 10. Public Interest Groups allege that the contracts described in Paragraph 10 speak for
4 themselves. Public Interest Groups further allege that they lack sufficient knowledge to admit or deny
5 the allegations of Paragraph 10 and, on that basis, deny the allegations of Paragraph 10.

6 **The Water Supply Contract Extension Amendments**

7 11. Public Interest Groups admit that DWR initiated a process to amend the Water Supply
8 Contracts and that the Contract Extension Amendments are the result of that process. Public Interest
9 Groups deny all other allegations in Paragraph 11.

10 12. Public Interest Groups allege that they lack sufficient knowledge to admit or deny the
11 allegations in the first sentence of Paragraph 12 and, on that basis, deny the allegations of that sentence.
12 Public Interest Groups deny all other allegations in Paragraph 12.

13 **Statutory Authority for the Contract Extension Amendments**

14 13. Public Interest Groups allege that Paragraph 13 contains legal conclusions and that the
15 law speaks for itself. Public Interest Groups deny all other allegations in Paragraph 13.

16 **The Contract Extension Amendments Being Validated**

17 14. Public Interest Groups allege that the terms of the proposed contract amendments in
18 Exhibit A to the complaint speak for themselves. Public Interest Groups deny all other allegations in
19 Paragraph 14.

20 15. Public Interest Groups admit that on December 11, 2018, DWR's Director purported to
21 approve the Contract Extension Amendments and purported to authorize their execution. Other than as
22 expressly admitted, Public Interest Groups deny all other allegations in Paragraph 15.

23 16. Public Interest Groups lack sufficient knowledge to admit or deny the allegations of
24 Paragraph 16 and, on that basis, deny the allegations in Paragraph 16.

25 **Statutory Authority to Bring This Validation Action**

26 17. No response is required to Paragraph 17 because it calls for legal conclusions; to the
27 extent any facts are stated, Public Interest Groups deny each and every allegation set forth therein and
28 further respond that the referenced statutes speak for themselves.

1 18. No response is required to Paragraph 18 because it calls for legal conclusions; to the
2 extent any facts are stated, Public Interest Groups deny each and every allegation set forth therein and
3 further respond that the referenced statutes speak for themselves.

4 19. No response is required to Paragraph 19 because it calls for legal conclusions; to the
5 extent any facts are stated, Public Interest Groups deny each and every allegation set forth therein and
6 further respond that the referenced statutes speak for themselves.

7 20. Public Interest Groups admit the allegations in Paragraph 20.

8 21. No response is required to Paragraph 21 because it calls for legal conclusions; to the
9 extent any facts are stated, Public Interest Groups deny each and every allegation set forth therein and
10 further respond that the referenced statutes speak for themselves.

11 **Service by Publication of Summons**

12 22. Public Interest Groups admit the allegations in Paragraph 22.

13 23. Public Interest Groups lack sufficient knowledge to admit or deny the allegations of
14 Paragraph 16 and, on that basis, deny the allegations in Paragraph 23.

15 24. Public Interest Groups lack sufficient knowledge to admit or deny the allegations of
16 Paragraph 24 and, on that basis, deny the allegations in Paragraph 24. Public Interest Groups further
17 allege that the allegations contained in Paragraph 24 call for legal conclusions; to the extent any facts
18 are stated, Public Interest Groups deny each and every allegation set forth therein and further respond
19 that the referenced statutes speak for themselves.

20 25. Public Interest Groups lack sufficient knowledge to admit or deny the allegations of
21 Paragraph 25 and, on that basis, deny the allegations in Paragraph 25.

22 **First Cause of Action**

23 (Validation of the Contract Extension Amendments)

24 26. Public Interest Groups incorporate their responses to paragraphs 1 through 25 above as
25 though fully set forth herein.

26 27. Public Interest Groups deny the allegations in Paragraph 27.

27 **Prayer for Relief**

28 28. Public Interest Groups lack sufficient knowledge to admit or deny the allegations

1 contained in Paragraph 28 and, on that basis, deny that DWR is entitled to the relief prayed for in
2 Paragraph 28.

3 29. Public Interest Groups lack sufficient knowledge to admit or deny the allegations
4 contained in Paragraph 29 and, on that basis, deny that DWR is entitled to the relief prayed for in
5 Paragraph 29.

6 30. Public Interest Groups lack sufficient knowledge to admit or deny the allegations
7 contained in Paragraph 30 and, on that basis, deny that DWR is entitled to the relief prayed for in
8 Paragraph 30.

9 31. Public Interest Groups deny that DWR is entitled to the relief prayed for in Paragraph
10 31. Public Interest Groups deny the allegations contained in Paragraph 31.

11 32. Public Interest Groups deny that DWR is entitled to the relief prayed for in Paragraph
12 32. Public Interest Groups deny the allegations contained in Paragraph 32.

13 33. Public Interest Groups deny that DWR is entitled to the relief prayed for in Paragraph
14 33.

15 **AFFIRMATIVE DEFENSES**

16 **First Affirmative Defense**

17 (Violation of Delta Reform Act)

18 34. The Delta Reform Act establishes as State policy two co-equal goals for management of
19 the Delta ecosystem: providing a more reliable water supply for California and protecting, restoring,
20 and enhancing the Delta ecosystem. (Water Code §§ 85020, 85054.) The Contract Extension
21 Amendments fail to satisfy, and in fact hinder the satisfaction of, these co-equal goals.

22 35. The Delta Reform Act, Water Code section 85020, describes the following objectives to
23 achieve the two co-equal goals providing a more reliable water supply for California and protecting,
24 restoring, and enhancing the Delta ecosystem:

25 a. Manage the Delta's water and environmental resources and the water resources of the
26 state over the long term.

27 b. Protect and enhance the unique cultural, recreational, and agricultural values of the
28 California Delta as an evolving place.

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

3 d. Promote statewide water conservation, water use efficiency, and sustainable water use.

4 e. Improve water quality to protect human health and the environment consistent with
5 achieving water quality objectives in the Delta.

6 f. Improve the water conveyance system and expand statewide water storage.

7 g. Reduce risks to people, property, and state interests in the Delta by effective emergency
8 preparedness, appropriate land uses, and investments in flood protection.

9 h. Establish a new governance structure with the authority, responsibility, accountability,
10 scientific support, and adequate and secure funding to achieve these objectives.

11 36. The Contract Extension Amendments fail to satisfy, and in fact hinder and obstruct the
12 satisfaction of, almost all of the objectives described above, including the objectives related to the long-
13 term sustainable management of the Delta's water and environmental resources, the protection and
14 restoration of the Delta's cultural, recreational, agricultural, and ecosystem values, promoting statewide
15 water conservation goals, improving water quality and human and environmental health in the Delta,
16 and improving the SWP system.

17 37. The Contract Extension Amendments violate the policy described in the Delta Reform
18 Act, Water Code section 85021, that establishes as State policy the reduction of reliance on the Delta
19 for future water supply needs:

20 The policy of the State of California is to reduce reliance on the Delta in meeting
21 California's future water supply needs through a statewide strategy of investing in
22 improved regional supplies, conservation, and water use efficiency. Each region that
23 depends on water from the Delta watershed shall improve its regional self-reliance for
24 water through investment in water use efficiency, water recycling, advanced water
technologies, local and regional water supply projects, and improved regional
coordination of local and regional water supply efforts.

25 38. One way that the Contract Extension Amendments violate and hinder the satisfaction of
26 the goals, policies and objectives of the Delta Reform Act described above is by relying on and
27 maintaining unsustainable "Table A Amounts" for determining annual water deliveries to contractors.
28 "Table A Amounts" are described in the Contract Extension Amendments as being the maximum

1 amount of water each water contractor can request for delivery each year. The total Table A Amounts
2 of all contractors is approximately 4.172 million acre feet (MAF). The Contract Extension
3 Amendments require DWR to make all reasonable efforts to provide the Table A Amounts requested
4 each year, and this includes an obligation to build out facilities to provide these requested amounts.
5 However, in part due to originally planned dams and facilities that were never built and can no longer
6 be built (primarily because of the designation of various rivers as “wild and scenic” under California
7 and federal law) the State Water Project cannot sustainably or reliably provide the maximum 4.172
8 MAF that can be requested each year. DWR admits that there is a 0% chance of delivery of even 3.3
9 MAF of Table A Amounts in any given year, and the number widely regarded as most realistic is
10 roughly half the current 4.172 MAF maximum. Thus, by including provisions that both allow and
11 incentivize water contractors to request their full Table A Amounts every year, the Contract Extension
12 Amendments place unreasonable pressure on DWR to provide water that the State Water Project cannot
13 sustainably or responsibly deliver, hindering the satisfaction of the goals and objectives of the Delta
14 Reform Act.

15 39. The Contract Extension Amendments also hinder the satisfaction of the goals, policies,
16 and objectives described above through the contracts’ enablement and encouragement of the use of
17 paper water in decision-making by water contractors and customers of water contractors. As used here,
18 paper water generally refers to the difference between the amount of water promised for delivery and
19 the actual amount of water that is delivered. The inflated Table A Amounts described above are the
20 principle cause of paper water but other contract provisions enable and encourage paper water as well.
21 One of the most obvious conflicts that results from the prevalence of paper water in the SWP system is
22 the reliance on it by public agencies when approving land use projects. By endorsing and encouraging
23 the use of and reliance on paper water, the Contract Extension Amendments hinder the satisfaction of
24 the goals and objectives of the Delta Reform Act.

25 **Second Affirmative Defense**

26 (Violation of Public Trust Doctrine)

27 40. Public Interest Groups hereby incorporate all of the allegations in the paragraphs set
28 forth in the First Affirmative Defense, above, as if fully set forth herein.

1 41. California’s navigable waterways are owned and held in trust by the state for the benefit
2 of the people of the state, and “title to and property in the fish within the waters of the state are vested
3 in the state of California and held by it in trust for the people of the state....” (*People v. Monterey Fish*
4 *Products Co.* (1925) 195 Cal. 548, 563; *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.) The
5 California Constitution guarantees that “[t]he people shall have the right to fish upon and from the
6 public lands of the State and in the waters thereof” (Art. I, sec. 25), and the Legislature has codified a
7 public trust protection requiring that “sufficient water at all times to pass . . . around, or through the
8 dam to keep in good condition any fish . . . below the dam” (Fish and Game Code § 5937).

9 42. DWR has the affirmative duty to consider public trust resources when making decisions
10 regarding its management of and impacts on public trust resources, including the Delta, and to preserve
11 and protect public trust resources that are affected by its decisions, so far as consistent with the public
12 interest. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, 446-47.) “Any
13 action which will adversely affect traditional public rights in trust lands is a matter of general public
14 interest and should therefore be made only if there has been full consideration of the state’s public
15 interest in the matter.” (*San Francisco Baykeeper, Inc. v. State Lands Commission* (2015) 242
16 Cal.App.4th 202, 234.)

17 43. A 2012 study by defendant C-WIN found that the total water rights claims in the Delta
18 watershed exceed by five times the flow conditions available in most years in those river systems.
19 (Stroshane 2012) A subsequent study by UC Davis confirmed these findings, showing that statewide
20 water users hold rights to water at a rate of approximately five times the state’s mean annual runoff,
21 with the greatest degree of appropriation in the Sacramento and San Joaquin basins. (Grantham and
22 Viers 2014.)

23 44. By including provisions that both allow and incentivize water contractors to request their
24 full Table A Amounts every year, the Contract Extension Amendments place unreasonable pressure on
25 DWR to provide water that the State Water Project cannot sustainably or responsibly deliver, violating
26 the Public Trust Doctrine.

27 45. DWR did not properly consider impacts to public trust resources when approving the
28 Contract Extension Amendments.

1 **Third Affirmative Defense**

2 (Impossibility and/or Impracticability of Performance)

3 46. Public Interest Groups hereby incorporate all of the allegations in the paragraphs set
4 forth in the First and Second Affirmative Defenses, above, as if fully set forth herein.

5 47. DWR cannot reliably or sustainably deliver 4.172 MAF of water to the water
6 contractors. The Contract Extension Amendments' use of and reliance on "Table A Amounts" that
7 total approximately 4.172 MAF, along with provisions in the water supply contracts that require DWR
8 to make all reasonable efforts to provide the full Table A Amounts requested each year, makes the
9 water supply contracts impossible and/or impractical to perform.

10 **Fourth Affirmative Defense**

11 (Unconscionability)

12 48. Public Interest Groups hereby incorporate all of the allegations in the paragraphs set
13 forth in the First and Second Affirmative Defenses, above, as if fully set forth herein.

14 49. The Contract Extension Amendments are unconscionable, as they permit the water
15 contractors to annually request from DWR unreasonable, unsustainable, and unattainable amounts of
16 water (4.172 MAF of "Table A Amounts") that DWR is contractually obligated to make all reasonable
17 efforts to provide.

18 **Fifth Affirmative Defense**

19 (Violation of Public Policy and Frustration of Public Interest)

20 50. Public Interest Groups hereby incorporate all of the allegations in the paragraphs set
21 forth in the First and Second Affirmative Defenses, above, as if fully set forth herein.

22 51. As public contracts, used by public agencies to secure credit and issue bonds, the
23 Contract Extension Amendments are against public policy and frustrate the public interest.

24 52. DWR improperly determined that the contract amendments are "necessary and
25 desirable" under Water Code section 11160 and "necessary, convenient or expedient" under section
26 Water Code 11454, in part because DWR ignored the ability of implementation of the "evergreen
27 clause" in the existing contracts to accomplish the goals of the project. The evergreen clause, found at
28 section 4 of the contracts, allows contractors to extend the existing terms of the contracts without being

1 forced to bear the burden of future costs associated with the WaterFix project or other unnecessary
2 costs associated with the Contract Extension Amendments.

3 53. The Contract Extension Amendments facilitate the issuance of bonds and the incurring
4 of debt without the required approval by voters.

5 **Sixth Affirmative Defense**

6 (Violation of CEQA)

7 54. CEQA is codified at Public Resources Code sections 21000 *et seq.* Guidelines for
8 implementation of CEQA are codified at 14 Cal. Code Regs. sections 15000 *et seq.* Pursuant to CEQA,
9 the CEQA Guidelines, and California case law, agencies may not take any actions that could limit the
10 choice of alternatives or mitigation measures, or give impetus to a planned project in a manner that
11 forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that
12 public project.

13 55. On November 13, 2018, DWR adopted a Notice of Determination certifying the Final
14 Environmental Impact Report for the “Water Supply Contract Extension Project” and approving
15 Contract Extension Amendment project.

16 56. One of the purposes of the Contract Extension Amendment project is to enable DWR to
17 issue long-term revenue bonds for the operation and maintenance of the SWP. As a result, the issuance
18 of revenue bonds by DWR would give impetus to the Contract Extension Amendment project in a
19 manner that forecloses feasible, less-damaging alternatives and mitigation measures, contrary to
20 CEQA.

21 57. DWR could only lawfully adopt the contract extension amendments that are the subjects
22 of this validation action following compliance with CEQA, including preparation of a legally sufficient
23 EIR. As also alleged in *Planning and Conservation League v. California Department of Water*
24 *Resources*, Superior Court of California, Sacramento, Case Number: 34-2019-80003053, DWR
25 violated CEQA by:

26 a. improperly piecemealing its analysis of the project and failed to consider the “whole of
27 the action” that constitutes the project;

28 b. failing to provide a stable, complete, and consistent project definition;

- 1 c. failing to adequately assess the project baseline;
2 d. failing to adequately assess the no-project alternative;
3 e. failing to analyze a reasonable range of project alternatives;
4 f. failing to adequately assess the project impacts;
5 g. failing to adequately assess cumulative impacts;
6 h. failing to adequately mitigate significant impacts;
7 i. failing to recirculate the EIR despite significant new information;
8 j. failing to adequately respond to comments;
9 k. approving defective project findings.

10 58. DWR cannot obtain any relief in this action prior to either this court or other court with
11 jurisdiction determining whether DWR's actions sought to be validated are lawful under CEQA.

12 **Seventh Affirmative Defense**

13 (Prematurity / Ripeness)

14 59. Plaintiff's claims are premature and not ripe for judicial resolution for the reason
15 including, but not limited to, that other pending judicial and administrative proceedings must be
16 determined and fully resolved before the Contract Extension Amendments project may be validated.

17 60. Defendants AquAlliance, C-WIN, CSPA, and PCL have challenged the lawfulness of
18 the Contract Extension Amendments project under the California Environmental Quality Act
19 ("CEQA") in a Petition for Writ of Mandate filed January 10, 2019, entitled *Planning and*
20 *Conservation League v. California Department of Water Resources*, Superior Court of California,
21 Sacramento, Case Number: 34-2019-80003053.

22 61. DWR cannot obtain any relief in this action prior to a court with jurisdiction determining
23 whether DWR's actions sought to be validated are lawful under CEQA.

24 **Eighth Affirmative Defense**

25 (Failure to State a Claim)

26 62. The Complaint for Validation fails to state facts sufficient to state a cause of action.

27 **Ninth Affirmative Defense**

28 (Ultra Vires)

63. DWR's approval of the Contract Extension Amendments is ultra vires. The Contract Extension Amendments place debt obligations on water contractors that exceed the legislative authority granted to either the water contractors or DWR, including but not limited to authorizing the funding for costs associated with the California WaterFix project that guarantee bond payments irrespective of whether the project is ever completed and require participants to assume the obligations of defaulting participants.

Tenth Affirmative Defense

(Uncertainty, Ambiguity, and Vagueness)

64. The Complaint is uncertain, ambiguous, and vague in defining the nature of the actions sought to be validated and the scope of the relief requested.

Eleventh Affirmative Defense

(Lack of Specificity)

65. The Complaint lacks the specificity required by law, such as to allow this Court to provide Plaintiff the relief it requests.

Twelfth Affirmative Defense

(Reservation of Defenses)

66. Public Interest Groups reserve all other defenses that may potentially become available as a result of information developed during the case.

Public Interest Groups' Prayer for Relief

Public Interest Groups pray for relief and judgment in their favor as follows:

1. That the Complaint for Validation be dismissed or judgment entered in favor of these answering Public Interest Groups;
 2. that Plaintiff take nothing by this suit;
 3. for costs of suit;
 4. for attorney's fees pursuant to law including Code of Civil Procedure section 1021.5;
- and
5. for such other and further relief as the Court deems just and proper.

1 DATED: February 25, 2019

LAW OFFICE OF ADAM KEATS

2
3 By: Adam Keats

4 Adam Keats
5 Attorney for Public Interest Groups California Water
6 Impact Network, AquAlliance, California Sportfishing
7 Protection Alliance, Center for Biological Diversity,
8 and Planning and Conservation League

8 DATED: February 25, 2019

FRIENDS OF THE RIVER

9
10 By: E. Robert Wright

11 E. Robert Wright
12 Attorney for Friends of the River

13 DATED: February 25, 2019

CENTER FOR BIOLOGICAL DIVERSITY

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15 By: John Buse

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19 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 COUNTY OF SACRAMENTO

22 CALIFORNIA DEPARTMENT OF WATER
23 RESOURCES,

24 Plaintiff,

25 v.

26 ALL PERSONS INTERESTED IN THE
27 MATTER of the State Water Project Water
28 Supply Contract Amendments for Continued
Service and the Terms and Conditions Thereof
(the "Contract Extension Amendments"),

Defendants;

CASE NO.: 34-2018-00246183

**VERIFIED RESPONSE AND ANSWER OF
PUBLIC AGENCIES TO COMPLAINT FOR
VALIDATION**

(Cal. Code Civ. Proc. §§ 860-870.5)

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25
26
27
28

1
2 **INTRODUCTION**

3 To protect their interests and preserve their claims and rights of action, interested parties County
4 of San Joaquin, Central Delta Water Agency, County of Contra Costa, Contra Costa County Water
5 Agency, County of Solano, County of Yolo, County of Butte, County of Plumas, Plumas County Flood
6 Control and Water Conservation District, and Local Agencies of the North Delta (collectively, the
7 “Public Agencies”¹) submit this Response and Answer to the Complaint for Validation (“Complaint”)
8 filed by Plaintiff California Department of Water Resources (“DWR”), as follows:

9 **RESPONSE TO THE COMPLAINT FOR VALIDATION**

10 1. The Public Agencies are a regionally diverse coalition of counties, water resource
11 management and flood control agencies, and reclamation and water storage districts. They collectively
12 span an area that includes major watersheds serving the State Water Project (the Feather River and
13 Sacramento River), its keystone water storage and hydroelectric facilities (Lake Oroville and Oroville
14 Dam), and most of the area comprising the Sacramento-San Joaquin Delta, as well as groundwater
15 basins and other surface water sources. In addition to serving downstream uses, these water resources
16 provide the lifeblood for agriculture, the economy and the environment in much of northern and central
17 California.

18 2. The Public Agencies would be adversely affected by, and are united in opposing, DWR’s
19 attempt to confirm the validity and legality of proposed amendments to State Water Project (SWP) water
20 contracts, based on a form attached as Exhibit A to DWR’s complaint. These Exhibit A Amendments
21 are referenced in DWR’s complaint as “Contract Extension Amendments.” DWR’s use of the word
22 “extension” is misleading insofar as it suggests a mere extension of the water contracts’ expiration dates.
23 If adopted, the Exhibit A Amendments would entrench longstanding current problems in the SWP while
24 adding new and risky changes well beyond re-setting of contract expiration dates.
25
26
27

28 ¹ Local Agencies of the North Delta is not itself a public agency, but is an association comprised of public agency members.

1 3. Subject to legal requirements and limitations, including the Burns-Porter Act (Wat. Code,
2 § 12930, *et seq.*), passed by the Legislature in 1959 and approved by California’s voters in 1960, DWR
3 operates and maintains California’s State Water Resources Development System, more commonly
4 known as the State Water Project. The SWP’s storage and conveyance facilities provide water meant to
5 serve the people and resources of California through deliveries to 29 local state water contractors
6 spanning the state from Plumas County in the north to San Diego County in the south. The 75-year
7 terms of the long-term water supply contracts DWR entered into with these local contractors during
8 1960s are scheduled to expire between 2035 and 2042. Through the Exhibit A Amendments, DWR
9 seeks to extend the terms of the SWP contracts through December 31, 2085.

10 4. A bait-and-switch underlies DWR’s efforts to characterize its Exhibit A Amendments
11 solely as “extension” amendments. If validated, these amendments would rank among the most
12 significant and consequential amendments proposed during nearly six decades of SWP history. The
13 amendments seek to extend the length of SWP water supply contracts for up to a half-century beyond
14 their originally scheduled expiration dates. The amendments also propose other transformative changes
15 affecting the SWP’s coverage and exposure to costs and risks. For example, the amendments would
16 remove existing SWP contract limitations on the facilities eligible for revenue bonds, including those
17 issued under the Central Valley Project Act (Wat. Code, § 11000, *et seq.*). These limitations on covered
18 facilities, which the Exhibit A Amendments would eliminate, prevent an expansion of revenue bond
19 debt to cover new facilities not in existence prior to January 1, 1987. (See, e.g., articles 1(cc) and 1(hh)
20 of State Water Project contracts). Through the Exhibit A “extension” amendments, DWR proposes new
21 authorization for “SWP revenue bonds to be issued to: (1) finance repairs, additions, and betterments to
22 most facilities of the SWP without regard to whether the facilities were in existence prior to January 1,
23 1987, which is the current Contract requirement in Article 1(hh)(8); and (2) finance other capital
24 projects (not already in the list in Article 1(hh) for which revenue bonds could be sold) when mutually
25 agreed to by DWR and at least 80 percent of the affected Contractors.”

26 5. The “elephant in the room” for DWR’s Exhibit A Amendments arises from DWR’s
27 repeated efforts to obfuscate their close relationship to, and key role in facilitating, a multi-billion dollar
28 Delta conveyance project long sought by DWR (“Delta conveyance project”). The controversial Delta

1 conveyance project, a successor to DWR's failed efforts to build and finance a "peripheral canal" in a
2 previous generation, was originally called the Bay-Delta Conservation Plan (BDGP) and is branded in
3 DWR's most recent iteration as California WaterFix.

4 6. DWR's attempt to confirm the validity and legality of the Exhibit A Amendments is
5 founded on the faulty premise that these amendments are separate and independent from the Delta
6 conveyance project, and of independent utility to address problems of debt compression facing the SWP.
7 In authorizing the Exhibit A Amendments, DWR avoided major criticisms made in public comments on
8 the 2016 Contract Extension Draft EIR, and developed further in commentary and California legislative
9 proceedings on DWR's proposed contract extension during 2018. Comments and testimony, including a
10 concession of DWR Director Karla Nemeth at a September 11, 2018 hearing of the Joint Legislative
11 Budget Committee (JLBC), confirmed commenters' concerns that the Exhibit A Amendments will
12 facilitate California WaterFix, and potentially other risky infrastructure projects proposed by major SWP
13 contractors despite public opposition, by removing obstacles that could otherwise prevent debt coverage
14 for revenue bonds designed to cover financing of the proposed Delta conveyance project. Commentary
15 and proceedings during 2018 also discredited DWR's "debt compression" rationale for the Exhibit A
16 Amendments. Rather than responsibly addressing debt compression problems consistently with the
17 Evergreen Clause in article 4 of current SWP contracts, DWR seeks through these amendments to
18 bundle major new risks into the SWP.

19 7. DWR's proposed Exhibit A Amendments would remove timing obstacles to revenue
20 bond financing, and help facilitate implementation of, and billions in new debt for, the Delta conveyance
21 project, one of the most costly and risky water infrastructure projects in California's history. California
22 WaterFix proposes construction of two massive tunnels to facilitate the diversion of large additional
23 quantities of freshwater from the San Francisco Bay-Delta Estuary for export south of the Delta. Despite
24 monumental cost and complexity, California WaterFix creates no new water supply. It would entrench
25 and compound reliance on unsustainable water exports, to the detriment of communities and water users.
26 California WaterFix would divert resources needed for investments in long-term water reliability, water
27 quality, reuse, storage, drought and flood protection, and ecosystem improvements. It would also
28 frustrate efforts in the northern Sacramento Valley and elsewhere to fulfill legislative duties on regional

1 self-reliance and the sustainable management of groundwater. If built and approved for operation,
2 California WaterFix would cause harmful diversions of water out of the Sacramento Valley and the
3 Delta, and further degradation of water quality. DWR's environmental review and decision-making for
4 California WaterFix is the subject of numerous pending legal actions, many of them coordinated in the
5 Sacramento County Superior Court (JCCP No. 4942).

6 8. In its decision to authorize the Exhibit A Amendments, DWR failed to heed criticism
7 from the Public Agencies and numerous others, including environmental and community organizations,
8 state and federal elected officials, and expert reviewers, discrediting the environmental, economic and
9 legal foundations of the proposed amendments. DWR avoided major project criticisms made during
10 2018 identifying still-unaddressed changed circumstances since project comments closed in October
11 2016 that necessitated circulation and review of a new EIR. These criticisms also underscored the clear
12 need to avoid piecemealing, and to provide a still-unmade integrated assessment of the project in
13 connection with DWR's separate set of proposed Water Supply Contract Amendments (on which a 2018
14 Draft EIR is presently pending), as well as the WaterFix project itself. In rushing forward to final
15 approval, DWR flouted commenters' concerns that DWR had failed to meet the Water Code's
16 prerequisites to final approval of the proposed contract extension. DWR avoided analysis and mitigation
17 of major project impacts, and failed to analyze alternatives that would address debt compression
18 problems without bundling major new risks into the State Water Project. DWR also failed in its historic
19 opportunity to address systemic problems in the SWP prior to extending the long-term contracts, such as
20 addressing "paper water" problems with SWP Table A deliveries and the failure to protect Delta
21 resources.

22 9. DWR's proposed Exhibit A Amendments provide the res to be addressed in this
23 validation action. As approved by DWR, these amendments open the door to imposing debt for DWR's
24 Delta conveyance project, and for other risky and costly projects favored by the largest SWP
25 contractors, despite opposition from others. By making the SWP more costly and risky, the amendments
26 compound rather than solve debt compression problems.

27 10. The validity of the Exhibit A Amendments cannot be lawfully resolved here in DWR's
28 favor. Validity cannot be segmented from interrelated issues in the WaterFix coordinated actions, and

1 from the outcome of additional Water Supply Contract Amendments under negotiation and review.

2 **PROCEDURAL HISTORY**

3 11. DWR’s current water supply contracts with its 29 individual State Water Contractors are
4 currently set to expire in 2035-2042. In 1966, DWR issued Project Order No. 12, which purported to
5 designate the Peripheral Canal as the SWP facility to transfer water across the Sacramento-San Joaquin
6 Delta. For reasons reinforced in the defeat by voters of Proposition 9 in 1982, the water system facilities
7 as referenced in the State Water Project contracts do not include the Peripheral Canal or permutations of
8 that proposed conveyance. Under Article 1 of current SWP contracts, facilities eligible for SWP revenue
9 bonds exclude those which were not in existence prior to January 1, 1987. (See, e.g., articles 1(cc) and
10 1(hh) of State Water Project contracts).

11 12. In 2013, DWR initiated a public negotiation process for extension of SWP contracts.
12 Contract extensions achieved through this process would remain in effect for another 50 years, through
13 the end of 2085. The initial phase of the process reached an “Agreement in Principle Concerning
14 Extension of the State Water Project Water Supply Contracts” (AIP). The AIP is included as Appendix
15 A of DWR’s 2016 Draft Environmental Impact Report (DEIR). Signatories to the AIP included most,
16 but not all, of the State Water Contractors. Plumas County Flood Control and Water Conservation
17 District and Butte County, which did not sign the AIP, raised concerns about taking steps that could risk
18 exposure to costs from DWR’s proposed Delta conveyance project, then known as BDCP.

19 13. DWR issued its Notice of Preparation (NOP) of its Environmental Impact Report for the
20 Water Supply Contract Extension Project on September 12, 2014. Scoping comments, including those of
21 the Central Delta Water Agency, expressed concern that amendments implementing the AIP could
22 entrench and compound major economic, institutional, and environmental problems associated with the
23 SWP over the additional half-century proposed for SWP contracts. Another SWP contractor that did not
24 sign the AIP, Santa Barbara County Flood Control and Water Conservation District, raised questions,
25 still left unaddressed when DWR ultimately certified and approved the project, about the proposed
26 project’s financial consequences and implications for taxpayers and ratepayers. A consistent theme in
27 public comments involved the contract extension amendments’ role in facilitating DWR’s proposed
28 Delta conveyance project.

1 14. Addressing criticisms centered on the contract extension project’s relationship to BDCP,
2 DWR sought delay in addressing financing for DWR’s proposed Delta conveyance project until a
3 subsequent contract amendment process could be undertaken, taking the position that this subject would
4 be better addressed in separate negotiations for a BDCP contract amendment. A separate SWP contract
5 amendments process related to DWR’s proposed Delta conveyance project began in December 2014, but
6 was suspended in February 2015.

7 15. In August 2016, DWR published its Draft EIR for its contract extension project, failing to
8 address the significant concerns about the project raised during scoping review. During the public
9 comment period that closed in October 2016, commenters identified numerous problems with the Draft
10 EIR. Commenters also presented extensive evidence discrediting the premise of the Draft EIR that
11 DWR’s proposed project of “contract extension” amendments was separate and independent from
12 DWR’s Delta conveyance project. Commenters pointed out that, as DWR and SWP contractors were
13 aware was the case with BDCP, California WaterFix could not obtain financing through revenue bonds
14 without a contract amendment. Evidence cited and documented by EIR commenters included, but was
15 not limited, to the following:

16 • An October 2011 Legislative Analyst Office (LAO) Report, *Potential Funding Alternatives for*
17 *the Bay Delta Conservation Plan Planning Process*, stated that “[f]unding BDCP implementation”
18 would “require amendment of long-term water supply contracts between DWR, the Bureau of
19 Reclamation, and the contractors in order to provide the funding mechanism.” (*Id.* at 5.) This report also
20 listed revenue bonds as one of the “currently infeasible” funding mechanisms, because revenue bonds
21 “require a clearly defined funding source before they can be sold.” (*Id.* at 8.)

22 • November 23, 2013 and April 1, 2014 briefings of State Water Contractors to DHCCP’s SWP
23 Cost Allocation Working Group concluded that California WaterFix financing options would require
24 contract amendments.

25 • When discussing revenue bonds in connection with BDCP, DWR’s own bond counsel concluded
26 that without contract amendments, BDCP was “not on the list of approved projects that are eligible for
27 funding, including through bond financing.” (Letter from Jake Campos, STIFEL, to Mary Lou Cotton,
28

1 SWPCA at 4 (March 19, 2014; see also MWD PRA Document 00000484-SWC Financing DHCCP 9-7-
2 12.)

3 • In September 2014, staff at the Metropolitan Water District acknowledged that proposed SWP
4 contract amendments are a necessary step in financing BDCP. *See* MWD, Special Committee on Bay-
5 Delta Presentation Re Review Status of BDCP Cost Allocation Discussions (September 23, 2014). In a
6 September 23, 2013 report, Kern County Water Agency also referenced the need for a contract
7 amendment to finance BDCP.

8 • In March 2014, a Morgan Stanley report concluded that “Clearly, in order to finance the
9 substantial costs associated with CM1 in the BDCP, the extension of these contracts is essential to allow
10 for the amortization of financing payments over a long period of time.”

11 16. For more than two years, between the closing of the Draft EIR comment period in
12 October 2016 and publication of the Final EIR in November 2018, DWR failed to provide responses to
13 public comments on DWR’s 2016 Contract Extension Draft EIR, including those providing evidence
14 discrediting the independence of the proposed “extension” amendments from DWR’s Delta conveyance
15 project. Nonetheless, on July 21, 2017, DWR separately certified its Final EIR for, and issued its Notice
16 of Determination for, the California WaterFix project. On the same day, after executing this notice,
17 DWR adopted Project Order No. 40, which purported to add California WaterFix facilities to the CVP,
18 and through that action, to the SWP. Also on the same day, DWR adopted three resolutions purporting
19 to impose revenue bond obligations for payment of California WaterFix, over a maximum period (70
20 years after commencement of construction) exceeding the term of current SWP contracts. DWR did not
21 include Project Order No. 40 and the three bond resolutions in any public administrative review,
22 comment period or public hearing prior to their adoption. In coordinated actions in the Sacramento
23 County Superior Court (JCCP No. 4942), the Public Agencies, among others, dispute the validity of the
24 three bond resolutions and Project No. 40, as well as DWR’s compliance with legal requirements
25 pertaining to its California WaterFix decision-making. Other administrative and judicial proceedings
26 relating to California WaterFix also remain pending.

27 17. In a letter dated May 10, 2018, DWR Director Karla Nemeth sent a letter to California’s
28 Joint Legislative Budget Committee (JLBC), seeking to schedule a hearing preceding final adoption of

1 SWP contract extension amendments pursuant to Water Code section 147.5. The Director’s letter did
2 not mention DWR’s proposed Delta conveyance, or that anyone had concerns about its close connection
3 to DWR’s efforts to expedite contract extension amendments. DWR’s legislative packet of “documents
4 related to the informational hearings” excluded public comments on the 2016 Contract Extension Draft
5 EIR, as well as the evidence accompanying those comments.

6 18. On July 3, 2018, the Senate Natural Resources and Water Committee (SNRWC) held an
7 informational hearing (<https://sntr.senate.ca.gov/content/2018-informationaloversight-hearings>) on
8 DWR’s proposed contract extension amendments. The committee staff’s background briefing for this
9 hearing referenced the recognition of SWP contractors and DWR that the proposed contract extension
10 amendments are “a necessary, but not sufficient condition to incorporate WaterFix into the SWP,” and
11 the contention of many organizations that contract amendments remain premature while WaterFix issues
12 are unresolved. Nonetheless at the hearing, testimony presented by DWR asserted the independence of
13 the proposed amendments from California WaterFix, and supported expedited adoption of DWR’s
14 proposed amendments. Other testimony and public comments disputed the amendments’ asserted
15 independence from California WaterFix. Testimony and comments also expressed concern that the
16 proposed amendments would perpetuate and compound other SWP problems, including overreliance on
17 Delta water and continuing failure to comply with requirements protecting Delta resources.

18 19. Following the SNWRC’s informational hearing, the Joint Legislative Budget Committee
19 twice scheduled and twice cancelled the proposed hearing requested by DWR during summer 2018. The
20 cancellations followed extensive public criticism of DWR’s efforts to expedite contract extension
21 amendments, including DWR’s continuing failure to candidly disclose and address the proposed
22 amendments’ role in facilitating financing for California WaterFix.

23 20. On September 11, 2018, JLBC held a legislative hearing
24 (<https://sntr.senate.ca.gov/content/2018-informationaloversight-hearings>) on DWR’s proposed contract
25 extension amendments. Testimony at the September 11, 2018 JLBC hearing undermined the premise of
26 independence from WaterFix upon which DWR’s separate Contract Extension Final EIR was founded.
27 That includes the testimony of DWR director Karla Nemeth, following questioning from Senator
28 Richard Pan, that DWR plans to “use these amendments to finance WaterFix,” and the testimony of

1 Rachel Ehlers of the Legislative Accounting Office that the contract extension amendments would
2 “affect and facilitate” WaterFix. Facilitation of WaterFix through the contract extension amendments is
3 also addressed in the testimony of Congressman McNerney and of Roger Moore.
4 (http://calchannel.granicus.com/MediaPlayer.php?view_id=2&clip_id=5820).

5 21. In a letter to DWR dated September 25, 2018, the Planning and Conservation League and
6 14 other organizations identified, and cited evidence pertaining to, major changed circumstances since
7 public comment closed in October 2016, necessitating preparation and circulation of a new Draft EIR.

8 22. DWR published and certified its Contract Extension Final EIR on November 13, 2018,
9 declining to prepare and circulate a new Draft EIR in response to the September 25, 2018 letter and
10 extensive public criticism of its proposed contract extension amendments prior to and during 2018
11 legislative hearings. DWR did not make a final decision on its proposed contract extension amendments
12 on that date. Instead DWR indicated that the State Water Project Analysis Office and Office of Chief
13 Counsel would first issue a “follow-on” memorandum and recommendation.

14 23. Having received no further memorandum and recommendation from DWR, or any
15 indication of when they would be forthcoming, the Public Agencies electronically submitted a letter to
16 DWR Director Karla Nemeth on December 11, 2018, included herein as Attachment 1 (Public
17 Agencies’ letter). The Public Agencies’ letter concluded it would be “both premature and risky” for
18 DWR to “finally authorize” its proposed contract extension amendments, highlighting still-unaddressed
19 problems previously brought to DWR’s attention during years of public proceedings. The Public
20 Agencies’ letter concluded that DWR’s claim that the contract extension amendments are independent
21 of California WaterFix and DWR’s Water Supply Contract Amendments was demonstrably wrong,
22 discredited during 2018 legislative proceedings on DWR’s proposed amendments.

