



FRIENDS OF THE RIVER
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November 18, 2015

Delta Stewardship Council Members and Staff
980 9th Street, Suite 1500
Sacramento, CA 95814 **via Email**

Re: Agenda Item 12, Options to Promote New and Improved Conveyance etc., Delta Stewardship Council meeting of November 19, 2015

Dear Delta Stewardship Council Members and Staff:

Introduction

Our public interest organizations¹ bring to your attention two recent developments that require the Delta Stewardship to not seek to advance development of the California Water Fix Delta Water Tunnels by the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation). The Delta Plan should not be tailored to “fit the fix.” We (Friends of the River) brought these issues to the attention of your Staff at the public workshop on Delta Plan performance measures on November 9, 2015, and we all believe it important to also bring these issues to your attention in writing.

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

The Tunnels would divert enormous quantities of water from the Sacramento River upstream from the Delta near Clarksburg. As a result of this massive diversion, the freshwater

¹ Friends of the River (FOR) is a nonprofit public interest organization devoted to the protection and restoration of California rivers. Restore the Delta (RTD) is a grassroots campaign committed to saving the San Francisco Bay-Delta estuary for our children and future generations. The Environmental Water Caucus (EWC) is a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes.

that presently flows through designated critical habitats for crashing fish populations in the Sacramento River and sloughs to and through the Bay-Delta before being diverted for export at the south Delta, would no longer reach the Delta. The benefits of those freshwater flows for Delta water flows and water quality, fish, and fish habitat would be lost. The question is not whether the new upstream diversion would be bad for Delta freshwater flows, water quality, and endangered and threatened species of fish and their designated critical habitats. The questions instead are how bad will it be and would the harm caused by taking those freshwater flows away from the Delta violate the Endangered Species Act (ESA), the Clean Water Act (CWA) and/or the Delta Reform Act.

Agenda Item 12 for the November 19, 2015, Delta Stewardship Council, meeting is “Options to Promote New and Improved Conveyance, Storage, and Operation of Both to Achieve the Coequal Goals.” (Staff Report). As explained by Staff:

This April, the Administration announced a new preferred alternative to the BDCP that would not complete the BDCP as a Natural Community Conservation Plan (NCCP), but instead construct water conveyance facilities through an initiative called California Water Fix. . .

In light of the recent changes, and because BDCP would no longer qualify as an NCCP, the Council may wish to update the Delta Plan to further address those topics. (Staff Report).

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

The two recent developments are as follows: First, an *adequate* Draft Environmental Impact Report (EIR)/Environmental Impact Statement (EIS) must be prepared *before* the Council could decide whether to promote or advance the Water Fix in any way. Second, the Water Fix no longer has any even arguable support in California law. The claimed conservation benefits of the BDCP were dropped in the conversion into the Water Fix.

In addition, the principles proposed for the Agenda item fail to integrate prospective Delta Plan policies on conveyance and storage issues with broader statewide policy framework stated in the Delta Reform Act of 2009—namely that the public trust and reasonable use doctrines are foundational and especially applicable in the Delta, and mandating reduced reliance on Delta imports to meet the state's future water supply needs. Avoiding these statewide policies means the proposed principles cannot be determined to comply with clear legislative direction to the Delta Stewardship Council.

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

The U.S. Environmental Protection Agency (EPA) reviewed the Water Fix RDEIR/SDEIS as required by Section 309 of the Clean Air Act. The EPA has in its October 30, 2015 letter, now given the SDEIS a rating of “‘3’ (*Inadequate*)”. (EPA Letter, October 30, 2015, p. 4).² That is EPA’s failing grade. EPA’s *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (10/3/84) explains what that means in section 4(b) of that document entitled “Adequacy of the Impact statement”:

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

The EPA says they expect the missing information will be “supplied as later regulatory processes proceed.” (EPA Letter, p. 4). “[P]ending actions by the State Water Resources Control Board” is one of the future processes that the EPA expects “will supply the missing pieces necessary to determine the environmental impacts of the entire project.” (*Id.*).

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

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

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

² A copy of the October 30, 2015 EPA letter is attached. We also provided a copy of this letter to Staff at the November 9, 2015 public workshop.

