



Friends of the River  
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September 22, 2016

Via Email

The Honorable Sally Jewell  
 Secretary of the Interior

Christina Goldfuss, Managing Director  
 Council on Environmental Quality

The Honorable Penny Pritzker  
 Secretary of Commerce

John Laird, Secretary  
 California Natural Resources Agency

The Honorable Gina McCarthy, Administrator  
 U.S. Environmental Protection Agency

David Murillo, Regional Director  
 U.S. Bureau of Reclamation

Additional Addressees at end of Letter

**Re: Request for full Operations and Financial Disclosure and Honesty in connection with issuance of new Draft EIR/EIS for California Water Fix project if project not dropped**

**Dear Secretary Jewell, Secretary Pritzker, Administrator McCarthy, Managing Director Goldfuss, Secretary Laird, Regional Director Murillo, and Federal and California**

## **Agencies, Officers, and Staff Members Carrying out and Reviewing the BDCP/California Water Fix:**

This letter from our public interest organizations follows up our letter of August 18, 2016 to each of you.<sup>1</sup> Our letter requested that you require the Bureau of Reclamation and Department of Water Resources (DWR) to issue a new California Water Fix Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on the California Water Fix proposed project if the project is not dropped. We repeat a paragraph from our August 18 letter: The Water Fix Delta Water Tunnels would divert enormous quantities of freshwater that presently flow through the Sacramento River, sloughs, and the San Francisco Bay-Delta estuary before being diverted for export from the south Delta. Due to the new points of diversion north of the Delta, freshwater that presently contributes to water quality, water quantity, fish, fish habitat, Delta agriculture and public health by flowing through the already impaired Delta would instead flow through massive Tunnels no longer providing benefits within the lower river, sloughs, and the Delta. *This undeniable truth is obvious. And this undeniable truth has been ignored for years by the federal and California agencies trying to take the water away from the Delta and the Sacramento River.*

For all the reasons we set forth in our August 18 letter, it would constitute failure to proceed in the manner required by law to issue a Final EIR/EIS on the Water Fix Delta Water Tunnels proposed project. Those reasons include new developments including: new court decisions; *Final Guidance* from the Council on Environmental Quality (CEQ) on consideration of the effects of climate change in National Environmental Policy Act (NEPA) reviews; recent issuance by Reclamation of a Biological Assessment including determinations of “likely to adversely affect” several endangered and threatened fish species and their designated critical habitats contrary to the false denials of such impacts in Reclamation’s earlier draft NEPA documents; and refusals by Reclamation and DWR to correct the deficiencies found by the Environmental Protection Agency (EPA) in its review of the Draft environmental documents for the project.

Now, additional recent developments create an even more disturbing picture of what is going on here. The proponent public agencies – Reclamation and DWR-- of what was first the Bay Delta Conservation Plan (BDCP) and now the Water Fix project have always represented that the users of water conveyed by the project would pay all project costs. It turns out that in November of 2015, the economic consultant for the project, David Sunding of The Brattle Group, prepared a draft *CalWater Fix Economic Analysis* for the California Natural Resources Agency. (November 15, 2015). That *Economic Analysis*, purporting to justify the economic feasibility of the project, assumed that the federal government or some other entity would need to provide a subsidy of \$6.5 billion to make the Water Tunnels a breakeven proposition for agricultural users of the water. (*Economic Analysis* pp. 2-4).<sup>2</sup> That is more than one third of the

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

<sup>2</sup> Dr. Jeffrey Michael, Director of the Center for Business and Policy Research at the University of the Pacific has explained (Comments, September 12, 2016) that “The report actually refers to the subsidy as \$3.9 billion, but this figure is in present value terms including a 3% real discount rate. This is equivalent to \$4.6 billion in actual costs, which is the appropriate figure to compare to the nearly \$16 billion in construction and mitigation costs.” He also

projected \$16 billion in construction and mitigation costs. Honest project proponents would have made that *Economic Analysis* immediately available to the public. Instead, there was a cover up. The *Economic Analysis* was concealed from the public. It took many months including demands under California's Public Records Act (the State equivalent of the Federal Freedom of Information Act) to obtain the suppressed *Analysis*. Concealment of material facts is the essence of fraud. The continuing representations to the public that the project's beneficiary water users would pay all project costs at the same time that the State's own Draft *Economic Analysis* to the contrary was being concealed, instead of disclosed, constituted continuing misrepresentation of material facts and, consequently, fraud on the public.