23 24. The Public Agencies’ letter noted that, as addressed in testimony for the September 11,
24 2011 JLBC hearing and earlier comments of the Delta Counties Coalition (Public Agencies’ letter,
25 Exhibits 2, 3), Water Code prerequisites for proceeding to finality on the extension amendments (Wat.
26 Code, §§ 147, 147.5) had still not been met.

27 25. The Public Agencies’ letter noted that DWR has long been aware that revenue bonds
28 could not be issued covering expenditures for the Delta conveyance project without enacting specific

1 contract revisions addressed in the “extension” amendments. That is partly because financing for this
2 multibillion-dollar project could not realistically fit within the current expiration dates of 2035 to 2042.
3 Beyond the time frame for repayment, facilities limitations in the existing SWP contracts would
4 otherwise prevent coverage of bond financing for the proposed Delta conveyance, including California
5 WaterFix or earlier variants such as BDCP. The 2018 legislative proceedings helped verify that DWR’s
6 certification and project approval sidestepped analysis of major project components of the Contract
7 Extension Amendments, including those stemming from removal of existing limitations on covered
8 facilities eligible for revenue bonds, as well as the unlawful perpetuation and entrenchment of
9 overreliance on Delta water resources.

10 26. The Public Agencies’ letter noted DWR’s continuing failure to heed critical comments
11 underscoring the importance of integrated rather than fragmented review of all pending and proposed
12 SWP contract amendments. During summer and fall 2018, public agency critics throughout California,
13 from Plumas County and the Delta Counties Coalition to the San Diego County Water Agency,
14 criticized DWR’s efforts to finalize the contract extension without integrated review of all DWR’s
15 proposed amendments related to the Delta Tunnels, including the Water Supply Contract Amendments
16 still awaiting public comment and completion of review. (Public Agencies’ letter, Exhibit 3.)
17 Nonetheless, DWR had failed to heed these criticisms. The contract extension amendments need an
18 integrated analysis that also includes DWR’s proposed Water Supply Contract Amendments, and
19 WaterFix itself, in a single cohesive environmental analysis.

20 27. The Public Agencies’ letter noted DWR’s continuing failure to heed 2018 comments of
21 the Legislative Delta Caucus urging DWR not to prematurely proceed to finality on its proposed
22 contract extension amendments. The Legislative Delta Caucus observed that these “poorly defined”
23 contract extension amendments proposed by DWR would have “potential adverse impacts far beyond
24 their apparent scope. There is much that remains unknown regarding the extensive changes to the SWP
25 contracts that are being proposed and how the changes will impact property taxes, water rates, the fiscal
26 integrity of the SWP and General Fund.” (Public Agencies’ letter, Exhibit 4.)

27 28. The Public Agencies’ letter noted DWR’s failure to confront numerous changed
28 circumstances requiring additional review since public comment closed in October 2016, and identified

1 in the letter submitted to DWR by 15 organizations on September 25, 2018 (Public Agencies’ letter ,
2 Exhibit 5.)

3 29. The Public Agencies’ letter noted DWR’s failure to heed commentary in major
4 newspapers criticizing the defective process and lack of transparency surrounding DWR’s proposed
5 contract extension amendments, as well as DWR’s attempts to leverage WaterFix indebtedness without
6 adequate review and debate (Public Agencies’ letter, Exhibit 6).

7 30. The Public Agencies’ letter criticized DWR’s assurance in its Contract Extension Final
8 EIR that projects facilitated by the contract extension would be covered by separate CEQA review (e.g.,
9 Contract Extension FEIR 2-10, 134). DWR’s California WaterFix EIR and project approval neither
10 admitted nor analyzed dependence on a subsequent SWP contract amendment. CEQA review of later-
11 approved projects would come too late to address the consequences of redefining covered “facilities,”
12 because the current contract language would already be eliminated with DWR’s proposed contract
13 extension amendments.

14 31. The Public Agencies’ letter noted that the Contract Extension Final EIR undermines its
15 premise that the contract extension amendments proposed by DWR have independent utility as a
16 “separate, independent project” addressing debt compression problems. (Contract Extension FEIR, 2-9.)
17 Debt compression is based on the comparatively short maturity dates of existing SWP contracts. (*id.*)
18 The Contract Extension Final EIR recognized that a provision in Article 4 of the SWP contracts known
19 as the Evergreen Clause already provides a way to extend these dates. (E.g., Contract Extension FEIR,
20 2-3 to 2-5, 2-33.)

21 32. The Public Agencies’ letter noted that the Evergreen Clause in section 4 of the SWP
22 contracts would empower contractors to request the cleaner “opt out” provision some have requested
23 since the inception of negotiations on project contracts—one which would allow terms to be extended
24 without bearing any of the WaterFix costs facilitated by either set of proposed contract amendments.
25 DWR has never shown its version of contract extension amendments, including the proposed facilities
26 redefinition, to be necessary to ensure continued water deliveries or responsibly address operation and
27 maintenance needs. By facilitating the issuance of billions of dollars to construct the Delta conveyance
28

1 project, and perhaps other projects not currently eligible, DWR may under the guise of risk reduction
2 force a risky escalation of indebtedness.

3 33. Notwithstanding all the still-unaddressed criticisms and unmet requirements noted above,
4 the DWR Director nonetheless made a decision authorizing DWR's execution of proposed Exhibit A
5 Amendments on December 11, 2018. The Exhibit A Amendments would tangibly facilitate financing for
6 proposed addition of a new Delta conveyance to the SWP, and also make it easier for DWR and the
7 most powerful SWP contractors to add further debt to finance other costly new facilities of their
8 choosing. While adding five additional decades to the length of SWP contracts, the Exhibit A
9 Amendments would enable DWR to entrench and compound its longstanding failure as SWP manager to
10 protect areas of origin and Delta resources in the manner required by law.

11 **ANSWER TO COMPLAINT FOR VALIDATION**

12 1. Answering Paragraph 1 of the Complaint, Public Agencies admit that the Complaint
13 purports to commence a validation action under Code Civ. Proc. § 860 et seq. and Gov. Code § 17700,
14 that DWR seeks a judgment confirming the validity of proposed contract amendments referenced in
15 paragraphs 14-16 of the complaint, and that DWR attached a proposed model form of these proposed
16 amendments in Exhibit A to the complaint. Public Agencies further allege that the provisions of Code
17 Civ. Proc. § 860 et seq. and Gov. Code § 17700 speak for themselves. Other than as expressly admitted,
18 Public Agencies deny each and every allegation of Paragraph 1.

19 **The Parties**

20 2. Answering Paragraph 2 of the Complaint, Public Agencies admit that DWR is a
21 department of the Natural Resources Agency of the State of California, and that DWR exists and must
22 operate under the constitution and laws of California. Public Agencies further allege that the provisions
23 of Code Civ. Proc. § 860 et seq. and Gov. Code § 17700 speak for themselves. Other than as expressly
24 admitted, Public Agencies deny each and every allegation of Paragraph 2.

25 3. Answering Paragraph 3 of the Complaint, Public Agencies admit the allegations therein.

26 4. Answering Paragraph 4 of the Complaint, Public Agencies Public Agencies admit that
27 they are interested in disputing DWR's attempts in this action to establish the validity of the Exhibit A
28 Amendments. Except as expressly so admitted, Public Agencies lack sufficient knowledge to admit or

1 deny the allegations of Paragraph 4 and, on that basis, deny each and every remaining allegation of
2 Paragraph 4 and allege the following facts concerning these answering Public Agencies:

3 A. COUNTY OF SAN JOAQUIN is a political subdivision of the State of California. Two-
4 thirds of the legal Delta is located within San Joaquin County, and the Delta comprises over one-third of
5 San Joaquin County's total area. Approximately 167,000 people live in the San Joaquin County portion
6 of the Delta, and those cities and communities rely in significant part on the Delta for their water
7 supplies. The Delta supports a \$5.2 billion annual agricultural industry, and approximately forty percent
8 (40%) of those farms are located in San Joaquin County. A large portion of the Delta's \$750 million
9 recreational economy is centered in San Joaquin County, encompassing, among other enterprises and
10 activities, innumerable privately-owned marinas, public and private boat launch facilities, recreational
11 facilities for fishing, tent camping, RV camping, hiking and picnicking, and many lodging
12 establishments and restaurants that contribute to the Delta's recreational economy.

13 B. CENTRAL DELTA WATER AGENCY ("CDWA") is a political subdivision of the
14 State of California created by the California Legislature under the Central Delta Water Agency Act,
15 chapter 1133 of the statutes of 1973 (Wat. Code, Appendix, 117-1.1, et seq.), by the provisions of which
16 CDWA came into existence in January of 1974. CDWA's boundaries are specified in Water Code
17 Appendix section 117-9.1 and encompass approximately 120,000 acres, which are located entirely
18 within both the western portion of San Joaquin County and the "Sacramento-San Joaquin Delta" as
19 defined in California Water Code section 12220. While the lands within the agency are primarily
20 devoted to agriculture, said lands are also devoted to numerous other uses including recreational,
21 wildlife habitat, open space, residential, commercial, and institutional uses. CDWA is empowered to
22 "sue and be sued" and to take all reasonable and lawful actions, including pursuing legislative and legal
23 action, that have for their general purpose: (1) to protect the water supply of the lands within the agency
24 against intrusion of ocean salinity; and/or (2) to assure the lands within the agency a dependable supply
25 of water of suitable quality sufficient to meet present and future needs. The agency may also undertake
26 activities to assist landowners and local districts within the agency in reclamation and flood control
27 matters. (See Wat. Code, Appendix, 117-4.3, subd. (b) & 117-4.1, subds. (a) and (b), respectively.)
28 CDWA may assist landowners, districts, and water right holders within its boundaries in the protection

1 of vested water rights and may represent the interests of those parties in water right proceedings and
2 related proceedings before courts of both the State of California and the United States to carry out the
3 purposes of the agency. (See Wat. Code, Appendix, 117-4.2, subd. (b).)

4 C. COUNTY OF CONTRA COSTA is, and at all times mentioned herein was, a political
5 subdivision of the State of California. Contra Costa County is vitally and beneficially interested in the
6 Exhibit A Amendments and their facilitation of California WaterFix, which if approved and constructed
7 will affect the Sacramento-San Joaquin Delta. The eastern portion of Contra Costa County is located
8 within the Delta and a portion of it borders Old River. CC County's entire northern boundary borders
9 San Pablo and Suisun Bays, the Carquinez Strait, New York Slough, and the western San Joaquin River.
10 Contra Costa County is home to over one million people. Persons who live and work within Contra
11 Costa County rely on the Delta as a source of drinking water, and as a place to live, work, and recreate.

12 D. CONTRA COSTA COUNTY WATER AGENCY ("CCC Water Agency") is, and at all
13 times mentioned herein was, a body politic and corporate organized and existing under the Contra Costa
14 County Water Agency Act (Stats. 1957, ch. 518, West's Wat. Code Appen., Ch. 80). CCC Water
15 Agency is vitally and beneficially interested in the Exhibit A Amendments and their facilitation of
16 California WaterFix, which if approved and constructed will affect the Sacramento-San Joaquin Delta,
17 and will affect water quality and beneficial uses of water within CCC Water Agency's jurisdiction.
18 CCC Water Agency is empowered to do all things necessary to ensure the availability of water for
19 beneficial uses within the agency's jurisdiction, including but not limited to preventing waste, salinity
20 intrusion, and interference of diminution of the natural flow of rivers of streams within the agency's
21 jurisdiction. (West's Wat. Code Appen., § 80-11(2), (5).) CCC Water Agency is authorized to
22 participate in litigation to protect "the ownership, use or supply of water, water rights or water service
23 within or without the agency which may be used or useful for any purpose within the agency." (West's
24 Wat. Code Appen., § 80-11(5).) CCC Water Agency's special statutory interests will be directly and
25 indirectly impacted by the Exhibit A Amendments' adverse environmental and economic impacts.

26 E. COUNTY OF SOLANO is, and at all times mentioned herein was, a political subdivision
27 of the State of California. Solano County is vitally and beneficially interested in the Exhibit A
28 Amendments and their facilitation of California WaterFix, which if approved and constructed will affect

1 the Sacramento-San Joaquin Delta. The eastern portion of Solano County, including the Cache Slough
2 region, is located within the Delta. Solano County's southern boundary borders San Pablo and Suisun
3 Bays, the Carquinez Strait, and the Sacramento River. Solano County is home to more than 400,000
4 people, as well as a thriving agricultural economy. Persons who live and work within Solano County
5 rely on the Delta as a source of drinking and irrigation water, and as a place to live, work, and recreate.
6 Solano County's interests, as well as the interests of the residents, landowners, farmers, and local
7 districts within its boundaries, will be directly and indirectly impacted by the Exhibit A Amendments'
8 adverse environmental and economic impacts.

9 F. COUNTY OF YOLO is, and at all times mentioned herein was, a political subdivision of
10 the State of California. Yolo County is vitally and beneficially interested in the Exhibit A Amendments
11 and their facilitation of California WaterFix, which if approved and constructed will affect the
12 Sacramento-San Joaquin Delta. California WaterFix project, if approved and constructed, will affect the
13 environment, economy, and public welfare within the Sacramento-San Joaquin Delta. A substantial
14 portion of Yolo County lies within the Delta, including part of the City of West Sacramento, the town of
15 Clarksburg and its surrounding farms and vineyards, and the Yolo Bypass. Persons who live and work
16 within Yolo County depend on Delta waters for agricultural and municipal uses, as well as for
17 commerce and recreation. Delta levees protect local communities and farms and, together with other
18 infrastructure such as roads and bridges, sustain the agricultural heritage and economic vitality of Yolo
19 County. The Exhibit A Amendments will adversely impact Yolo County's interests and the interests of
20 its residents, landowners, and local agencies, such as reclamation districts ("RDs").

21 G. COUNTY OF BUTTE is a political subdivision of the State of California, charged by the
22 California Constitution with the duty to protect the environment and economy of the people and
23 resources within its jurisdiction, and the reasonable and beneficial uses of surface water and
24 groundwater. Butte County, governed by a five-member Board of Supervisors, provides services to
25 residents through 23 departments. Butte is also the second northernmost of 29 State Water Contractors
26 that signed and still hold long-term contracts for water deliveries with DWR. Operation of the SWP
27 affects residents and taxpayers within Butte County.

1 H. COUNTY OF PLUMAS is a political subdivision of the State of California, charged by
2 the California constitution with the duty to protect the environment and the economy of the people and
3 resources within its jurisdiction. Plumas County is located predominantly in the Feather River
4 watershed, upstream of DWR's Oroville project. The SWP also has project reservoirs inside Plumas
5 County, including Antelope Dam and Lake, Grizzly Valley Dam and Lake Davis, and Frenchman Dam
6 and Lake. The Lake Davis unit of the SWP supplies water to the Plumas County Flood Control and
7 Water Conservation District, one of the SWP contractors. Operation of the SWP affects residents and
8 taxpayers within Plumas County.

9 I. PLUMAS COUNTY FLOOD CONTROL AND WATER CONSERVATION
10 DISTRICT is governed by the Plumas County Board of Supervisors, is a special law water district
11 created by the State Legislature in 1959 through Act 5964, and is the northernmost State
12 Water Contractor.

13 J. LOCAL AGENCIES OF THE NORTH DELTA ("LAND"), an unincorporated
14 association, is a coalition comprised of reclamation, water and levee districts ("districts") in an
15 approximately 120,000-acre area of the northern geographic area of the Delta. These districts provide
16 water delivery and/or drainage services, and assist in the maintenance of the levees that provide flood
17 protection to Delta communities, homes and farms that contribute to the agricultural productivity of the
18 Delta. LAND member interests and the interests of local landowners within individual LAND districts
19 would be adversely impacted by the Exhibit A Amendments, including their facilitation of California
20 WaterFix. California WaterFix would impact these interests through reduced fresh water flows, changes
21 in water levels, and worsened quality of water in the channels within the boundaries of LAND member
22 agencies. In addition, flood protection within LAND member districts would be worsened by the
23 negative effects of the California WaterFix on Delta levees and flood infrastructure.

24 **Jurisdiction and Venue**

25 5. Answering Paragraph 5 of the Complaint, Public Agencies allege that Paragraph 5 sets
26 forth legal conclusions, statements of law, or both, as to which no response is required. Public Agencies
27 further allege that the provisions of Code Civ. Proc. § 860 et seq. and Gov. Code § 17700 speak for
28

1 themselves. To the extent that Paragraph 5 may be deemed to contain statements of fact, Public
2 Agencies deny all such allegations.

3 6. Answering Paragraph 6 of the Complaint, Public Agencies admit the allegations therein.

4 **The State Water Project and Water Supply Contracts**

5 7. Answering Paragraph 7 of the Complaint, Public Agencies admit that DWR operates,
6 manages and oversees facilities which store, transport and deliver water to urban and agricultural water
7 agencies throughout the State; that DWR has since approximately 1960 planned portions of the State
8 Water Project, a system of water storage and transportation and power general facilities, referenced in
9 DWR's Complaint as the "State Water Project"; and that provisions approved by the Legislature in 1959
10 and by California's voters in 1960 are commonly known as the Burns-Porter Act. Public Agencies
11 further allege that the provisions of the Burns-Porter Act (Wat. Code, §§ 12930, et seq.), and the Central
12 Valley Project Act (Wat. Code, §§ 111000, et seq.), speak for themselves. Except as expressly admitted,
13 Public Agencies lack sufficient knowledge to admit or deny the allegations of Paragraph 7 and, on that
14 basis, deny each and every remaining allegation of Paragraph 7.

15 8. Answering Paragraph 8 of the Complaint, Public Agencies allege that the provisions of
16 the Burns-Porter Act, Central Valley Project Act, and Water Code, §§ 11454, 11455, 12931, and 12937
17 speak for themselves. Other than as expressly admitted, Public Agencies deny each and every allegation
18 of Paragraph 8.

19 9. Answering Paragraph 9 of the Complaint, Public Agencies admit that 29 contractors,
20 including Public Agencies County of Butte and Plumas County Flood Control and Water Conservation
21 District, currently have Water Supply Contracts for delivery of water from the State Water Project.
22 Public Agencies further allege that the provisions of these 29 Water Supply Contracts speak for
23 themselves. Except as expressly admitted, Public Agencies lack sufficient knowledge to admit or deny
24 the allegations of Paragraph 9 and, on that basis, deny each and every remaining allegation of Paragraph
25 9.

26 10. Answering Paragraph 10 of the Complaint, Public Agencies allege that the provisions of
27 the 29 Water Supply Contracts for delivery of Water from the State Water Project, including the
28 respective term lengths of each contract and the provisions of Articles 2 and 4, speak for themselves.

1 Except as expressly admitted, Public Agencies lack sufficient knowledge to admit or deny the
2 allegations of Paragraph 10 and, on that basis, deny each and every remaining allegation of Paragraph
3 10.

4 **The Water Supply Contract Extension Amendments**

5 11. Answering Paragraph 11 of the Complaint, Public Agencies admit that DWR initiated a
6 process to amend the Water Supply Contracts, and later proposed amendments to the Water Supply
7 Contracts. Other than as expressly admitted, Public Agencies deny each and every allegation of
8 Paragraph 11.

9 12. Answering Paragraph 12 of the Complaint, Public Agencies admit that DWR has
10 previously utilized revenue bonds in connection with the State Water Project, and that DWR's proposed
11 contract amendments would in addition to other significant changes seek to extend the terms of the
12 Water Supply Contracts. Other than as expressly admitted, Public Agencies deny each and every
13 allegation of Paragraph 12.

14 **Statutory Authority for the Contract Extension Amendments**

15 13. Answering Paragraph 13 of the Complaint, Public Agencies allege that the Water Supply
16 Contracts and the provisions of Water Code sections 11454, 11455, 11625, 12931 and 12937 speak for
17 themselves. Other than as expressly admitted, Public Agencies deny each and every allegation of
18 Paragraph 13.

19 **The Contract Extension Amendments Being Validated**

20 14. Answering Paragraph 14 of the Complaint, Public Agencies admit that DWR proposes
21 contract amendments that, in addition to other significant changes seek to extend the stated term in
22 Article 2 to December 31, 2085, and assert that the terms of the proposed contract amendments in
23 Exhibit A to the complaint speak for themselves. Other than as expressly admitted, Public Agencies
24 deny each and every allegation of Paragraph 14.

25 15. Answering Paragraph 15 of the Complaint, Public Agencies admit that on December 11,
26 2018, DWR's Director executed a document purporting to approve proposed amendments to State Water
27 Project contracts, the form of which is attached to the complaint in the Exhibit A Amendments. Public
28 Agencies admit that the entities other than DWR listed in Paragraph 15 are State Water Contractors,

1 including Public Agencies County of Butte and Plumas County Flood Control and Water Conservation
2 District, and that on December 11, 2018, DWR's Director executed a document purporting to approve
3 the Exhibit A Amendments on DWR's behalf. Public Agencies allege that the proposed amendments
4 referenced in Exhibit A speak for themselves. Other than as expressly admitted, Public Agencies deny
5 each and every allegation of Paragraph 15.

6 16. Answering Paragraph 16 of the Complaint, Public Agencies lack sufficient knowledge to
7 admit or deny the allegations of Paragraph 10 and, on that basis, deny each and every remaining
8 allegation of Paragraph 10. Public Agencies deny that the amendments proposed in Exhibit A have been
9 lawfully executed. Other than as expressly admitted, Public Agencies deny each and every allegation of
10 Paragraph 16.

11 **Statutory Authority to Bring this Validation Action**

12 17. Answering Paragraph 17 of the Complaint, Public Agencies allege that Paragraph 17 sets
13 forth legal conclusions, statements of law, or both, as to which no response is required. To the extent
14 Paragraph 17 may be deemed to contain statements of fact, Public Agencies deny all such allegations.

15 18. Answering Paragraph 18 of the Complaint, Public Agencies allege that Paragraph 18 sets
16 forth legal conclusions, statements of law, or both, as to which no response is required. To the extent
17 Paragraph 18 may be deemed to contain statements of fact, Public Agencies deny all such allegations.

18 19. Answering Paragraph 19 of the Complaint, Public Agencies allege that Paragraph 18 sets
19 forth legal conclusions, statements of law, or both, as to which no response is required. To the extent
20 Paragraph 19 may be deemed to contain statements of fact, Public Agencies deny all such allegations.

21 20. Answering Paragraph 20 of the Complaint, Public Agencies admit the allegations therein.

22 21. Answering Paragraph 21 of the Complaint, Public Agencies allege that Paragraph 21 sets
23 forth legal conclusions, statements of law, or both, as to which no response is required. To the extent
24 Paragraph 21 may be deemed to contain statements of fact, Public Agencies deny all such allegations.

25 **Service By Publication of Summons**

26 22. Answering Paragraph 22 of the Complaint, Public Agencies allege that Paragraph 22 sets
27 forth legal conclusions, statements of law, or both, as to which no response is required. To the extent
28 Paragraph 22 may be deemed to contain statements of fact, Public Agencies deny all such allegations.

1 23. Answering Paragraph 23 of the Complaint, Public Agencies lack sufficient knowledge to
2 admit or deny the allegations of Paragraph 23 and, on that basis, deny each and every allegation of
3 Paragraph 23.

4 24. Answering Paragraph 24 of the Complaint, Public Agencies lack sufficient knowledge to
5 admit or deny the allegations of Paragraph 24 and, on that basis, deny each and every allegation of
6 Paragraph 24.

7 25. Answering Paragraph 25 of the Complaint, Public Agencies lack sufficient knowledge to
8 admit or deny the allegations of Paragraph 25 and, on that basis, deny each and every allegation of
9 Paragraph 25.

10 **First Cause of Action**

11 26. Answering Paragraph 26 of the Complaint, Public Agencies incorporate by reference as
12 though fully set forth herein their responses in paragraphs 1 through 25, inclusive, above.

13 27. Answering Paragraph 27 of the Complaint, Public Agencies deny the allegations therein
14 and denies, further, that DWR is entitled to any declaratory relief whatsoever.

15 **Prayer for Relief**

16 28. Answering Paragraph 28 of the Complaint, Public Agencies admit that DWR prays for
17 the relief described in Paragraph 28. Except as expressly so admitted, Public Agencies lack sufficient
18 knowledge to admit or deny the allegations of Paragraph 28 and, on that basis, deny each and every
19 allegation of Paragraph 28.

20 29. Answering Paragraph 29 of the Complaint, Public Agencies admit that DWR prays for
21 the relief described in Paragraph 29. Except as expressly so admitted, Public Agencies lack sufficient
22 knowledge to admit or deny the allegations of Paragraph 28 and, on that basis, deny each and every
23 allegation of Paragraph 29.

24 30. Answering Paragraph 30 of the Complaint, Public Agencies admit that DWR prays for
25 the relief described in Paragraph 30. Except as expressly so admitted, Public Agencies lack sufficient
26 knowledge to admit or deny the allegations of Paragraph 28 and, on that basis, deny each and every
27 allegation of Paragraph 30.

1 31. Answering Paragraph 31 of the Complaint, Public Agencies admit that DWR prays for
2 the relief described in Paragraph 31. Except as expressly so admitted, Public Agencies deny the
3 allegations of Paragraph 31.

4 32. Answering Paragraph 32 of the Complaint, Public Agencies admit that DWR prays for
5 the relief described in Paragraph 32. Except as expressly so admitted, Public Agencies deny the
6 allegations of Paragraph 32. Public Agencies deny that DWR is entitled to the relief sought in Paragraph
7 32 or to any injunctive or other form of relief whatsoever.

8 33. Answering Paragraph 33 of the Complaint, Public Agencies admit that DWR prays for
9 the relief described in Paragraph 33. Except as expressly so admitted, Public Agencies deny the
10 allegations of Paragraph 33. Public Agencies deny that DWR is entitled to the relief sought in
11 Paragraph 33 or to any injunctive or other form of relief whatsoever.

12 **ADDITIONAL DEFENSES**

13 For their separate and additional defenses, and without admitting that they bear the burden of
14 proof or persuasion as to any such defenses, Public Agencies allege as follows:

15 **FIRST AFFIRMATIVE DEFENSE**

16 (Failure to State a Claim)

17 34. The Complaint, including each purported cause of action and remedy sought therein, fails
18 to allege facts sufficient to constitute a cause of action.

19 **SECOND AFFIRMATIVE DEFENSE**

20 (Prematurity/Ripeness)

21 35. DWR seeks to establish "valid, legal and binding obligations," the validity of which all
22 others would be enjoined and restrained from challenging in the future.

23 36. The validation sought by DWR would be premature under Code of Civil Procedure
24 section 860, *et seq.*, unripe for judicial resolution, or both. The determination of validity sought for the
25 Exhibit A Amendments is inextricably intertwined with the disposition of other pending judicial and
26 administrative proceedings. Those proceedings include, but are not limited to (1) DWR's California
27 WaterFix validation action, included among the coordinated proceedings presently pending in the
28 Sacramento County Superior Court (JCCP No. 4942); (2) CEQA challenges to DWR's certification of

1 the Contract Extension Final EIR and approval of its contract extension amendments project, presently
2 pending in the Sacramento County Superior Court (No. 34-2019-80003053, No. 34-2019-80003047);
3 and (3) DWR’s pending environmental review and consideration of additional Water Supply Contract
4 Amendments to the SWP contracts (<https://water.ca.gov/Programs/State-Water>
5 Project/Management/Water-Supply-Contract-Amendment).

6 **THIRD AFFIRMATIVE DEFENSE**

7 (Misrepresentation of Project Role)

8 37. The determinations that the contract amendments are “necessary and desirable” under
9 Water Code 11160 and “necessary, convenient or expedient” under Water Code 11454 are irreparably
10 flawed. DWR’s determination of consistency with these provisions in its decision authorizing Exhibit A
11 Amendments misrepresent the relationship of the project to the purposes and objects of the Central
12 Valley Project Act and Burns-Porter Act. This includes, but is not limited to, the failure of DWR in
13 these determinations to accurately disclose or address (1) DWR’s unidentified project objective to
14 facilitate financing of its Delta conveyance project, known in DWR’s most recent iteration as California
15 WaterFix; (2) the inability of the Exhibit A Amendments to meet DWR’s identified project objectives;
16 (3) the incompatibility of the Exhibit A Amendments with DWR’s fulfillment of its existing duties as
17 manager and operator of the SWP under the Burns-Porter Act; and (4) the incompatibility of the Exhibit
18 A Amendments with other legal obligations of DWR, including but not limited to laws protecting areas
19 of origin and Delta resources.

20 **FOURTH AFFIRMATIVE DEFENSE**

21 (Impairment of State Water Project Operation and Maintenance)

22 38. Water Code section 11455 requires DWR to demonstrate that SWP water supply
23 contracts, as amended, “will afford sufficient funds to pay the costs of operation and maintenance.”

24 39. In authorizing the Exhibit A Amendments, DWR failed to make the required
25 demonstration of sufficient funds needed to comply with Water Code section 11455, and to conduct
26 analysis needed to support this determination. Furthermore, the Exhibit A Amendments entail potential
27 billions in further indebtedness over an additional half-century of SWP contract terms, placing enormous
28 financial strains needing further study on the existing SWP, and violating the priority provisions of the

1 Burns-Porter Act in Water Code section 12937. The validation sought by DWR would prejudicially
2 impair State Water Project operation and maintenance, violating DWR's Burns-Porter Act obligations
3 and related laws in at least the respects specified below:

4 A. DWR's chief responsibilities as operator and manager of the State Water
5 Project are set forth in the Burns-Porter Act (also called the "Bond Act"), codified in the
6 Water Code following its approval by California voters in 1960. (Wat. Code, §§ 12930, *et*
7 *seq.*)

8 B. The objective of the State Water Project to operate for the good of the
9 people of California was central to its approval and enactment. See P.A. Towner, *Brief*
10 *History of the Negotiation of Water Supply Contracts for the State Water Project*,
11 presented to the California Water Commission (Dec. 3, 1976). SWP contractors are
12 required to have taxing authority. See Wat. Code, § 12937 (codifying original SWP
13 financial commitments).

14 C. Cost overruns and failure to account for risks to customers have been
15 recurrent in the State Water Project's history. Cost estimates for the State Water Project
16 of \$1.75 billion (the amount in general obligation funds authorized under the Burns-
17 Porter Act) have more than quadrupled under the existing project contracts,
18 notwithstanding DWR's subsequent recognition that the State Water Project cannot be
19 completed as originally contemplated. State Water Project contracts are presently set to
20 expire for all 29 State Water Project contractors between 2035 and 2042.

21 D. By facilitating coverage of California WaterFix with revenue bonds, as
22 well as other costly and risky future projects that may otherwise be ineligible for revenue
23 bonds under current SWP contracts, the proposed Contract Extension Amendments
24 would add major new risks to the SWP under the rubric of contract "extension," risking
25 addition of billions of dollars of new indebtedness to the SWP. DWR has failed to
26 account for the likelihood of major cost overruns far exceeding DWR's preliminary cost
27 estimates for California WaterFix. DWR has failed to secure reliable and legally required
28 funding commitments from beneficiaries of California WaterFix, or to account for the

1 likelihood that much of the WaterFix funding referenced by DWR will not materialize,
2 resulting in undisclosed risk for others.

3 E. The validation sought by DWR would place additional strains on the
4 existing State Water Project's operation and maintenance, as well as its replacement
5 reserve and emergency costs, when foreseeable funding shortfalls arise and SWR
6 contractors and their customers are called upon to bear these risks. Bearing these costs
7 may also prevent or deter investment that would better support the sustainable and
8 reliable operation of the State Water Project. Validation of the Exhibit A Amendments, as
9 proposed by DWR, would impair the sustainable operation of the State Water Project,
10 creating risks for millions of Californians depending upon its safe, affordable and
11 environmentally responsible operation. In authorizing the Exhibit A Amendments, and in
12 proceeding in the absence of financial analysis needed to support its determinations,
13 DWR failed to ensure that its obligations can be performed consistently with its existing
14 duties to SWP contractors, their member agencies, and members of the public.

15 **FIFTH AFFIRMATIVE DEFENSE**

16 (Validation would Unlawfully Prejudice California Voters and Taxpayers)

17 40. The Exhibit A Amendments would facilitate major changes in the SWP without fully
18 studying their consequences for taxpayers and ratepayers, as requested by Santa Barbara County Flood
19 Control District and other commenters, but not honored by DWR prior to its decision authorizing
20 Exhibit A Amendments. As noted by project criticisms published in major newspapers and presented in
21 legislative testimony during 2018, DWR's proposed amendments resemble a "time machine." The
22 amendments would improperly treat the Delta conveyance as if it were part of the original SWP
23 approved by California's voters in 1960. That would unlawfully ignore constitutional property tax and
24 voting requirements currently in place. (Public Agencies' letter, Exhibit 6).

25 41. The validation DWR seeks by its Complaint would prejudice California voters and
26 taxpayers in at least the following ways:

27 A. DWR's water supply contracts provide that when contractors are unable to raise
28 sufficient funds by other means, State Water Projects contractors are to levy assessments

1 on all property not otherwise exempt within a contractor's territory. DWR has also
2 referenced obligations under Water Code section 11652 and current water supply
3 contracts for water contractors to levy property taxes if adequate payment cannot
4 otherwise be made to cover the project's financial requirements. If contractors are unable
5 to raise sufficient funds to cover costs associated with the Delta conveyance facilitated by
6 the Exhibit A Amendments, or other costly new facilities newly eligible for revenue bond
7 financing, contractors are likely to impose property tax increases in order to address the
8 deficit. Foreseeable conflicts are likely to emerge over whether levying taxes to cover
9 costs of the Delta tunnels are within the costs of "maintaining, operating and replacing"
10 the existing State Water Project. (*Goodman v. County of Riverside* (1983) 140
11 Cal.App.3d 900, 908.)

12 B. Validation of the Exhibit A Amendments would assist in facilitating revenue bond
13 financing for California WaterFix, a project facing major cost uncertainties and posing
14 serious risks of substantial cost overruns. Accordingly, validation of the Exhibit A
15 Amendments would invite conflicts over whether it overrides opportunities under
16 Propositions 13, 26 and 218 to challenge property tax increases without a public vote.

17 **SIXTH AFFIRMATIVE DEFENSE**

18 (Failure to Comply with Water Code 147)

19 42. In a letter to the Chair and Vice-Chair of JLBC dated June 11, 2018, the Delta Counties
20 Coalition (comprised of Public Agencies Contra Costa, San Joaquin, Solano, and Yolo Counties, as well
21 as Sacramento County) requested postponement of legislative hearings and additional oversight of
22 DWR's proposed contract extension amendments (DCC letter) (Public Agencies' letter, Exhibit 3). The
23 letter noted that, notwithstanding DWR's stated rationale for the amendments to provide a longer term
24 for financing of "SWP capital expenditures," there is "little question that the primary impetus for this
25 contract extension is the California WaterFix project, which is estimated to cost SWP contractors tens of
26 billions of dollars in the coming decades." As noted in the DCC letter, "WaterFix is plainly the largest
27 capital improvement to the SWP under consideration."
28

1 43. The DCC letter requested that DWR provide the information required under Water Code
2 147, which provides as follows:

3 a) On or before January 10, 2010, and annually thereafter, the department shall
4 prepare and submit to the chairpersons of the fiscal committees of the Legislature a report
5 with regard to the budget for the State Water Resources Development System.

6 (b) The department shall include in the report all of the following information:

7 (1) A description of the expenditures made, or projected to be made, as
8 applicable, on behalf of the State Water Resources Development System, by program and
9 fund, and of the total revenues expended, or projected to be expended, as applicable, for
10 that system, including each fund source.

11 (2) A description of the positions within the department that carry out functions
12 related to the State Water Resources Development System, and the total number of those
13 positions.

14 (3) A description of any funds, other than funds generated by the State Water
15 Resources Development System, that are expended, or projected to be expended, as
16 applicable, for the State Water Resources Development System, including those funds used
17 for cost-sharing purposes.

18 (4) An itemization of all contracts related to the Bay-Delta Conservation Plan
19 financed, or projected to be financed, as applicable, in full or in part with funds generated
20 by the State Water Resources Development System, including the dollar amount of those
21 contracts and a brief description of the purposes of those contracts.

22 (c) The department shall include in each report information relating to three fiscal
23 years that include the two completed fiscal years that immediately precede the year in
24 which the report is due, along with applicable information for the fiscal year in which the
25 report is due. The department shall prepare the first report required under subdivision (a)
26 for the 2007-08, 2008-09, and 2009-10 fiscal years.

27 44. Despite the DCC letter, and similar requests made by other commenters during 2018,
28 DWR failed to provide information required by Water Code section 147 before making its final
determination authorizing execution by DWR of the Exhibit A Amendments.

SEVENTH AFFIRMATIVE DEFENSE

(Failure to Comply with Water Code 147.5)

45. The Exhibit A Amendments fail to meet the Water Code prerequisites for contract
extensions, including presentation of the final operative amendments in the legislative hearing under
Water Code 147.5. That provision requires as follows:

At least 60 days prior to the final approval of the renewal or extension of a long-
term water supply contract between the department and a state water project
contractor, the department shall present at an informational hearing before the

1 Legislature the details of the terms and conditions of the contract and how they
2 serve as a template for the remaining long-term water supply contracts. This
3 presentation shall be made to the Joint Legislative Budget Committee and
4 relevant policy and fiscal committees of both houses, as determined by the
5 Speaker of the Assembly and the Senate Committee on Rules. The department
6 shall submit a copy of one long-term contract to the Joint Legislative Budget
7 Committee no less than 30 days prior to the scheduled hearing.

8 46. In proceeding to authorize final approval of SWP contract extension amendments, DWR
9 failed to heed warnings in comments and legislative testimony that neither of the 2018 legislative
10 hearings (the July 3, 2018 SNWRC hearing and the September 11, 2018 JLBC hearing) could serve as
11 the final hearing to be held “at least 60 days prior to final approval” of a SWP contract extension under
12 Water Code section 147.5. (Public Agencies’ letter, Exhibit 2.) Although DWR presented the JLBC
13 *draft* contract “extension” amendments on May 10, 2018, neither these nor any other legislative
14 submission met DWR’s duty under Water Code 147.5 to present to the Legislature “the details of the
15 terms and conditions of the contract and how they serve as a template for the remaining long-term water
16 supply contracts.”