The RDEIR/SDEIS is inadequate and has been found to be so by the EPA.³ In addition, the October 30, 2015 EPA review letter does not say that the EPA's prior concerns have been addressed. So, all of those concerns still apply.⁴ Critical omissions include the failure to develop the required range of reasonable alternatives. As just one example, "CVP/SWP [Central Valley Project/State Water Project] operations scenarios that propose additional outflow, such as BDCP Alternatives 7 and 8 from the DEIS, could provide substantially more water for resident and migratory fish and provide benefits to aquatic life; however, these were not evaluated as alternatives in the SDEIS." (EPA Letter, p.3). Because of the failure to complete the ESA required consultations, the reasonable and prudent alternatives required under the ESA have not been identified, let alone adopted. "When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest 'reasonable and prudent alternatives [RPA].' *Id.*" *Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir. 2015). There has also been complete failure to identify, let alone adopt, the Least Environmentally Damaging Practicable Alternative (LEDPA) required by CWA § 404(b)(1). "A proposed action is not the LEDPA simply because a federal agency is a partner and chooses that proposed action as its preferred alternative." (EPA Letter, August 27, 2014, Corrections and Additional Editorial Recommendations, p. 1).⁵ The Delta Reform Act requires that: "the Council shall develop the Delta Plan consistent with all of the following . . . the federal Clean Water Act." Water Code § 85300(d)(1)(C).

The result is that in addition to there not being an adequate informational basis at this time for the Council to seek to advance the Water Fix, there has been a complete failure to present for public and decision-maker evaluation the required range of reasonable alternatives. The absence of reasonable and prudent alternatives under the ESA and Least Environmentally Damaging Practicable Alternative under the CWA graphically demonstrate that there is no basis in law at this time for the Council to seek to advance or promote the Water Fix.

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

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

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) . . .
- (3) A *feasible project alternative* or mitigation measure considerably different from others previously analyzed *would clearly lessen the significant environmental impacts* of the project, *but the project's proponents decline to adopt it.*

³ There are many reasons why the RDEIR/SDEIS is inadequate. To keep this alert as short as possible, at this time we simply reference the EPA Letter.

⁴ The EPA's prior concerns were set forth in its August 26, 2014, letter which we expect you are already familiar with.

⁵ Comment 5 of the Army Corps of Engineers July 16, 2014 comment letter on the BDCP Draft EIR/EIS was that: "The incomplete information and analysis would prevent us from making any decision based on the EIS/EIR as it is currently written, including making a recommendation on which alternative may contain the Least Environmentally Damaging Practicable Alternative (LEDPA). As a result, we would likely require an additional EIS process as part of our permitting review for CM1."

- (4) The draft EIR was *so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded*. 14 Code Cal. Regs § 15088.5(a)(1), (3), and (4)(emphasis added).

Again, the RDEIR/SDEIS is inadequate. Under CEQA, unless DWR and Reclamation prepare a new Draft EIR/EIS sufficient to provide for meaningful public review and comment, the Council would need to do so before in essence adopting the Water Fix by promoting or advancing it.⁶

The Water Fix has no Force of Law Behind it

As set forth above, it would be necessary to prepare an adequate Draft EIR/EIS before the Council could seek to promote or advance the Water Fix. In addition, the EPA pointed out in its October 30, 2015 RDEIR/SDEIS review letter that:

The Delta is listed as impaired for several water quality parameters under Section 303(d) of the CWA. EPA is working closely with the State Water Board to ensure that the revised standards are sufficient to address impaired water quality conditions in the Delta and reverse the declines in the fish species. (EPA Letter, p.4).

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

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

So it is established that the Delta is already in violation of water quality standards, and that the proposed Water Fix would contribute to worsening the violations. It is also established that the impacts of the Water Fix on the Delta lack an adequate informational basis for analysis because the SDEIS is inadequate. The undisputed facts are that the Sacramento River Winter-

⁶ The NEPA Regulations require that:

The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is *so inadequate as to preclude meaningful analysis*, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action. 40 C.F.R. § 1502.9(a)(emphasis added).