Now, finally, the truth is out there for the world to see in the news article *California water tunnels would need US funding, analyst says* (Associated Press, by Ellen Knickmeyer, September 14, 2016):

Giant tunnels that Gov. Jerry Brown wants to build to haul water across California are economically feasible only if the federal government bears a third of the nearly \$16 billion cost because local water districts may not benefit as expected, according to an analysis that the state commissioned last year but never released.

The findings run counter to longstanding state pledges that the districts that would get water from the tunnels would pay the full cost. . .

There is an additional element of misrepresentation involved here. As explained by Dr. Jeffrey Michael, Director of the Center for Business and Policy Research at the University of the Pacific (Comments, September 12, 2016) the subject *Analysis* "assumes water yields (the difference in export water delivery with and without the tunnels) are 4 times higher than in official Water Fix documents including its RDEIR/SDEIS (Recirculated Draft EIR/Supplemental Draft EIS) and petition [for change in point of diversion] to the State Water Resources Control Board." The NEPA and CEQA (California Environmental Quality Act) documents for the project are supposed to be environmental full disclosure documents. Instead, the proponent agencies have a secret *Economic Analysis* showing far greater water yields for the project beneficiaries and thus more severe adverse impacts on water quantity, quality, and designated critical habitat than have been set forth in the NEPA/CEQA documents provided to the public.

This project reeks of misrepresentation by the proponent agencies. The public is told the beneficiary users will pay all costs of the project. In secret, the proponent public agencies have received information from their own economic consultant that a substantial public subsidy would be necessary for the project. The public is told one thing in public about water yields and corresponding impacts on the Delta and fisheries. In secret, the proponent public agencies base financial feasibility decision-making on assuming far higher water yields than disclosed to the public.

These most recent concealments are part of a pattern of misconduct by the public agency proponents of the Water Tunnels project. It was learned in March 2016 as a result of a Securities and Exchange Commission (SEC) Order that:

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explained that "the report finds an additional \$1.9 billion subsidy would be needed to make the tunnels a break-even proposition for agriculture."

The Westlands Water District shifted about \$8.3 million in expenses and other obligations to the revenue side of its ledgers, solely to be able to represent that it had enough revenue to cover debt payments on \$77 million in bonds without having to raise rates, according to the Securities and Exchange Commission. (*California's largest water district, accused of misleading investors, settles with the SEC*, by Geoffrey Mohan, Los Angeles Times, March 9, 2016). . . , Westlands is one of the chief supporters of a \$15-billion plan to build tunnels under the Sacramento-San Joaquin River Delta to bring more water directly from the Sacramento River southward.” (*Id.*).

It was learned in April 2016 as a result of a whistleblower complaint by a Bureau of Reclamation employee that:

How the State of California spent millions of dollars of federal aid meant for improving fish habitat on preparing the Environmental Impact Statement for its controversial Delta Tunnel Project is under new legal scrutiny, according to documents posted today by Public Employees for Environmental Responsibility (PEER). Representing a U.S. Bureau of Reclamation employee, PEER filed a complaint detailing how a funding agreement with the California Water Resources Department [DWR] is illegally siphoning off funds that are supposed to benefit fish and wildlife to a project that will principally benefit irrigators. (*Feds to Probe Delta Tunnel Misuse of Grant Funds, Inspector General to Audit California Water Resources Handling of Federal Aid*, PEER Release, April 11, 2016).

In addition, according to PEER Senior Counsel Paula Dinerstein:

California is improperly diverting federal grants to a giant slush fund for the California Water Fix, . . . In this case, the Bureau of Reclamation is abetting the State of California in breaking laws designed to ensure that federal investments to benefit wildlife are not used to their detriment. (*Id.*).

The Office of Inspector General, U.S. Department of the Interior, responded to PEER's complaint: “Based on this information we have decided to conduct a review into the issues raised in your letter and we expect to commence our work on this matter this month.” (Letter, Mary L. Kendall, Deputy Inspector General to Paula Dinerstein, April 8, 2016). The investigation is ongoing.

On August 10, 2016, "The [California] Legislature's Joint Audit Committee voted to direct State Auditor Elaine Howle to delve into how the project, dubbed California Water Fix, has spent an estimated quarter-billion dollars on planning and how the state plans to finance its multi-billion-dollar cost.” (*Legislators approve audit of Gov. Jerry Brown's water tunnels plan*, Dan Walters, Sacramento Bee, August 11, 2016).