17 47. The “terms and conditions” under Water Code section 147.5 must be the operative ones
18 providing this template, not drafts subject to modification after responding to comments and completing
19 review of related terms. DWR recognized that the Final EIR, which remained unavailable as of the
20 September 11, 2018 JLBC hearing, must “serve as the basis for DWR and the individual contractors to
21 determine whether to approve the Extension Amendment.” ([https://water.ca.gov/Programs/State-Water-
22 Project/Management/Water-Supply-Contract-Extension.](https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension)) Yet as confirmed in the JLBC’s background
23 paper for the September 11 2018 hearing (page 3), DWR had no plans to complete its Contract
24 Extension Final EIR “until after” that hearing took place. DWR did not release that Final EIR until
25 November 13, 2018. As of the September 11, 2018 JLBC hearing, had neither responded to public
26 comments submitted to DWR more than two years earlier, nor arrived at a final set of proposed
27 amendments following responses to those comments.

28 48. In a letter to JLBC dated July 31, 2018 (Public Agencies’ letter, Exhibit 3), San Diego
County Water Authority (SDCWA) stated that holding the hearing required under Water Code section
147.5 would be “premature,” and should not occur until “at least early in 2019 to allow adequate time
for the *full scope* of SWP contract amendments to be vetted by the Legislature.” (Emphasis in original).

1 The letter noted that there “remains substantial information that must be publicly disclosed and shared
2 with interested parties relative to financing, financial arrangements, and cost allocation associated with
3 the WaterFix project that must be built-in” to the SWP contract amendments. Contract amendments “on
4 WaterFix financing and cost allocation” remained under negotiation and were excluded from the
5 contract amendments furnished to the JLBC.

6 49. SDCWA concluded in its letter that the hearing required under Water Code section 147.5
7 needed to be timed “to ensure an adequate time and opportunity” for “a full public disclosure and
8 dialogue related to the entire scope of SWP contract amendments that will be necessary to understand
9 the financing, operations, and cost allocation considerations related to the WaterFix project.” Other
10 commenters expressed similar and related concerns, which remained unresolved when the JLBC held an
11 informational hearing on September 11, 2018 and when DWR proceeded to authorize the Exhibit A
12 Amendments. For example, in a letter to JLBC dated September 10, 2018 (Public Agencies’ letter,
13 Exhibit 1), Congressman McNerney, joined by three other members of Congress, warned that
14 proceeding to a final legislative hearing and completion of contract extension amendments would be
15 “premature,” and that “until there is a determination on DWR’s validation action” relating to WaterFix
16 revenue bonds in the Sacramento County Superior Court (JCCP No. 4942), information would be
17 lacking “to make such a significant and costly decision.” In proceeding to final authorization of contract
18 extension amendments on December 11, 2018, DWR ignored these warnings and failed to comply with
19 Water Code section 147.5.

20 **EIGHTH AFFIRMATIVE DEFENSE**

21 (Validation Would Violate California Environmental Quality Act)

22 50. In reviewing the contract extension amendments project culminating in the Exhibit A
23 Amendments, DWR correctly concluded that it was reviewing a project subject to the requirements of
24 the California Environmental Quality Act (CEQA, Pub. Resources Code, §§ 21000, et seq.), and that it
25 was required as lead agency to prepare an EIR complying with the requirements of CEQA.

26 51. In certifying the Contract Extension Final EIR and rendering its final project approval,
27 DWR violated CEQA. Those violations include, but are not limited to:
28

- 1 •Improper Piecemealing of Project Analysis, and Failure to Consider the “Whole of the Action”
- 2 constituting the project.
- 3 •Failure to Provide a Stable, Complete and Consistent Project Definition.
- 4 •Faulty Assessment of Project Baseline.
- 5 •Faulty Assessment of No Project Alternative
- 6 •Failure to Analyze a Reasonable Range of Alternatives
- 7 •Faulty and Incomplete Assessment of Project Impacts
- 8 •Faulty and Incomplete Assessment of Cumulative Impacts
- 9 •Failure to Mitigate Significant Impacts
- 10 •Failure to Recirculate EIR Despite Significant New Information
- 11 •Failure to Adequately Respond to Comments
- 12 •Approval of Defective Project Findings.

NINTH AFFIRMATIVE DEFENSE

(Validation Would Violate Laws Protecting the Delta)

13 52. The Exhibit A Amendments, as finally authorized by DWR, propose to extend the terms
 14 of SWP contracts for another half-century, until 2085. In comments addressing DWR’s proposed
 15 contract amendments, commenters repeatedly emphasized the need for DWR, prior to proceeding to
 16 finality on contract extension amendments, to ensure compliance with numerous and long-unfulfilled
 17 legal duties relating to protection of the Delta. In 2009, for example, the Legislature concluded that the
 18 Bay-Delta was “in crisis” and that existing Delta policies “were not sustainable.” (Wat. Code, § 85001,
 19 subd. (a).)

20 53. The Exhibit A Amendments, if validated, would entrench and exacerbate, rather than
 21 lessening, the SWP’s damaging consequences for the Delta. In proceeding to final authorization of these
 22 amendments, DWR failed to ensure that its long-term water supply contracts, over a proposed 50
 23 additional years of operation, will be aligned with and ensure the enforcement of numerous legal
 24 requirements relating to the protection of the Delta region and resources. Those requirements include,
 25 but are not limited to the following:

26 A. 1959 Delta Protection Act (Wat. Code, §§ 12200, *et seq.*)

- 27 • The Legislative declaration that:
- 28

1 an adequate water supply in the Delta sufficient to maintain and expand agriculture,
2 industry, urban, and recreational development in the Delta . . . *and to provide a common*
3 *source of fresh water for export to areas of water deficiency* is necessary to the peace,
4 health, safety and welfare of the people of the State

5 (Wat. Code, § 12201, emphasis added.)

- 6 • The requirement of Water Code section 12205 that:

7 It is the policy of the State that the operation and management of releases from storage
8 into the Sacramento-San Joaquin Delta of water for use outside the area in which such
9 water originates *shall be integrated to the maximum extent possible in order to permit the*
10 *fulfillment of the objectives of this part.*

- 11 • The mandatory duty of DWR to integrate its “releases from storage into the [Delta] of water for
12 use outside the area in which such water originates . . . to the maximum extent possible in order to
13 permit the fulfillment of [that] objective.” (Wat. Code, §§ 12201, 12205.)

- 14 • DWR’s duty for “the provision of salinity control and an adequate water supply for the users of
15 water in the [Delta].” (Wat. Code, § 12202; see also, Wat. Code, § 12201.)

- 16 • DWR’s duty to integrate its “releases from storage into the [Delta] of water for use outside the
17 area in which such water originates . . . to the maximum extent possible in order to permit the fulfillment
18 of the objectives” of providing that “salinity control and an adequate water supply for the users of water
19 in the [Delta].” (Wat. Code, § 12202.)

- 20 • DWR’s duties under Water Code section 12204, which provides:

21 In determining the availability of water for export from the Sacramento-San Joaquin
22 Delta no water shall be exported which is necessary to meet the requirements of Sections
23 12202 and 12203 of this chapter.

24 B. 1992 Delta Protection Act (Pub. Res. Code, §§ 29700, et seq.), and related provisions.

- 25 • The declaration in in Public Resources Code sections 29701 and 29702, respectively, that:

26 [T]he Sacramento-San Joaquin Delta is a natural resource of statewide, national, and
27 international significance, containing irreplaceable resources, and it is the policy of the
28 state to recognize, *preserve, and protect* those resources of the delta for the use and
enjoyment of current and future generations.

(Wat. Code, § 29701, emphasis added.)

[T]he basic goals of the state for the delta are the following: (b) *Protect, maintain, and,*
where possible, enhance and restore the overall quality of the delta environment,
including, but not limited to, agriculture, wildlife habitat, and recreational activities.

(Wat. Code, § 29702, emphasis added.)

1 • The co-equal goals set forth in Public Resources Code section 29702, subdivision (a)
2 (also set forth in Water Code Provisions of the 2009 Delta Reform Act), which provides:

3 The Legislature further finds and declares that the basic goals of the state for the Delta
4 are the following: (a) Achieve the two coequal goals of providing a more reliable water
5 supply for California and protecting, restoring, and enhancing the Delta ecosystem. The
6 coequal goals shall be achieved in a manner that protects and enhances the unique
7 cultural, recreational, natural resource, and agricultural values of the Delta as an evolving
8 place.

9 • The duty to ensure that efforts to provide a more reliable water supply are “in a manner
10 that protects and enhances the unique cultural, recreational, natural resource, and agricultural
11 values of the Delta as an evolving place.” (Pub. Resources Code, § 29702.)

12 C. Watershed Protection Act (Wat. Code, §§ 11460, et seq.)

13 • DWR’s duty to ensure that in its “construction and operation” of “any project under the
14 provisions of this part a watershed or area wherein water originates, or an area immediately adjacent
15 thereto which can conveniently be supplied with water therefrom, shall not be deprived by the
16 department directly or indirectly of the prior right to all of the water reasonably required to adequately
17 supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.”

18 D. 2009 Delta Reform Act (Pub. Res. Code, §§ 29700, et seq.)

19 • DWR’s duty to achieve “the coequal goals for management of the Delta” (Wat. Code, § 85020),
20 defined as “the two goals of providing a more reliable water supply for California and protecting,
21 restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that
22 protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the
23 Delta as an evolving place.” (Wat. Code, § 85054.)

24 • DWR’s duty to achieve the following objectives the Legislature has declared to be “inherent” in
25 the coequal goals for management of the Delta:

26 (a) Manage the Delta’s water and environmental resources and the water resources of the state
27 over the long term.

28 (b) Protect and enhance the unique cultural, recreational, and agricultural values of the California
Delta as an evolving place.

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

(d) Promote statewide water conservation, water use efficiency, and sustainable water use.

1 (e) Improve water quality to protect human health and the environment consistent with achieving
2 water quality objectives in the Delta.

3 (f) Improve the water conveyance system and expand statewide water storage.

4 (g) Reduce risks to people, property, and state interests in the Delta by effective emergency
5 preparedness, appropriate land uses, and investments in flood protection.

6 (h) Establish a new governance structure with the authority, responsibility, accountability,
7 scientific support, and adequate and secure funding to achieve these objectives.

8 • DWR's duty to follow "[t]he policy of the State of California" to "reduce reliance on the Delta in
9 meeting California's future water supply needs through a statewide strategy of investing in improved
10 regional supplies, conservation, and water use efficiency." (Wat. Code, § 85021; see also Cal. Code
11 Regs., tit. 23, § 5003) (Delta Reform Act regulations requiring reduced reliance on the Delta).

12 • DWR's duty to ensure that "the constitutional principle of reasonable use and the public trust
13 doctrine," which the Legislature describes as "particularly important and applicable to the Delta," serve
14 as "the foundation of state water management policy."

15 • DWR's duty to ensure, consistently with the Delta Reform Act of 2009, that no project
16 implemented in the Delta may impair future potential for implementation of habitat restorations. (Cal.
17 Code Regs., tit. 23, § 5007.)

18 **TENTH AFFIRMATIVE DEFENSE**

19 (Reservation of Defenses)

20 54. Certain additional defenses to the Complaint and to the purported cause of action therein
21 stated may be available to the Public Agencies. However, these additional defenses require further
22 discovery before they can be properly alleged. Public Agencies therefore reserve the right to assert other
23 separate and additional defenses, causes of action, and/or cross-complaints if and when they become
24 appropriate in this action.

25 **ELEVENTH AFFIRMATIVE DEFENSE**

26 (Relationship of Exhibit A Amendments to Other Proceedings)

27 55. DWR inaccurately characterizes the relationship between this action and other
28 proceedings by suggesting that still-unresolved proceedings over the lawfulness of the Delta conveyance
project have no bearing on the determination of validity. California WaterFix is already the subject of
numerous other pending legal actions, challenging compliance with CEQA, the Delta Reform Act, the

1 public trust doctrine, and state and federal laws protecting endangered species, among other laws. DWR
2 does not clearly disclose how the outcome of unresolved administrative proceedings, federal decision-
3 making, and stakeholder financing decisions could, and almost certainly will, transform the very nature
4 of the matters sought for validation.

5 **TWELFTH AFFIRMATIVE DEFENSE**

6 (Lack of Legislative Authority)

7 56. The Exhibit A Amendments, if validated, would place, or facilitate the placement of,
8 obligations exceeding any grant of legislative authority, or any other lawful source of authorization. This
9 includes, but is not limited to, debt obligations on water contractors exceeding any grant of legislative
10 authority, such as imposition of costs for the California WaterFix project, guarantee of bond payments
11 for that project irrespective of project completion, and required assumption of the obligations of
12 defaulting participants.

13 **THIRTEENTH AFFIRMATIVE DEFENSE**

14 (Uncertainty)

15 57. The Exhibit A amendments are uncertain, ambiguous and value in defining the matters to
16 be validated and the scope of relief DWR requests in its validation complaint.

17 **PUBLIC AGENCIES' PRAYER FOR RELIEF**

18 58. WHEREFORE, Public Agencies respectfully request the Court enter judgment as
19 follows:

20 A. For a determination that it is premature for DWR to request, or for this Court to adjudge,
21 the determinations of validity and legality sought by DWR in its Complaint.

22 B. That DWR take nothing by its Complaint.

23 C. That facts and law as alleged herein by Public Agencies be determined as alleged in favor
24 of Public Agencies.

25 D. If, and to the extent a judgment of validation is entered, Public Agencies request that such
26 Judgment be limited in scope, and against validation, with an affirmative determination as to the legal
27 and factual issues set forth herein, in favor of these answering Public Agencies: County of San Joaquin,
28 Central Delta Water Agency, County of Contra Costa, Contra Costa County Water Agency, County of

1 Solano, County of Yolo, County of Butte, County of Plumas, Plumas County Flood Control and Water
2 Conservation District, and Local Agencies of the North Delta.

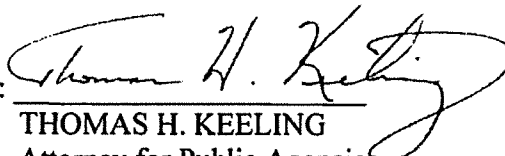
3 E. That Public Agencies be awarded reasonable attorneys' fees pursuant to Code of Civil
4 Procedure section 1021.5 and/or to the extent otherwise allowed by any provision of California statutory
5 law or any common law doctrine recognized in California.

6 F. For Public Agencies' costs of suit herein.

7 G. For such other and further relief as the Court may deem just and proper.


8
9 Dated: February 25, 2019

Respectfully submitted,
FREEMAN FIRM, A PLC

10
11 By: 
12 THOMAS H. KEELING
Attorney for Public Agencies

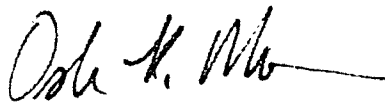
13 Dated: February 25, 2019

LAW OFFICE OF ROGER B. MOORE

14
15 By: 
16 ROGER B. MOORE
17 Attorney for Public Agencies

18 Dated: February 25, 2019


SOLURI MESERVE,
A LAW CORPORATION

19
20 By: 
21 Osha R. Meserve
22 Attorney for Local Agencies of the North Delta and
23 County of San Joaquin
24
25
26
27
28

VERIFICATION

I, Roger B. Moore, am counsel of record for County of San Joaquin, Central Delta Water Agency, County of Contra Costa, Contra Costa County Water Agency, County of Solano, County of Yolo, County of Butte, County of Plumas, and Plumas County Flood Control and Water Conservation District ("Public Agencies"), parties to the foregoing Response and Answer of Public Agencies to Complaint for Validation. I sign for Public Agencies absent from the county and/or because facts contained in the Response and Answer are within the knowledge of counsel. I have read the foregoing Response and Answer and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 25th day of February, 2019, in Oakland, California.



ROGER B. MOORE

1 **PROOF OF SERVICE**

2 I hereby certify that I am a citizen of the United States, over the age of eighteen years, and not
3 a party to this action. My business address is 1818 Grand Canal Boulevard, Suite 4, Stockton,
4 California 95207. I served the foregoing document entitled:

5 **VERIFIED RESPONSE AND ANSWER OF PUBLIC**
6 **AGENCIES TO COMPLAINT FOR VALIDATION**

7 **Service by United States Mail:**

8 ✓ by placing a true copy thereof enclosed in a sealed envelope or package with postage thereon
9 fully prepaid in a box or receptacle designated by my employer for collection and processing of
10 correspondence for mailing with the United States Postal Service, addressed as set forth below. I am
11 readily familiar with the business practices of my employer, FREEMAN FIRM, for the collection and
12 processing of correspondence for mailing with the United States Postal Service. Under that practice, the
13 correspondence placed in the designated box or receptacle is deposited with the United States Postal
14 Service at San Joaquin County, California, the same day in the ordinary course of business.

15 **Attorneys for California Department of**
16 **Water Resources:**

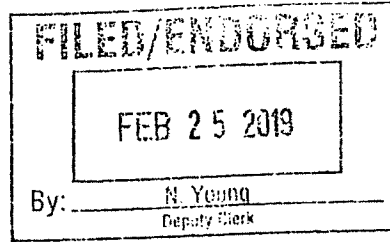
17 Xavier Becerra
18 Attorney General of California
19 Eric M. Katz
20 Supervising Deputy Attorney General
21 Janelle M. Smith
22 Deputy Attorney General
23 455 Golden Gate Avenue, Suite 11000
24 San Francisco, CA 94102-7004

Michael Weed
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95814

25 The acts described above were undertaken and completed in San Joaquin County on
26 February 25, 2019.

27 I declare under penalty of perjury under the laws of the State of California that the foregoing is
28 true and correct, and that this declaration was executed at Stockton, California.

TONIA M. ROBANCHO



10.639.02

1 STEPHAN C. VOLKER (CBN 63093)
ALEXIS E. KRIEG (CBN 254548)
2 STEPHANIE L. CLARKE (CBN 257961)
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Attorneys for Defendants
6 NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR
FISHERIES RESOURCES, PACIFIC COAST FEDERATION
7 OF FISHERMEN'S ASSOCIATIONS, SAN FRANCISCO
CRAB BOAT OWNERS ASSOCIATION, and the WINNEMEM WINTU TRIBE
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11 CALIFORNIA DEPARTMENT OF WATER)
RESOURCES,)

12 Plaintiff,)

13 v.)

14 ALL PERSONS INTERESTED IN THE)
15 MATTER of the State Water Project Supply)
Contract Amendments for Continued Service and)
16 the Terms and Conditions thereof (the "Contract)
Extension Amendments"))
17)
18)
19)

Civ. No. 34-2018-00246183

VERIFIED ANSWER OF DEFENDANTS
NORTH COAST RIVERS ALLIANCE,
INSTITUTE FOR FISHERIES
RESOURCES, PACIFIC COAST
FEDERATION OF FISHERMEN'S
ASSOCIATIONS, SAN FRANCISCO CRAB
BOAT OWNERS ASSOCIATION, and the
WINNEMEM WINTU TRIBE TO
COMPLAINT FOR VALIDATION

20 Defendants NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR FISHERIES

21 RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, SAN

22 FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and the WINNEMEM WINTU TRIBE

23 ("defendants") hereby answer the Complaint for Validation filed by the California Department of Water

24 Resources ("DWR") as follows:

25 1. Paragraph 1 consists of DWR's description of its case, to which no response is required. To
26 the extent a response is required, defendants deny each and every allegation therein

27 2. Defendants admit the allegations of the first sentence of paragraph 2. The second sentence
28 of paragraph 2 consists of a legal conclusion, to which no response is required. To the extent a response

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1 is required, defendants deny each and every allegation in the second sentence of paragraph 2.

2 3. Defendants admit the allegations of paragraph 3.

3 4. Defendants lack information and belief sufficient to answer the allegations in paragraph 4,
4 and on that basis deny each and every allegation therein.

5 5. Paragraph 5 consists of legal conclusions to which no response is required. To the extent a
6 response is required, defendants deny each and every allegation therein.

7 6. Defendants admit the allegations of paragraph 6.

8 7. As to the first sentence of paragraph 7, defendants lack information and belief sufficient to
9 answer the allegations, and on that basis deny each and every allegation therein. The remainder of
10 paragraph 7 consists of legal conclusions to which no response is required. To the extent a response is
11 required, defendants deny each and every allegation therein.

12 8. Paragraph 8 consists of legal conclusions to which no response is required. To the extent a
13 response is required, defendants deny each and every allegation therein.

14 9. As to the first sentence of paragraph 9, defendants lack information and belief sufficient to
15 answer the allegations in the first sentence, and on that basis deny each and every allegation therein. The
16 remainder of paragraph 9 consists of legal conclusions to which no response is required. To the extent a
17 response is required, defendants deny each and every allegation therein.

18 10. In response to paragraph 10, the Water Supply Contracts are the best evidence of their
19 contents and speak for themselves, and as such no response is required. To the extent a response is
20 required, defendants deny each and every allegation in paragraph 10.

21 11. In response to paragraph 11, defendants lack information and belief sufficient to answer the
22 allegations, and on that basis deny each and every allegation therein.

23 12. In response to paragraph 12, defendants lack information and belief sufficient to answer the
24 allegations, and on that basis deny each and every allegation therein. The Contract Extension
25 Amendments referenced the second sentence of paragraph 12 speak for themselves. In addition, to the
26 extent that the second sentence contains legal conclusions, no response is required.

27 13. Paragraph 13 consists of legal conclusions to which no response is required. Water Code
28 sections 11454, 11455, 11625, 12931, and 12937 speak for themselves.

1 14. As to paragraph 14, the Contract Extension Amendments speak for themselves, and as such
2 no response is required. To the extent a response is required, defendants deny each and every allegation
3 in paragraph 14.

4 15. Defendants lack information and belief sufficient to answer the allegations contained within
5 paragraph 15, and on that basis deny each and every allegation therein. Exhibit A to the Validation
6 Complaint speaks for itself.

7 16. Defendants admit the allegations the first sentence of paragraph 16. Defendants lack
8 information and belief sufficient to answer the allegations contained within the second sentence of
9 paragraph 16, and on that basis deny each and every allegation therein.

10 17. Paragraph 17 consists of legal conclusions to which no response is required. To the extent a
11 response is required, defendants deny each and every allegation therein.

12 18. Paragraph 18 consists of legal conclusions to which no response is required. To the extent a
13 response is required, defendants state that Government Code section 17700(a) speaks for itself.

14 19. Paragraph 19 consists of legal conclusions to which no response is required. To the extent a
15 response is required, defendants state that Government Code section 17700(b)(1) speaks for itself.

16 20. The first sentence of paragraph 20 consists of legal conclusions to which no response is
17 required. To the extent a response is required, defendants deny each and every allegation therein.

18 Defendants admit the allegations in the second sentence of paragraph 20.

19 21. Paragraph 21 consists of legal conclusions and DWR's description of its case, to which no
20 response is required. To the extent a response is required, defendants deny each and every allegation
21 therein.

22 22. Paragraph 22 consists of legal conclusions to which no response is required. To the extent
23 a response is required, defendants deny each and every allegation therein.

24 23. Defendants lack information and belief sufficient to answer the allegations in paragraph 23,
25 and on that basis deny each and every allegation therein.

26 24. As to the first sentence of paragraph 24, defendants lack information and belief sufficient to
27 answer the allegations, and on that basis deny each and every allegation therein. The second sentence of
28 paragraph 24 consists of legal conclusions to which no response is required. To the extent a response is

1 required, defendants lack information and belief sufficient to answer the allegations, and on that basis
2 deny each and every allegation therein.

3 25. Defendants lack information and belief sufficient to answer the allegations in the first
4 sentence of paragraph 25, and on that basis deny each and every allegation therein. The second sentence
5 of paragraph 25 consists of legal conclusions, to which no response is required.

6 26. In response to paragraph 26, defendants hereby incorporate by reference their response to
7 paragraphs 1 through 26 above as though fully set forth herein.

8 27. Defendants deny each and every allegation in paragraph 27 and subparagraphs (a) through
9 (c) thereto.

10 28. In response to paragraphs 28 through 33, defendants deny that DWR is entitled to either the
11 relief requested or any relief at all.

12 29. Except as otherwise admitted or denied herein, defendants deny each and every allegation
13 contained in paragraphs 1 through 33.

14 **AFFIRMATIVE FACTUAL ALLEGATIONS**

15 30. Defendant NORTH COAST RIVERS ALLIANCE (“NCRA”) is a non-profit
16 unincorporated association with members throughout Northern California. NCRA was formed for the
17 purpose of protecting California’s rivers and their watersheds from the adverse effects of excessive water
18 diversions, ill-planned urban development, harmful resource extraction, pollution, and other forms of
19 degradation. Its members use and enjoy California’s rivers and watersheds for recreational, aesthetic,
20 scientific study, and related non-consumptive uses. The interests of NCRA and its members have been,
21 are being, and unless the relief requested herein is granted, will be adversely affected and injured by the
22 Contract Extension Amendments.

23 31. Defendant INSTITUTE FOR FISHERIES RESOURCES (“IFR”) is a non-profit, tax-
24 exempt organization that works to protect and restore salmon and other fish populations and the human
25 communities that depend on them. IFR maintains its principal place of business in San Francisco,
26 California. IFR both funds and manages many fish habitat protection programs and initiatives. In that
27 capacity, IFR advocates for reforms to protect fish health and habitat throughout the West Coast of the
28 United States and has successfully advocated for dam removals, improved pesticide controls, better

1 forestry stream protection standards, and enhanced marine and watershed conservation regulations
2 throughout the West Coast. IFR has worked tirelessly for years to restore and enhance the Delta and its
3 beleaguered fish and wildlife. IFR and its members will be directly and indirectly injured by the
4 Contract Extension Amendments.

5 32. Defendant PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
6 ("Pacific Coast Fishermen") is a nonprofit membership organization incorporated in 1976 with
7 headquarters located in San Francisco, California. Pacific Coast Fishermen is composed of more than 14
8 separate commercial fishing and vessel owners' associations situated along the West Coast of the United
9 States. By virtue of its combined membership of approximately 750 fishermen and women, Pacific
10 Coast Fishermen is the single largest commercial fishing organization on the West Coast. Pacific Coast
11 Fishermen represents the majority of California's organized commercial salmon fishermen and has been
12 a tireless advocate for the protection of Pacific salmon and their spawning, rearing and migratory habitat
13 for more than 30 years. Pacific Coast Fishermen and its members would be harmed by the Contract
14 Extension Amendments because they would threaten sustainable management of the salmonid fisheries
15 resources of the Delta and its connected ecosystems on which Pacific Coast Fishermen and their
16 members depend.

17 33. Defendant SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION ("San Francisco
18 Fishermen") is a century-old association of owners and operators of small, family owned fishing boats
19 that catch Dungeness crab, wild California King salmon, Pacific herring, and other species that live in
20 and depend upon the cold waters of the Pacific Ocean, the San Francisco Bay-Delta, the Sacramento and
21 San Joaquin Rivers and their tributaries. San Francisco Fishermen is also actively involved in
22 community education and advocacy concerning fisheries resources legislation to ensure that the rich
23 heritage of commercial fishing in the Bay Area will survive for future generations. San Francisco
24 Fishermen and its members will be harmed by the Contract Extension Amendments because they would
25 threaten sustainable management of the fisheries resources of the Delta and its connected ecosystems on
26 which San Francisco Fishermen and their members depend.

27 34. Defendant WINNEMEM WINTU TRIBE is a Native American Tribe recognized by the
28 State of California whose aboriginal territory encompasses the upper watersheds of the Sacramento River

1 including the McCloud River. The Winnemem Wintu Tribe was traditionally dependent on salmon
2 fishing for both subsistence and cultural purposes, and maintains a deep cultural, spiritual and
3 recreational interest in the continued viability of California’s salmon runs that pass through the Delta.
4 The Project assumes and depends upon continued inundation of the McCloud River by Shasta Reservoir
5 and the blocking of McCloud River salmon runs by Shasta Dam. DWR has ignored the Winnemem
6 Wintu’s vital historic and cultural interest in restoration of the historic salmon runs that the Project will
7 preclude. The Winnemem Wintu Tribe is a strong proponent of Delta restoration, including
8 construction of fishways around Shasta Dam to restore historic McCloud River salmon runs through the
9 Delta. The Winnemem Wintu Tribe will be harmed by the reduction in fresh water flows in the Delta,
10 degradation of its water quality, and loss of its fish and wildlife species that the Contract Extension
11 Amendments would cause.

12 **FIRST AFFIRMATIVE DEFENSE**
13 **(Violation of the California Environmental Quality Act)**

14 35. DWR’s validation action is premature. Pending before this court are two separate
15 challenges to DWR’s approval of the Contract Extension Amendments under the California
16 Environmental Quality Act (“CEQA”) Public Resources Code section 21000 *et seq.*, among other laws.
17 These actions, including the action filed by defendants on January 8, 2019 (no. 34-2019-80003047),
18 allege that DWR’s approval of the Project violates CEQA. DWR’s proposed Contract Extension
19 Amendments would further the Project “in a manner that [would] foreclose[.]” additional or modified
20 “alternatives or mitigation measures” from being considered on remand – and prior to project re-
21 approval – in the CEQA cases. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 138 (first
22 quote); 14 Cal. Code Regs. § 15004(b)(2) (second quote). Thus, DWR cannot obtain relief in this action
23 before the CEQA cases have been adjudicated and the courts have determined DWR’s compliance with
24 CEQA, and the other laws whose violation is alleged in the CEQA cases, in approving the Contract
25 Extension Amendments.

26 **SECOND AFFIRMATIVE DEFENSE**
27 **(Violation of the Public Trust Doctrine)**

28 36. DWR’s Contract Extension Amendments are invalid because they are contrary to the Public

1 Trust Doctrine. Water Code section 85023 states, “the longstanding constitutional principle of
2 reasonable use and the Public Trust Doctrine shall be the foundation of state water management policy
3 and are particularly important and applicable to the Delta.”

4 37. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted
5 that the public trust doctrine mandates that “before state courts and agencies approve water diversions
6 they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt,
7 so far as feasible, to avoid or minimize any harm to those interests.” The *National Audubon Society*
8 Court went on to explain:

9 Just as the history of this state shows that appropriation may be necessary for efficient use of
10 water despite unavoidable harm to public trust values, it demonstrates that an appropriative
11 water rights system administered without consideration of the public trust may cause
12 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state
13 may have to approve appropriations despite foreseeable harm to public trust uses. In so
14 doing, however, the state must bear in mind its duty as trustee to consider the effect of the
15 taking on the public trust, and to preserve, so far as consistent with the public interest, the
16 uses protected by the trust.

17 *Id.*, citations omitted.

18 38. “Public trust easements are traditionally defined in terms of navigation, commerce and
19 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and
20 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
21 waters for anchoring, standing, or other purposes.” *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For
22 nearly 50 years it has been settled law in California that public trust values also “encompass[] . . . the
23 preservation of those lands in their natural state, so that they may serve as ecological units for scientific
24 study, as open space, and as environments which provide food and habitat for birds and marine life, and
25 which favorably affect the scenery and climate of the area.”

26 39. The Contract Extension Amendments will adversely affect numerous public trust resources,
27 including flows and habitat necessary for fish, wildlife, and recreation.

28 40. The Contract Extension Amendments fail to implement feasible alternatives that would
mitigate or avoid these significant impacts on the public trust, including, but not limited to a reduced
Table A alternative, or an alternative that incorporates water conservation goals. Such alternatives
would reduce diversions, have beneficial effects on fish and wildlife, and attain most of the Project’s

1 basic objectives.

2 41. By approving the Contract Extension Amendments despite the existence of feasible
3 alternatives that would preserve public trust resources to a greater extent than the Project, DWR
4 abdicated its affirmative statutory and constitutional “duties to take the trust into account and protect
5 public trust uses whenever feasible,” based on a fair and fully informed balancing of the impacts of these
6 alternatives on public trust resources. *San Francisco Baykeeper, Inc. v. State Lands Com.* (“*Baykeeper*
7 *IP*”) (2018) 29 Cal.App.5th 562, 571.

8 42. The Public Trust Doctrine “imposes an obligation on the state trustee [here, DWR] ‘to
9 protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right
10 of protection only in rare cases when the abandonment of that right is consistent with the purposes of the
11 trust.’” *Baykeeper II*, 29 Cal.App.5th at 569, quoting *San Francisco Baykeeper, Inc. v. State Lands*
12 *Com.* (“*Baykeeper I*”) (2015) 242 Cal.App.4th 202, 234 and *National Audubon*, 33 Cal.3d at 441. The
13 Public Trust Doctrine “impose[s] an affirmative duty” on DWR “to take the public trust into account”
14 before authorizing private parties to extract public resources subject to the trust – in this case, water from
15 the Delta and rivers tributary to the Delta. *Baykeeper II*, 29 Cal.App.5th at 570-571. Although “the state
16 trustee has broad discretion . . . to promote [one public trust use] over other legitimate trust uses,” it does
17 not have discretion to promote *non*-public trust uses over “legitimate trust uses.” *Id.* at 577. But DWR
18 did exactly that here. It allowed diversions of water for irrigation and urban consumption – non-public
19 trust uses – that deprive the Delta of the flows that the State Water Resources Control Board has found
20 to be “necessary” to protect public trust resources. State Water Resources Control Board Resolution
21 2010-0039, p. 1. The State Water Resources Control Board’s 2010 Delta Flow Criteria Report
22 establishes the minimum flows necessary to protect trust resources, and the Contract Extension
23 Amendments directly violate them.

24 43. The Contract Extension Amendments will adversely affect numerous public trust resources,
25 including flows and habitat necessary for fish, wildlife, and recreation, because it sets base flow
26 requirements significantly lower than the flows established in the Delta Flow Criteria Report adopted by
27 the State Water Resources Control Board. The Contract Extension Amendments impermissibly promote
28 non-public trust uses – farmland irrigation and urban consumption – over the needs and at the expense

1 (indeed, potential extirpation) – of the Delta’s imperiled fish and wildlife, as documented by the Delta
2 Flow Criteria Report, found by the State Water Resources Control Board in Resolution 2010-0039, and
3 thereafter confirmed by experts.

4 44. Feasible alternatives exist that would mitigate or avoid the significant adverse impacts of
5 the Contract Extension Amendments on the Delta’s public trust resources and uses, including, but not
6 limited to, an alternative that reduces the quantities of water to be exported in Table A. Such an
7 alternative would have beneficial effects on fish and wildlife, and attain most of the Contract Extension
8 Amendments’ basic objectives.

9 45. By approving the Contract Extension Amendments despite the fact that feasible alternatives
10 exist that would preserve public trust resources to a far greater extent than with those amendments,
11 DWR abdicated its affirmative statutory and constitutional “duties to take the trust into account and
12 protect public trust uses whenever feasible,” and impermissibly promoted non-public trust uses – farm
13 irrigation and urban consumption – at the expense of public trust resources. *Baykeeper II*, 29
14 Cal.App.5th at 571, 577.

15 **THIRD AFFIRMATIVE DEFENSE**
16 **(Violation of the Delta Reform Act)**

17 46. The Delta Reform Act, Water Code sections 85000 *et seq.*, was passed by the Legislature in
18 recognition of the fact that the “[t]he Sacramento-San Joaquin Delta watershed and California’s water
19 infrastructure are in crisis” and that “[r]esolving the crisis requires fundamental reorganization of the
20 state’s management of Delta watershed resources.” Water Code § 85001(a). The Legislature’s goal was
21 “to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide
22 for a more reliable water supply for the state, to protect and enhance the quality of water supply from the
23 Delta, and to establish a governance structure that will direct efforts across state agencies to develop a
24 legally enforceable Delta Plan.” *Id.* § 85001(c).

25 47. The Delta Reform Act requires any state agency “that proposes to undertake a covered
26 action” to “prepare a written certification of consistency with detailed findings as to whether the covered
27 action is consistent with the Delta Plan” and submit that written finding to the Delta Stewardship
28 Council. Water Code § 85225.

1 48. The Delta Reform Act defines “[c]overed action” as “a plan, program or project” as defined
2 by PRC section 21065 that:

3 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.

4 (2) Will be carried out, approved, or funded by the state or a local public agency.

5 (3) Is covered by one or more provisions of the Delta Plan.

6 (4) Will have a significant impact on achievement of one or both of the coequal
7 goals or the implementation of government-sponsored flood control programs to reduce
8 risks to people, property, and state interests in the Delta.

9 Water Code § 85057.5(a). While the Delta Reform Act states that “[r]outine maintenance and operation
10 of the State Water Project” is not a covered action, the Contract Extension Amendments do not qualify
11 for that exemption because they are neither routine maintenance nor routine operation of the State Water
12 Project (“SWP”). Water Code § 85057.5(b).

13 49. Although DWR has previously denied that the Contract Extension Amendments are a
14 covered action under the Delta Reform Act, under the Delta Reform Act DWR cannot approve the
15 Contract Extension Amendments without *first* making a determination of consistency with the Delta
16 Plan. Water Code § 85225. And because approval of the Contract Extension Amendments continues
17 DWR’s over-allocation of SWP water without any attempt to address the Contract Extension
18 Amendments’ conflict with the Delta Reform Act’s coequal goals, the amendments are inherently
19 inconsistent with what would be required by any valid Delta Plan.¹ Before approving the Contract
20 Extension Amendments, DWR failed to “prepare a written certification of consistency with detailed
21

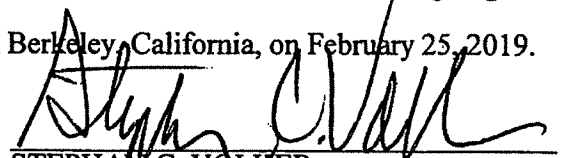
22 ¹ The 2013 Delta Plan prepared by the Delta Stewardship Council was found invalid and set aside by the
23 Sacramento Superior Court because it failed to satisfy the requirements of the Delta Reform Act.
24 Specifically, the Delta Plan failed to include “quantified or otherwise measurable targets associated with
25 achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more
26 natural flows, and increased water supply reliability, in accordance with the Delta Reform Act.” Ruling
27 on Submitted Matter, JCCP 4758 (Sacramento Superior Court, May 18, 2016) at 26. The Delta
28 Stewardship Council’s appeal of this decision is pending before the Third District Court of Appeal (Case
No. C082944). In addition, defendants – and others – have challenged the Delta Stewardship Council’s
2018 Delta Plan Amendments, as those amendments violate CEQA, the Delta Reform Act, the Public
Trust Doctrine and other laws requiring informed decisionmaking. Sacramento Superior Court Case Nos.
34-2018-80002898, 34-2018-80002900, 34-2018-80002901, 34-2018-80002904.

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VERIFICATION

I, Stephan C. Volker, am the attorney for defendants in this action. I make this verification on behalf of the defendants because such parties and their representatives are absent from the county in which my office is located. I have read the foregoing Verified Answer of Defendants North Coast Rivers Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe to Complaint for Validation, and known its contents. The facts therein alleged are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in Berkeley, California, on February 25, 2019.


STEPHAN C. VOLKER

1 findings as to whether the covered action is consistent with the Delta Plan” as required by the Delta
2 Reform Act, its approval is invalid. Water Code § 85225.