Run Chinook Salmon is listed as an endangered species under the ESA, 16 U.S.C. § 1531 *et seq.* Likewise, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA. The reaches of the Sacramento River, sloughs, and the Delta that would lose significant quantities of freshwater flows through operation of the Water Tunnels are designated critical habitats for each of these five listed and endangered fish species. “ESA section 7 prohibits a federal agency from taking any action that is ‘likely to jeopardize the continued existence’ of any listed or threatened species or ‘result in the destruction or adverse modification’ of those species’ critical habitat.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9th Cir. 2015). As just one example of issues calling for preparation of an adequate Draft EIR/EIS before adopting the Water Fix, the Water Fix proposal to take significant freshwater flows away from the Delta in the face of the prohibition of adverse modification of designated critical habitat raises Red Warning Flags under CEQA, the ESA and the CWA.

There is no rational reason for the Council to seek to promote or advance the Water Fix at this time. The Water Fix is not a federally authorized project. Congress has not enacted legislation authorizing development and construction of the Water Tunnels. And, because of a recent change to the BDCP/Water Fix the Water Fix no longer has any recognition in State law.

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

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

The Water Fix, involving construction of massive new conveyance facilities to take water away from the Delta before it even reaches the Delta is contrary to State policy as declared by the Legislature. “The policy of the State of California is to *reduce reliance on the Delta* in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” Water Code § 85021.

(emphasis added). Also, the Delta is to be restored, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem. Water Code § 85020(c).⁷

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

The fact that more time and more work are necessary before the Water Fix could be promoted or advanced lawfully is not the fault of the law, the EPA, the Council, or Water Tunnels opponents. Reclamation delayed nine years before commencing the ESA consultation process. Reclamation and DWR could have prepared an adequate Draft EIR/EIS. Reclamation and DWR could have developed a reasonable range of alternatives to increase Delta flows by reducing exports that might have served as the basis for a habitat conservation and national community conservation plan. Reclamation could have obtained reasonable and prudent alternatives (RPA) pursuant to the ESA and could have developed the Least Environmentally Damaging Practicable Alternative (LEDPA) pursuant to the CWA. Reclamation and DWR have failed to do what the law requires. The Council is bound by law to not attempt to advance the Water Fix unless and until such time as there is an adequate Draft EIR/EIS for public and decision-maker review and comment.

Specific Concerns about the Proposed Delta Conveyance Principles

There has been no genuine needs assessment, nor economic and water supply justification for new storage. Recent environmental documents on CalFED surface storage projects and the Water Fix have simply restated the supposed "need" to meet contractual amounts and increase storage and conveyance capacity across the Delta to do so. This does not qualify as real needs assessment, however; it essentially states, "because we've always done it this way." The principles follow in these mislaid footsteps, not the applicable framework of statewide DRA policies.

The absence of an adequate Draft EIR/EIS and the effect of the change from the BDCP to the Water Fix have been discussed above. Because of these developments, there is no basis to support "new or improved Delta conveyance", "conveyance improvements", or "new or expanded water storage projects" called for by proposed Delta Conveyance Principles 1, 2, 3, 4, and 5. The Water Fix is the only current new conveyance proposal; its SDEIS has been

⁷ In addition, the Water Fix is not even eligible for state funding because it fails to meet the requirements of § 85320(b) of the Delta Reform Act. Because of the absence of an adequate Draft EIR/EIS, there has not been the compliance with CEQA required by § 85320(b)(2). Nor has there been the comprehensive review and analysis of: a reasonable range of "flows necessary for recovering the Delta ecosystem and restoring fisheries . . . which will identify the remaining water available for export and other beneficial uses" required by § 85320(b)(2)(A); "A reasonable range of Delta conveyance alternatives, including through-Delta . . ." required by § 85320(b)(2)(B); "The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities . . ." required by § 85320(b)(2)(C); "the potential effects on migratory fish and aquatic resources" required by § 85320(b)(2)(D); or "The potential effects of each Delta conveyance alternative on Delta water quality." § 85320(b)(2)(G).

determined inadequate by the EPA; and there is not even arguable support for it now in State law.

