

Friends of the River
1418 20th Street, Suite 100
Sacramento, CA 95811

June 7, 2018

Attorney General Xavier Becerra
California Department of Justice
Attn: Public Inquiry Unit
PO Box 944255
Sacramento, CA 94244-2550

Re: Keep the Interior Appropriations bill rider that would exempt the California Water Fix Tunnels from Federal or State judicial review, from being enacted into law

Dear Attorney General Becerra:

Regardless of whether one is for or against the California Water Fix Delta Water Tunnels Project, all reasonable people would agree that it is the most controversial public works project in California history. Its predecessor, the peripheral canal, was voted down by a 2 to 1 margin in the referendum of June 1982. The current proposal has met with enormous public opposition

during the public review periods on project draft environmental documents. Nineteen lawsuits including more than 80 public agencies and public interest organizations as plaintiffs have been filed alleging that California's Department of Water Resources failed to proceed in the manner required by law when it approved the project in July 2017. Pursuant to California procedure those cases have all been coordinated for trial before the same state court judge of the Sacramento County Superior Court. Plaintiffs include numerous public agencies, five counties and six cities including Sacramento and Stockton.¹

Given the history and the controversy, it is an outrage that there is a rider (Congressman Ken Calvert, R-Corona) in the House of Representatives, Section 437 in the Interior Appropriations bill that would *exempt* the Tunnels Project from Federal *or State* judicial review. The rider states,

Notwithstanding any other provision of law, the Final Environmental Impact Report/Final Environmental Impact Statement for the Bay Delta Conservation Plan/California Water Fix (81 Fed. Reg. 96485 (Dec. 30, 2016) and any resulting agency decision, record of decision, or similar determination shall hereafter not be subject to judicial review under any Federal *or State law*. (Emphasis added.)

The United States and California Constitutions established governments of laws not rulers. Independent judicial review over the executive branches of government is a hallmark of a healthy democracy. The truth proven throughout history is that "power tends to corrupt, absolute power corrupts absolutely." Independent judicial review is the only way to establish whether the executive branch has proceeded in the manner required by law. Its absence is the start of a slide downward toward a corrupt government of rulers not laws.

The Water Tunnels boosters claim the Project will be good not bad for the environment and the San Francisco Bay-Delta. It is the height of hypocrisy to make that claim with one hand, while using the other hand to take away the right to obtain independent judicial review determining whether the executive branch has in fact complied with law including the California Environmental Quality Act (CEQA) in approving the project.

The Water Fix Tunnels would be a "megaproject," a term commonly understood as projects that cost at least \$1 billion. It is unacceptable that this massive controversial project would be immunized from independent judicial review. Megaprojects "are 'the Vietnams of policy and management: easy to begin and difficult and expensive to stop.'" Jacques Leslie, *The Trouble with Megaprojects* (The New Yorker, p. 3, April 11, 2015.) "[M]egaproject planners are often outright dishonest, systematically overestimating benefits and underestimating costs." (*Id.*,

¹ Our public interest organizations, 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.

p. 4). “Unfortunately, false cost-benefit estimates have a way of elevating big projects over more cost-efficient, less environmentally disruptive ones.” (*Id.*, p. 4).

If this massive, controversial project is immunized by Congress from Federal and State judicial review, the precedent set would lead to the end of the environmental protection and full environmental disclosure purposes served by such laws as CEQA and the National Environmental Policy Act (NEPA.) As California courts have explained,

Problems raised by the public and responsible experts require a good faith reasoned analysis in response. [Citation omitted.] The requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not ‘swept under the rug.’ . . . Instead of undertaking a serious and detailed analysis of SWP supplies, the EIR does little more than dismiss project opponents' concerns about water supply. Water is too important to receive such cursory treatment. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 723.

CEQA is a vital part of a government of laws not rulers. This important California law allows the public to have informed participation in critical government decisions that may affect their lives, health, occupations, and property rights. As California courts have said,

The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “[i]dentify ways that environmental damage can be avoided or significantly reduced.” [Citation omitted.] Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment but also informed self-government. [Citation and internal quotation marks omitted.] *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1354.

Laws such as CEQA making possible informed public participation in government decision-making affecting their interests become meaningless in the absence of the right to obtain judicial review of agency decisions. Judicial relief can only be obtained by plaintiffs if independent judges determine that a government agency has failed to proceed in the manner required by law. Enacting this bill would be a major step toward a government of rulers not laws. The public must retain the right to independent judicial review to determine whether a government agency that has approved a massive public works project that they believe will damage them has proceeded in the manner required by law.

Additionally, WaterFix Tunnels Project proponents failed to identify statistically the sizeable environmental justice community within the Delta, or the impacts that would be experienced by the Delta’s environmental justice community as a result of degraded water quality from project operations. It is not lost on our organizations that the State is pursuing needed litigation against the Federal Government to protect farmworkers from weakened toxin standards, but that the Delta’s environmental justice community stands to be stripped of its due

process rights to litigate if needed to protect drinking water quality standards should this rider make it into law.

Last but not least, it is similarly unacceptable that Congress would interfere in California State government by immunizing the Water Fix Tunnels Project from judicial review under State, as well as under Federal, law.

We respectfully request that you make the defeat of this terrible bill a top priority and do everything in your power to keep it from being enacted into law.

Sincerely,



E. Robert Wright, Senior Counsel
Friends of the River



Bill Jennings, Executive Director
California Sportfishing Protection Alliance



Barbara Barrigan-Parrilla, Executive Director
Restore the Delta



Conner Everts, Facilitator
Environmental Water Caucus



John Buse, Senior Counsel, Legal Director
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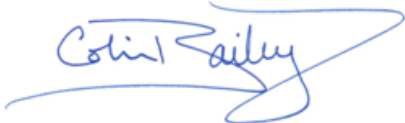
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Colin Bailey, Executive Director
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Jonas Minton, Senior Water Policy Advisor
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Cc. Senator Dianne Feinstein
Senator Kamala Harris