3 **RESERVATION OF ADDITIONAL AFFIRMATIVE DEFENSES**

4 All affirmative defenses that may be applicable to the complaint cannot be fully anticipated.
5 Accordingly, defendants reserve the right to assert additional applicable affirmative defenses to the
6 extent permitted by law.

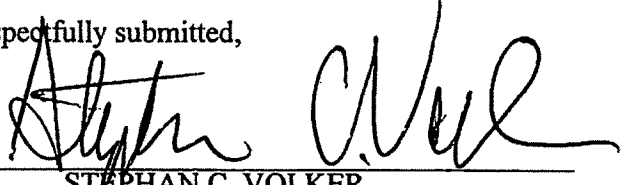
7 **PRAYER FOR RELIEF**

8 WHEREFORE, defendants NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR
9 FISHERIES RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS,
10 SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and the WINNEMEM WINTU TRIBE
11 pray that:

- 12 1. Judgment be entered in favor of defendants;
- 13 2. The Court enter judgment invalidating DWR’s actions purporting to approve the Contract
14 Extension Amendments;
- 15 3. DWR’s request for a judgment validating its approval of the Contract Extension
16 Amendments be denied;
- 17 4. DWR take nothing by its Complaint for Validation;
- 18 5. Defendants be awarded their costs of suit incurred herein;
- 19 6. Defendants be awarded their attorney fees incurred herein; and
- 20 7. Defendants be awarded such other and further relief as the Court deems just and proper.

21 Dated: February 25, 2019

Respectfully submitted,

22 
23 _____
24 By: STEPHAN C. VOLKER
25 Attorney for Defendants
26 NORTH COAST RIVERS ALLIANCE,
27 INSTITUTE FOR FISHERIES RESOURCES,
28 PACIFIC COAST FEDERATION OF
FISHERMEN’S ASSOCIATIONS, SAN
FRANCISCO CRAB BOAT OWNERS
ASSOCIATION, and the WINNEMEM WINTU
TRIBE

1 **PROOF OF SERVICE**

2 On February 25, 2019, I served a true copy of the following document entitled:

3 **VERIFIED ANSWER OF DEFENDANTS NORTH COAST RIVERS ALLIANCE, INSTITUTE**
4 **FOR FISHERIES RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN'S**
5 **ASSOCIATIONS, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and the**
6 **WINNEMEM WINTU TRIBE TO COMPLAINT FOR VALIDATION**

7 in the above-captioned matter on each of the persons listed below by email and by placing a true copy of
8 said document in a prepaid envelope in the United States mail at Berkeley, California, addressed as
9 follows:

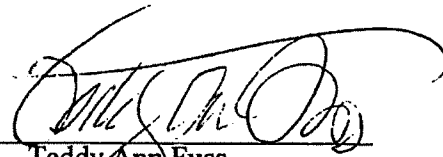
10 Xavier Becerra, Attorney General
11 State of California, Department of Justice
12 Eric M. Katz, Supervising Deputy Attorney General
13 L. Elizabeth Sarine
14 Ryan R. Hoffman
15 Janelle M. Smith
16 Deputy Attorneys General
17 455 Golden Gate Avenue, Suite 11000
18 San Francisco, CA 94102-7004

Michael Weed
Orrick Herrington & Sutcliffe, LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95814

mweed@orrick.com

15 Eric.Katz@doj.ca.gov
16 Elizabeth.Sarine@doj.ca.gov
17 Ryan.Hoffman@doj.ca.gov
18 Janelle.Smith@doj.ca.gov

19 I declare under penalty of perjury that the foregoing is true and correct. Executed on February
20 25, 2019 at Berkeley, California.

21 
22 _____
23 Teddy Ann Fuss

de la Guerra, Sheila

From: Roger Moore <rbm@landwater.com>
Sent: Tuesday, February 2, 2021 1:08 AM
To: sbcob
Cc: Carolee Krieger
Subject: Re: Letter to Board of Supervisors Re : Amendments 20 and 21 (February 2 agenda)
Attachments: CWIN Appendix -Part 3.pdf

Caution: This email originated from a source outside of the County of Santa Barbara. Do not click links or open attachments unless you verify the sender and know the content is safe.

Attached is Part 3 of 4 for CWIN's Appendix.

On Tue, Feb 2, 2021 at 1:06 AM Roger Moore <rbm@landwater.com> wrote:
Attached is Part 2 of 4 for CWIN's Appendix.

On Tue, Feb 2, 2021 at 1:04 AM Roger Moore <rbm@landwater.com> wrote:
In case it is helpful to guide any further consideration by the Board of Amendments 20 and 21, CWIN is submitting its appendix of documents mentioned in its letter submitted on February 1, 2021. To prevent any errors from large file size, CWIN is emailing this Appendix in four parts. Attached is Part 1 of 4.

Thanks,

Roger B. Moore
Attorney for CWIN

Law Office of Roger B. Moore

337 17th Street, Suite 211

Oakland, CA 94612

Office phone: 510-548-1401

Email: rbm@landwater.com

Attachments area

On Mon, Feb 1, 2021 at 4:47 PM Roger Moore <rbm@landwater.com> wrote:
The attached letter is submitted on behalf of the California Water Impact Network (CWIN).

Respectfully,

Roger B. Moore
Attorney for CWIN

Law Office of Roger B. Moore

337 17th Street, Suite 211

Oakland, CA 94612

Office phone: 510-548-1401

Email: rbm@landwater.com

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ROGER B. MOORE (SBN: 159992)
LAW OFFICE OF ROGER B. MOORE
337 17th Street, Suite 211
Oakland, California 94602
Telephone: (510) 548-1401
Email: rbm@landwater.com

FILED
Superior Court Of California,
Sacramento
01/10/2019

kfay

Attorneys for Petitioners Planning and Conservation League, California Water Impact Network, AquAlliance, and California Sportfishing Protection Alliance

Case Number: 34-2019-80003053

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO**

**PLANNING AND CONSERVATION
LEAGUE, CALIFORNIA WATER
IMPACT NETWORK,
AQUALLIANCE, AND CALIFORNIA
SPORTFISHING PROTECTION
ALLIANCE**

Case No.:

**VERIFIED PETITION FOR WRIT
OF MANDATE**

Petitioners

*CEQA action subject to preference over
all other civil actions per Public
Resources Code § 21167.1*

vs.

(Code Civ. Proc., §§ 1085, 1094.5; Pub.
Res. Code, §§21000, et seq.)

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES**

Respondent

DOES 1 THROUGH 50

Real Parties in Interest.

BY FAX

Petitioners Planning and Conservation League, California Water Impact Network, AquAlliance, and California Sportfishing Protection Alliance (collectively, "petitioners") pray for this Court to issue its writ of mandate directed against Department of Water Resources ("DWR"), based on the following allegations:

1
2
3 **INTRODUCTION**

4 1. In this petition, petitioners challenge the failure of respondent Department of Water
5 Resources ("DWR") to comply with the California Environmental Quality Act ("CEQA,"
6 Pub. Res. Code §§ 21000, *et seq.*) when it certified its Final Environmental Impact Report
7 ("FEIR") and rendered final approval as state lead agency of the project ("contract
8 extension" or "project"). Petitioners seek to set aside DWR's certification of the Final EIR
9 for the Water Supply Contract Extension Project on November 13, 2018, and final project
10 approval recorded in DWR's Notice of Determination filed in the State Clearinghouse on
11 December 11, 2018.

12 2. The FEIR challenged in this action is designated as the *Water Supply Contract*
13 *Extension Project Final Environmental Impact Report*. This action challenges DWR's
14 compliance with state law in its EIR certification and the final project decision as CEQA
15 lead agency recorded in its Notice of Determination. Subject to legal requirements and
16 limitations, including the Burns-Porter Act (Wat. Code, § 12930, *et seq.*), passed by the
17 Legislature in 1959 and approved by California's voters in 1960, DWR operates and
18 maintains California's State Water Resources Development System, more commonly
19 known as the State Water Project ("SWP"). The SWP's storage and conveyance facilities
20 provide water meant to serve the people and resources of California through deliveries to
21 29 local state water contractors spanning the state from Plumas County in the north to San
22 Diego County in the south. Without contract amendments, the 75-year terms of the long-
23 term water supply contracts DWR entered into with these local contractors during 1960s
24 the are scheduled to expire between 2035 and 2042. In the EIR certification and final
25 project decision challenged in this petition, DWR seeks to extend the terms of the SWP
26 contracts through December 31, 2085 and make major changes in their governing
27 provisions without complying with CEQA.

28 3. Although DWR's proposed project seeks to extend the length of SWP water supply
contracts for up to a half-century beyond their originally scheduled expiration dates, the

1 contract “extension” project also would change far more than simply extending their length.
2 Instead, the project also includes other transformative changes that rank among the most
3 significant and consequential amendments proposed during nearly six decades of SWP
4 history. As detailed further below, the contract amendments included in the project would
5 remove existing SWP contract limitations on the facilities eligible for revenue bonds,
6 including those issued under the Central Valley Project Act (Wat. Code, § 11000, *et seq.*).
7 Without the contract amendments proposed in the project, limitations on covered facilities
8 in the current State Water Project contracts would prevent an expansion of revenue bond
9 debt to cover new facilities not in existence prior to January 1, 1987, including DWR’s
10 multi-billion dollar Delta tunnels project. (See, e.g., articles 1(cc) and 1(hh) of State Water
11 Project contracts). DWR’s Delta tunnels project, earlier referenced as the Bay-Delta
12 Conservation Plan (BDCP), is known in its most recent iteration as California WaterFix.

13 4. DWR’s EIR and project decision challenged in this action are founded on the faulty
14 premise that the contract extension amendments are “separate” and “independent” from
15 California WaterFix, and of independent utility to address problems of debt compression
16 facing the State Water Project. Those premises are fundamentally false. In proceeding to
17 final certification and approval of the project, DWR avoided major criticisms on these
18 issues made in public comments on the 2016 Draft EIR, and developed significantly further
19 in commentary and California legislative proceedings on DWR’s proposed contract
20 extension during 2018. Comments and testimony, including a concession of DWR Director
21 Karla Nemeth at a September 11, 2018 hearing of the Joint Legislative Budget Committee,
22 confirmed commenters’ concerns that the contract extension project will facilitate the
23 California WaterFix Project, and potentially other risky infrastructure projects proposed by
24 major SWP contractors despite public opposition, by removing obstacles that could
25 otherwise prevent debt coverage for revenue bonds designed to cover financing of the
26 proposed Delta tunnels. Moreover, commentary and proceedings during 2018 thoroughly
27 discredited DWR’s “debt compression” rationale for the project. Far from responsibly
28 addressing debt compression problems, as could already be addressed under the Evergreen

1 Cause in article 4 of the existing State Water Project, DWR's project seeks to bundle major
2 new risks into the SWP by removing existing timing and facilities limitations.

3
4 5. The contract extension project would remove timing obstacles to revenue bond
5 financing, and thereby help facilitate implementation of, and billions in new debt for, the
6 Delta tunnels project, one of the most costly and risky water infrastructure projects in
7 California's history. The California WaterFix project proposes construction of two massive
8 tunnels to facilitate the diversion of large additional quantities of freshwater from the San
9 Francisco Bay-Delta Estuary for export south of the Delta. Despite monumental cost and
10 complexity, California WaterFix creates no new water supply. It would entrench and likely
11 compound reliance on unsustainable water exports, to the detriment of communities and
12 water users within and upstream of the Delta. California WaterFix would divert resources
13 needed for investments in long-term water reliability, water quality, reuse, storage, drought
14 and flood protection, and ecosystem improvements. It would also frustrate efforts in the
15 northern Sacramento Valley and elsewhere to fulfill legislative duties on regional self-
16 reliance and the sustainable management of groundwater. If built and approved for
17 operation, California WaterFix's new intakes in the northern Delta may divert up to a third
18 of the flow of the Sacramento River, increasing the potential for reverse flows on the
19 Sacramento River, harmful diversions of water out of the Sacramento Valley and the Delta,
20 and further degradation of water quality.

21 6. In certifying the FEIR and approving the contract extension project, DWR failed to
22 heed major criticism from the petitioner organizations, counties, communities, public
23 agencies, and expert reviewers discrediting the project's environmental, economic and legal
24 foundations. DWR also failed to heed major project criticisms made during 2018, including
25 those presented by the petitioners, identifying still-unaddressed changed circumstances
26 since project comments closed in October 2016 that necessitated circulation and review of a
27 new EIR. These criticisms also underscored the clear need under CEQA to avoid
28 piecemealing, and to provide a still-unmade integrated assessment of the project in
connection with DWR's separate set of proposed Water Supply Contract Amendments (on

1 which a 2018 Draft EIR is presently pending), as well as the WaterFix project itself. In
2 rushing forward to final approval, DWR flouted commenters' concerns that DWR had
3 failed to meet the Water Code's prerequisites to final approval of the proposed contract
4 extension. DWR avoided analysis and mitigation of major project impacts, and failed to
5 analyze alternatives that would address debt compression problems without bundling major
6 new risks into the State Water Project. DWR also failed in its historic opportunity to
7 address systemic problems in the SWP prior to extending the long-term contracts, such as
8 addressing "paper water" problems with SWP Table A deliveries and the failure to protect
9 Delta resources.

10 7. Petitioners seek a writ of mandate under California Code of Civil Procedure sections
11 1085, 1094.5, or both, directing DWR to vacate its EIR certification and approval of the
12 project, and to revise its findings to conform with the law.

13 **PARTIES, JURISDICTION AND VENUE**

14 8. Petitioner Planning and Conservation League (PCL), a nonprofit advocacy
15 organization whose headquarters in is Sacramento, California, is empowered to protect and
16 restore California's natural environment, and to promote and defend the public health and
17 safety of the people of California, through legislative, administrative, and judicial action.
18 PCL was founded in 1965 and since then has advocated in all branches of California
19 government for a body of laws that remains at the forefront of environmental policy in the
20 United States. PCL's staff undertakes extensive research and works closely with legislators
21 to promote laws that protect and improve California's environment.

22
23 9. One of the PCL's 's earliest accomplishments was the enactment in 1970 of the
24 California Environmental Quality Act ("CEQA"), which PCL helped draft and has
25 continually supported over the years, and which lies at the heart of this action. As a party
26 and an *amicus curiae*, PCL--in behalf of its twenty-seven institutional members and
27 thousands of individual members--has contributed to some of the leading cases interpreting
28 CEQA's provisions. PCL has also submitted detailed comments addressing environmental

1 review issues in numerous proceedings before public agencies, including those culminating
2 in the final agency decisions challenged here. Beyond agency proceedings and the
3 courtroom, PCL has published and updated *The Community Guide to CEQA* and has
4 sponsored CEQA workshops throughout the state. These workshops advise interested
5 individuals, governmental and non-governmental organizations, and locally elected and
6 appointed officials about CEQA's two-fold purpose of environmental protection and
7 informed self-government. PCL members reside and own property throughout California as
8 well as those areas to be served by the Project, and use the waters and lands affected by the
9 proposed Project.

10 10. PCL was one of the prevailing petitioners in *Planning and Conservation League v.*
11 *Department of Water Resources* (2000) 83 Cal.App.4th 892, which set aside the 1995
12 environmental review of the Monterey Amendments prepared by the wrong lead agency,
13 Central Coast Water Authority (CCWA), rather than DWR. The Court found also found
14 that the EIR's "no project" assessment and project alternatives analysis failed to properly
15 analyze the consequences of implementing the State Water Project contracts' long-term
16 shortage provision, article 18(b), prior to its elimination in the Monterey Amendments. In
17 its ruling requiring DWR as lead agency to prepare a new EIR for the Monterey
18 Amendments, this Court described the EIR as the "heart and soul of CEQA" and observed
19 that "CEQA compels process. It is a meticulous process designed to ensure that the
20 environment is protected." (*Id.* at 911.)

21 11. Petitioner California Water Impact Network ("C-WIN") is a California non-profit
22 public benefit organization with its principal place of business in Santa Barbara, California.
23 C-WIN's organization purpose is the protection and restoration of fish and wildlife
24 resources, scenery, water quality, recreational opportunities, agricultural uses, and other
25 natural environmental resources and uses of the rivers and streams of California, including
26 the Bay-Delta, its watershed and its underlying groundwater resources. C-WIN has
27 members who reside in, use, and enjoy the Bay-Delta and inhabit and use its watershed.
28

1 They use the rivers of the Central Valley and the Bay-Delta for nature study, recreation,
2 and aesthetic enjoyment.

3
4 12. Petitioner AquAlliance ("AquAlliance"), whose headquarters is in Chico, California,
5 is a California public benefit corporation. Its mission is to defend northern California
6 waters and the ecosystems these waters support and to challenge threats to the hydrologic
7 health of the Sacramento River watershed. This includes escalating attempts to divert and
8 withdraw more water from the hydrologic region. AquAlliance's members include farmers,
9 scientists, businesses, educators, and residents all of whom have significant financial,
10 recreational, scientific, aesthetic, educational, and conservation interests in the aquatic and
11 terrestrial environments that rely on waters of the Sacramento River Watershed and Bay-
12 Delta estuary. This hydrologic system provides water for orchards, homes, gardens,
13 businesses, wetlands, streams, rivers, terrestrial habitat, and myriad species, which in turn
14 allows AquAlliance members to live, fish, hunt, cycle, photograph, camp, swim, and invest
15 in northern California.

16 13. Petitioner California Sportfishing Protection Alliance ("CSPA") is a California non-
17 profit public benefit organization established in 1983 with its principal place of business in
18 Stockton, California. CSPA's organizational purpose is the protection, preservation, and
19 enhancement of the public trust, fisheries and associated aquatic and riparian ecosystems of
20 California's waterways. This mission is implemented through active participation in federal,
21 state and local agency processes, education and organization of the fishing community,
22 restoration efforts, and vigorous enforcement of environmental laws enacted to protect
23 fisheries, habitat and water quality. Members of CSPA reside along the Central Valley
24 watershed and in the Bay-Delta where they view, enjoy, and routinely use the ecosystem
25 for boating, fishing, and wildlife viewing. CSPA's members derive significant and ongoing
26 use and enjoyment from the aesthetic, recreational, and conservation benefits of
27 California's rivers.

28

1 14. Respondent and Defendant California Department of Water Resources (“DWR”) is a
2 California public agency, established by the California Legislature in 1956. Under state
3 law, DWR is principally responsible for operation and management of the State Water
4 Project. DWR served as the CEQA lead agency for the project. DWR issued the November
5 13, 2018 EIR certification and December 11, 2018 Notice of Determination recording its
6 approval of the project, both challenged in this action. The Final EIR prepared by DWR as
7 CEQA lead agency must also serve as a legally adequate decision-making document for
8 any discretionary determinations of responsible and trustee agencies subject to the
9 requirements of CEQA.

10 15. Real Party in Interest State Water Contractors, Inc. (SWC) is a non-profit association
11 of 27 California public agencies, organized under California law, that purchase water under
12 contract from the State Water Project. Member agencies of SWC include each of the state
13 water contractor agencies that were signatories to the Agreement in Principle (AIP) that
14 formed the basis for the Water Supply Contract Extension Project.

15
16 16. Does 1 through 50, inclusive, may have an interest or claim to the project whose
17 specific details are not presently known to the petitioners and plaintiffs. Their true names
18 and capacities, whether in individual, corporate, associate, governmental, or other
19 designations, are not presently known to plaintiffs and petitioners, and are therefore
20 referenced here by fictitious names. Should their true names and capacities later be
21 ascertained, petitioners and plaintiffs will seek to amend this petition and complaint to
22 identify their true names and capacities.

23 17. DWR’s December 11, 2018 Notice of Determination for the project did not identify
24 any real parties in interest pursuant to Public Resources Code section 21167.6.5, and
25 petitioners are not aware of any parties that meet the statutory definition of real parties in
26 interest. Nonetheless, because SWC’s membership includes the signatories to the AIP
27 relating to the review of DWR’s project, and without conceding that SWC or any of its
28

1 members meet the statutory definition of real parties in interest, petitioners have in an
2 abundance of caution named SWC herein as a real party in interest.

3
4 18. This civil action is brought pursuant to Code Civ. Proc., §§ 1085, and 1094.5; and
5 CEQA, Public Resources Code section 21000 *et seq.*

6
7 19. Pursuant to Code of Civil Procedure sections 393, 394 and 395, venue for this action
8 is appropriate in Sacramento County Superior Court. DWR is a state agency whose
9 principal office is located in the City of Sacramento, within Sacramento County.
10 Sacramento County is the most convenient venue for this action, which addresses matters
11 of statewide import. The affirmative acts of DWR recorded in its notice of determination
12 resulted in wrongs that were felt, at least in large part, in Sacramento County.

13 20. Petitioners have exhausted all administrative remedies by submitting written
14 comments during several stages of the project approval and EIR processes preceding
15 DWR's certification of the EIR and approval of the project. All issues raised in this petition
16 and complaint were raised by petitioners, or by other public entities, members of the public,
17 or both, prior to DWR's final decision on the project recorded in the Notice of
18 Determination.

19
20 20. Petitioners have complied with Public Resources Code section 21167.5 by prior
21 service of a notice upon DWR indicating their intent to file this petition.

22
23 21. Petitioners have complied with Public Resources Code section 21167.7 and Code of
24 Civil Procedure section 388 by serving a copy of this petition on the Attorney General.
25 Petitioners bring this action on behalf of its members and members of the public, to enforce
26 important rights affecting the public interest.
27
28

1 22. Petitioners elect to prepare the record of proceedings in the above-captioned
2 proceeding or to pursue an alternative method of record preparation pursuant to Public
3 Resources Code section 21167.6(b)(2).

4
5
6 **PROCEDURAL HISTORY**

7
8 23. In 2013, DWR initiated a public negotiation process for extension of SWP contracts.
9 Contract extensions achieved through this process would be for another 50 years, through
10 the end of 2085. The initial phase of the process reached an "Agreement in Principle
11 Concerning Extension of the State Water Project Water Supply Contracts" (AIP). The AIP
12 is included as Appendix A of DWR's 2016 Draft Environmental Impact Report (DEIR).
13 Signatories to the AIP included most, but not all, of the State Water Contractors.

14 24. DWR issued its Notice of Preparation (NOP) of its Environmental Impact Report for
15 the Water Supply Contract Extension Project on September 12, 2014. Petitioners were
16 among the signatories to a scoping comment letter addressing the NOP. In other scoping
17 comments, Santa Barbara County's Flood Control and Water Conservation District raised
18 questions, still left unaddressed when DWR ultimately certified and approved the project,
19 about the proposed project's financial consequences and implications for taxpayers and
20 ratepayers. A consistent theme in public comments involved the contract extension
21 amendments' role in facilitating DWR's Delta tunnels project, then known as BDCP.

22 25. DWR sought delay in addressing financing for DWR's proposed Delta tunnels
23 project (then known as BDCP) financing until a subsequent contract amendment process
24 could be undertaken after Plumas County Flood Control and Water Conservation District
25 and Butte County raised concerns about costs from BDCP-related matters in the contract
26 extension scope. DWR responded that this subject would be better addressed in a separate
27 negotiation for a BDCP amendment. A separate SWP contract amendments process begun
28

1 in December 2014 for the proposed BDCP (now California WaterFix) was suspended in
2 February 2015.

3
4 26. DWR's separately proposed and reviewed Delta water tunnels cannot be deemed
5 part of the State Water Project in the absence of amendments to the State Water Project
6 contracts. (See, e.g., Articles 1(cc) and 1(hh)(8) of State Water Project contracts.) These
7 provisions, as amended, place limitations on the water system facilities eligible for Central
8 Valley Project revenue bonds. For reasons reinforced in the defeat by voters of Proposition
9 9 in 1982, water system facilities as referenced in the project contracts did not include a
10 peripheral canal or permutations of that proposed conveyance.

11 27. In August 2016, DWR published its Draft EIR for the contract extension project,
12 failing to address the significant concerns about the project raised during scoping review.
13 During the public comment period that closed in October 2016, petitioners and other
14 commenters raised major additional concerns about the project, which DWR failed to
15 address as required by CEQA when it certified the EIR on November 13, 2018 and when it
16 rendered its final project approval on December 11, 2018. DWR also failed to address
17 major changed circumstances necessitating preparation of a new Draft EIR, addressed in
18 additional comments submitted by petitioners and other organizations on September 25,
19 2018.

20
21 28. In portraying the project as "separate" and independent" from DWR's Delta tunnels
22 project in its final decision-making, DWR avoided evidence discrediting these premises
23 introduced during 2016 public comment on the Draft EIR, such as the following:

24 • An October 2011 Legislative Analyst Office (LAO) Report, *Potential Funding*
25 *Alternatives for the Bay Delta Conservation Plan Planning Process*, stated that "[f]unding
26 BDCP implementation" would "require amendment of long-term water supply contracts
27 between DWR, the Bureau of Reclamation, and the contractors in order to provide the
28 funding mechanism." (*Id.* at 5.) This report also listed revenue bonds as one of the

1 “currently infeasible” funding mechanisms, because revenue bonds “require a clearly
2 defined funding source before they can be sold.” (*Id.* at 8.)

3 • When discussing revenue bonds in connection with BDCP, DWR’s bond counsel
4 concluded that without contract amendments, BDCP was “not on the list of approved
5 projects that are eligible for funding, including through bond financing.” (Letter from Jake
6 Campos, STIFEL, to Mary Lou Cotton, SWPCA at 4 (March 19, 2014; see also MWD
7 PRA Document 00000484-SWC Financing DHCCP 9-7-12.)

8 • In September 2014, staff at the Metropolitan Water District acknowledged that
9 proposed SWP contract amendments are a necessary step in financing BDCP. *See* MWD,
10 Special Committee on Bay-Delta Presentation Re Review Status of BDCP Cost Allocation
11 Discussions (September 23, 2014). In a September 23, 2013 report, Kern County Water
12 Agency also referenced the need for a contract amendment to finance BDCP.

13 • In March 2014, a Morgan Stanley report concluded that “Clearly, in order to finance
14 the substantial costs associated with CM1 in the BDCP, the extension of these contracts is
15 essential to allow for the amortization of financing payments over a long period of time.”
16 Like BDCP, California WaterFix cannot obtain financing through revenue bonds without a
17 contract amendment. November 23, 2013 and April 1, 2014 briefings of State Water
18 Contractors to DHCCP’s SWP Cost Allocation Working Group, for example, concluded
19 that California WaterFix financing options would require contract amendments.

20 29. As highlighted in earlier project criticism, 2018 legislative testimony and
21 correspondence, and in a December 11, 2018 letter to DWR from Roger Moore (Moore
22 letter), which DWR failed to address before proceeding to final approval of the project,
23 DWR’s claim that the contract extension amendments are independent of California
24 WaterFix and DWR’s Water Supply Contract Amendments are misleading and
25 demonstrably wrong. For example:

26 • DWR has long been aware that revenue bonds could not be issued covering
27 expenditures for the Delta tunnels without enacting specific contract revisions addressed in
28 the “extension” amendments. That is partly because financing for this multibillion-dollar
tunnels project could not realistically fit within the current expiration dates of 2035 to 2042.

1 Beyond the time frame for repayment, facilities limitations in the existing SWP contracts
2 would otherwise prevent the coverage of the Delta tunnels project, including California
3 WaterFix or earlier variants such as BDCP. That existing contractual limitation on covered
4 facilities, included in article 1(hh)(8) of the SWP contracts,¹ is specifically proposed for
5 removal in DWR's contract extension amendments.

6 • Through the "extension" amendments, DWR proposes new authorization for "SWP
7 revenue bonds to be issued to: (1) finance repairs, additions, and betterments to most
8 facilities of the SWP without regard to whether the facilities were in existence prior to
9 January 1, 1987, which is the current Contract requirement in Article 1(hh)(8); and (2)
10 finance other capital projects (not already in the list in Article 1(hh) for which revenue
11 bonds could be sold) when mutually agreed to by DWR and at least 80 percent of the
affected Contractors."

12 • Hearings before the Senate Natural Resources and Water Committee (SNRWC) on
13 July 3, 2018 and the Joint Legislative and Budget Committee (JLBC) on September 11,
14 2018 bear directly on DWR's improper piecemealing from the contract extension
15 amendment and WaterFix reviews.² This includes the foundational issue of the extension
16 project's relationship to the Delta Tunnels and the Water Supply Contract Amendments.³

17
18 ¹ See, e.g., Santa Barbara County Flood Control and Water Conservation District's SWP contract
19 (Santa Barbara SWP Contract), art. 1(hh)(8), [https://water.ca.gov/-/media/DWR-Website/Web-
20 Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Santa-Barbara-
21 Flood-Control-and-Water-Conservation-District/Files/Santa-Barbara-
22 CC.pdf?la=en&hash=50978D6A89B5D21854ECA6CC160E3CAB9B9BFFAE](https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Santa-Barbara-County-Flood-Control-and-Water-Conservation-District/Files/Santa-Barbara-CC.pdf?la=en&hash=50978D6A89B5D21854ECA6CC160E3CAB9B9BFFAE).

23 ² See, e.g., DWR's Water Supply Contract Extension web page, including all linked documents
24 ([https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-
25 Extension](https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension)); SNRWC's web page, including all linked documents for July 3, 2018 hearing and web
26 link to video recording of hearing ([https://sntr.senate.ca.gov/content/2018-informationaloversight-
27 hearings](https://sntr.senate.ca.gov/content/2018-informationaloversight-hearings)); JLBC's web page, including all linked documents for September 11, 2018 hearing and
28 cancelled August 30, 2018 hearing (<https://www.senate.ca.gov/legislativebudget>); video link to
September 11, 2018 JLBC hearing on proposed SWP contract extension
(http://calchannel.granicus.com/MediaPlayer.php?view_id=2&clip_id=5820).

³ See, e.g., SNRWC Background Brief to July 3, 2018 hearing, p. 17 (referencing the recognition
of SWP contractors and DWR that the proposed contract extension amendments are "a necessary,
but not sufficient condition to incorporate WaterFix into the SWP," and the contention of many
organizations that contract amendments remain premature while WaterFix issues are unresolved).

1 • Testimony at the September 11, 2018 JLBC hearing undermined the premise of
2 independence from WaterFix upon which DWR's separate Contract Extension Final EIR
3 was founded. That includes the testimony of DWR director Karla Nemeth, following
4 questioning from Senator Richard Pan, that DWR plans to "use these amendments to
5 finance WaterFix," and the testimony of Rachel Ehlers of the Legislative Accounting
6 Office that the contract extension amendments would "affect and facilitate" WaterFix.⁴
7 Facilitation of WaterFix through the contract extension amendments is also addressed in the
8 testimony of Congressman McNeerney and of Roger Moore at the same hearing.

9 • 2018 comments not addressed DWR's Contract Extension Final EIR and final
10 project approval underscore the critical importance of integrated rather than fragmented
11 review. Public agency critics throughout California, from Plumas County and the Delta
12 Counties Coalition to San Diego County, criticized DWR's efforts to finalize the contract
13 extension without integrated review of all DWR's proposed amendments related to the
14 Delta Tunnels, including the Water Supply Contract Amendments still awaiting public
15 comment and completion of review. (Moore letter, Exhibit 3.)

16 • The Legislative Delta Caucus observed that the "poorly defined" contract extension
17 amendments would have "potential adverse impacts far beyond their apparent scope. There
18 is much that remains unknown regarding the extensive changes to the SWP contracts that
19 are being proposed and how the changes will impact property taxes, water rates, the fiscal
20 integrity of the SWP and General Fund." (Moore letter, Exhibit 4.)

21 • Following the 2018 legislative hearings, more than a dozen organizations identified
22 numerous changed circumstances requiring additional environmental review since public
23 comment closed in October 2016, only to have DWR, in its November 13, 2018
24 certification memo, respond with the *non-sequitur* that general issue areas were discussed
25 (Moore letter, Exhibit 5).

26
27 ⁴ Video link to September 11, 2018 JLBC hearing, *op cit.*; see also Moore letter, Exhibit 5, pp. 2, 5,
28 fn. 2, 16-17 (quoting DWR Director's testimony) and p. 13, fn. 46 (referencing testimony of Roger
Moore).

- 1 • Commentary in major newspapers criticized the defective process and lack of
2 transparency surrounding the contract extension, as well as DWR's attempts to leverage
3 WaterFix indebtedness without adequate review and debate (Moore letter, Exhibit 6).
- 4 • The 2018 legislative proceedings helped verify that DWR's certification and project
5 approval sidestepped environmental analysis of a major project component of the Contract
6 Extension Amendments, stemming from removal of the existing limitations on covered
7 "facilities" under article 1(hh)(8) of current SWP contracts that would otherwise render
8 WaterFix ineligible for revenue bond financing.
- 9 • DWR's assurance that projects facilitated by the contract extension will be covered
10 by separate CEQA review (e.g., Contract Extension FEIR 2-10, 134) ring hollow. DWR's
11 Delta Tunnels EIR and project approval neither admitted nor analyzed dependence on a
12 subsequent SWP contract amendment. CEQA review of later-approved projects would
13 come too late to address the consequences of redefining covered "facilities," because the
14 current contract language would already be eliminated with the first of DWR's two sets of
15 proposed amendments.
- 16 • The Contract Extension FEIR undermines its premise that the contract extension
17 amendments proposed by DWR have independent utility as a "separate, independent
18 project" addressing debt compression problems. (Contract Extension FEIR, 2-9.) Debt
19 compression is based on the comparatively short maturity dates of existing SWP contracts.
20 (*id.*) The Contract Extension Final EIR recognized that the Evergreen Clause in Article 4 of
21 the SWP contracts already provides a way to extend these dates. (E.g., Contract Extension
22 FEIR, 2-3 to 2-5, 2-33.)
- 23 • The Evergreen Clause in section 4 of the SWP contracts would empower contractors
24 to request the cleaner "opt out" provision some have requested since the inception of
25 negotiations on project contracts—one which would allow terms to be extended without
26 bearing *any* of the WaterFix costs facilitated by *either* set of proposed contract amendments.
27 DWR has never shown its version of the extension amendments, including the proposed
28 facilities redefinition, to be necessary to ensure continued water deliveries or responsibly
address operation and maintenance needs. By facilitating the issuance of billions of dollars

1 to construct the Delta Tunnels project, and perhaps other projects not currently eligible,
2 DWR may under the guise of risk reduction force a risky escalation of indebtedness.

3 • As addressed in the written testimony of Roger Moore and the comments of the
4 Delta Counties Coalition (Moore letter, Exhibits 2, 3), Water Code prerequisites for
5 proceeding to finality on the extension amendments (Wat. Code, §§ 147, 147.5) still have
6 not been met. Put another way, by enabling the financing and addition of new SWP
7 facilities not meeting this earlier facilities limitation, the contract extension amendments
8 would tangibly facilitate addition of the Delta tunnels to the SWP, and also make it easier
9 for DWR and the most powerful SWP contractors to add further debt to finance other costly
10 new facilities of their choosing. The Contract Extension Amendments need an integrated
11 analysis that also includes DWR's proposed Water Supply Contract Amendments, and
12 WaterFix itself, in a single cohesive environmental analysis.

13 **FIRST CAUSE OF ACTION:**
14 **VIOLATIONS OF CEQA**

15
16 30. In certifying the Contract Extension Final EIR and rendering its final project
17 approval, DWR violated CEQA in at least the following respects:

- 18 • Improper Piecemealing of Project Analysis, and Failure to Consider the "Whole of
19 the Action" constituting the project.
- 20 • Failure to Provide a Stable, Complete and Consistent Project Definition.
 - 21 • Faulty Assessment of Project Baseline.
 - 22 • Faulty Assessment of No Project Alternative
 - 23 • Failure to Analyze a Reasonable Range of Alternatives
 - 24 • Faulty and Incomplete Assessment of Project Impacts
 - 25 • Faulty and Incomplete Assessment of Cumulative Impacts
 - 26 • Failure to Mitigate Significant Impacts
 - 27 • Failure to Recirculate EIR Despite Significant New Information
 - 28 • Failure to Adequately Respond to Comments
 - Approval of Defective Project Findings.

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PRAYER FOR RELIEF

WHEREFORE, petitioners pray that this Court:

1. Issue its writ of mandate setting aside the orders of respondent, including its certification of the FEIR as adequate and its decision recorded in its Notice of Determination;
2. Enjoin DWR's project until and unless respondent Department of Water Resources lawfully approves the project in the manner required by CEQA;
3. Award petitioner costs, and attorneys' fees under section 1021.5 of the Code of Civil Procedure; and
4. Grant such further relief that the Court deems just.

Dated: January 10, 2019

Respectfully submitted,

ROGER B. MOORE (SBN 159992)
LAW OFFICE OF ROGER B. MOORE

By: 
Roger B. Moore

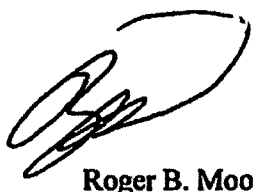
Attorney for Petitioners Planning and Conservation
League, California Water Impact Network,
AquAlliance, and California Sportfishing Protection
Alliance

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VERIFICATION

I, Roger B. Moore, am counsel of record for petitioners Planning and Conservation League, California Water Impact Network, AquAlliance, and California Sportfishing Protection Alliance. I am signing this verification due to petitioners' absence from the county, and because facts in the petition are within the knowledge of the undersigned counsel. I have read the foregoing petition and complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of January, 2019 in Oakland, California.



Roger B. Moore

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FISHERIES RESOURCES, PACIFIC COAST FEDERATION
7 OF FISHERMEN'S ASSOCIATIONS, SAN FRANCISCO
CRAB BOAT OWNERS ASSOCIATION, and the WINNEMEM
8 WINTU TRIBE

FILED 10.639.02
Superior Court Of California,
Sacramento
01/08/2019
mrubalcaba
By _____, Deputy
Case Number:
34-2019-80003047

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11 NORTH COAST RIVERS ALLIANCE,
INSTITUTE FOR FISHERIES RESOURCES,
12 PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, SAN
13 FRANCISCO CRAB BOAT OWNERS
ASSOCIATION, and the WINNEMEM WINTU
14 TRIBE,

15 Petitioners and Plaintiffs,

16 v.

17 DEPARTMENT OF WATER RESOURCES,
and DOES 1 through 20,

18 Respondents and Defendants,

19
20 STATE WATER CONTRACTORS, and DOES
21 21 through 200,

22 Real Parties in Interest.

) Civ. No.

