

CA Save Our Streams Council



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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://aar.assembly.ca.gov/sites/aar.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/JPA.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://mavensnotebook.com/wp-content/uploads/2018/07/PCL-et-al.-SWP-Contract-Amds-July-3rd-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_factsheet.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/orovillerelicensing/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 SCRB 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 JBLC 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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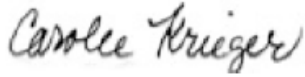


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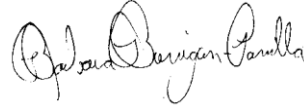


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⁴⁹ County of Inyo v. City of Los Angeles (II) (1976) 61 Cal.App.3d 91 (appellate jurisdiction and relief); (III) (1977) 71 Cal.App.3d 185 (Owens Valley groundwater management); (V) (1980) 124 Cal.App.3d 1 (groundwater management); (VI) (1984) 160 Cal.App.3d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 unpublished (appellate jurisdiction); (VIII) (1997) (final resolution and dismissal)



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