A major focus of our August 18, 2016 letter to each of you was the persistent refusal by Reclamation and DWR to develop and consider a reasonable range of alternatives to the Water Tunnels project that would restore the San Francisco Bay-Delta estuary instead of furthering its destruction by taking yet more freshwater flows away from the Delta upstream for the Water Tunnels. There is a pattern of misconduct here within Reclamation and DWR to falsely represent that public subsidies will not be sought for the Water Tunnels and to understate in public NEPA

and CEQA documents the amount of freshwater flows that would be taken away from the Delta for the project. This is part of an effort to unlawfully confine alternatives to the one arbitrarily favored by Reclamation and DWR -- the Delta Water Tunnels-- while misrepresenting who would pay for the project and understating its adverse environmental impacts.

The alternatives section "is the heart" of an EIS. NEPA Regulations, 40 C.F.R. § 1502.14. "[I]t should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." (*Id.*). The alternatives section should "Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." § 1502.14(b). Instead, in addition to the foundational deficiencies set forth in our August 18 letter, the draft NEPA and CEQA documents issued to the public have concealed from the public who would pay for the project and the quantities of water taken for the project thus concealing the severity of the project's adverse environmental impacts.

In *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 811 (9<sup>th</sup> Cir. 2005), the Ninth Circuit held that "Inaccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." The Court found that "the market-demand error was sufficiently significant that it subverted NEPA's purpose of providing decision makers and the public with an accurate assessment of the information relevant to evaluate the Tongass Plan." 421 F.3d at 812. The Court concluded that:

the Forest Service presented misleading economic effects of the Plan significant to its evaluation of alternatives considered by the Plan, and the public was similarly misled in its opportunity for comment. We hold that the Forest Service violated NEPA's procedural requirement to present complete and accurate information to decision-makers and to the public to allow an informed comparison of the alternatives considered in the EIS. 421 F.3d at 813.

Here also, the misleading economic information is significant to the evaluation of alternatives and unlawfully misled the public in its opportunity to comment on the Draft Water Fix NEPA and CEQA documents. Behind closed doors Reclamation and DWR know from the *Economic Analysis* that the Water Tunnels alternative is not even beneficial enough to agricultural users to make the project worthwhile to them without a public subsidy. The public needs to be informed of these material facts prior to a new comment period on a new, honest Draft EIR/EIS.

The California courts have repeatedly held that:

An accurate, stable and finite project description is the *sine qua non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. [citation deleted]. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. [citation deleted]. Only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives. *E.g., San Joaquin Raptor Rescue Center v. County of Merced*,

149 Cal.App.4<sup>th</sup> 645, 654 (2007) (project description held unstable and misleading) (internal quotation marks deleted).

Here, we have the opposite of an accurate, stable, and finite project description. Instead, we have an inaccurate, unstable, and misleading project description provided to the public while internally there are secret plans to make the public subsidize the project and to take more water away from the Delta than is disclosed to the public.

The NEPA Regulations require that: “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.” 40 C.F.R § 1502.9(a).<sup>3</sup> Given these NEPA and CEQA requirements it will constitute failure to proceed in the manner required by both federal and California law if Reclamation and DWR proceed to issue a Final EIR/EIS on the Water Fix project. They must be required to first prepare and circulate for public review and comment a new Draft EIR/EIS accurately and honestly disclosing and analyzing the true plans for how much water they plan to take away from the Delta for the Water Tunnels. The same is true with respect to whether the public will be expected to subsidize the project. Of course, the Water Fix project would be such an environmental disaster for the Delta and financial disaster for ratepayers and taxpayers, that the sensible thing to do is to drop the project. When it takes misrepresentation, fraud, and cover-ups to keep a project proposal afloat, that is a red flag that the project is a bad one that should not go forward.

## CONCLUSION

President Obama has established a legacy of honesty, scientific integrity, and commitment to conservation and protection of our precious natural resources. There is no acceptable reason for you to allow the California Water Fix Project to go forward at this time staining that legacy in the process of contributing to the destruction of the San Francisco Bay-Delta estuary. You must either require Reclamation and DWR to drop the Water Fix project or require their issuance of a new accurate and honest Draft EIR/EIS for public review and comment. That new Draft EIR/EIS must include disclosure of whether taxpayers as well as ratepayers will be paying for the project and disclosure of the true quantities of freshwater flows that will actually be diverted for the Water Tunnels. The truth needs to start. The lying needs to stop. If instead, you allow Reclamation and DWR to issue a Final EIR/EIS for this project, that will constitute failure to proceed in the manner required by law. We are confident that you will decide to honor President Obama’s legacy and our laws by proceeding in the manner required by law.

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

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<sup>3</sup> Moreover, agencies must prepare supplements to a draft EIS when “There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(ii). The CEQA Guidelines section requiring recirculation of a new Draft EIR, 14 Cal. Code Regulations § 15088.5(a)(1), (2), (3), and (4), is similar to the NEPA requirement.

Sincerely,



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Additional Addressees, all via email:

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