) VERIFIED PETITION FOR WRIT OF
) MANDATE AND COMPLAINT FOR
) DECLARATORY AND INJUNCTIVE
) RELIEF AND FOR ATTORNEYS' FEES

) CEQA CASE

) FILED BY FACSIMILE

23 Petitioners and Plaintiffs NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR FISHERIES
24 RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, SAN
25 FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and the WINNEMEM WINTU TRIBE
26 (collectively "Conservation Groups") hereby petition the Court for a writ of mandate against defendant
27 and respondent Department of Water Resources ("DWR") and by this Verified Petition for Writ of
28 Mandate and Complaint for Declaratory and Injunctive Relief and for Attorney's Fees ("Verified

1 Petition”) hereby allege as follows:

2 **INTRODUCTION**

3 1. This is a public interest citizen suit to enforce the California Environmental Quality Act
4 (“CEQA”), Public Resources Code (“PRC”) section 21000 et seq. (“CEQA”), the Delta Reform Act
5 (“DRA”), Water Code section 85000, et seq., and the Public Trust Doctrine. Petitioners bring this action
6 to challenge DWR’s November 13, 2018, Certification of the Final Environmental Impact Report
7 (“FEIR”) for the Water Supply Contract Extension Project (“Project”), and December 11, 2018, Project
8 approval. In taking these actions DWR violated CEQA, the Delta Reform Act, and the Public Trust
9 Doctrine.

10 2. CEQA is California’s preeminent environmental law. It requires all public agencies to
11 examine the potential adverse impacts of their actions before taking them. It is designed to protect
12 California’s extraordinary environmental resources from uninformed and needlessly destructive agency
13 actions.

14 3. CEQA requires DWR to fully examine the impacts of its actions and to carefully consider
15 alternatives that would reduce those impacts. Contrary to CEQA, DWR’s FEIR does neither.

16 4. The Project extends the terms of the State Water Project (“SWP”) contracts to December
17 31, 2085, without adequately examining the environmental impacts of doing so, without studying a
18 reasonable range of alternatives, and without compliance with other state law protecting the
19 environment.

20 **VENUE AND JURISDICTION**

21 5. This Court has jurisdiction over this proceeding pursuant to Code of Civil Procedure
22 (“CCP”) sections 526 (injunctive relief), 1060 (declaratory relief), and 1085 (traditional mandamus);
23 PRC sections 21168 and 21168.5 (mandamus review); and article VI, section 10 of the California
24 Constitution.

25 6. Venue is proper in this Court pursuant to CCP sections 393 (actions against public officers)
26 and 395 (actions generally) because DWR’s offices are located in Sacramento.

27 7. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a
28 copy of this verified petition and complaint. Consistent with PRC section 21167.5, petitioners timely

1 served DWR with notice of this suit.

2 **PARTIES**

3 8. Petitioner NORTH COAST RIVERS ALLIANCE ("North Coast Rivers") is a non-profit
4 unincorporated association with members throughout Northern California. North Coast Rivers was
5 formed for the purpose of protecting California's rivers and their watersheds from the adverse effects of
6 excessive water diversions, ill-planned urban development, harmful resource extraction, pollution, and
7 other forms of environmental degradation. Its members use and enjoy California's rivers and watersheds
8 for recreational, aesthetic, scientific study, and related non-consumptive uses. The interests of North
9 Coast Rivers and its members have been, are being, and unless the relief requested herein is granted, will
10 be adversely affected and injured by DWR's certification of its inadequate FEIR and approval of the
11 Project.

12 9. Petitioner INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a non-profit, tax-exempt
13 organization that works to protect and restore salmon and other fish populations and the communities
14 that depend on them. IFR maintains its principal place of business in San Francisco, California. IFR
15 both funds and manages many fish habitat protection programs and initiatives. In that capacity, IFR
16 seeks reforms to protect fish health and habitat throughout the West Coast of the United States and has
17 successfully advocated for dam removals, improved pesticide controls, better forestry stream protection
18 standards, and enhanced marine and watershed conservation regulations throughout the West Coast. IFR
19 has worked tirelessly for years to restore and enhance the Delta and its beleaguered fish and wildlife.
20 IFR and its members will be directly and indirectly injured by DWR's Project approval and its failure to
21 adequately protect and restore the imperiled fisheries of the Delta.

22 10. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
23 ("PCFFA") is a nonprofit membership organization incorporated in 1976 with headquarters located in
24 San Francisco, California. PCFFA is composed of more than 14 separate commercial fishing and vessel
25 owners' associations situated along the West Coast of the United States. By virtue of its combined
26 membership of approximately 750 fishermen and women, PCFFA is the single largest commercial
27 fishing advocacy organization on the West Coast. PCFFA represents the majority of California's
28 organized commercial salmon fishermen and has been an active advocate for the protection of Pacific

1 salmon and their spawning, rearing and migratory habitat for more than 30 years. PCFFA and its
2 members would be harmed by the proposed Project because it would threaten their commercial fishing
3 livelihoods, which depend on sustainable management of the salmonid fisheries resources of the Delta
4 and its associated ecosystems.

5 11. Petitioner SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION ("San Francisco
6 Fishermen") is a century-old association of owners and operators of small, family owned fishing boats
7 that catch Dungeness crab, wild California King salmon, Pacific herring, and other species that live in
8 and depend upon the cold waters of the Pacific Ocean, and San Francisco Bay-Delta and the Sacramento
9 and San Joaquin Rivers and their tributaries. San Francisco Fishermen is also actively involved in
10 community education and advocacy concerning fisheries resources legislation to ensure that the rich
11 heritage of commercial fishing in the Bay Area will survive for future generations. San Francisco
12 Fishermen and its members will be harmed by the DWR's Project approval because it would threaten
13 their continued historic use and enjoyment of the fisheries resources of the Delta and its connected
14 ecosystems.

15 12. Petitioner WINNEMEM WINTU TRIBE is a Native American Tribe whose aboriginal
16 territory encompasses the upper watersheds of the Sacramento River including the McCloud River. The
17 Winnemem Wintu Tribe was traditionally dependent on salmon fishing for both subsistence and cultural
18 purposes, and maintains a deep cultural, spiritual and recreational interest in the continued viability of
19 California's salmon runs that pass through the Sacramento-San Joaquin River Delta ("Delta"). The
20 Winnemem Wintu Tribe is a strong proponent of Delta restoration, and will be harmed by the reduced
21 Delta fresh water flows, degradation of water quality, destruction of fish and wildlife species, and other
22 environmental harms that implementation of the Project will allow.

23 13. Respondent and defendant CALIFORNIA DEPARTMENT OF WATER RESOURCES
24 ("DWR") is a California public agency established by the Legislature and charged with management of
25 the State Water Project and other water management tasks. Its certification of the FEIR on November
26 13, 2018, and approval of the Project on December 11, 2018, was subject to and violated the
27 requirements of CEQA, the Delta Reform Act, and the Public Trust Doctrine. DWR is the lead agency
28 under CEQA for environmental review of the Project.

1 14. The true names and capacities of respondents DOES 1-20, inclusive, are unknown to
2 petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.
3 Petitioners are informed and believe, and based on such information and belief allege, that the
4 fictitiously named respondents are state or local officials or agencies who are responsible, in whole or in
5 part, for the approval and implementation of the Project. Petitioners will, with leave of Court if
6 necessary, amend this Verified Petition if and when the true names and capacities of said Doe
7 respondents have been ascertained.

8 15. Real party in interest State Water Contractors ("SWC") is a non-profit corporation
9 composed of and representing public water agencies throughout California that have contracted with
10 DWR to receive SWP water. The Project purports to amend the contract terms that govern DWR's
11 delivery of water to SWC members.

12 16. DWR did not identify any real parties in interest in its Notice of Determination pursuant to
13 PRC section 21167.6.5(a), and petitioners are not otherwise aware that any specific real parties in
14 interest exist. However, out of an abundance of caution and without conceding that its participation is
15 necessary, petitioners have identified SWC as a potential real party in interest. The true names and
16 capacities of real parties in interest DOES 21-200, inclusive, are unknown to petitioners who therefore
17 sue such real parties in interest by fictitious names pursuant to CCP section 474. Petitioners are
18 informed and believe, and based on such information and belief allege, that the fictitiously named real
19 parties in interest have a direct interest in approval of the Project. Petitioners will, with leave of Court if
20 necessary, amend this Verified Petition if and when the true names and capacities of said Doe real parties
21 in interest have been ascertained.

22 GENERAL ALLEGATIONS

23 17. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate
24 their substantial beneficial interest in securing DWR's compliance with the law.

25 18. Petitioners have performed any and all conditions precedent to the filing of this Verified
26 Petition and Complaint and have exhausted any and all available administrative remedies to the extent
27 required by law.

28 19. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law within

1 the meaning of CCP section 1086 in that, unless this Court issues its writ of mandate setting aside
2 DWR's Certification of the FEIR and approval of the Project, and ordering it to comply with the laws
3 whose violation is alleged herein, the environmental interests of petitioners and the public that are
4 protected by those laws will be substantially and irreparably harmed. No monetary damages or other
5 legal remedy could adequately compensate petitioners for the harm to their beneficial interests, and to the
6 environment, occasioned by DWR's unlawful conduct.

7 20. Petitioners are entitled to declaratory relief under CCP section 1060 because an actual
8 controversy exists between petitioners and DWR. Petitioners contend that DWR has acted in violation
9 of applicable laws and must therefore vacate and set aside its approval of the Project. Petitioners are
10 informed and believe that DWR disputes this contention. A judicial resolution of this controversy is
11 therefore necessary and appropriate.

12 21. Petitioners are also entitled to injunctive relief under CCP section 526 because approval of
13 the Project threatens irreparable environmental harm. Unless enjoined, DWR will implement the Project
14 despite its lack of compliance with applicable laws, causing undue and unnecessary environmental
15 degradation. Petitioners would thereby suffer irreparable harm due to DWR's failure to take the required
16 steps to adequately protect the environment. Injunctive relief is thus warranted under CCP section 525 *et*
17 *seq.* and PRC section 21168.9 to prevent irreparable harm to the environment.

18 LEGAL BACKGROUND

19 CEQA

20 22. CEQA is California's primary statutory mandate for environmental protection. It applies to
21 all state and local agencies, and requires them to "first identify the [significant] environmental effects of
22 projects, and then to mitigate those adverse effects through the imposition of feasible mitigation
23 measures or through the selection of feasible alternatives." *Sierra Club v. State Board of Forestry*
24 (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires "public agencies to
25 deny approval of a project with significant adverse effects when feasible alternatives or feasible
26 mitigation measures can substantially lessen such effects." *Sierra Club v. Gilroy City Council* (1990)
27 222 Cal.App.3d 30, 41.

28 23. CEQA's mandate for detailed environmental review "ensures that members of the

1 [governmental decision-making body] will fully consider the information necessary to render decisions
2 that intelligently take into account the environmental consequences” of their proposed action. *Mountain*
3 *Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; PRC §§ 21080.5(d)(2)(D),
4 21091(d)(2); 14 C.C.R. [CEQA Guidelines] (“Guidelines”) § 15088. The CEQA process thus “protects
5 not only the environment but also informed self-government.” *Citizens of Goleta Valley v. Board of*
6 *Supervisors* (1990) 52 Cal.3d 553, 564.

7 24. All California “public agencies” must comply with CEQA when they approve discretionary
8 projects. PRC § 21080(a). DWR is a “public agency” and a “state agency” as defined in CEQA. PRC §
9 21063. Therefore, DWR’s discretionary approvals are subject to CEQA.

10 25. A proposed governmental action requires environmental review under CEQA if (1) the
11 agency is contemplating an “approval” of an action as defined by Guidelines section 15352, (2) the
12 subject matter of the contemplated approval constitutes a “project” under PRC section 21065 and
13 Guidelines section 15378(a), and (3) the project to be approved does not fall within a statutory
14 exemption created by the Legislature under PRC section 21080(b) and recognized under CEQA
15 Guidelines sections 15260-15285, or a categorical exemption in the Guidelines as promulgated by the
16 California Resources Agency pursuant to PRC section 21084(a) and Guidelines sections 15061(b)(2),
17 15300-15333 and 15354.

18 26. The lead agency must prepare an environmental impact report (“EIR”) if it determines that a
19 project may have significant adverse environmental impacts. The EIR must analyze those effects and
20 suggest feasible means, if any, of mitigating or avoiding them including alternatives that would achieve
21 most of the basic objectives of the project without causing significant environmental effects. PRC §§
22 21002, 21002.1, 21061; Guidelines §§ 15080-15096, 15120-15132, 15160-15170.

23 27. In applying these CEQA procedures, an agency may not segment a project to avoid
24 preparing an EIR on the entirety, or whole, of the project. Guidelines § 15378(a), (c), (d). CEQA’s
25 “requirements cannot be avoided by chopping up proposed projects into bite-size pieces which,
26 individually considered, might be found to have no significant effect on the environment or to be only
27 ministerial.” *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.

28 ///

1 **The Delta Reform Act**

2 28. To address the indisputably perilous state of the Delta, in 2009 the California Legislature
3 enacted the Delta Reform Act, declaring that “[t]he Sacramento-San Joaquin Delta watershed and
4 California’s water infrastructure are in crisis and *existing Delta policies are not sustainable.*” Water
5 Code § 85001(a), emphasis added. The Legislature found that “the Delta’ . . . is a critically important
6 natural resource for California and the nation. It serves Californians concurrently as both the hub of the
7 California water system and the most valuable estuary and wetland ecosystem on the west coast of North
8 and South America.” Water Code § 85002. “Resolving the crisis requires *fundamental reorganization*
9 of the state’s management of Delta watershed resources.” Water Code § 85001(a), emphasis added.
10 Therefore, the Legislature resolved “to provide for the sustainable management of the [Delta] ecosystem,
11 to provide for a more reliable water supply for the state, to protect and enhance the quality of water
12 supply from the Delta, and to establish a governance structure that will direct efforts *across state*
13 *agencies* to develop a *legally enforceable* Delta Plan.” Water Code § 85001(c), emphasis added.

14 29. The Delta Reform Act was meant to advance the “coequal goals” of restoring the Delta
15 ecosystem and ensuring water supply reliability. Water Code § 85054. The Legislature found that eight
16 “objectives” were inherent in those coequal goals:

- 17 (a) *Manage the Delta’s water and environmental resources and the water resources of the state*
18 *over the long term.*
- 19 (b) *Protect and enhance the unique cultural, recreational, and agricultural values of the*
20 *California Delta as an evolving place.*
- 21 (c) *Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy*
22 *estuary and wetland ecosystem.*
- 23 (d) Promote statewide water conservation, water use efficiency, and *sustainable water use.*
- 24 (e) Improve water quality to protect human health and the environment consistent with
25 *achieving water quality objectives in the Delta.*
- 26 (f) Improve the water conveyance system and expand statewide water storage.
- 27 (g) Reduce risks to people, property, and state interests in the Delta by effective emergency
28 preparedness, appropriate land uses, and investments in flood protection.
- (h) Establish a new governance structure with the authority, responsibility, accountability,
scientific support, and adequate and secure funding to achieve these objectives.

Water Code § 85020, emphasis added.

1 30. The Legislature also declared that:

2 The policy of the State of California is to *reduce reliance on the Delta in meeting*
3 *California's future water supply needs* through a statewide strategy of investing in
4 improved regional supplies, conservation, and water use efficiency. Each region that
5 depends on water from the Delta watershed shall improve its regional self-reliance for
6 water through investment in water use efficiency, water recycling, advanced water
7 technologies, local and regional water supply projects, and improved regional
8 coordination of local and regional water supply efforts.

9 Water Code § 85021, emphasis added.

10 **The Public Trust Doctrine**

11 31. Water Code section 85023 states, "the longstanding constitutional principle of reasonable
12 use and the Public Trust Doctrine shall be the foundation of state water management policy and are
13 particularly important and applicable to the Delta."

14 32. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted
15 that the public trust doctrine mandates that "before state courts and agencies approve water diversions
16 they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt,
17 so far as feasible, to avoid or minimize any harm to those interests." *The National Audubon Society*
18 Court went on to explain:

19 Just as the history of this state shows that appropriation may be necessary for efficient use of
20 water despite unavoidable harm to public trust values, it demonstrates that an appropriative
21 water rights system administered without consideration of the public trust may cause
22 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state
23 may have to approve appropriations despite foreseeable harm to public trust uses. In so
24 doing, however, the state must bear in mind its duty as trustee to consider the effect of the
25 taking on the public trust, and to preserve, so far as consistent with the public interest, the
26 uses protected by the trust.

27 *Id.*, citations omitted.

28 33. "Public trust easements are traditionally defined in terms of navigation, commerce and
fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and
general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
waters for anchoring, standing, or other purposes." *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For
nearly 50 years it has been settled law in California that public trust values also "encompass[] . . . the
preservation of those lands in their natural state, so that they may serve as ecological units for scientific
study, as open space, and as environments which provide food and habitat for birds and marine life, and

1 which favorably affect the scenery and climate of the area.”

2 34. Although compliance with CEQA “may assist an agency in complying with its duties under
3 the public trust doctrine [,] CEQA review of a project does not necessarily or automatically satisfy
4 the agency’s affirmative duties to take the trust into account and protect public trust uses whenever
5 feasible.” *San Francisco Baykeeper Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 571. “[A]
6 public trust use is not any use that may confer a public benefit, but rather a use that facilitates public
7 access, public enjoyment, or public use of trust land.” *Id.* at 570.

8 **FACTUAL BACKGROUND**

9 35. “[T]he Sacramento-San Joaquin River Delta is a natural resource of statewide, national, and
10 international significance, containing irreplaceable resources.” PRC § 29701. The Delta is the largest
11 and most productive estuarine system on the West Coast of North and South America, but its future is in
12 peril. It is the State of California’s avowed policy “to recognize, preserve, and protect those resources of
13 the delta for the use and enjoyment of current and future generations.” *Id.*

14 36. The Delta’s imminent ecologic collapse is well-recognized and indisputable. It has two
15 principal causes. First, an unsustainable proportion of the Delta’s freshwater flows has been diverted for
16 decades by the Central Valley Project (“CVP”) and the California (or “State”) Water Project (“SWP”).
17 Second, for too long, agricultural diverters have discharged subsurface drainage and surface run-off
18 contaminated with salt, selenium, and other toxic substances into groundwater and the rivers that are
19 tributary to the Delta. This one-two punch of diminished freshwater flows and increased temperature,
20 salinity, herbicides, pesticides, and heavy metals has pushed the Delta to the brink of ecologic collapse.

21 37. Due to excessive diversions of water for consumptive use, many species of fish endemic to
22 the Delta have already gone extinct, including the Sacramento perch, formerly one of the most abundant
23 fishes of the Delta, which disappeared in the 1970s. Just 12 indigenous species remain, and these are in
24 grave danger. Since the SWP and CVP began operation, the Sacramento River winter and spring run
25 Chinook salmon, Central Valley steelhead, North American green sturgeon and Delta smelt have been
26 driven perilously close to extirpation.

27 38. Winter run Chinook salmon were declared threatened under the federal Endangered
28 Species Act (“ESA”) in 1990 (55 Fed.Reg. 46515), and then due to continuing population declines,

1 declared endangered in 2005 (70 Fed.Reg. 37160). Their critical habitat in the Sacramento River and its
2 tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring run Chinook salmon were declared
3 threatened, and their critical habitat designated under the ESA in 2005. 70 Fed.Reg. 37160, 52488.
4 Central Valley steelhead were declared threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat
5 was designated in 2005 (70 Fed.Reg. 52488). The Southern distinct population segment ("DPS") of
6 North American green sturgeon was declared threatened in 2006 (71 Fed.Reg. 17757) and its critical
7 habitat was designated in 2008 (73 Fed.Reg. 2084). Delta smelt were declared endangered in 1993 (58
8 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256).

9 39. The SWP, as originally envisioned, would have included additional dams and diversions
10 that would have destroyed the free-flowing rivers of California's North Coast and removed additional
11 essential spawning and rearing habitat for salmon and steelhead. The unbuilt portion of the SWP was
12 expected to provide between five and 10 million acre feet of water each year to the SWP system. Thus,
13 DWR's SWP existing contracts contemplate delivery of much more water than can be delivered in all
14 but the wettest of water years.

15 40. In addition to harming many fish species in the Delta, the excessive use of Delta water
16 exports to irrigate contaminated soils in the San Joaquin Valley pollutes ground and surface waters that
17 flow into the Delta. Irrigation leaches pollutants from the toxic soils underlying many of the areas
18 irrigated with Delta water. The subsurface drainage and surface run off from these contaminated soils
19 contain pollutants including selenium, arsenic, boron, mercury, uranium, chromium, molybdenum and
20 sodium chlorides and sulfates. The resulting pollution of the Delta and its San Joaquin Valley tributaries
21 threatens the Delta's water quality and the fish and wildlife dependent on them.

22 41. DWR's existing waters supply contracts with the SWC begin to expire in 2035 and the last
23 ends by 2042. DWR states that an extension of these contracts is necessary to finance capital
24 expenditures for the SWP through the use of revenue bonds. DWR entered into a negotiation process
25 regarding potential terms for its contract extensions, and petitioners provided detailed comments
26 regarding the environmental impacts and considerations that must be addressed during the contract
27 extension process that became the Project, including comments dated July 3, 2013, July 10, 2013, and
28 January 29, 2014, by PCFFA, and March 3, 2014 by PCFFA and the Winnemem Wintu Tribe.

1 42. On or about September 12, 2014 DWR issued a Notice of Preparation notifying the public
2 that it would act as the lead agency for the preparation of an EIR for the Project. That Notice of
3 Preparation identified the Project as “amending certain provisions of the State Water Resources
4 Development System (SWRDS) Water Supply Contracts.”

5 43. In response to the Notice of Preparation, in October 2014, petitioners PCFFA, IFR, North
6 Coast Rivers, San Francisco Fishermen, and other environmental groups, agencies, and members of the
7 public submitted detailed scoping comments to DWR. Commentors raised concerns regarding the scope
8 of DWR’s Project and exclusion of interrelated decisions and approvals. Commentors raised concerns
9 regarding the ways in which climate change and sea level rise will occur during the Project’s term and
10 the need to examine how the Project’s impacts would change over time. Commentors requested that
11 DWR disclose and analyze the Project’s potential changes regarding responsibility for fish, wildlife and
12 recreation mitigation measures. And commentors requested that DWR study alternatives that reduced
13 total contract amounts in light of the SWP’s historic over-allocation and likely reduction in available
14 water over the duration of the Project, and that established water conservation standards for SWP water,
15 among other concerns.

16 44. In August 2016, DWR released its Draft EIR for the Project. The Draft EIR failed to
17 address many of the concerns raised during the scoping process.

18 45. Petitioner PCFFA provided detailed comments on DWR’s Draft EIR via letter dated
19 October 17, 2016. These comments highlighted DWR’s failure to address the Project’s impacts, refusal
20 to study appropriate Project alternatives, and improper piecemealing of its environmental analysis.

21 46. PCFFA and IFR submitted additional comments on the Project that DWR received on or
22 about August 13, 2018.

23 47. IFR, North Coast Rivers and San Francisco Fishermen, along with other concerned
24 organizations, submitted additional comments regarding the Project that DWR received on or about
25 September 25, 2018.

26 48. On November 13, 2018, DWR Director Karla Nemeth certified the FEIR.

27 49. On December 11, 2018, DWR Director Karla Nemeth approved the Project.

28 50. DWR’s Notice of Determination was received by the Governor’s Office of Planning and

1 Research on December 11, 2018.

2 **FIRST CAUSE OF ACTION**

3 **(Violation of CEQA)**

4 **(Alleged by All Petitioners Against All Respondents)**

5 51. The paragraphs set forth above and below are realleged and incorporated herein by
6 reference.

7 52. Petitioners bring this First Cause of Action pursuant to PRC sections 21168 and 21168.5, on
8 the grounds that DWR committed a prejudicial abuse of discretion, by failing to proceed in the manner
9 required by law, in approving a deeply flawed Project based on a legally inadequate FEIR.

10 53. The purpose of an EIR is to provide agencies and the public with information about a
11 proposed project's potential environmental effects, ways to minimize those effects, and potential
12 alternatives to the project. PRC § 21061. The EIR must "include a detailed statement" describing, *inter*
13 *alia*, all of the proposed project's significant effects on the environment, alternatives to the project, and
14 potential mitigation measures. PRC § 21100(b).

15 **The FEIR's Analysis Is Improperly Segmented**

16 54. CEQA requires agencies to prepare EIRs regarding the impacts of "projects" that may have
17 significant environmental impacts. Guidelines § 15064(a)(1). CEQA defines "project" to mean "the
18 whole of an action." Guidelines § 15378(a). "The term 'project' refers to the activity which is being
19 approved and which may be subject to several discretionary approvals by governmental agencies. The
20 term 'project' does not mean each separate governmental approval." Guidelines § 15378(c).
21 Accordingly, agencies "must consider the whole of an action, not simply its constituent parts, when
22 determining whether [the action] will have a significant environmental effect (*Citizens Assoc. for*
23 *Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151)." Guidelines §
24 15003(h), *see also* Guidelines § 15378(a), (c).

25 55. CEQA thus intends to ensure "that environmental considerations do not become submerged
26 by chopping a large project into many little ones – each with a minimal potential impact on the
27 environment – which cumulatively may have disastrous consequences." *Bozung v. Local Agency*
28 *Formation Com.* (1975) 13 Cal.3d 263, 283-284.

1 56. Here, instead of studying all of its interdependent actions together, DWR has improperly
2 segmented its analysis of the State Water Project Water Supply Contract Amendments for Water
3 Management and California WaterFix from its analysis and consideration of the Project. DWR
4 circulated a Draft EIR for the State Water Project Water Supply Contract Amendments for Water
5 Management and California Waterfix for public comment in October 2018. Yet DWR's Project
6 approval is necessary for its implementation of WaterFix and its related contract amendments.

7 57. This segmentation violates CEQA's demand for unified and comprehensive environmental
8 review:

9 Theoretical independence is not a good reason for segmenting the environmental analysis
10 of the two matters. Doing so runs the risk that some environmental impacts produced by
11 the way the two matters combine or interact might not be analyzed in the separate
12 environmental reviews. Furthermore, if the two matters are analyzed in sequence . . . and
13 the combined or interactive environmental effects are not fully recognized until the review
of the second matter, the opportunity to implement effective mitigation measures as part
of the first matter may be lost. This could result in mitigation measures being adopted in
the second matter that are less effective than what would have been adopted if the matters
had been analyzed as a single project.

14 *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214,
15 1230. DWR's segmented review subverts CEQA's informational purposes.

16 **DWR's No Project Alternative Violates CEQA**

17 58. The CEQA Guidelines direct that "[t]he 'no project' analysis shall discuss the existing
18 conditions at the time the notice of preparation is published . . . as well as what would be reasonably
19 expected to occur in the foreseeable future if the project were not approved . . ." (Guidelines §
20 15126.6(e)(2).)

21 59. DWR's No Project Alternative improperly assumes that the SWP contracts would be
22 renewed absent the Project, and that all water deliveries would occur with or without the Project. As
23 such the scenario examined in the environmental documents does not describe a situation where an
24 agency approval is not granted. Instead it describes a scenario where a different Project alternative is
25 approved, and SWP water deliveries continue. DWR has not examined the environmental conditions of
26 the Project against an appropriate No Project Alternative where these deliveries are not made. This failure
27 violates CEQA.

28 ///

1 **DWR Failed to Fully Consider A Reasonable Range of Alternatives and**
2 **Dismissed Feasible Alternatives from Review**

3 60. Under CEQA, an EIR must focus on alternatives that would lessen significant effects, even
4 if they “would impede to some degree the attainment of the project objectives, or be more costly.”
5 Guidelines § 15126.6(b).

6 61. CEQA requires an EIR to “include sufficient information about each alternative to allow
7 meaningful evaluation, analysis, and comparison with the proposed project.” Guidelines § 15126.6(d).
8 Agencies must prevent “significant, avoidable damage to the environment” through the use of feasible
9 alternatives or mitigation measures. Guidelines § 15002(a)(3); PRC §§ 21002, 21002.1, 21081. Project
10 approval should be withheld where such measures or alternatives exist, but are, as here, ignored.
11 Guidelines § 15021(a)(2).

12 62. The FEIR fails to study a reasonable range of alternatives, including an alternative that
13 significantly reduces deliveries, or an alternative that implements conservation targets. Instead, DWR
14 dismissed any reduced contract quantity alternatives or water conservation target alternatives from
15 detailed analysis before it prepared its Draft EIR.

16 63. All but one of the Alternatives studied in the FEIR contemplate the same level of water
17 deliveries, and only vary in end year and financial structure. For this reason, DWR concludes that
18 Alternatives 2 through 6 have the same impacts as the Project. Alternative 7 would extend the end-date
19 of the contracts to 2085 but allows some current contractors to “choose not to sign.” None of these
20 Alternatives are sufficiently distinct to provide a reasonable range of alternatives under CEQA.

21 64. Because none of the Alternatives substantially reduce the existing level of excessive
22 exports, and none restore the Delta’s “natural flows,” the FEIR failed to analyze a reasonable range of
23 alternatives as CEQA requires.

24 **The FEIR Improperly Concludes That the Project Has No Impacts**

25 65. DWR concludes that the Project will have no impact on any resource topics “because it
26 would amend and add financial provisions” to its SWP contracts and “would not create new water
27 management measures, alter the existing authority to build or modify existing SWP facilities, or change
28 water allocation provisions” of those contracts. ES-4. But DWR overlooks the essential purpose of the

1 Project's contracts – to deliver water through the SWP. DWR's SWP water deliveries have impacts to
2 the source and receiving watersheds, including impacts on important habitat, yet DWR fails to consider
3 these impacts as impacts of the Project. DWR's failure to address the impacts of Project approval
4 violates CEQA.

5 66. DWR also improperly concludes that the Project has no cumulative impacts. *Id.* But DWR
6 has failed to examine the closely related past, present, and reasonably foreseeable probable future
7 projects that, when taken with the Project's water deliveries, will result in significant cumulative
8 impacts. This violates CEQA.

9 **DWR Fails to Analyze Changed Circumstances**

10 67. DWR's FEIR relies upon the 1986 Coordinated Operating Agreement ("COA") between
11 DWR and the United States Bureau of Reclamation ("Reclamation") to describe the operating criteria for
12 the SWP, and assumes that Project operations will be constrained by the 1986 COA. Yet as DWR
13 prepared the FEIR, it was actively renegotiating the COA with Reclamation, and executed an addendum
14 to the COA the day after it approved the Project. The FEIR fails to address this reasonably foreseeable
15 change in SWP operations as either part of the Project itself or a closely related and reasonably
16 foreseeable probable project, despite its likely significant cumulative impacts.

17 **SECOND CAUSE OF ACTION**

18 **(Violation of the 2009 Delta Reform Act)**

19 **(Alleged by All Petitioners Against All Respondents)**

20 68. The paragraphs set forth above and below are realleged and incorporated herein by
21 reference.

22 69. The Delta Reform Act, Water Code sections 85000 *et seq.*, was passed by the Legislature in
23 recognition of the fact that the "[t]he Sacramento-San Joaquin Delta watershed and California's water
24 infrastructure are in crisis" and that "[r]esolving the crisis requires fundamental reorganization of the
25 state's management of Delta watershed resources." Water Code § 85001(a). The Legislature's goal was
26 "to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide
27 for a more reliable water supply for the state, to protect and enhance the quality of water supply from the
28 Delta, and to establish a governance structure that will direct efforts across state agencies to develop a

1 legally enforceable Delta Plan.” *Id.* § 85001(c).

2 70. The Delta Reform Act requires any state agency “that proposes to undertake a covered
3 action” to “prepare a written certification of consistency with detailed findings as to whether the covered
4 action is consistent with the Delta Plan” and submit that written finding to the Delta Stewardship
5 Council. Water Code § 85225.

6 71. The Delta Reform Act defines “[c]overed action” as “a plan, program or project” as defined
7 by PRC section 21065 that:

8 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.

9 (2) Will be carried out, approved, or funded by the state or a local public agency.

10 (3) Is covered by one or more provisions of the Delta Plan.

11 (4) Will have a significant impact on achievement of one or both of the coequal
12 goals or the implementation of government-sponsored flood control programs to reduce
risks to people, property, and state interests in the Delta.

13 Water Code § 85057.5(a). While the Delta Reform Act states that “[r]outine maintenance and operation
14 of the State Water Project” is not a covered action, the Project does not qualify for that exemption
15 because it is neither routine maintenance nor routine operation of the SWP. Water Code § 85057.5(b).

16 72. The 2013 Delta Plan prepared by the Delta Stewardship Council was found invalid and set
17 aside by the Sacramento Superior Court because it failed to satisfy the requirements of the Delta Reform
18 Act. Specifically, the Delta Plan failed to include “quantified or otherwise measurable targets associated
19 with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring
20 more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act.”
21 Ruling on Submitted Matter, JCCP 4758 (Sacramento Superior Court, May 18, 2016) at 26. The Delta
22 Stewardship Council’s appeal of this decision is pending before the Third District Court of Appeal (Case
23 No. C082944). In addition, petitioners – and others – have challenged the Delta Stewardship Council’s
24 2018 Delta Plan Amendments, as those amendments violate CEQA, the Delta Reform Act, the Public
25 Trust Doctrine and other laws requiring informed decisionmaking. Sacramento Superior Court Case Nos.
26 34-2018-80002898, 34-2018-80002900, 34-2018-80002901, 34-2018-80002904.

27 73. DWR denies that the Project is covered action under the Delta Reform Act. FEIR 2-100.
28 But under the Delta Reform Act, DWR cannot approve the Project without *first* making a determination

1 of consistency with the Delta Plan. Water Code § 85225. And because approval of the Project continues
2 DWR's over-allocation of SWP water without any attempt to address the Project's conflict with the
3 Delta Reform Act's coequal goals, the Project is inherently inconsistent with what would be required by
4 any valid Delta Plan.

5 74. Because DWR failed to "prepare a written certification of consistency with detailed findings
6 as to whether the covered action is consistent with the Delta Plan" as required by the Delta Reform Act,
7 its approval must be set aside. Water Code § 85225.

8 **THIRD CAUSE OF ACTION**

9 **(Violation of the Public Trust Doctrine)**

10 **(Alleged by All Petitioners Against All Respondents)**

11 75. The paragraphs set forth above and below are realleged and incorporated herein by
12 reference.

13 76. Water Code section 85023 states, "the longstanding constitutional principle of reasonable
14 use and the Public Trust Doctrine shall be the foundation of state water management policy and are
15 particularly important and applicable to the Delta."

16 77. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted
17 that the public trust doctrine mandates that "before state courts and agencies approve water diversions
18 they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt,
19 so far as feasible, to avoid or minimize any harm to those interests." The *National Audubon Society*
20 Court went on to explain:

21 Just as the history of this state shows that appropriation may be necessary for efficient use of
22 water despite unavoidable harm to public trust values, it demonstrates that an appropriative
23 water rights system administered without consideration of the public trust may cause
24 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state
25 may have to approve appropriations despite foreseeable harm to public trust uses. In so
26 doing, however, the state must bear in mind its duty as trustee to consider the effect of the
27 taking on the public trust, and to preserve, so far as consistent with the public interest, the
28 uses protected by the trust.

26 *Id.*, citations omitted.

27 78. "Public trust easements are traditionally defined in terms of navigation, commerce and
28 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and

1 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
2 waters for anchoring, standing, or other purposes." *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For
3 nearly 50 years it has been settled law in California that public trust values also "encompass[] . . . the
4 preservation of those lands in their natural state, so that they may serve as ecological units for scientific
5 study, as open space, and as environments which provide food and habitat for birds and marine life, and
6 which favorably affect the scenery and climate of the area."

7 79. The Project will adversely affect numerous public trust resources, including flows and
8 habitat necessary for fish, wildlife, and recreation. Despite public comment regarding the Project's
9 impacts to public trust resources, DWR declined to address or examine the issue in its FEIR.

10 80. Feasible alternatives exist that would mitigate or avoid these significant impacts, including,
11 but not limited to a reduced Table A alternative, or an alternative that incorporates water conservation
12 goals. Such alternatives would reduce diversions, have beneficial effects on fish and wildlife, and attain
13 most of the Project's basic objectives.

14 81. By approving the Project despite the fact that feasible alternatives exist that would preserve
15 public trust resources to a greater extent than the Project, DWR abdicated its affirmative statutory and
16 constitutional "duties to take the trust into account and protect public trust uses whenever feasible,"
17 based on a fair and fully informed balancing of the impacts of these alternatives on public trust
18 resources. *San Francisco Baykeeper, Inc. v. State Lands Com., supra*, 29 Cal.App.5th at 571.

19 **FOURTH CAUSE OF ACTION**

20 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**

21 **Project Approvals as Contrary to CCP §§ 1085 and 1094.5)**

22 **(Alleged by All Petitioners Against All Respondents)**

23 82. The paragraphs set forth above and below are realleged and incorporated herein by
24 reference.

25 83. DWR proceeded in excess of its jurisdiction and abused its discretion in purporting to
26 approve the Project and to certify the FEIR thereon, because such approvals violate CCP sections 1085
27 and 1094.5 in the following respects, among others:

28 a. such approvals were not granted in accordance with the procedures required by law;

- b. such approvals were not based on the findings required by law; and
- c. such approvals were not based on, or were contrary to, the evidence in the record before DWR.

84. DWR failed to proceed in the manner required by law in the following respects, among others:

- a. DWR violated CEQA as alleged hereinabove;
- b. DWR violated the Delta Reform Act as alleged hereinabove; and
- c. DWR violated the Public Trust Doctrine as alleged hereinabove.

85. DWR's actions in approving the Project without complying with the procedures required by CCP sections 1085 and 1094.5 exceeded DWR's jurisdiction and constitute a prejudicial abuse of discretion, and therefore are invalid and must be set aside.

PRAYER FOR RELIEF

WHEREFORE, petitioners pray for relief as follows:

1. For interlocutory and permanent injunctive relief restraining DWR from taking any action to carry out the Project pending, and following, the hearing of this matter;
2. For a peremptory writ of mandate directing DWR to set aside and vacate its approval of the Project, and certification of its FEIR;
3. For declaratory relief declaring the Project, its approval, and its FEIR to be unlawful;
4. For a peremptory writ of mandate directing DWR to suspend all activity implementing the Project that could result in any change or alteration in the physical environment until it has taken all actions necessary to bring its approval of the Project and its FEIR into compliance with CEQA, the Delta Reform Act, the Public Trust Doctrine and the Code of Civil Procedure;
5. For attorneys' fees under Code of Civil Procedure section 1021.5;
6. For costs incurred in this action; and

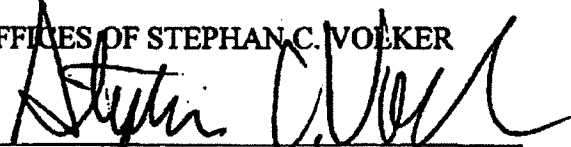
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1 7. For such other equitable or legal relief as the Court may deem just and proper.