Delta Water System Operation Principle 10 in stating that “water exported from the Delta should more closely match water supplies available to be exported” ignores the ESA prohibition of adverse modification of designated critical habitats and the CWA prohibition of worsening water quality violations. Operation Principle 11 including language about “conveyance should be operated to provide more natural, functional flows to enhance Delta inflows and outflows by storing water in wet periods and reducing diversions in dry periods” sounds like claims made by supporters of the Water Fix Water Tunnels.

Principle 16 currently reads that conveyance and storage projects and their operation should "provide net benefits to the ecosystem, as opposed to just protecting the ecosystem from further degradation." We think this is not well stated because "net benefits" has no clear ecological meaning here, since this phrase is usually associated with economic analysis. We think it makes more sense, and will be more easily understood if it reads as "provide for recovery of the ecosystem, as opposed to just preventing jeopardy to listed species and deterioration of critical habitat and ecological function." This would make the principle clearer, more robust and would comply and integrate well with other Delta Reform Act objectives.

We ask too that Principle 17 clarify that use of best available science (BAS) and adaptive management (AM) do not confer a license to state agencies to delay protective and restorative action in the Delta until "all the science is in" on conceptual mechanisms and thresholds of effect. We will be waiting a long time for that. Instead, BAS and AM should be seen as useful for designing protection actions concerning affected listed species and ecosystem process challenges that promote learning by scientists and decision makers, while also ensuring that the species and processes that are the object of study continue to exist, in hopes of thriving once again. Again, such language, we think, would make Principle 17 clearer and would comply and integrate well with other Delta Reform Act objectives.

The DSC has found already that the Water Fix Tunnels Project would be treated as a "covered action" under the DRA, the Delta Plan and its implementing regulations. We are deeply concerned that rushing these problematic principles forward will mean the DSC intends to prejudice Delta Plan policies in such a way as to "fix" the Water Fix's certification as a covered action—to make the Delta Plan safe for the Water Fix, since it is no longer a habitat conservation plan with legislative basis for incorporation into the Delta Plan. We think this path of these draft principles leads to more conflict, not less, over not only the Water Fix, but also the very meaning of "improved conveyance and storage" in the Delta Reform Act.

Conclusion

We commend the Council's efforts to look ahead and determine what Delta Reform Act language means concerning "improved conveyance and storage." We agree that once that meaning is determined, it should be placed into the Delta Plan as policies to be followed. But the present draft principles lack clarity and integration with respect to all of the policies contained in the Delta Reform Act, including the public trust and reasonable use doctrines, which the Act states are applicable to the Delta, They ignore the vacancy of analytic justification for increasing

new storage and capacity in the state's coordinated water systems. These draft principles rely far too heavily on talking points from the Water Fix project to pass muster with the public or be a reasonable interpretation of the Act's policies.

We urge that the Council decline to adopt the draft conveyance and storage principles on November 19th, and instead direct staff to return to the Council with a recommended scope, schedule, and budget for a public process to gather public input on what "improved conveyance and storage" mean for the Delta and for the State of California. The scope should include several meetings as hearings (not mere "open houses") throughout the Delta region, in small communities and neighboring larger cities to gain a broad spectrum, consistent with the Council's charge from the Act to protect the Delta as a unique place.

There is no adequate informational basis at this time on which to do anything more than speculate as to whether the Water Fix might be a desirable project. From the standpoint of adverse impacts on endangered and threatened species of fish, designated critical habitats, Delta water quality, and Delta water supply the evidence is overwhelming that the Water Fix would be very bad for all of the above. Extinction is forever. No adequate Draft EIR/EIS has been prepared and circulated for public review and comment. The Water Fix has no force of either federal or State law behind it. Reclamation and DWR deliberately dropped the habitat conservation and national community conservation plan when they changed the BDCP into the Water Fix. That eliminated the Water Fix from mandatory incorporation into the governing Delta Plan. There is no legitimate planning reason for the Council to proceed to promote the Water Fix in any way, shape or form.

If you have any questions, please contact Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org.

Sincerely,

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Friends of the River

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Co-Facilitator
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/s/Barbara Barrigan-Parilla
Executive Director
Restore the Delta

Attachment

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