2
3 Dated: January 7, 2019

Respectfully submitted,

4 LAW OFFICES OF STEPHAN C. VOLKER



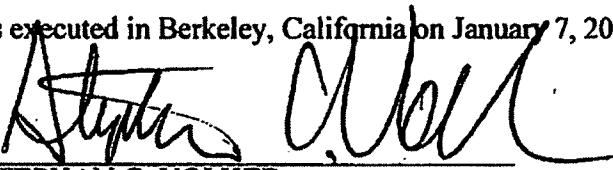
5
6 By: STEPHAN C. VOLKER
7 Attorney for Plaintiffs and Petitioners
8 North Coast Rivers Alliance, et al.

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VERIFICATION

1
2 I, Stephan C. Volker, am the attorney for petitioners/plaintiffs in this action. I make this
3 verification on behalf of the petitioners/plaintiffs because such parties and their representatives are
4 absent from the county in which my office is located. I have read the foregoing Verified Petition for
5 Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys' Fees and know its
6 contents. The facts therein alleged are true and correct to the best of my knowledge and belief, and are
7 based on documents within the public records underlying the approvals herein challenged.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct, and that this Verification was executed in Berkeley, California on January 7, 2019.

10
11 
12 STEPHAN C. VOLKER

de la Guerra, Sheila

From: Roger Moore <rbm@landwater.com>
Sent: Tuesday, February 2, 2021 1:09 AM
To: sbcob
Cc: Carolee Krieger
Subject: Re: Letter to Board of Supervisors Re : Amendments 20 and 21 (February 2 agenda)
Attachments: CWIN Appendix-Part 4.pdf

Caution: This email originated from a source outside of the County of Santa Barbara. Do not click links or open attachments unless you verify the sender and know the content is safe.

Attached is Part 4 of 4 for CWIN's Appendix.

On Tue, Feb 2, 2021 at 1:07 AM Roger Moore <rbm@landwater.com> wrote:
Attached is Part 3 of 4 for CWIN's Appendix.

On Tue, Feb 2, 2021 at 1:06 AM Roger Moore <rbm@landwater.com> wrote:
Attached is Part 2 of 4 for CWIN's Appendix.

On Tue, Feb 2, 2021 at 1:04 AM Roger Moore <rbm@landwater.com> wrote:
In case it is helpful to guide any further consideration by the Board of Amendments 20 and 21, CWIN is submitting its appendix of documents mentioned in its letter submitted on February 1, 2021. To prevent any errors from large file size, CWIN is emailing this Appendix in four parts. Attached is Part 1 of 4.

Thanks,

Roger B. Moore
Attorney for CWIN

Law Office of Roger B. Moore

337 17th Street, Suite 211

Oakland, CA 94612

Office phone: 510-548-1401

Email: rbm@landwater.com

Attachments area

On Mon, Feb 1, 2021 at 4:47 PM Roger Moore <rbm@landwater.com> wrote:
The attached letter is submitted on behalf of the California Water Impact Network (CWIN).

Respectfully,

Roger B. Moore
Attorney for CWIN

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Office phone: 510-548-1401

Email: rbm@landwater.com

LAW OFFICE OF ROGER B. MOORE

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ADMITTED IN CALIFORNIA

August 27, 2020

Via email

David Rizzardo, Supervising Water Resources Engineer
Karla Nemeth, Director
Department of Water Resources
1416 9th Street
Sacramento, CA 95814
David.rizzardo@water.ca.gov
Karla.Nemeth@water.ca.gov
Janiene.Friend@water.ca.gov

Re: Due to Serious Deficiencies in the Final Environmental Impact Report (FEIR) for the State Water Project (SWP) Water Supply Contract Amendments for Water Management, EIR Certification and Project Approval Must Be Denied, or Minimum Delayed Pending Further Study

Dear Mr. Rizzardo and Ms. Nemeth:

This letter is submitted on behalf of the California Water Impact Network (CWIN), which along with other organizations submitted detailed comments on the Draft EIR for the above-referenced project ("Project"). (See, e.g., Comment Letters 12, 13.) CWIN continues to have major concerns about the project even after its superficial repackaging this year, which fails to overcome numerous problems raised in earlier public comments on DWR's environmental review and underlying project, and has in some respects made them even worse.

CWIN is dismayed to learn that without holding another CEQA hearing or notifying it and other groups that raised formidable problems in comment letters, DWR now appears poised to prematurely proceed to certification of an intended Final Environmental Impact Report (FEIR). Rather than keep CWIN and other interested groups in the dark, DWR should promptly indicate, through timely advance communication to commenting parties and postings on its website, whether and when, if at all, it intends to certify a FEIR and make a decision on

DWR's proposed water management contract amendments. Notably, the May 20, 2019 AIP, the basis for the revised project, is on its face an incomplete draft document contingent on the outcome of pending "public negotiations."

Should DWR, despite the warnings of CWIN and others, nonetheless proceed promptly to final decision-making, it must deny EIR certification and reject the project. If DWR does not, it must at least delay its determination pending further study and coordination with DWR's review of closely interrelated pending projects. Those include DWR's proposed **Delta Conveyance Project (DCP)**, which has been the subject of a Notice of Preparation and scoping review and awaits EIR preparation (<https://water.ca.gov/deltaconveyance>). A forthcoming set of contract amendments tied to DWR's pending Delta conveyance project is also the subject of pending negotiation and forthcoming review (<https://water.ca.gov/Programs/State-Water-Project/Management/Delta-Conveyance-Amendment>). Those are referred to herein as the **Delta Conveyance Amendments (DCA)**. To avoid a textbook case of CEQA piecemealing and ensure adequate consideration of project impacts (including cumulative impacts) and alternatives, DCP and DCA cannot lawfully be disconnected from review of the Project.

Moreover, despite the FEIR's specious efforts to suggest otherwise, DWR's water management contract amendments remain closely connected to other pending matters. That includes an earlier set of amendments to extend the SWP and facilitate expansion of its facilities, which DWR has mislabeled the "contract extension" amendments. These challenged amendments do far more than to extend the contracts for another half-century; they would also remove existing limitations on facilities eligible for revenue bonds and seek to remove certain obstacles to financing of new capital-intensive projects, even where they are opposed by some affected contractors, other public agencies, members of the public, or all of the above. (<https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>; see Comment Letter 12, comment 14 and related attachments.) To avoid furthering DWR's misleading nomenclature, these comments reference those challenged amendments as the **Contract Expansion Amendments (CEA)**.

Lastly, limiting assumptions in the FEIR undermine the project definition and thwart an honest comparison of the project, no project alternative, and project alternatives. Given DWR's own checkered history with CEQA compliance for SWP contract amendments, DWR should know better than to rely on a final documents that fails to identify or address the SWP's unresolved "paper water" problems and substitutes an "aura of unreality" for the informative analysis CEQA requires. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 912.)

The FEIR Compounds, Rather than Solves, DWR's "Whole of the Action" and Piecemealing Problem

CEQA prohibits piecemealing and requires evaluation of 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." (14 Cal. Code Regs., § 15378(a); see also *Bozung v. Local Agency Formation Com.* (1975) 13.3d 263, 283-284 (preventing the submerging of environmental considerations by "chopping a large project into many little ones"); *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 396 (same).) As the FEIR is constrained to recognize in its first two master responses, DWR's failure to analyze the "whole of the action" and to avoid CEQA's prohibition of piecemealing was a recurrent subject of EIR criticism, raised by public agencies spanning the state and by CWIN and other organizations. (See, e.g., Comment Letters 2, 3, 5, 6, 7, 10, 12, 13, 14, 15, 17.)

Due to the intertwined and inextricable relationships connecting the Project with others of its own DWR artificially separated from this review, including the CEA and DWR's then-current project for Delta conveyance (California WaterFix), CWIN and its co-commenters warned that the isolated analysis in its EIR amounted to "piecemealing on top of piecemealing," and warned that if left uncorrected, this error would undermine the EIR's integrity as a decision-making document. (FEIR, A-327.)

Yet rather than overcoming the EIR's foundational project definition and piecemealing problems, the FEIR makes them even worse. As analyzed in the DEIR, DWR improperly disconnected review of two closely related sets of contract amendments: the CEA and the Project as originally framed, which then embraced both water management amendments and amendments intended to facilitate the then-proposed Delta conveyance. By contrast, DWR further segments its environmental review into *three* prejudicially disconnected analyses of contract amendments: the CEA, the Project (which retains its earlier water management and transfer provisions without correction or improvement), and the Delta Conveyance Amendments. These, in turn, are disconnected from review of the underlying CEQA review of the new Delta Conveyance Project, which all three of these sets of contract amendments would help facilitate.

Far from justifying this suspect reliance on a muddled morass of closely related, but disconnected CEQA reviews—the reverse of what DWR's "whole of the action" approach requires for good reason--the FEIR doubles down on DWR's earlier defective approach. First, DWR implausibly argues that simply because it is no longer pursuing California WaterFix, detailed comments analyzing how the Project (including the water management and transfer provisions) could be utilized in tandem with a DWR-proposed Delta conveyance and compound the problems

of both are somehow “no longer relevant.” (FEIR, 2-9, 2-10.) The obvious, and unanalyzed problem with that assumption is that as mentioned above, DWR is actively pursuing its new proposed Delta conveyance project and its related set of conveyance-specific contract amendments (respectively, the DCA and DCP). DWR has not even commenced, much less completed analysis of how the Project would operate, how its impacts may be compounded, and what mitigation and alternatives may come into play when it is considered in connection with the DCP, as well as the related DCA.

Second, DWR’s cursory attempt to justify piecemealing from the CEA is, if anything, even less plausible. As DWR is well aware but does not discuss in the FEIR, environmental review of the CEA is the subject of pending CEQA challenges brought by CWIN and others in Sacramento Superior Court, as well as DWR’s direct validation action, which CWIN and others have answered and raised multiple affirmative defenses. (Sacramento County Superior Court Case No. 34-2018-00246183, Case No. 34-2019-80003047, Case No. 34-2019-80003053.) The FEIR admits that the Project EIR’s analysis works in tandem with the CEA, and assumes contract features and a time frame of operation for the Project that are expressly rooted in the CEA (FEIR, 2-9.) But rather than justifying piecemealing of this obviously interconnected analytical framework, DWR argues that it does not matter, because it expects contractors would still request extensions of their contract length under the Evergreen Clause in Article 4 of SWP contracts.

Using a tactic whose evasive nature should be very familiar to DWR, the FEIR truncates the analysis of the no project alternative, arguing it does not matter whether SWP contractors choose to extend their contracts through the CEA or via the Evergreen Clause. (FEIR, 2-13; see *PCL v. DWR*, 93 Cal.App.4th at 910-920 (faulty assessment of no project alternative in SWP contracts).)

Understood in context, the FEIR’s rationalization of this analytic gap *proves*, rather than disproves, why the Project’s analysis cannot be disconnected from DWR’s assessment of the CEA. Indeed, part of what is at issue in the pending CEA cases is DWR’s failure to analyze the difference between extensions of contract length under Article 4 and the CEA, a failure perpetuated in the current Project’s FEIR. As CWIN and others noted in comments here (letter 12, comment 14 and attachments), DWR’s earlier FEIR for the CEA undermined DWR’s own claim of independence by showing that the contracts could be extended under Article 4—thus addressing DWR’s claimed “debt compression” problems--without the other problematic provisions of the CEA facilitating new SWP facilities and expansion. (E.g., CEA FEIR, 2-3 to 2-5, 2-33.) Nonetheless, both in the CEA FEIR and here, DWR avoids analysis of a road not taken, in which some or all SWP contractors may have the contract length extended under

Article 4, *without* bundling in provisions through the CEA that redefine project facilitates and help facilitate risky debt burdens for a Delta conveyance.

Moreover, as CWIN and others pointed out in their DEIR comments on this Project (Comment letter 12), documents and testimony, including those from the September 11, 2018 JLBC hearing, undermine DWR's premise of the CEA's independence from DWR's proposed Delta conveyance. At that hearing, DWR Director Nemeth conceded that DWR planned to "use these amendments" (e.g., the CEA) to "finance" DWR's then-current conveyance project, California WaterFix. Rachel Ehlers of the Legislative Analyst's Office that the contract extension amendments would "affect and facilitate" that conveyance project. DWR is now again pursuing a proposed conveyance in the form of the DCP, yet the FEIR is devoid of analysis of how Project impacts could be compounded and expanded by use of its management provisions along with the CEA.

Faulty Assumption of "Normal" Operation

A further problem with the FEIR is that it assumes "normal" operation and "financial integrity" of the SWP can continue unaffected over an additional fifty years. (FEIR 2-6.) It fails to confront that the Project's management and transfer provisions are specifically intended to affect operations. It fails to analyze in context how such factors as laws protecting the Delta, laws protecting endangered species and water quality, climate change, and the protection of public trust resources may work to disrupt the FEIR's assumptions. Finally, the FEIR neglects to confront the core "paper water" problem noted in *PCL v. DWR*: the "huge gap" between what the SWP promised and what can be reliably delivered. (83 Cal.App.4th at 915; see also *In Re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168 (exports may need to be reduced to protect the Delta and comply with other legal requirements).) The "normal" condition referenced in the FEIR, like paper water itself, remains an illusion.

The FEIR Needs, and Lacks, Cumulative Analysis of DWR's Delta Conveyance Project

As Sacramento County and Sacramento County Water Agency correctly points out in comments on the FEIR dated August 26, 2020, the FEIR is also deficient because it needs, and entirely lacks, cumulative analysis of the proposed single-tunnel DCP.

DWR has an affirmative duty under CEQA to address project impacts "in connection with the effects of . . . other current projects, and the effects of probable future projects." (Cal. Code Regs., tit. 14, § 15065(a)(3); see also *id.* § 15355.) The DCP falls well within this definition, and cannot be excluded from the FEIR's analysis of the Project. Contrary to the FEIR's assumption that no such

project has been “formally proposed” in a Notice of Preparation (FEIR, 6-2), precisely that has occurred. DWR issued its NOP for that project on January 15, 2020, and has engaged in scoping activities during 2020. It is clearly the responsibility of DWR to conduct this further analysis prior to certifying the EIR or progressing toward a project decision. (Cal. Code Regs., tit. 14, §§ 15065(a)(3), 15088(d).)

Conclusion

For reasons detailed in above and in earlier EIR comments, the FEIR cannot be certified at this time, nor can the project lawfully support a project approval in compliance with CEQA. If the EIR, project, or both are approved, the analysis excluded from the FEIR would subvert core purposes of CEQA, depriving decision-makers and the public of “material necessary to informed decision-making and informed public participation.” (*Sierra Club v. County of Fresno* (2019) 6 Cal.5th 502, 520.)

Respectfully submitted,



By: _____
ROGER B. MOORE

Attorney for California Water
Network

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Deputy Clerk

Attorneys for Petitioners California Water Impact Network, AquAlliance

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

CALIFORNIA WATER IMPACT
NETWORK, AQUALLIANCE

Petitioners

vs.

CALIFORNIA DEPARTMENT OF
WATER RESOURCES

Respondent

DOES I THROUGH 50

Real Parties in Interest.

Case No.: 34-2020-80003492

**VERIFIED PETITION FOR WRIT
OF MANDATE**

*CEQA action subject to preference over
all other civil actions per Public
Resources Code § 21167.1*

(Code Civ. Proc., §§ 1085, 1094.5; Pub.
Res. Code, §§21000, et seq.)

Petitioners California Water Impact Network and AquAlliance (collectively, "petitioners") pray for this Court to issue its writ of mandate directed against Respondent California Department of Water Resources ("DWR"), based on the following allegations:

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INTRODUCTION

1. In this petition, petitioners California Water Impact Network (CWIN) and AquAlliance, a regionally diverse coalition of public interest organizations from northern and southern California, challenge the failure of respondent California Department of Water Resources ("DWR") to comply with the California Environmental Quality Act ("CEQA," Pub. Res. Code §§ 21000, *et seq.*) when it certified its Final Environmental Impact Report ("FEIR") and rendered final approval as state lead agency of the project referenced in its decision-making documents as the State Water Project Water Supply Contract Amendments for Water Management ("Water Management Amendments" or "project"). Petitioners seek to set aside DWR's certification of the Final EIR and final project approval recorded in DWR's Notice of Determination ("NOD") filed in the State Clearinghouse on August 28, 2020.

2. The FEIR challenged in this action is designated as the *State Water Project Water Supply Contract Amendments for Water Management Final Environmental Impact Report*. This action challenges DWR's compliance with state law in its EIR certification and the final project decision as CEQA lead agency recorded in its Notice of Determination. Subject to legal requirements and limitations, including the Burns-Porter Act (Wat. Code, § 12930, *et seq.*), passed by the Legislature in 1959 and approved by California's voters in 1960, DWR operates and maintains California's State Water Resources Development System, more commonly known as the State Water Project ("SWP"). The SWP's storage and conveyance facilities provide water meant to serve the people and resources of California through deliveries to 29 local state water contractors spanning the state from Plumas County in the north to San Diego County in the south. Operation of the SWP also significantly degrades environmental conditions, particularly in the Sacramento River and San Joaquin River watersheds and the Bay-Delta estuary.

1 3. Through the EIR certification and final project decision challenged in this petition,
2 DWR seeks to approve major changes in environmentally significant provisions of long-
3 term SWP contracts without complying with CEQA.

4
5 4. Courts have long recognized the important role DWR must play as CEQA lead
6 agency in reviewing the environmental impacts of projects proposing amendments to SWP
7 contracts, and ensuring compliance with CEQA before making its final decision on a
8 contract amendment project proposing such amendments. CEQA “compels process. It is a
9 meticulous process designed to ensure the environment is protected,” and the
10 Environmental Impact Report serves as the “heart and soul” of CEQA. (*Planning and
11 Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911.)
12 Because CEQA’s “fundamental purpose” is for agencies to “inform the public and
13 responsible officials of the environmental consequences of their decision before they are
14 made,” CEQA’s EIR process “protects not only the environment but also informed self-
15 government.” (*Id.* at 916 (citation omitted.) However, SWP decision-making is complicated
16 by the SWP system’s historic long-term inability to reliably deliver approximately half, if
17 not more, of the total water allocation amounts referenced in Table A of the SWP contracts.
18 The SWP “has never been completed,” and those amounts “represent nothing more than
19 hopes, expectations, water futures, or... ‘paper water’...Consequently, there is a huge gap
20 between what is promised and what can be delivered.” (*Id.* at 908, fn. 5.)

21 5. DWR’s NOD approves a project that would make permanent changes in the water
22 management provisions of long-term SWP contracts, allowing for expanded use of water
23 transfers and exchanges of SWP water within the SWP service area. As approved, the
24 project would place additional strains on the oversubscribed SWP and its source
25 watersheds. However, foundational errors in DWR’s FEIR, project findings, and statement
26 of overriding considerations deprive decision-makers and the public of critical information
27 necessary to informed decision-making and public participation. At critical stages of project
28 review, DWR refused to provide analysis needed under CEQA to ensure adherence to a
stable and consistent project definition, to provide a full analysis of direct and cumulative

1 impacts, to study feasible mitigation measures, and to allow for a fair and full comparison
2 of the project, the “no project” condition, and project alternatives.

3
4 6. As the FEIR recognized in its first two master responses, DWR’s failure to analyze
5 the “whole of the action” and to avoid CEQA’s prohibition of piecemealing was a recurrent
6 subject of EIR criticism, raised by public agencies spanning the state and by petitioners and
7 other organizations. (See, e.g., Comment Letters 2, 3, 5, 6, 7, 10, 12, 13, 14, 15, 17; FEIR
8 2-2 to 2-10.) However, DWR in its FEIR and final decision-making compounded rather
9 than resolved these problems stemming from disconnection of the project review from
10 DWR’s other closely related projects.

11 7. DWR’s project addressed in this CEQA challenge arose out of years of public
12 meetings and negotiation sessions with SWP contractors addressing two heavily
13 interrelated subjects: pursuit of long-term contract amendments covering multiple
14 provisions, and pursuit of a Delta conveyance project intended in large part to facilitate
15 water exports south from the Sacramento Valley and Bay-Delta region to water contractors
16 in southern California. DWR has sought to facilitate a Delta conveyance from the outset of
17 these proceedings, and sought new contract amendments in connection with its planned
18 Delta conveyance, but the specific configuration of conveyance project supported by DWR
19 has changed several times.

20
21 8. When DWR prepared its Draft EIR, the project included water management
22 provisions and other proposed amendments more directly tied to its then-current twin
23 tunnel Delta conveyance project, California WaterFix. In the FEIR, DWR refused requests
24 for interrelated and cumulative analysis of how its proposed water management changes
25 would be used, and what additional impacts it would have, in the context of a Delta
26 conveyance. The FEIR disingenuously portrayed these concerns as no longer “relevant”
27 because DWR by then was no longer pursuing California WaterFix and had deleted
28 WaterFix-specific provisions from its Agreement in Principle. Although DWR pretended
that it no longer had a specific conveyance project to address in the EIR’s analysis, it failed

1 to disclose that it had filed a Notice of Preparation for its new Delta Conveyance Project
2 months before completing the FEIR, and had engaged in extensive scoping review and
3 taken other concrete steps toward preparation of the Delta Conveyance Project's Draft
4 EIR. DWR also failed to disclose that months before completing the FEIR, it had prepared
5 a separate Agreement in Principle for an additional conveyance-specific set of contract
6 amendments slated for forthcoming separate and segmented environmental review.

7
8 9. DWR disconnected its review of the water management project from its pending
9 environmental review of the Delta Conveyance Project, and its isolated analysis amounted
10 to piecemealing on top of piecemealing. Through its FEIR and NOD, DWR further
11 segmented environmental review into *three* prejudicially disconnected analyses of contract
12 amendments: (1) the already-approved "contract extension" amendments, which also
13 revise certain substantive contract provisions and are the subject of pending litigation; (2)
14 the project as approved (which retains its earlier water management and transfer provisions
15 without correction or improvement); and (3) the Delta Conveyance Amendments, which
16 are identified in DWR's 2020 agreement in principle and planned to be the subject of a
17 separate review. All three of these sets of contract amendments would help facilitate the
18 Delta Conveyance Project.

19 10. In the FEIR and its final decision-making on the project, DWR also repeatedly
20 evaded requested analysis of project impacts, mitigation and alternatives based on faulty
21 and unsupportable assumptions about the "normal" operation and "financial integrity" of
22 the SWP, and the project's assumed, but unanalyzed "continued" adherence to numerous
23 laws, including laws protecting the Delta and areas of origin, water quality, the public trust,
24 and other resources. The FEIR vaguely references "SWP water" or the "SWP service area"
25 as the source of water for the project, without explaining the geographic location and the
26 means with which the water will be available. The FEIR avoids required analysis of the
27 environmental impacts of the project's expanded reliance on transfers and exchanges,
28 including their consequences for the oversubscribed Sacramento River and the Bay-Delta
and already-depleted groundwater aquifers. The FEIR impermissibly defers key elements

1 of project review until after DWR's project of proposed amendments has become a *fait*
2 *accompli*. The FEIR fails to analyze the extent to which climate change and changes to the
3 coordinated operation of state and federal water projects may exacerbate project impacts.
4 In certifying the FEIR and approving the project, DWR failed to heed major criticism from
5 the petitioner organizations, counties, communities, public agencies, and expert reviewers
6 discrediting the foundations of DWR's asserted compliance with CEQA, undermining the
7 FEIR's environmental and legal foundations. Petitioners seek a writ of mandate under
8 California Code of Civil Procedure sections 1085, 1094.5, or both, directing DWR to
9 vacate its EIR certification and approval of the project, and to revise its findings to conform
10 with the law.

11 **PARTIES, JURISDICTION AND VENUE**

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13
14 11. Petitioner California Water Impact Network ("CWIN") is a California non-profit
15 public benefit organization with its principal place of business in Santa Barbara, California.
16 CWIN's organization purpose is the protection and restoration of fish and wildlife
17 resources, scenery, water quality, recreational opportunities, agricultural uses, and other
18 natural environmental resources and uses of the rivers and streams of California. These
19 resources include, but are not limited to, the Bay-Delta, its watershed and its underlying
20 groundwater resources. CWIN has members who reside in, use, and enjoy the Bay-Delta
21 and inhabit and use its watershed. They use the rivers of the Central Valley and the Bay-
22 Delta for nature study, recreation, and aesthetic enjoyment. CWIN has long sought to
23 ensure that the SWP is managed and operated in a manner that ensures public
24 accountability, environmental responsibility, and protection of the public trust. In numerous
25 activities, including participation in administrative and judicial proceedings, it has drawn
26 attention to the risks stemming from oversubscription of California's major water
27 resources, and overreliance on "paper water" allocations referenced in water project
28 contracts far exceeding supplies that can be reliably and safely delivered.

1 12. Petitioner AquaAlliance (“AquaAlliance”), whose headquarters is in Chico, California,
2 is a California public benefit corporation. Its mission is to defend northern California
3 waters and the ecosystems these waters support and to challenge threats to the hydrologic
4 health of the Sacramento River watershed. This includes escalating attempts to divert and
5 withdraw more water from the hydrologic region, which has faced growing dangers from
6 droughts, floods, fires, and other major risks compounded by the onset of climate change.
7 AquaAlliance’s members include farmers, scientists, businesses, educators, and residents all
8 of whom have significant financial, recreational, scientific, aesthetic, educational, and
9 conservation interests in the aquatic and terrestrial environments that rely on waters of the
10 Sacramento River Watershed and Bay-Delta estuary. This hydrologic system provides
11 water for orchards, homes, gardens, businesses, wetlands, streams, rivers, terrestrial habitat,
12 and myriad species, which in turn allows AquaAlliance members to live, fish, hunt, cycle,
13 photograph, camp, swim, and invest in northern California. AquaAlliance recognizes that
14 the northern Sacramento Valley and foothills need water for their own cities, residential
15 wells, and family farms, and also for threatened and endangered species. In addition to
16 addressing overreliance on surface water sources, AquaAlliance seeks to avoid overuse of
17 groundwater, from sources such as the Tuscan Aquifer. Overuse of groundwater results in
18 the dewatering of creeks and streams and could easily impair the fragile riparian, wetland,
19 and oak woodland ecosystems of the Sacramento Valley and foothills.

20 13. Respondent California Department of Water Resources (“DWR”) is a California
21 public agency, established by the California Legislature in 1956. Under state law, DWR is
22 principally responsible for operation and management of the State Water Project. DWR
23 served as the CEQA lead agency for the project. DWR certified the FEIR and filed the
24 Notice of Determination recording its approval of the project, both challenged in this
25 action. The FEIR prepared by DWR as CEQA lead agency must also serve as a legally
26 adequate decision-making document for any discretionary determinations of responsible
27 and trustee agencies subject to the requirements of CEQA.
28

- 1 14. Does 1 through 50, inclusive, may have an interest or claim to the project whose
2 specific details are not presently known to the petitioners and plaintiffs. Their true names
3 and capacities, whether in individual, corporate, associate, governmental, or other
4 designations, are not presently known to plaintiffs and petitioners, and are therefore
5 referenced here by fictitious names. Should their true names and capacities later be
6 ascertained, petitioners and plaintiffs will seek to amend this petition to identify their true
7 names and capacities.
- 8 15. DWR's Notice of Determination for the project did not identify any real parties in
9 interest pursuant to Public Resources Code section 21167.6.5, and petitioners are not aware
10 of any entities that meet the statutory definition of real parties in interest.
- 11
- 12 16. This civil action is brought pursuant to Code Civ. Proc., §§ 1085, and 1094.5; and
13 CEQA, Public Resources Code section 21000 *et seq.*
- 14
- 15 17. Pursuant to Code of Civil Procedure sections 393, 394 and 395, venue for this action
16 is appropriate in Sacramento County Superior Court. DWR is a state agency whose
17 principal office is located in the City of Sacramento, within Sacramento County. The
18 affirmative acts of DWR recorded in its notice of determination resulted in wrongs that
19 were felt, at least in large part, in Sacramento County.
- 20
- 21 18. Petitioners have exhausted all administrative remedies by submitting written
22 comments preceding DWR's certification of the EIR and approval of the project. All issues
23 raised in this petition were raised by petitioners, or by other public entities, members of the
24 public, or both, prior to DWR's final decision on the project recorded in the Notice of
25 Determination. Petitioners possess no remedy to challenge DWR's unlawful conduct
26 identified herein other than by bringing this action.
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- 28 19. Petitioners have complied with Public Resources Code section 21167.5 by prior
service of a notice upon DWR indicating their intent to file this petition.

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20. Petitioners have complied with Public Resources Code section 21167.7 and Code of Civil Procedure section 388 by serving a copy of this petition on the Attorney General. Petitioners bring this action on behalf of their members and members of the public, to enforce important rights affecting the public interest and confer a significant public benefit. Petitioners and their members are directly and adversely affected by DWR's approval of the project and failure to comply with CEQA. DWR's actions set forth in this petition amount to a prejudicial abuse of discretion under Public Resources Code section 21168.5 and Code of Civil Procedure section 1085. Without the relief requested in this petition, petitioners, their members, the public, and the environment would be irreparably harmed, and no monetary damages could adequately compensate for that harm.

21. Petitioners elect to prepare the record of proceedings in the above-captioned proceeding or to pursue an alternative method of record preparation pursuant to Public Resources Code section 21167.6(b)(2).

PROCEDURAL HISTORY

22. For much of the past decade, DWR has studied and pursued detailed amendments to long-term SWP contracts, originally enacted with expiration dates between 2035 and 2042. DWR has also studied and pursued approval and financing of a proposed Delta conveyance, and related changes in the rules governing SWP management.

23. DWR, which earlier pursued conveyance projects known as the Bay Delta Conservation Plan (BDCP) and California WaterFix (WaterFix), is currently reviewing, and has received numerous scoping comments from petitioners and others on its latest proposed conveyance, the Delta Conveyance Project (DCP).

1 24. Whether to add a Delta conveyance to the existing SWP, and the consequences of
2 facilitating such a conveyance for ratepayers, taxpayers, and the environment, have long
3 been among the most controversial and contentious subjects in the seven-decade history of
4 the SWP. In 1966, DWR issued Project Order No. 12, which purported to designate the
5 Peripheral Canal as the SWP facility to transfer water across the Sacramento-San Joaquin
6 River to the Delta. For reasons reinforced in the defeat by voters of Proposition 9 in 1982,
7 existing SWP water system facilities do not include the peripheral canal, permutations of
8 that proposed conveyance, or any subsequently-proposed Delta conveyance.

9
10 25. An October 2011 Legislative Analyst's Office (LAO) Report, *Potential Funding*
11 *Alternatives for the Bay Delta Conservation Plan Planning Process*, stated that "[f]unding
12 BDCP implementation" would "require amendment of long-term water supply contracts
13 between DWR, the Bureau of Reclamation, and the contractors in order to provide the
14 funding mechanism." (*Id.* at 5.) This report also listed revenue bonds as one of the
15 "currently infeasible" funding mechanisms (*Id.* at 8.)

16 26. In 2013, DWR initiated a public negotiation process with SWP contractors to
17 discuss amendments of long-term SWP contracts, including but not limited to extension of
18 the length of these contracts through the end of 2085. Among the topics of discussion were
19 SWP water management practices, and whether and how adoption of SWP contract
20 amendments could facilitate indebtedness for a Delta conveyance, or remove obstacles to
21 that indebtedness. During the negotiation process on proposed SWP contract amendments,
22 certain SWP contractors, including Plumas County Flood Control and Water Conservation
23 District and Butte County, raised concerns about taking steps that could risk exposure to
24 costs from DWR's proposed Delta conveyance project, then known as BDCP.

25 27. When discussing revenue bonds in connection with DWR's then-current Delta
26 conveyance project, BDCP, DWR's bond counsel concluded that without contract
27 amendments, BDCP was "not on the list of approved projects that are eligible for funding,
28 including through bond financing." (Letter from Jake Campos, STIFEL, to Mary Lou

1 Cotton, State Water Project Contractors Authority, at 4 (March 19, 2014; see also
2 Metropolitan Water District of Southern California (MWD) PRA Document 00000484-
3 SWC Financing DHCCP 9-7-12.)

4
5 28. In September 2014, MWD staff acknowledged that proposed SWP contract
6 amendments were a necessary step in financing BDCP. *See* MWD, Special Committee on
7 Bay-Delta Presentation Re Review Status of BDCP Cost Allocation Discussions
8 (September 23, 2014). In a September 23, 2013 report, Kern County Water Agency also
9 indicated contract amendments were needed to finance BDCP.

10 29. DWR issued its Notice of Preparation for a first set of new contract amendments,
11 designated as the Water Supply Contract Extension Project, on September 12, 2014. The
12 term “contract extension” does not fully describe those amendments, which proposed to
13 change substantive provisions of SWP contracts as well as extend their terms until 2085.
14 Santa Barbara County’s Flood Control and Water Conservation District raised scoping
15 questions about the proposed project’s financial consequences and implications for
16 taxpayers and ratepayers. A consistent theme in public comments involved the role of
17 contract amendments in facilitating DWR’s proposed Delta conveyance.

18
19 30. Although DWR pursued substantive amendments to SWP contracts that could
20 remove certain obstacles to financing a Delta conveyance as part of its “contract extension”
21 amendments project, it also sought delay in addressing other proposed contract
22 amendments, including water management provisions and those addressing financing for
23 DWR’s proposed Delta conveyance. Separately from its contract extension project review,
24 DWR initiated a separate SWP contract amendments process in November 2014 for its
25 proposed Delta conveyance. DWR later suspended that process in February 2015.

26 31. In August 2016, DWR published its Draft EIR for the contract extension project. In
27 October 2016, petitioners and other commenters submitted public comments on the contract
28 extension Draft EIR. Commenters, including petitioners, submitted evidence discrediting

1 the independence of the contract extension project from DWR's proposed Delta
2 conveyance, as well as from other proposed SWP contract amendments under separate
3 consideration, such as those addressing water management and conveyance financing.

4
5 32. In July 2017, DWR separately certified the Final EIR and issued its Notice of
6 Determination recording final approval of its then-current twin-tunnel Delta conveyance
7 project, designated as California WaterFix (also referenced as BDCP Alternative 4A). The
8 same day, DWR approved three resolutions purporting to authorize revenue bond
9 obligations for payment of California WaterFix. Also on the same day, but after executing
10 the Notice of Determination for its California WaterFix approvals, DWR adopted Project
11 Order No. 40, which purported to add California WaterFix facilities under the Central
12 Valley Project Act, and through that action, to the SWP. DWR did not include Project
13 Order No. 40 and the three WaterFix bond resolutions in any public administrative review,
14 comment period or public hearing prior to their adoption. DWR failed to enact any of its
15 proposed SWP contract amendments facilitating Delta conveyance financing before
16 rendering these approvals. In coordinated actions in the Sacramento County Superior Court
17 (JCCP No. 4942), petitioners and others disputed the validity of the three bond resolutions
18 and Project No. 40, and argued that DWR had exceeded its authority and violated CEQA
19 and other requirements of law in connection with its California WaterFix decision-making.

20 33. In May 2018, although DWR had still not responded to 2016 public comments from
21 petitioners and others on the contract extension DEIR, DWR requested a legislative hearing
22 required under Water Code section 147.5 before executing contract extension amendments.
23 Hearings were held on DWR's proposed contract amendments before the Senate Natural
24 Resources and Water Committee (SNRWC) on July 3, 2018 and the Joint Legislative and
25 Budget Committee (JLBC) on September 11, 2018. Testimony at the September 11, 2018
26 JLBC hearing undermined the premise of the amendments' independence from DWR's
27 proposed Delta conveyance. DWR director Karla Nemeth confirmed that DWR plans to
28 "use these amendments to finance WaterFix," and Rachel Ehlers of the Legislative
Analyst's Office testified that the contract extension amendments would "affect and

1 facilitate” WaterFix. Facilitation of WaterFix through contract amendments is also
2 addressed in the testimony of Congressman McNerney and of Roger Moore at the same
3 hearing.

4
5 34. While SWP contract amendments were the subject of legislative proceedings during
6 2018, public agency critics throughout California, from Plumas County and the Delta
7 Counties Coalition to San Diego County, criticized DWR’s efforts to complete contract
8 amendments without integrated review of all DWR’s proposed amendments related to the
9 Delta Tunnels, including pending water management and water supply contract
10 amendments. The Legislative Delta Caucus observed that DWR’s “poorly defined”
11 amendments would have “potential adverse impacts far beyond their apparent scope,” with
12 many unknowns “regarding the extensive changes to the SWP contracts that are being
13 proposed and how the changes will impact property taxes, water rates, the fiscal integrity of
14 the SWP and General Fund.” Commentary in major newspapers criticized DWR’s lack of
15 transparency and attempts to leverage indebtedness for a Delta conveyance without
16 adequate review and debate.

17 35. Following the 2018 legislative hearings, more than a dozen organizations, including
18 petitioners, sent a letter to DWR in September 25, 2018, identifying changed circumstances
19 and calling for integrated environmental review of all DWR’s anticipated and interrelated
20 contract amendments. A December 11, 2018 letter to DWR on behalf of San Joaquin
21 County, and other counties and agencies in the Delta region and the northern Sacramento
22 Valley, supported the same position. Instead, following certification of a separate Final EIR
23 DWR finally approved the “contract extension” project on December 13, 2018. DWR’s
24 December 2018 decision-making on the contract extension amendments is the subject of
25 pending CEQA challenges brought by petitioners and others in Sacramento Superior Court.
26 (Sacramento County Superior Court Case No. 34-2018-00246183, Case No. 34-2019-
27 80003047, Case No. 34-2019-80003053), as well as a direct validation action brought by
28 DWR (Sacramento County Superior Court Case No. 34-2018-00246183).

1 36. Separately from its contract extension proceedings, DWR issued a notice to SWP
2 contractors in December 2017, confirming its desire to pursue contract amendments to
3 revise water management practices, including those pertaining to transfers and exchanges,
4 and to address changes in financial provisions related to the costs of DWR's proposed
5 Delta conveyance. A series of public negotiation sessions followed in early 2018
6 addressing these subjects. In June 2018, following up on these negotiations, DWR issued a
7 non-binding Agreement in Principle (2018 AIP) for the project. DWR determined that
8 preparation of an EIR was necessary for the project.

9
10 37. On July 13, 2018, DWR, acting as CEQA lead agency, published a Notice of
11 Preparation (NOP) for the project, identified as the *State Water Project Contract*
12 *Amendment for Water Management and California WaterFix*. Scoping comments submitted
13 in response to the NOP expressed concerns about piecemealing of matters separately
14 pending in other proceedings on California WaterFix and the contract extension
15 amendments, among other subjects. They also expressed concerns about other problems
16 that could render DWR's environmental review inadequate under CEQA, including such
17 subjects as the baseline for project analysis, project definition, methodology for impact
18 assessment, and assessment of alternatives.

19 38. In October 2018, DWR published its *State Water Project Contract Amendment for*
20 *Water Management and California WaterFix Draft Environmental Impact Report (DEIR)*.
21 DWR opened the public comment period on the DEIR on October 26, 2018, and closed that
22 period on January 9, 2019. DWR also held public meetings on November 16, 2018 and
23 November 30, 2018. During public meetings, members of the public expressed concerns
24 about deficiencies in DWR's DEIR, piecemealing of its impact assessment, and refusal to
25 provide an integrated analysis of all DWR's proposed contract amendments.

26 39. Prior to the close of the public comment period, the petitioners, along with other
27 organizations, public agencies, and members of the public, submitted detailed EIR
28 comments identifying substantial deficiencies in the DEIR.

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40. On February 12, 2019, while DWR's litigation remained pending in Sacramento County Superior Court in the coordinated actions challenging California WaterFix (JCCP No. 4942), California Governor Gavin Newsom announced in his State-of-the-State speech that he did not support the twin-tunnel California WaterFix project, but did support a single-tunnel Delta conveyance.

41. On April 9, 2019, Governor Newsom issued Executive Order N-10-19, which directed the California Natural Resources Agency, California Environmental Protection Agency, California Department of Food and Agriculture, in consultation with the Department of Finance, to prepare a water resilience portfolio that meets the needs of California's communities, economy, and environment through the 21st century. The Executive Order included planning for a single-tunnel approach to Delta conveyance as one of eight subjects for these agencies to consider in a new inventory and assessment, along with other subjects, such as "[e]xisting demand for water on a statewide and regional basis and available water supply to address this demand," and "existing water quality of our aquifers, rivers, lakes and beaches."

42. On May 2, 2019, DWR rescinded the Notice of Determination for its California WaterFix project and the CEQA approval documents referenced in its Notice of Determination. The same day, DWR set aside its certification of the California WaterFix Final EIR, as well as pending permitting applications pertaining to California WaterFix. On May 7, 2019, DWR adopted a general bond resolution rescinding all three California WaterFix bond resolutions it had sought to validate in the WaterFix coordinated actions. On May 9, 2020, DWR's counsel sent a note to opposing counsel in these actions, clarifying that it also considers Project Order No. 40 to be "rescinded" due to DWR's rescission of all its California WaterFix project approvals.

43. In a public meeting with SWP water contractors on May 20, 2019, DWR indicated it would revise the 2018 AIP to remove provisions pertaining to cost allocation for California

1 WaterFix, while leaving other provisions unchanged. The same day, DWR released a draft
2 working document for public discussion, entitled *Draft Agreement in Principle for the SWP*
3 *Water Supply Contract Amendment for Water Management (2019 AIP)*. The 2019 AIP
4 revised the 2018 AIP to delete provisions pertaining to California WaterFix, but retained
5 the earlier AIP's water management provisions pertaining to transfers and exchanges of
6 water within the SWP service area. The 2019 AIP referred to itself as a "straw proposal"
7 for a "draft" AIP, and indicated that "many provisions are under discussion and the
8 workgroup will update the Draft AIP after future public negotiations." The 2019 AIP noted
9 that its provisions are "not final contract language" and did not represent a "contractual
10 commitment." It represented DWR's intent to "ultimately develop a proposed project
11 consisting of contractual amendments consistent" with the AIP principles, and to prepare
12 the EIR for consideration by lead and responsible agencies. Although the 2019 AIP did not
13 disavow the use of its transfer and exchange provisions along with the new Delta
14 conveyance that DWR continued to pursue, it provided no indication of how, or whether,
15 DWR would provide an integrated assessment of its proposed new contract amendments in
16 the context of a new conveyance project.

17 44. In June 2019, after effectively obtaining the relief they had sought against DWR,
18 petitioners and others challenging DWR's WaterFix decision-making requested dismissal
19 of their writ petitions in the WaterFix coordinated actions (JCCP No. 4942). In July 2019,
20 DWR likewise requested dismissal of its California WaterFix validation action.

21 45. On January 15, 2020, DWR issued its Notice of Preparation of a separate
22 environmental impact report for DWR's Delta Conveyance Project (DCP-NOP). The DCP-
23 NOP provided a detailed description of the proposed facilities and project area for DWR's
24 current single-tunnel conveyance project, indicating that although it would "utilize relevant
25 information" from past environmental planning for California WaterFix, it intended to
26 prepare a new stand-alone environmental analysis for its new EIR on the DCP. The DCP-
27 NOP also disclosed that DWR's conveyance project may include "modifications" to SWP
28 water supply contracts "to incorporate the Delta Conveyance Project." DWR represented

1 that “if modifications move forward, the Delta Conveyance Project will assess, as part of
2 the proposed project, potential environmental impacts associated with reasonably
3 foreseeable potential contract modifications.” The notice did not indicate when, or whether,
4 DWR would analyze how impacts of its separately pending Water Management
5 Amendments project could be exacerbated by the DCP.

6
7 46. In February 2020, DWR released its *State Water Project Water Supply Contracts for*
8 *Water Management Partially Recirculated Draft Environmental Impact Report* (RDEIR).
9 Although the RDEIR deleted numerous references to California WaterFix from the DEIR,
10 and noted that DWR was no longer pursuing California WaterFix, it did not analyze how
11 the water management project would operate in the context of its current Delta Conveyance
12 Project. Although DWR allowed an additional comment period on the RDEIR’s revisions,
13 it held no public meetings to address the RDEIR. The RDEIR acknowledged that
14 negotiations were underway on “a possible contract amendment for cost allocation in
15 anticipation of a single tunnel project.” (*Id.* at 6-2.)

16 47. Referring to DWR’s proposal for a “single-tunnel Delta conveyance project,” the
17 RDEIR asserted that “no NOP for a proposed single tunnel project has yet been issued...”
18 (*Id.*) The RDEIR failed to mention that DWR had issued precisely such a notice for its
19 single-tunnel Delta Conveyance Project on January 15, 2020. In the months following
20 issuance of the Delta Conveyance Project, DWR received numerous detailed scoping
21 comments on that project. Among other subjects, commenters noted the need to address
22 how SWP contract amendments, and transfer and exchange provisions, would be used in
23 connection with the proposed new Delta conveyance.

24 48. While preparing and circulating the RDEIR on its water management contract
25 amendments project, DWR continued to negotiate an additional set of proposed contract
26 amendments for the Delta Conveyance Project. On April 30, 2020, drawing from SWP
27 contractor proposals in a series of offers starting in July 2019, DWR agreed to a separate
28 *Agreement in Principle for the State Water Project Water Supply Contract Amendment on a*

1 *Delta Conveyance Project (2020 AIP)*. The same day, DWR released a Final White Paper
2 conveying how DWR intended to address the accounting and administration of water
3 attributable to the Delta conveyance facility. The 2020 AIP indicated that “transfers and
4 exchanges” were not intended to be modified under it and would instead be subject to the
5 provisions of “the then existing” SWP contracts. However, the 2020 AIP did not mention
6 that DWR was already separately seeking to amend those same transfer and exchange
7 provisions, following the conclusion of a segmented environmental review that was closer
8 to completion. Accordingly, the 2020 AIP reinforces, rather than allays, the concern that
9 the water management amendments’ transfer and exchange provisions may be used
10 together with DWR’s Delta Conveyance Project.

11 49. In August 2020, DWR released its *State Water Projects Water Supply Contracts for*
12 *Water Management Final EIR (FEIR)*. Despite DWR’s expectation in the 2019 AIP that it
13 would “ultimately develop a proposed project consisting of contract amendments”
14 consistent with that AIP (2019 AIP at 10), the FEIR, like the RDEIR, does not provide
15 those specific amendments. It again relies on the 2019 AIP to frame the project under
16 review. The FEIR fails to overcome major CEQA defects identified in public comments,
17 including but not limited to those of petitioners. For example:

- 18 • Addressing concerns about its faulty project definition, piecemealing of the water
19 management contract amendments from DWR’s other proposed actions, and failure to
20 study the “whole of the action” as required under CEQA, DWR refused to provide
21 integrated assessment of its complete proposed contract amendments, and complete
22 analysis of their relationship to DWR’s proposed Delta conveyance. (FEIR, 2-4 to 2-9.)
- 23 • Addressing requests to analyze impacts of using the proposed water management
24 amendments along with a new Delta conveyance, DWR implausibly claimed that these
25 were “no longer relevant” merely because DWR was no longer pursuing its previous Delta
26 conveyance project, California WaterFix. (FEIR, 2-9, 2-10, 2-17.)
- 27 • Addressing whether the proposed Delta conveyance could exacerbate the impacts of
28 its proposed contract amendments, DWR refused to analyze even the cumulative impacts of
the Delta Conveyance Project as a current or probable future project, even though it

1 initiated review of that project in January 2020, had received extensive scoping comments,
2 and anticipated in the January 2020 NOP that this conveyance project may include
3 additional project-specific contract amendments. (FEIR, 2-18, 2-19; RDEIR, 6-2, 6-3;
4 DCP-NOP at 6.)

5 • Addressing concerns about its refusal to provide a complete assessment of the
6 environmental impacts of the project's transfer and exchange provisions, the FEIR defers
7 analysis until after project approval and proposed contract amendments are already final,
8 based partly on a provision of the 2019 AIP calling for subsequent evaluation of impacts to
9 "normal operations" and financial integrity of the SWP, as well as review for consistency
10 with DWR policy and existing laws. (FEIR, 2-6.)

11 • Addressing avoidance of analysis pending post-approval of review for impacts to
12 "normal operations" of the SWP, among other factors (FEIR, 2-6), the FEIR fails to
13 analyze the lack of any such "normal" operation within the oversubscribed SWP, fails to
14 disclose the SWP's existing inability to adhere to numerous requirements of law, and fails
15 to confront that the project's water management provisions are specifically intended to
16 affect project operations, by allowing for expanded use of transfers and exchanges in
17 comparison to existing SWP contract provisions. Compounding that disconnected analysis,
18 the FEIR fails to analyze the extent to which climate change and changes to the coordinated
19 operation of state and federal water projects may exacerbate project impacts.

20 • Addressing DWR's failure in its project to ensure compliance with laws protecting
21 the Delta, such as the Delta Reform Act of 2009's requirement to "reduce reliance on the
22 Delta" in meeting California's future water supply needs (Wat. Code, § 85021), the FEIR
23 admits that the project may increase exports from the Delta, but erroneously assumes that
24 impacts will be benign based on an assumption they would be within "existing operations"
25 of the SWP. (FEIR, 2-20.) The FEIR draws conclusions about the likely scope and location
26 of transfers, that while unsupported, contradict DWR's grounds for avoiding further
27 analysis. The FEIR fails to analyze how laws protecting the Delta, endangered species,
28 public trust resources and other rights may disrupt assumptions about "normal" project
operation of the SWP, adding to the "paper water" problems that the SWP already faces.

1 • Addressing DWR's failure in its earlier documents to clearly identify program-level
2 and project-level applications of its environmental review, the FEIR impermissibly defers
3 even program-level analysis of project impacts from expanded use of transfers and
4 exchanges until after the water management project and its proposed contract amendments
5 are already final. (FEIR, 2-11.) The FEIR relies heavily on analysis conflating the
6 distinction between SWP "Table A" allocations and surplus or "interruptible" water
7 supplied when available under Article 21 of the SWP contracts. (*Id.*) The FEIR repeatedly
8 fails CEQA's requirement for the reviewing agency to use its best efforts to find out and
9 disclose all that it reasonably can to adequately describe important elements of the project
10 and to analyze the impacts of its implementation. (CEQA Guidelines, §§ 15144, 15378.)

11 • Addressing DWR's reliance on a truncated assessment of the "no project"
12 assessment, DWR relies on speculative assumptions about future actions of SWP
13 contractors, and relies on disputed positions that are already the subject of pending legal
14 challenges (FEIR, 2-13.)

15 • Addressing DWR's refusal to study a reasonable range of alternatives, the FEIR
16 selectively relies on project objectives to ensure the "efficient delivery" of SWP supplies
17 and ensure the SWP's "financial integrity" (FEIR 2-14), without conducting the analysis
18 needed to fairly determine whether the project itself, as well as other project alternatives,
19 can feasibly meet these project objectives.

20 50. In a letter to DWR dated August 26, 2020, Sacramento County and Sacramento
21 County Water Agency ("Sacramento County") criticized the FEIR and noted DWR's
22 failure to comply with CEQA. Sacramento County noted DWR's impermissible
23 piecemealing of project analysis from the Delta Conveyance project, and refusal to provide
24 cumulative analysis of project impacts in connection with the effects of that conveyance
25 project, contrary to CEQA's requirement to do so for both "current" and "probable future
26 projects." (*Id.* at 1, citing 14 Cal. Code Regs., § 15065(a)(3); see also 14 Cal. Code Regs., §
27 15355.) Sacramento County also noted the failure to study ways to mitigate or avoid any
28 significant cumulative impacts (*Id.* at 3, citing 14 Cal. Code Regs., § 15130.)

1 51. Citing to meeting materials from a May 27, 2020 meeting of the Delta Conveyance
2 Design and Construction Authority (DCA), Sacramento County's August 26, 2020 letter
3 also observed that by the beginning of June 2020, more than two months before releasing
4 the FEIR, DWR "was already in the process of preparing the Scoping Summary Report and
5 the range of alternatives proposed for detailed analysis of the DCP in a Draft
6 Environmental Impact Report." (*Op cit.* at 2.)

7
8 52. In a letter to DWR dated August 27, 2020, CWIN noted that due to serious
9 deficiencies in the FEIR and failure to provide analysis "necessary to informed decision-
10 making and informed public participation," approval of DWR's water management project
11 must be denied, or at minimum delayed pending further study. (*Id.* at 6, citing *Sierra Club v.*
12 *County of Fresno* (2019) 6 Cal. 5th 502, 520.) Criticizing DWR's "suspect reliance on a
13 muddled morass of closely related, but disconnected CEQA reviews," CWIN argued that
14 the FEIR compounded, rather than solved, its unlawful piecemealing and refusal to study
15 "the whole of the action," raised in numerous public comments, including its own. (*Id.* at
16 3.) Like Sacramento County, CWIN criticized DWR's unlawful refusal to study the
17 cumulative impacts of its own Delta Conveyance Project. Noting DWR's continued failure
18 to address oversubscription and "paper water" problems in the SWP, CWIN criticized
19 DWR's benign assumptions about the project's ability to protect the "normal operation"
20 and "financial integrity" of the SWP. (*Id.* at 5.)

21 53. In their correspondence with DWR regarding the FEIR and DWR's unmet CEQA
22 obligations, Sacramento County and CWIN requested notification of any decision by DWR
23 on its project. Sacramento County also requested a copy of DWR's Notice of
24 Determination when issued. Ignoring these requests, and without correcting any of the
25 CEQA problems noted in their letters, DWR signed its NOD for the project on August 27,
26 2020 and filed the NOD with the State Clearinghouse on August 28, 2020. The NOD
27 recorded DWR's certification of the FEIR and approval of CEQA findings of fact and
28 overriding considerations. DWR did not make mitigation measures a condition of project
approval, or prepare a mitigation monitoring plan.

1
2 54. DWR's NOD assumed that under the project, water would "continue to be delivered"
3 to SWP contractors "consistent with current SWP Water Supply Contract terms" and "all
4 regulatory requirements." DWR's NOD and findings did not address whether "current"
5 terms included contract amendments already the subject of pending legal challenges, or
6 address how DWR's water management contract amendments, once finally approved, could
7 still be used along with additional contract amendments based on the 2020 AIP. The NOD
8 and findings did not address DWR's existing inability to meet the SWP's regulatory
9 requirements, and how that inability could be compounded by adoption of the project.

10 55. DWR's findings acknowledge that project-related changes in transfers and
11 exchanges could cause "significant and unavoidable" impacts from substantial depletion of
12 groundwater supplies (Impact 5.10-1) and subsidence caused by project-related depletion of
13 groundwater. However, DWR failed to fully analyze and identify project-related risks to
14 groundwater, and failed to analyze and implement feasible mitigation measures as CEQA
15 requires. (Pub. Resources Code, § 21002.) Instead, without requiring mitigation, DWR
16 impermissibly deferred that responsibility to be addressed, if at all, in post-approval review
17 by other permitting entities.

18
19 56. DWR's Statement of Overriding Considerations relies upon a comparison of the
20 project to contract terms that remain the subject of pending litigation. Moreover, the
21 statement rests upon legally unsupported assumptions, also lacking in substantial evidence,
22 that water transfers under the project would only use the SWP's "existing facilities" and
23 "existing operational and regulatory processes," and that "most" project related transfer
24 would not require "additional export of SWP water from the Delta." The statement fails to
25 disclose or analyze the extent of other transfers that would require such exports, despite
26 numerous legal requirements to protect the Delta and to reduce rather than increase exports
27 from the Delta. (See, e.g., Wat. Code, §§ 12201, 12202, 12405, 12205, 29701, 29702,
28 85020, 85021, 85054.)

1 **FIRST CAUSE OF ACTION:**

2 **VIOLATIONS OF CEQA**

3
4 57. Petitioners reallege and incorporate the allegations in paragraphs 1 through 56,
5 inclusive, as if fully set forth herein.

6
7 58. In certifying the Contract Extension Final EIR and rendering its final project
8 approval, DWR violated CEQA in at least the following respects:

- 9 • Improper Piecemealing of Project Analysis, and Failure to Consider the “Whole of
10 the Action” constituting the project.
11 • Failure to Provide a Stable, Complete and Consistent Project Definition.
12 • Faulty Assessment of Project Baseline.
13 • Faulty Assessment of No Project Alternative
14 • Failure to Analyze a Reasonable Range of Alternatives
15 • Faulty and Incomplete Assessment of Project Impacts
16 • Faulty and Incomplete Assessment of Cumulative Impacts
17 • Failure to Mitigate Significant Impacts
18 • Failure to Recirculate EIR Despite Significant New Information
19 • Failure to Adequately Respond to Comments
20 • Approval of Defective Project Findings and Statement of Overriding Considerations.

21 59. For all the reasons noted above, DWR prejudicially abused its discretion by failing
22 to proceed as required under law, taking arbitrary and capricious action, and making
23 conclusions and findings not supported by substantial evidence.

24 **PRAYER FOR RELIEF**

25 **WHEREFORE**, petitioners pray that this Court:
26

- 27 1. For a peremptory writ of mandate, commanding Respondent DWR to:
28 a. Vacate and set aside approval of the Project and Findings supporting the

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approval;

b. Vacate and set aside certification of the EIR and approval of its Notice of Determination;

c. Suspend any and all activity that can result in an adverse change or alteration to the physical environment, until Respondent has complied with all requirements of CEQA and all other applicable state and local laws and regulations as directed by this Court pursuant to Public Resources Code section 21168.9;

2. For a stay, temporary restraining order, preliminary injunction, and permanent injunction prohibiting any actions by Respondent that can result in any adverse change or alteration to the physical environment, pursuant to Respondent's approval of the project and certification of the EIR until Respondent has fully complied with all requirements of CEQA and all other applicable state laws, policies, and regulation.

3. For an award to petitioners of costs and attorneys' fees under section 1021.5 of the Code of Civil Procedure; and

4. For a grant of such further relief as the Court deems just.

Dated: September 28, 2020

Respectfully submitted,

ROGER B. MOORE (SBN 159992)
LAW OFFICE OF ROGER B. MOORE

By: 
Roger B. Moore

Attorney for Petitioners California Water Impact
Network and AquAlliance

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VERIFICATION

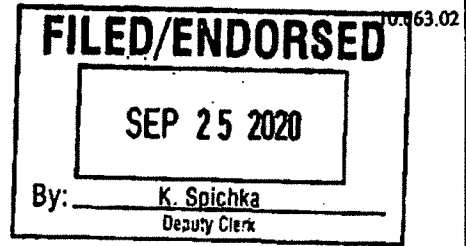
I, Roger B. Moore, am counsel of record for petitioners California Water Impact Network and AquAlliance. I am signing this verification due to petitioners' absence from the county, and because facts in the petition are within the knowledge of the undersigned counsel. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of September, 2020, in Oakland, California.



Roger B. Moore

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8 FISHERMEN'S ASSOCIATIONS, SAN
FRANCISCO CRAB BOAT OWNERS
9 ASSOCIATION, CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE and the WINNEMEM
10 WINTU TRIBE

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SACRAMENTO

14 NORTH COAST RIVERS ALLIANCE,
15 INSTITUTE FOR FISHERIES RESOURCES,
PACIFIC COAST FEDERATION OF
16 FISHERMEN'S ASSOCIATIONS,
SAN FRANCISCO CRAB BOAT OWNERS
17 ASSOCIATION,
CALIFORNIA SPORTFISHING PROTECTION
18 ALLIANCE,
19 and the WINNEMEM WINTU TRIBE,

20 Petitioners and Plaintiffs,

21 v.

22 DEPARTMENT OF WATER RESOURCES,
and DOES 1 through 100,

23 Respondents and Defendants,

24 DOES 101 through 200,

25 Real Parties in Interest.
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27
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Civ. No. 34-2020-80003491

VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND FOR ATTORNEYS' FEES

CEQA CASE

FILED BY FACSIMILE

VERIFIED PETITION FOR WRIT OF
MANDATE & COMPLAINT

FILED BY FAX
by RiverCityProcessService.com

1 Petitioners and Plaintiffs NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR FISHERIES
2 RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, SAN
3 FRANCISCO CRAB BOAT OWNERS ASSOCIATION, CALIFORNIA SPORTFISHING
4 PROTECTION ALLIANCE, and the WINNEMEM WINTU TRIBE hereby petition the Court for a writ
5 of mandate against defendant and respondent Department of Water Resources ("DWR") and by this
6 Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and for
7 Attorney's Fees ("Verified Petition") hereby allege as follows:

8 **INTRODUCTION**

9 1. This is a public interest citizen suit to enforce the California Environmental Quality Act
10 ("CEQA"), Public Resources Code ("PRC") section 21000 et seq., the Sacramento San Joaquin Delta
11 Reform Act of 2009 ("Delta Reform Act" or "DRA"), Water Code section 85000, et seq., and the Public
12 Trust Doctrine. Petitioners bring this action to challenge DWR's August 25, 2020 Certification of the
13 Final Environmental Impact Report ("FEIR") for the State Water Project Water Supply Amendments for
14 Water Management ("Project"), adoption of CEQA Findings and Statement of Overriding
15 Considerations, and approval of the Project. In taking these actions DWR violated CEQA, the Delta
16 Reform Act, and the Public Trust Doctrine.

17 2. CEQA is California's preeminent environmental law. It requires all public agencies to
18 examine the potential adverse impacts of their actions before taking them. It is designed to protect
19 California's extraordinary environmental resources from uninformed and needlessly destructive agency
20 actions.

21 3. CEQA requires DWR to fully examine the impacts of its actions and to carefully consider
22 alternatives that would reduce those impacts. Contrary to CEQA, DWR's FEIR does neither.

23 4. The Project amends the terms of the State Water Project ("SWP") contracts to alter the ways
24 in which SWP water users can transfer and exchange water supplies within the SWP service area,
25 without adequately examining the environmental impacts of doing so, without studying a reasonable
26 range of alternatives, and without compliance with other state laws protecting the environment.

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1 VENUE AND JURISDICTION

2 5. This Court has jurisdiction over this proceeding pursuant to Code of Civil Procedure
3 (“CCP”) sections 526 (injunctive relief), 1060 (declaratory relief), and 1085 (traditional mandamus);
4 PRC sections 21168 and 21168.5 (mandamus review); and article VI, section 10 of the California
5 Constitution.

6 6. Venue is proper in this Court pursuant to CCP sections 393 (actions against public officers)
7 and 395 (actions generally) because DWR’s offices are located in Sacramento.

8 7. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a
9 copy of this Verified Petition. Consistent with PRC section 21167.5, petitioners timely served DWR
10 with notice of this suit.

11 PARTIES

12 8. Petitioner NORTH COAST RIVERS ALLIANCE (“North Coast Rivers”) is a non-profit
13 unincorporated association with members throughout Northern California. North Coast Rivers was
14 formed for the purpose of protecting California’s rivers and their watersheds from the adverse effects of
15 excessive water diversions, ill-planned urban development, harmful resource extraction, pollution, and
16 other forms of environmental degradation. Its members use and enjoy California’s rivers and watersheds
17 for recreational, aesthetic, scientific study, and related non-consumptive uses. The interests of North
18 Coast Rivers and its members have been, are being, and unless the relief requested herein is granted, will
19 be adversely affected and injured by DWR’s certification of its inadequate FEIR and approval of the
20 Project.

21 9. Petitioner INSTITUTE FOR FISHERIES RESOURCES (“IFR”) is a non-profit, tax-exempt
22 organization that works to protect and restore salmon and other fish populations and the communities
23 that depend on them. IFR maintains its principal place of business in San Francisco, California. IFR
24 both funds and manages many fish habitat protection programs and initiatives. In that capacity, IFR
25 seeks reforms to protect fish health and habitat throughout the West Coast of the United States and has
26 successfully advocated for dam removals, improved pesticide controls, better forestry stream protection
27 standards, and enhanced marine and watershed conservation regulations throughout the West Coast. IFR
28 has worked tirelessly for years to restore and enhance the Delta and its beleaguered fish and wildlife.

1 IFR and its members will be directly and indirectly injured by DWR's Project approval and its failure to
2 adequately protect and restore the imperiled fisheries of the Delta.

3 10. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
4 ("PCFFA") is a nonprofit membership organization incorporated in 1976 with headquarters located in
5 San Francisco, California. PCFFA is composed of more than 14 separate commercial fishing and vessel
6 owners' associations situated along the West Coast of the United States. By virtue of its combined
7 membership of approximately 750 fishermen and women, PCFFA is the single largest commercial
8 fishing advocacy organization on the West Coast. PCFFA represents the majority of California's
9 organized commercial salmon fishermen and has been an active advocate for the protection of Pacific
10 salmon and their spawning, rearing and migratory habitat for more than 30 years. PCFFA and its
11 members would be harmed by the proposed Project because it would threaten their commercial fishing
12 livelihoods, which depend on sustainable management of the salmonid fisheries resources of the Delta
13 and its associated ecosystems.

14 11. Petitioner SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION ("San Francisco
15 Fishermen") is a century-old association of owners and operators of small, family-owned fishing boats
16 that catch Dungeness crab, wild California King salmon, Pacific herring, and other species that live in
17 and depend upon the cold waters of the Pacific Ocean, the San Francisco Bay-Delta, and the Sacramento
18 and San Joaquin Rivers and their tributaries. San Francisco Fishermen is also actively involved in
19 community education and advocacy concerning fisheries resources legislation to ensure that the rich
20 heritage of commercial fishing in the Bay Area will survive for future generations. San Francisco
21 Fishermen and its members will be harmed by DWR's Project approval because it would threaten their
22 continued historic use and enjoyment of the fisheries resources of the Delta and its connected
23 ecosystems.

24 12. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE ("CSPA") is a
25 non-profit corporation organized under the laws of the State of California. CSPA has thousands of
26 members who reside and recreate throughout California. CSPA's members are citizens who, in addition
27 to being duly licensed sport fishing anglers, are interested in the preservation and enhancement of
28 California's public trust fishery resources and vigorous enforcement of California's environmental laws.

1 CSPA members have been involved for decades in public education and advocacy efforts to protect and
2 restore the public trust resources of California's rivers. CSPA members use California's rivers and the
3 Bay-Delta for recreation, scientific study and aesthetic enjoyment. The interests of CSPA and its
4 members have been, are being, and unless the relief requested herein is granted, will be adversely
5 affected and injured by DWR's unlawful approval of the Project.

6 13. Petitioner WINNEMEM WINTU TRIBE is a Native American Tribe whose aboriginal
7 territory encompasses the upper watersheds of the Sacramento River including the McCloud River. The
8 Winnemem Wintu Tribe was traditionally dependent on salmon fishing for both subsistence and cultural
9 purposes, and maintains a deep cultural, spiritual and recreational interest in the continued viability of
10 California's salmon runs that pass through the Sacramento-San Joaquin River Delta ("Delta"). The
11 Winnemem Wintu Tribe is a strong proponent of Delta restoration, and will be harmed by the
12 degradation of water quality, destruction of fish and wildlife species, and other environmental harms that
13 implementation of the Project will allow.

14 14. Respondent and defendant DEPARTMENT OF WATER RESOURCES ("DWR") is a
15 California public agency established by the Legislature and charged with management of the State Water
16 Project and other water management tasks. Its certification of the FEIR and approval of the Project on
17 August 25, 2020, was subject to and violated the requirements of CEQA, the Delta Reform Act, and the
18 Public Trust Doctrine. DWR is the lead agency under CEQA for environmental review of the Project..

19 15. The true names and capacities of respondents DOES 1-100, inclusive, are unknown to
20 petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.
21 Petitioners are informed and believe, and based on such information and belief allege, that the
22 fictitiously named respondents are state or local officials or agencies who are responsible, in whole or in
23 part, for the approval and implementation of the Project. Petitioners will, with leave of Court if
24 necessary, amend this Verified Petition if and when the true names and capacities of said Doe
25 respondents have been ascertained.

26 16. DWR did not identify any real parties in interest in its Notice of Determination pursuant to
27 PRC section 21167.6.5(a), and petitioners are not otherwise aware that any specific real parties in
28 interest exist. The true names and capacities of real parties in interest DOES 101-200, inclusive, are

1 unknown to petitioners who therefore sue such real parties in interest by fictitious names pursuant to
2 CCP section 474. Petitioners are informed and believe, and based on such information and belief allege,
3 that the fictitiously named real parties in interest have a direct interest in approval of the Project.
4 Petitioners will, with leave of Court if necessary, amend this Verified Petition if and when the true
5 names and capacities of said Doe real parties in interest have been ascertained.

6 **GENERAL ALLEGATIONS**

7 17. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate
8 their substantial beneficial interest in securing DWR's compliance with the law.

9 18. Petitioners have performed any and all conditions precedent to the filing of this Verified
10 Petition and Complaint and have exhausted any and all available administrative remedies to the extent
11 required by law.

12 19. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law within
13 the meaning of CCP section 1086 in that, unless this Court issues its writ of mandate setting aside
14 DWR's Certification of the FEIR and approval of the Project, and ordering it to comply with the laws
15 whose violation is alleged herein, the environmental interests of petitioners and the public that are
16 protected by those laws will be substantially and irreparably harmed. No monetary damages or other
17 legal remedy could adequately compensate petitioners for the harm to their beneficial interests, and to the
18 environment, occasioned by DWR's unlawful conduct.

19 20. Petitioners are entitled to declaratory relief under CCP section 1060 because an actual
20 controversy exists between petitioners and DWR. Petitioners contend that DWR has acted in violation
21 of applicable laws and must therefore vacate and set aside its approval of the Project. Petitioners are
22 informed and believe that DWR disputes this contention. A judicial resolution of this controversy is
23 therefore necessary and appropriate.

24 21. Petitioners are also entitled to injunctive relief under CCP section 526 because approval of
25 the Project threatens irreparable environmental harm. Unless enjoined, DWR will implement the Project
26 despite its lack of compliance with applicable laws, causing undue and unnecessary environmental
27 degradation. Petitioners would thereby suffer irreparable harm due to DWR's failure to take the required
28 steps to adequately protect the environment. Injunctive relief is thus warranted under CCP section 525 *et*

1 seq. and PRC section 21168.9 to prevent irreparable harm to the environment.

2 **LEGAL BACKGROUND**

3 **CEQA**

4 22. CEQA is California's primary statutory mandate for environmental protection. It applies to
5 all state and local agencies, and requires them to "first identify the [significant] environmental effects of
6 projects, and then to mitigate those adverse effects through the imposition of feasible mitigation
7 measures or through the selection of feasible alternatives." *Sierra Club v. State Board of Forestry*
8 (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires "public agencies to
9 deny approval of a project with significant adverse effects when feasible alternatives or feasible
10 mitigation measures can substantially lessen such effects." *Sierra Club v. Gilroy City Council* (1990)
11 222 Cal.App.3d 30, 41.

12 23. CEQA's mandate for detailed environmental review "ensures that members of the
13 [governmental decision-making body] will fully consider the information necessary to render decisions
14 that intelligently take into account the environmental consequences" of their proposed action. *Mountain*
15 *Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; PRC §§ 21080.5(d)(2)(D),
16 21091(d)(2); 14 C.C.R. [CEQA Guidelines] ("Guidelines") § 15088. The CEQA process thus "protects
17 not only the environment but also informed self-government." *Citizens of Goleta Valley v. Board of*
18 *Supervisors* (1990) 52 Cal.3d 553, 564.

19 24. All California "public agencies" must comply with CEQA when they approve discretionary
20 projects. PRC § 21080(a). DWR is a "public agency" and a "state agency" as defined in CEQA. PRC §
21 21063. Therefore, DWR's discretionary approvals are subject to CEQA.

22 25. A proposed governmental action requires environmental review under CEQA if (1) the
23 agency is contemplating an "approval" of an action as defined by Guidelines section 15352, (2) the
24 subject matter of the contemplated approval constitutes a "project" under PRC section 21065 and
25 Guidelines section 15378(a), and (3) the project to be approved does not fall within a statutory
26 exemption created by the Legislature under PRC section 21080(b) and recognized under Guidelines
27 sections 15260-15285, or a categorical exemption in the Guidelines as promulgated by the California
28 Resources Agency pursuant to PRC section 21084(a) and Guidelines sections 15061(b)(2), 15300-15333

1 and 15354.

2 26. The lead agency must prepare an environmental impact report (“EIR”) if it determines that a
3 project may have significant adverse environmental impacts. The EIR must analyze those effects and
4 suggest feasible means, if any, of mitigating or avoiding them including alternatives that would achieve
5 most of the basic objectives of the project without causing significant environmental effects. PRC §§
6 21002, 21002.1, 21061; Guidelines §§ 15080-15096, 15120-15132, 15160-15170.

7 27. In applying these CEQA procedures, an agency may not segment a project to avoid
8 preparing an EIR on the entirety, or whole, of the project. Guidelines § 15378(a), (c), (d). CEQA’s
9 “requirements cannot be avoided by chopping up proposed projects into bite-size pieces which,
10 individually considered, might be found to have no significant effect on the environment or to be only
11 ministerial.” *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.

12 **The Delta Reform Act**

13 28. To address the indisputably perilous state of the Delta, in 2009 the California Legislature
14 enacted the Delta Reform Act, declaring that “[t]he Sacramento-San Joaquin Delta watershed and
15 California’s water infrastructure are in crisis and *existing Delta policies are not sustainable.*” Water
16 Code § 85001(a), emphasis added. The Legislature found that “‘the Delta’ . . . is a critically important
17 natural resource for California and the nation. It serves Californians concurrently as both the hub of the
18 California water system and the most valuable estuary and wetland ecosystem on the west coast of North
19 and South America.” Water Code § 85002. “Resolving the crisis requires *fundamental reorganization*
20 of the state’s management of Delta watershed resources.” Water Code § 85001(a), emphasis added.
21 Therefore, the Legislature resolved “to provide for the sustainable management of the [Delta] ecosystem,
22 to provide for a more reliable water supply for the state, to protect and enhance the quality of water
23 supply from the Delta, and to establish a governance structure that will direct efforts *across state*
24 *agencies to develop a legally enforceable Delta Plan.*” Water Code § 85001(c), emphasis added.

25 29. The Delta Reform Act was meant to advance the “coequal goals” of restoring the Delta
26 ecosystem and ensuring water supply reliability. Water Code § 85054. The Legislature found that eight
27 “objectives” were inherent in those coequal goals:

28 (a) *Manage the Delta’s water and environmental resources and the water resources of the state*

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over the long term.

- (b) *Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.*
- (c) *Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.*
- (d) Promote statewide water conservation, water use efficiency, and *sustainable water use.*
- (e) Improve water quality to protect human health and the environment consistent with *achieving water quality objectives in the Delta.*
- (f) Improve the water conveyance system and expand statewide water storage.
- (g) Reduce risks to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses, and investments in flood protection.
- (h) Establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives.

Water Code § 85020, emphasis added.

30. The Legislature also declared that:

The policy of the State of California is to *reduce reliance on the Delta in meeting California's future water supply needs* through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

Water Code § 85021, emphasis added.

The Public Trust Doctrine

31. Water Code section 85023 states, “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.”

32. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted that the public trust doctrine mandates that “before state courts and agencies approve water diversions they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.” The *National Audubon Society*

Court went on to explain:

Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative

1 water rights system administered without consideration of the public trust may cause
2 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state
3 may have to approve appropriations despite foreseeable harm to public trust uses. In so
4 doing, however, the state must bear in mind its duty as trustee to consider the effect of the
5 taking on the public trust, and to preserve, so far as consistent with the public interest, the
6 uses protected by the trust.

7 *Id.*, citations omitted.

8 33. "Public trust easements are traditionally defined in terms of navigation, commerce and
9 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and
10 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
11 waters for anchoring, standing, or other purposes." *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For
12 nearly 50 years it has been settled law in California that public trust values also "encompass[] . . . the
13 preservation of those lands in their natural state, so that they may serve as ecological units for scientific
14 study, as open space, and as environments which provide food and habitat for birds and marine life, and
15 which favorably affect the scenery and climate of the area."

16 34. Although compliance with CEQA "may assist an agency in complying with its duties under
17 the public trust doctrine . . . [,] CEQA review of a project does not necessarily or automatically satisfy
18 the agency's affirmative duties to take the trust into account and protect public trust uses whenever
19 feasible." *San Francisco Baykeeper, Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 571. "[A]
20 public trust use is not any use that may confer a public benefit, but rather a use that facilitates public
21 access, public enjoyment, or public use of trust land." *Id.* at 570.

22 FACTUAL BACKGROUND

23 35. "[T]he Sacramento-San Joaquin River Delta is a natural resource of statewide, national, and
24 international significance, containing irreplaceable resources." PRC § 29701. The Delta is the largest
25 and most productive estuarine system on the West Coast of North and South America, but its future is in
26 peril. It is the State of California's avowed policy "to recognize, preserve, and protect those resources of
27 the delta for the use and enjoyment of current and future generations." *Id.*

28 36. The Delta's imminent ecologic collapse is well-recognized and indisputable. It has two
principal causes. First, an unsustainable proportion of the Delta's freshwater flows has been diverted for
decades by the Central Valley Project ("CVP") and the California (or "State") Water Project ("SWP").

1 Second, for too long, agricultural diverters have discharged subsurface drainage and surface run-off
2 contaminated with salt, selenium, and other toxic substances into groundwater and the rivers that are
3 tributary to the Delta. This one-two punch of diminished freshwater flows and increased temperature,
4 salinity, herbicides, pesticides, and heavy metals has pushed the Delta to the brink of ecologic collapse.

5 37. Due to excessive diversions of water for consumptive use, many species of fish endemic to
6 the Delta have already gone extinct, including the Sacramento perch, formerly one of the most abundant
7 fishes of the Delta, which disappeared in the 1970s. Just 12 indigenous species remain, and these are in
8 grave danger. Since the SWP and CVP began operation, the Sacramento River winter and spring run
9 Chinook salmon, Central Valley steelhead, North American green sturgeon and Delta smelt have been
10 driven perilously close to extirpation.

11 38. Winter run Chinook salmon were declared threatened under the federal Endangered
12 Species Act ("ESA") in 1990 (55 Fed.Reg. 46515), and then due to continuing population declines,
13 declared endangered in 2005 (70 Fed.Reg. 37160). Their critical habitat in the Sacramento River and its
14 tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring run Chinook salmon were declared
15 threatened, and their critical habitat designated under the ESA in 2005. 70 Fed.Reg. 37160, 52488.
16 Central Valley steelhead were declared threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat
17 was designated in 2005 (70 Fed.Reg. 52488). The Southern distinct population segment ("DPS") of
18 North American green sturgeon was declared threatened in 2006 (71 Fed.Reg. 17757) and its critical
19 habitat was designated in 2008 (73 Fed.Reg. 2084). Delta smelt were declared endangered in 1993 (58
20 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256).

21 39. The SWP, as originally envisioned, would have included additional dams and diversions
22 that would have destroyed the free-flowing rivers of California's North Coast and removed additional
23 essential spawning and rearing habitat for salmon and steelhead. The unbuilt portion of the SWP was
24 expected to provide between five and 10 million acre feet of water each year to the SWP system. Thus,
25 DWR's SWP existing contracts contemplate delivery of much more water than can be delivered in all
26 but the wettest of water years.

27 40. In addition to harming many fish species in the Delta, the excessive use of Delta water
28 exports to irrigate contaminated soils in the San Joaquin Valley pollutes ground and surface waters that

1 flow into the Delta. Irrigation leaches pollutants from the toxic soils underlying many of the areas
2 irrigated with Delta water. The subsurface drainage and surface run off from these contaminated soils
3 contain pollutants including selenium, arsenic, boron, mercury, uranium, chromium, molybdenum and
4 sodium chlorides and sulfates. The resulting pollution of the Delta and its San Joaquin Valley tributaries
5 threatens the Delta's water quality and the fish and wildlife dependent on them.

6 41. DWR has entertained many proposals to re-plumb the Delta to divert even more water away
7 from this struggling ecosystem since the SWP's inception. For example, California's voters rejected the
8 peripheral canal in 1982. In the years since, the names and proposed methods for these diversions have
9 evolved but each concept would, at its core, remove water before it can enter the Delta, so that it can be
10 delivered to the SWP and CVP pumps in the South-Delta for delivery to South-of-Delta water users.
11 Despite continued unpopularity, concerns regarding the impacts to imperiled fish, and cost, DWR
12 continues to push for a new water conveyance system in the Delta. In the 2000s, DWR called its
13 proposal the Bay Delta Conservation Plan. Because state and federal fisheries agencies did not believe
14 this proposal qualified as a habitat conservation plan, it was relabeled the California WaterFix, which
15 DWR approved on or about July 21, 2017.

16 42. On or about July 13, 2018, DWR issued a Notice of Preparation notifying the public that it
17 would act as the lead agency for the preparation of an EIR for the Project. That Notice of Preparation
18 indicated that the purpose of the Project was "to confirm and supplement certain provisions for several
19 water management actions, including transfers and exchanges, and to address changes in financial
20 provisions related to costs of California WaterFix." It indicated that DWR's previously negotiated
21 agreement in principle ("AIP") would constitute the EIR's proposed project. *Id.*

22 43. In response to the Notice of Preparation, petitioners PCFFA and IFR submitted detailed
23 scoping comments addressing DWR's piecemeal approach to SWP contract amendments, and need to
24 comprehensively study the environmental impacts of its actions, and a reasonable range of alternatives
25 thereto.

26 44. On or about October 26, 2018, DWR released its initial Draft EIR for the Project. The Draft
27 EIR stated:

28 The proposed project would add, delete, and modify provisions of the Contracts and

1 clarify certain terms of the Contracts that will provide greater water management
2 regarding transfers and exchanges of SWP water within the service area; and provide a
3 fair and equitable approach for cost allocation of California WaterFix facilities to
maintain the SWP financial integrity.

4 Draft EIR 4-4. This Draft EIR failed to address many of the concerns petitioners raised during the
5 scoping process. Petitioners and others submitted timely, detailed comments notifying DWR of the
6 deficiencies in its environmental analysis.

7 45. Faced with numerous meritorious lawsuits and administrative appeals and protests
8 challenging the California WaterFix and the agency approvals it required, on or about May 2, 2019,
9 DWR rescinded its approvals of the California WaterFix. Rather than admit that its prospects for
10 overcoming these many legal challenges were meager, DWR cited Governor Newsom's intention to
11 approve a single-tunnel conveyance, instead of the two tunnels proposed by the California WaterFix.

12 46. In February 2020, DWR issued a Partially Recirculated Draft EIR for the Project
13 ("RDEIR"). This RDEIR acknowledged that DWR had rescinded its approvals for the California
14 WaterFix and removed the provisions for WaterFix cost allocation from its description of the Project.
15 FEIR 1-3. But it failed to account for the Delta Conveyance Project – DWR's single-tunnel replacement
16 for the WaterFix – as either a connected or cumulative project.

17 47. On or about August 25, 2020, DWR Director Karla Nemeth certified the FEIR, and
18 approved the Project. Because the FEIR identifies significant unavoidable impacts that cannot be
19 mitigated, DWR also made CEQA Findings and adopted a Statement of Overriding Considerations for
20 the Project.

21 48. DWR's Notice of Determination was received by the Governor's Office of Planning and
22 Research on August 28, 2020.

23 **FIRST CAUSE OF ACTION**

24 **(Violation of CEQA)**

25 **(Alleged by All Petitioners Against All Respondents)**

26 49. The paragraphs set forth above and below are realleged and incorporated herein by
27 reference.

28 50. Petitioners bring this First Cause of Action pursuant to PRC sections 21168 and 21168.5, on

1 the grounds that DWR committed a prejudicial abuse of discretion, by failing to proceed in the manner
2 required by law, in approving a deeply flawed Project based on a legally inadequate FEIR.

3 51. The purpose of an EIR is to provide agencies and the public with information about a
4 proposed project's potential environmental effects, ways to minimize those effects, and potential
5 alternatives to the project. PRC § 21061. The EIR must "include a detailed statement" describing, *inter*
6 *alia*, all of the proposed project's significant effects on the environment, alternatives to the project, and
7 potential mitigation measures. PRC § 21100(b).

8 **The FEIR's Analysis Is Improperly Segmented**

9 52. CEQA requires agencies to prepare EIRs regarding the impacts of "projects" that may have
10 significant environmental impacts. Guidelines § 15064(a)(1). CEQA defines "project" to mean "the
11 whole of an action." Guidelines § 15378(a). "The term 'project' refers to the activity which is being
12 approved and which may be subject to several discretionary approvals by governmental agencies. The
13 term 'project' does not mean each separate governmental approval." Guidelines § 15378(c).
14 Accordingly, agencies "must consider the whole of an action, not simply its constituent parts, when
15 determining whether [the action] will have a significant environmental effect (*Citizens Assoc. for*
16 *Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151)." Guidelines §
17 15003(h), *see also* Guidelines § 15378(a), (c).

18 53. CEQA thus intends to ensure "that environmental considerations do not become submerged
19 by chopping a large project into many little ones – each with a minimal potential impact on the
20 environment – which cumulatively may have disastrous consequences." *Bozung v. Local Agency*
21 *Formation Com.* (1975) 13 Cal.3d 263, 283-284.

22 54. Here, instead of studying all of its interdependent actions together, DWR has improperly
23 segmented its analysis of the 2018 Water Supply Contract Extension Project, 2018 Coordinated
24 Operations Agreement Amendment, 2019 Long Term Operation of the California State Water Project,
25 and pending Delta Conveyance Project from its analysis and consideration of this Project. Yet DWR's
26 Project approval is necessary for its implementation of the Delta Conveyance Project and these related
27 contract amendments.

28 55. This segmentation violates CEQA's demand for unified and comprehensive environmental

1 review:

2 Theoretical independence is not a good reason for segmenting the environmental analysis
3 of the two matters. Doing so runs the risk that some environmental impacts produced by
4 the way the two matters combine or interact might not be analyzed in the separate
5 environmental reviews. Furthermore, if the two matters are analyzed in sequence . . . and
6 the combined or interactive environmental effects are not fully recognized until the review
of the second matter, the opportunity to implement effective mitigation measures as part
of the first matter may be lost. This could result in mitigation measures being adopted in
the second matter that are less effective than what would have been adopted if the matters
had been analyzed as a single project.

7 *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214,
8 1230. DWR's segmented review subverts CEQA's informational purposes.

9 **DWR Improperly Ignores the Delta Conveyance Project and its Likely Impacts**

10 56. CEQA requires DWR to examine the impacts of its project "when added to other closely
11 related past, present, and reasonably foreseeable probable future projects." Guidelines § 15355(b);
12 *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151,
13 168. "In formulating its list of probable future projects for review as to cumulative effects the lead
14 agency should reasonably interpret the guidelines to afford the fullest possible protection of the
15 environment." *Id.*

16 57. DWR failed to examine the Delta Conveyance Project as a cumulatively considerable
17 project, as CEQA requires. Instead, DWR's RDEIR removes references to the California WaterFix
18 project without considering its replacement, DWR's Delta Conveyance Project. It did so despite
19 publishing the RDEIR during the period in which DWR was soliciting scoping comments on the EIR for
20 the Delta Conveyance Project. DWR also dismissed without consideration all comments addressing the
21 California WaterFix, regardless of their continued applicability to the Delta Conveyance Project.

22 **DWR's No Project Alternative Violates CEQA**

23 58. The Guidelines direct that "[t]he 'no project' analysis shall discuss the existing conditions at
24 the time the notice of preparation is published . . . as well as what would be reasonably expected to occur
25 in the foreseeable future if the project were not approved . . ." (Guidelines § 15126.6(e)(2).)

26 59. DWR's No Project Alternative improperly assumes that the SWP contracts that expire in
27 2035 would be renewed absent the Project, and that similar water deliveries would occur with or without
28 the Project. As such the scenario examined in the environmental documents does not describe a

1 situation where an agency approval is not granted. Instead it describes a scenario where a different
2 Project alternative is approved, and SWP water deliveries continue. DWR has not examined the
3 environmental conditions of the Project against an appropriate No Project Alternative where these
4 deliveries are not made. This failure violates CEQA.

5 **DWR Failed to Address the Project's Impacts**

6 60. The Project amends the existing contracts to allow transfers and exchanges of SWP water
7 between public water agencies ("PWAs") that receive SWP water that otherwise would not occur. FEIR
8 1-4. The DEIR claims that these amendments "would provide the PWAs with increased flexibility for
9 short-term and long-term planning and management of their SWP water supplies" FEIR 2-6. But that
10 increased flexibility to the PWAs comes at a significant cost to the environment.

11 61. The proposed water supply transfer and exchange amendments would "result in a greater
12 amount of water transfers among the PWAs than under the current Contract provisions," and "exchanges
13 may be used more frequently" as well. FEIR 2-78 (first quote) 2-7 (second quote). Although the FEIR
14 provides that these "exchanges may be used more frequently to respond to variations in hydrology," it
15 makes no effort to quantify the extent of these changes, or the extent of their impacts on the
16 environment. FEIR 2-7.

17 62. Some of the Project's most problematic amendments include those involving storing and
18 handling of carryover water. For example, Agreement in Principle item I.5.1 provides that PWAs can
19 store and transfer or exchange carryover water in the San Luis Reservoir in the same year; previously
20 Article 56(c)(4) did not allow for this type of exchange. RDEIR Appendix A, p. 5; DEIR 4-5. Further,
21 the Project's new amendment provides that the PWA may transfer and exchange carryover water to
22 another PWA's service area. *Id.* This is a significant change, as previously these PWAs were required
23 to use carryover water in their own service areas. *Id.*

24 63. Notably, DWR disclaims any need or ability to quantify or explain the extent of these
25 transfers and exchanges, or how the environment could be impacted by transfers and exchanges
26 essentially being regulated and decided by these PWAs. CEQA requires an agency to "use its best
27 efforts to find out and disclose all that it can" regarding significant impacts. Guidelines §§ 15121,
28 15144; *Vineyard Area Citizens et al. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 440

1 (“Vineyard”). Contrary to CEQA, DWR – despite conceding that the Project will cause “significant
2 impacts” – presents virtually no analysis of how these amendments could impact the environment.

3 64. The FEIR appears to claim that because “the proposed project would not include any
4 permanent changes to the PWA’s Annual Table A amounts,” DWR need not analyze the impacts of
5 increased transfers and exchanges. *See* DEIR 5.1-6. However, this ignores the fact that increased water
6 transfers and exchanges result in different and potentially greater environmental impacts as water is
7 removed from, and applied to, different locations, at different times, and in different amounts.
8 Consequently, DWR fails to disclose and explain those different impacts to the public, and its FEIR fails
9 to foster informed decisionmaking, in violation of CEQA. PRC § 21002.1; Guidelines §§ 15121, 15126,
10 15126.2, 15144.

11 65. The FEIR claims that because the “precise location, amount and timing of future water
12 transfers and exchanges are not known at this time,” its analysis “[i]s programmatic.” FEIR 2-11. The
13 FEIR claims to “focus on the types of reasonably foreseeable changes in the physical environment that
14 may occur due to implementation of the proposed amendments.” FEIR 2-77. However, DWR does not
15 even accomplish this “programmatic” analysis. The *only* environmental effect described as resulting
16 from increased transfers is that those transfers “could potentially result in less SWP water supplied to
17 agricultural PWAs and more to municipal and industrial (M&I) PWAs.” FEIR 2-7. The FEIR states that
18 “[m]ost of the transfers and exchanges are expected to occur south of the Delta and would not affect
19 SWP operations in the Delta nor make changes in releases or operations that impact natural rivers or
20 streams within the SWP place of use.” FEIR 2-7. It states that “[n]orth of Delta to south of Delta
21 transfers or exchanges beyond that water stored in San Luis Reservoir would potentially result in a slight
22 increase in exports but would be within existing operations of the SWP.” *Id.* But the FEIR provides
23 insufficient information to explain the reason for and environmental impacts of these increases.

24 66. The Project explicitly allows for north-of-Delta transfers, and indicates that those transfers
25 would result in an increase in exports. FEIR 2-7. But the FEIR dismisses that impact, claiming –
26 without explanation, let alone facts and analysis – that it would fall within existing Contract operations.
27 This cryptic dismissal is both cursory and conclusory, and fails to provide decisionmakers and the public
28 with the information they need to make an informed judgment about the Project’s impacts. This violates

1 CEQA's demand for meaningful disclosure and analysis. PRC § 21002.1; Guidelines §§ 15121, 15126,
2 15126.2; *Vineyard*, 40 Cal.4th at 440 (EIRs must provide an "analytically complete and coherent
3 explanation" of impacts).

4 67. Further, this last example illuminates the contradictory nature of the FEIR. It emphasizes
5 repeatedly that it cannot possibly analyze the impacts since it cannot predict future transfers and
6 exchanges. FEIR 2-7. Yet, this uncertainty is nowhere to be found when DWR declares with confidence
7 that "[m]ost water transfers that may occur due to the proposed amendments would occur among PWAs
8 located south of the Delta." FEIR 2-20.

9 68. While the FEIR admits that impacts to groundwater supplies could be significant and
10 unavoidable, that analysis still suffers the same deficiencies as the remainder of the FEIR. FEIR 2-15
11 (citing RDEIR Chapter 5). Rather than identifying the actual impacts of the water transfers and
12 exchanges, the FEIR similarly provides that because DWR does not know what will happen, the impacts
13 could be significant and unavoidable. *Id.* For example, the RDEIR equivocates that "while there is the
14 potential for the proposed project to be beneficial to groundwater levels, there is also the potential for the
15 proposed project to result in a net deficit in aquifer volume or lowering the local groundwater table."
16 *E.g.* RDEIR 5.10-19. The entire groundwater analysis, and in fact the entire EIR, is fraught with this
17 same "anything could happen" mantra. But CEQA requires more. *California Native Plant Society v.*
18 *City of Santa Cruz* (2009) 177 Cal.App.4th 957, 978-979 (CEQA must "be interpreted to afford the
19 fullest possible protection to the environment within the reasonable scope of the statutory language;" as
20 the "heart of CEQA," the EIR must demonstrate "adequacy, completeness and a good faith effort at full
21 disclosure"). Simply concluding that the impact would be significant and unavoidable, without actually
22 analyzing what that impact would include, is not sufficient. The EIR must provide an actual,
23 "analytically complete and coherent explanation" of the Project's groundwater impacts, such as the
24 impacts of increased groundwater pumping from shrinking or contaminated sources, both on the sources
25 and on areas that receive the pumped waters. *Vineyard*, 40 Cal.4th at 440.

26 69. In a similar vague manner, the EIR states that "[t]he incremental contribution of the
27 proposed project's effect on groundwater supplies would be cumulatively considerable . . . [and] [t]his
28 cumulative impact would be significant." RDEIR ES-13; FEIR 2-93 . However, the EIR fails to

1 describe, or suggest ways to mitigate, these impacts. Instead, it points to the Sustainable Groundwater
2 Management Act (“SGMA”), claiming that because it “is in the process of being implemented and
3 because the extent, location, and implementation timing of groundwater pumping associated with
4 changes in transfers and exchanges implemented by PWAs are not known, assumptions related to the
5 ability of SGMA to mitigate any changes in groundwater levels are speculative.” *Id.* Thus DWR avoids
6 meaningful analysis by denying any control over the potential groundwater impacts of increased transfers
7 and exchanges. This is both untrue and contrary to its CEQA duties to analyze those impacts. DWR
8 claims that it “has no information on specific implementation of the transfers and exchanges from the
9 proposed project and it has no authority to implement mitigation measures in the PWA service area.”
10 FEIR 2-69. But that is not true. If DWR were to adequately analyze the potential Project impacts, it
11 could then mitigate those impacts, or detail ways in which other agencies would need to do so.

12 70. Instead of describing the detrimental effects the Project’s increased transfers and exchanges
13 would have on subsidence-related impacts affecting public safety, habitat, and infrastructure,¹ DWR
14 again points to SGMA as a reason to not analyze these impacts. *See* FEIR 2–93 to 2-94. DWR relies
15 upon the PWAs’ anticipated implementation of SGMA to examine, address, and potentially mitigate the
16 Project’s groundwater impacts. *Id.* However, this sidesteps the analysis that CEQA requires. Simply
17 referring to the fact that another piece of legislation – which will not be fully implemented for another 30
18 years – exists does not satisfy DWR’s CEQA duty to use its “best efforts to find out and disclose all that
19 it can.” Guidelines §§ 15121, 15144; *Vineyard*, 40 Cal.4th at 440. And it certainly does not provide an
20 “analytically complete and coherent explanation” of this project’s impacts. *Id.* DWR cannot simply
21 point to a new statute and, without more, magically absolve itself of its existing responsibility under
22 CEQA to analyze the impacts caused by what it admits will be an increase in exchanges and transfers of
23 water rights.

24 71. Furthermore, DWR could limit transfers and exchanges to excess water available from SWP
25 contracts only. Such a limitation would avoid “agricultural PWAs . . . increas[ing] groundwater
26

27 ¹ U.S. Geological Survey, *Land Subsidence in California* (Oct. 16, 2017), available at
28 https://ca.water.usgs.gov/land_subsidence/ (last visited September 24, 2020).

1 pumping as a replacement water source for transferred water supplies,” and the resulting deficit in
2 aquifer volume. RDEIR 5.10-18 to 5.10-19, 5.10-22 to 5.10-23. DWR’s failure to actually analyze and
3 feasibly mitigate the Project’s significant and unavoidable groundwater impacts violates CEQA.

4 72. The FEIR’s deficiencies are further exacerbated by its lack of analysis of the impacts that it
5 actually does perceive as within DWR’s control and purview. For example, the DWR states that the
6 amendments would “allow the PWAs to transfer water based on terms they establish for cost
7 compensation and duration,” and accordingly “a water transfer under the proposed project could be as
8 long as the remainder of the term of the PWA’s Contract.” RDEIR 5.1-6. Yet DWR fails to identify any
9 potential environmental impacts associated with increased water transfers, such as impacts on fish and
10 wildlife habitat and resulting effects on recreationists and sport and commercial fishermen, impacts on
11 ground and surface water supplies and resulting effects on local rural communities – particularly
12 disadvantaged and minority communities – dependent on these supplies, and impacts on overall water
13 rights and structure.

14 73. Similarly, the FEIR indicates that the Project could “increase the frequency, duration, and
15 timing of water transfers and exchanges among the PWAs than under the current Contract provisions.”
16 FEIR 2-6. But DWR failed to describe the full environmental impacts associated with these increased
17 transfers. DWR was required to analyze the impacts of these increased transfers on water allocations –
18 especially given the likelihood of increased droughts in the future – and the resulting impacts on water
19 security, and associated impacts to fish and wildlife species,² in order to comply with CEQA and provide
20 the public with the ability to make informed decisions regarding this Project’s far-reaching
21 environmental impacts. The EIR’s failure to do so violates CEQA. PRC § 21002.1; Guidelines §§
22 15121, 15126, 15126.2, 15144.

23 **DWR Failed to Fully Consider A Reasonable Range of CEQA-Compliant Alternatives**

24 74. CEQA confirms “it is the policy of the state that public agencies should not approve

25
26 ² Water transfers would generally occur in dry years when fish are present in the Delta; fish are most at
27 risk in the driest years when their habitat is most degraded. See Maven, *Dr. Bruce Herbold: Delta Flows*
28 *and the Effects of Water Transfers* (Sept. 21, 2017), available at
<https://mavensnotebook.com/2017/09/21/dr-bruce-herbold-delta-flows-and-the-effects-of-water-transfers/>
/.

1 projects as proposed if there are feasible alternatives . . . available which would substantially lessen the
2 significant environmental effects of such projects . . .” PRC § 21002. The Legislature directed that an
3 “[EIR] shall include a detailed statement setting forth . . . [a]lternatives to the proposed project,” and
4 declared that one of “[t]he purpose[s] of an [EIR] is . . . to identify alternatives to the project.” PRC §§
5 21002.1(a) (second quote), 21061, 21100(b)(4) (first quote). Indeed, CEQA requires an EIR to describe
6 a reasonable range of alternatives that could feasibly attain most of the basic objectives of the project
7 while avoiding or substantially lessening any of its significant effects. Guidelines § 15126.6(a) and (f),
8 emphasis added.. “An EIR’s discussion of alternatives must contain analysis sufficient to allow
9 informed decision making.” *Laurel Heights Improvement Association v. Regents of the University of*
10 *California* (1988) 47 Cal.3d 376, 404.

11 75. The FEIR states in the most general terms possible that the alternatives presented would
12 have impacts that are similar to or greater than the impacts of the proposed Project. E.g. FEIR 2-14 to 2-
13 15 (citing DEIR 7-5 (Table 7-1)), FEIR 2-16. But the FEIR fails to address many of the Project’s
14 significant impacts. Thus, it is impossible for the public or decisionmakers to gauge whether the
15 alternatives discussed would, in fact, have more impacts, or different impacts, or more severe impacts,
16 than would the proposed Project. But assuming that DWR’s bare conclusion is correct, it follows that
17 DWR has failed to present a reasonable range of alternatives as *none* of these alternatives avoid or
18 substantially lessen the Project’s significant and unavoidable impacts on groundwater supply and land
19 subsidence. FEIR 2-15 (there are no alternatives with impacts determined to be less severe than the
20 proposed Project); RDEIR 7-5; Guidelines § 15126.6(a), (f).

21 76. Furthermore, DWR’s conclusion that Alternative 4 is environmentally superior is not
22 supported by its analysis. FEIR 2-16; RDEIR 7-25. While DWR describes Alternative 4 as having
23 “similar” impacts to groundwater resources, the FEIR actually reveals that it “could result in an increase
24 in groundwater pumping in some areas of the study area” without quantifying whether these impacts
25 could be worse than the impacts posed by the proposed Project. RDEIR 7-18. As Alternative 4 allows
26 PWAs more flexibility than the proposed Project, it follows that Alternative 4 would enable additional
27 groundwater pumping as compared to the proposed Project. Because Alternative 4 presents the potential
28 for *greater* impacts than the proposed Project, it cannot be the environmentally superior alternative.

1 77. DWR argues that under alternatives studied in the FEIR, there would be greater
2 environmental impacts than under the Project because public water agencies "may seek alternative
3 sources of surface water," and develop or modify existing "surface or groundwater supplies" to meet
4 water supply needs during dry year conditions. RDEIR 7-7, 7-12, 7-15, 7-21; FEIR 2-16. The DEIR
5 presents any resulting construction as potentially significant impacts arising from the alternatives. *Id.*
6 Further, DWR argues that agricultural public water agencies may fallow lands or change cropping
7 patterns. *Id.* Yet, even with the proposed Project, PWAs may still undertake similar activities. Thus,
8 the FEIR's assumption that increased pumping and the need for alternative water supplies would cause
9 all other alternatives to be more impactful than the proposed Project lacks support. FEIR 2-16; RDEIR
10 7-4 to 7-16, 7-19 to 7-24. Thus, the FEIR fails to study a reasonable range of alternatives as CEQA
11 requires.

12 **DWR's CEQA Findings and Statement of Overriding Considerations Are**
13 **Not Supported by Substantial Evidence**

14 78. If a project will have "significant environmental effects," CEQA requires the agency to
15 make "one or more written findings for each of those significant effects, accompanied by a brief
16 explanation of the rationale for each finding." Guidelines § 15091(a). There are three "possible
17 findings":

- 18 (1) Changes or alterations have been required in, or incorporated into, the project which avoid
19 or substantially lessen the significant environmental effect
- 20 (2) Such changes or alterations are within the responsibility and jurisdiction of another public
21 agency and . . . have been adopted . . . or can and should be adopted by such other agency.
- 22 (3) Specific economic, legal, social, technological, or other considerations . . . make infeasible
23 the mitigation measures or project alternatives identified in the final EIR.

24 Guidelines §15091(a); PRC § 21081(a). The findings "shall be supported by substantial evidence in the
25 record." Guidelines § 15091(b).

26 79. Where, as here, an agency approves a project that has significant environmental effects that
27 "are not avoided or substantially lessened," the agency must "state in writing the specific reasons to
28 support its action." Guidelines §§ 15093(b); 15096(h), 15064(a)(2). This "statement of overriding
considerations shall be supported by substantial evidence," Guidelines section 15093(b), and is to be

1 made in addition to the findings required under section 15091. Guidelines § 15091(f).

2 80. CEQA requires these findings and statement of overriding considerations to prompt the
3 agency to carefully consider the proposed action's environmental effects and make its decisionmaking
4 process transparent. The "intended effect is to facilitate orderly analysis and minimize the likelihood
5 that the agency will randomly leap from evidence to conclusions." *Topanga Assn. for a Scenic Com. v.*
6 *County of Los Angeles* (1974) 11 Cal.3d 506, 516-517. Since they lay out the agency's rationale, the
7 findings and statement of overriding considerations also assist judicial review of agency compliance with
8 CEQA's required procedures. *Mira Mar Mobile Com. v. City of Oceanside* (2004) 119 Cal.App.4th 477,
9 496 (noting that "findings must 'bridge the analytic gap between the raw evidence and ultimate
10 decision,' so as to allow a reviewing court 'to trace and examine the agency's mode of analysis'")
11 (citation omitted).

12 81. In order to make the findings required under CEQA, the DWR must properly identify and
13 fully analyze the Project's significant environmental impacts. As discussed above, DWR's FEIR
14 completely fails to do so. DWR's CEQA findings, which are based on this deficient impacts analysis,
15 are therefore necessarily defective as well.

16 82. Likewise, as discussed above, the FEIR fails to consider a reasonable range of alternatives
17 that lessen the Project's impacts while feasibly attaining most of the Project's objectives. Where, as
18 here, an agency has failed to determine whether there are feasible alternatives that would avoid a
19 project's significant environmental impacts (or reduce them to insignificance), its contrary findings are
20 "necessarily invalid." *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 603;
21 *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 368.

22 83. Moreover, petitioners are informed and believe, and therefore allege that DWR's findings
23 and statement of overriding consideration lack substantial evidentiary support. This omission violates
24 CEQA. PRC §§ 21081.5; Guidelines §§ 15091(b), 15093(b).

25 **SECOND CAUSE OF ACTION**

26 **(Violation of the 2009 Delta Reform Act)**

27 **(Alleged by All Petitioners Against All Respondents)**

28 84. The paragraphs set forth above and below are realleged and incorporated herein by

1 reference.

2 85. The Delta Reform Act, Water Code sections 85000 *et seq.*, was passed by the Legislature in
3 recognition of the fact that the “[t]he Sacramento-San Joaquin Delta watershed and California’s water
4 infrastructure are in crisis” and that “[r]esolving the crisis requires fundamental reorganization of the
5 state’s management of Delta watershed resources.” Water Code § 85001(a). The Legislature’s goal was
6 “to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide
7 for a more reliable water supply for the state, to protect and enhance the quality of water supply from the
8 Delta, and to establish a governance structure that will direct efforts across state agencies to develop a
9 legally enforceable Delta Plan.” *Id.* § 85001(c).

10 86. The Delta Reform Act requires any state agency “that proposes to undertake a covered
11 action” to “prepare a written certification of consistency with detailed findings as to whether the covered
12 action is consistent with the Delta Plan” and submit that written finding to the Delta Stewardship
13 Council. Water Code § 85225.

14 87. The Delta Reform Act defines “[c]overed action” as “a plan, program or project” as defined
15 by PRC section 21065 that:

- 16 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- 17 (2) Will be carried out, approved, or funded by the state or a local public agency.
- 18 (3) Is covered by one or more provisions of the Delta Plan.
- 19 (4) Will have a significant impact on achievement of one or both of the coequal goals or the
20 implementation of government-sponsored flood control programs to reduce risks to people,
property, and state interests in the Delta.

21 Water Code § 85057.5(a). While the Delta Reform Act states that “[r]outine maintenance and operation
22 of the State Water Project” is not a covered action, the Project does not qualify for that exemption
23 because it is neither routine maintenance nor routine operation of the SWP. Water Code § 85057.5(b).

24 88. In its comments on DWR’s RDEIR, the Delta Stewardship Council informed DWR that the
25 Project constitutes a covered action under the Delta Reform Act. FEIR A-470 to A-473. The Delta
26 Stewardship Council warned DWR of its need to make a consistency determination for the Project, and
27 of the specific policies and regulations of the Delta Plan that could apply to the Project. *Id.*

28 89. Despite the Delta Stewardship Council’s authoritative comments, DWR denies that the

1 Project is a covered action under the Delta Reform Act. FEIR 2-123. Consequently, DWR disclaims
2 any duty to make a consistency determination, and instead argues that it “has made a good faith
3 determination that the proposed project is not a ‘covered action.’” *Id.*

4 90. Thus, in contravention to the requirements of the Delta Reform Act, DWR approved the
5 Project without *first* making a determination of consistency with the Delta Plan. Water Code § 85225.
6 And because approval of the Project continues DWR’s over-allocation of SWP water without any
7 attempt to address the Project’s conflict with the Delta Reform Act’s coequal goals, the Project is
8 inherently inconsistent with the Delta Plan.

9 91. Because DWR failed to “prepare a written certification of consistency with detailed findings
10 as to whether the covered action is consistent with the Delta Plan” as required by the Delta Reform Act,
11 its approval must be set aside. Water Code § 85225.

12 THIRD CAUSE OF ACTION

13 (Violation of the Public Trust Doctrine)

14 (Alleged by All Petitioners Against All Respondents)

15 92. The paragraphs set forth above and below are realleged and incorporated herein by
16 reference.

17 93. Water Code section 85023 states, “the longstanding constitutional principle of reasonable
18 use and the Public Trust Doctrine shall be the foundation of state water management policy and are
19 particularly important and applicable to the Delta.”

20 94. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted
21 that the public trust doctrine mandates that “before state courts and agencies approve water diversions
22 they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt,
23 so far as feasible, to avoid or minimize any harm to those interests.” The *National Audubon Society*
24 Court went on to explain:

25 Just as the history of this state shows that appropriation may be necessary for efficient use of
26 water despite unavoidable harm to public trust values, it demonstrates that an appropriative
27 water rights system administered without consideration of the public trust may cause
28 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state
may have to approve appropriations despite foreseeable harm to public trust uses. In so
doing, however, the state must bear in mind its duty as trustee to consider the effect of the
taking on the public trust, and to preserve, so far as consistent with the public interest, the

1 uses protected by the trust.

2 *Id.*, citations omitted.

3 95. "Public trust easements are traditionally defined in terms of navigation, commerce and
4 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and
5 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
6 waters for anchoring, standing, or other purposes." *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For
7 nearly 50 years it has been settled law in California that public trust values also "encompass[] . . . the
8 preservation of those lands in their natural state, so that they may serve as ecological units for scientific
9 study, as open space, and as environments which provide food and habitat for birds and marine life, and
10 which favorably affect the scenery and climate of the area."

11 96. Despite DWR's erroneous conclusion to the contrary, the Project will adversely affect
12 numerous public trust resources, including flows and habitat necessary for fish, wildlife, and recreation
13 that will be impacted due to the Project's water transfers and exchanges, as well as from potentially
14 contaminated discharges should the Project lead to increased groundwater pumping in areas with
15 contaminated groundwater.

16 97. Although compliance with CEQA "may assist an agency in complying with its duties under
17 the public trust doctrine . . . [,] CEQA review of a project does not necessarily or automatically satisfy
18 the agency's affirmative duties to take the trust into account and protect public trust uses whenever
19 feasible." *San Francisco Baykeeper, Inc. v. State Lands Com.*, *supra*, 29 Cal.App.5th at 571. Yet DWR
20 relies upon its CEQA analysis to satisfy its public trust obligations. FEIR 2-55.

21 98. Because DWR failed to study a reasonable range of alternatives, including alternatives that
22 lessen the impacts of the Project, DWR failed to determine whether feasible alternatives exist that would
23 mitigate or avoid these significant impacts.

24 99. By approving the Project despite the fact that feasible alternatives could exist that would
25 preserve public trust resources to a greater extent than the Project, DWR abdicated its affirmative
26 statutory and constitutional "duties to take the trust into account and protect public trust uses whenever
27 feasible," based on a fair and fully informed balancing of the impacts of these alternatives on public trust
28 resources. *San Francisco Baykeeper, Inc. v. State Lands Com.*, *supra*, 29 Cal.App.5th at 571.

1 **FOURTH CAUSE OF ACTION**

2 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**

3 **Project Approvals as Contrary to CCP §§ 1085 and 1094.5)**

4 **(Alleged by All Petitioners Against All Respondents)**

5 100. The paragraphs set forth above and below are realleged and incorporated herein by
6 reference.

7 101. DWR proceeded in excess of its jurisdiction and abused its discretion in purporting to
8 approve the Project and to certify the FEIR thereon, because such approvals violate CCP sections 1085
9 and 1094.5 in the following respects, among others:

- 10 a. such approvals were not granted in accordance with the procedures required by law;
11 b. such approvals were not based on the findings required by law; and
12 c. such approvals were not based on, or were contrary to, the evidence in the record
13 before DWR.

14 102. DWR failed to proceed in the manner required by law in the following respects, among
15 others:

- 16 a. DWR violated CEQA as alleged hereinabove;
17 b. DWR violated the Delta Reform Act as alleged hereinabove; and
18 c. DWR violated the Public Trust Doctrine as alleged hereinabove.

19 103. DWR's actions in approving the Project without complying with the procedures required by
20 CCP sections 1085 and 1094.5 exceeded DWR's jurisdiction and constitute a prejudicial abuse of
21 discretion, and therefore are invalid and must be set aside.

22 **PRAYER FOR RELIEF**

23 **WHEREFORE, petitioners pray for relief as follows:**

- 24 1. For interlocutory and permanent injunctive relief restraining DWR from taking any action to
25 carry out the Project pending, and following, the hearing of this matter;
26 2. For a peremptory writ of mandate directing DWR to set aside and vacate its approval of the
27 Project, and certification of its FEIR;
28 3. For declaratory relief declaring the Project, its approval, and its FEIR to be unlawful;

1 4. For a peremptory writ of mandate directing DWR to suspend all activity implementing the
2 Project that could result in any change or alteration in the physical environment until it has taken all
3 actions necessary to bring its approval of the Project and its FEIR into compliance with CEQA, the Delta
4 Reform Act, the Public Trust Doctrine and the Code of Civil Procedure;

5 5. For attorneys' fees under Code of Civil Procedure section 1021.5;

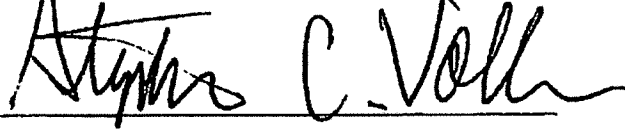
6 6. For costs incurred in this action; and

7 7. For such other equitable or legal relief as the Court may deem just and proper.

8 Dated: September 25, 2020

Respectfully submitted,

9 LAW OFFICES OF STEPHAN C. VOLKER

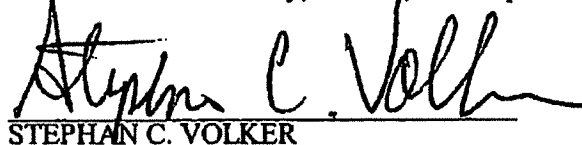
10 
11 _____

12 By: STEPHAN C. VOLKER
13 Attorney for Petitioners and Plaintiffs
14 NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR
15 FISHERIES RESOURCES, PACIFIC COAST
16 FEDERATION OF FISHERMEN'S ASSOCIATIONS, SAN
17 FRANCISCO CRAB BOAT OWNERS ASSOCIATION,
18 CALIFORNIA SPORTFISHING PROTECTION
19 ALLIANCE, and the WINNEMEM WINTU TRIBE

20 **VERIFICATION**

21 I, Stephan C. Volker, am the attorney for petitioners/plaintiffs in this action. I make this
22 verification on behalf of the petitioners/plaintiffs because such parties and their representatives are
23 absent from the county in which my office is located. I have read the foregoing Verified Petition for
24 Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys' Fees and know its
25 contents. The facts therein alleged are true and correct to the best of my knowledge and belief, and are
26 based on documents within the public records underlying the approvals herein challenged.

27 I declare under penalty of perjury under the laws of the State of California that the foregoing is
28 true and correct, and that this Verification was executed in Berkeley, California on September 25, 2020.

29 
30 _____
31 STEPHAN C. VOLKER