

**PROTEST of Sierra Club California, Center for Biological Diversity, Friends of the River, Planning and Conservation League, Save California Salmon, and North Coast Rivers Alliance**

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
P.O. Box 2000, Sacramento, CA 95812-2000  
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<http://www.waterboards.ca.gov/waterrights>

**PROTEST—(Applications and Petitions)**

**BASED ON ENVIRONMENTAL AND PUBLIC INTEREST  
CONSIDERATIONS**

**APPLICATIONS 5630, 14443, 14445A, & 17512, PETITIONS  
seeking changes of Water Right Permits 16478, 16479, 16481,  
and 16482 of California Department of Water Resources  
(DWR) (Petition received by SWRCB on February 22, 2024)**

We have carefully read the notice (state name):

**Notice of Petition Requesting Changes in Water Rights of the  
Department of Water Resources for the Delta Conveyance  
Project**

Address, email address and phone number of protestant or authorized agent:

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**We protest these applications/petitions on the following grounds:**

- **the applications/petitions are not within the State Water Resources Control Board's jurisdiction**
- **the applications/petitions will not best serve the public interest**
- **the applications/petitions will be contrary to law**
- **the applications/petitions will have adverse environmental impacts**

State facts which support the foregoing allegations

The new upstream diversion for the Delta Conveyance Project Tunnel would in addition to other violations of law and adverse environmental impacts, adversely modify designated critical habitat for endangered and threatened fish species, would unlawfully worsen already existing water quality violations in the Delta, and would endanger the public health of Delta residents and users by worsening harmful algal blooms. The Proposed Action is not in the public interest. The facts supporting the above allegations are set forth in the attached supplemental sheets.

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

This Protest may only be disregarded and dismissed if the Petition is withdrawn and the Board terminates consideration of the Department of Water Resources' (DWR) Petition. It is not possible to "condition" reality. The Delta Conveyance Project Tunnel would cost billions of dollars to construct. Approving the diversion change subject to conditioning it on not damaging Delta water quality or fish habitat would be useless. It is not possible to operate the Tunnel by taking away large quantities of freshwater that presently flow through the Delta

before being diverted without reducing freshwater flows through the Delta, worsening Delta water quality and quantity, and damaging endangered and threatened fish species and their designated critical habitat. It is not possible to mitigate the adverse environmental impacts of the diversions for the Project.

**Protest based on INJURY TO PRIOR RIGHTS:**

This section is not applicable because protestants do not claim a right to the use of water from a source involved in the petition.

**All protests must be signed by the protestant or authorized representative:**

Signed May 9, 2024:



A handwritten signature in blue ink, appearing to read "Hei Party", with a long horizontal flourish extending to the right.

**All protests must be served on the petitioner. Provide the date served and method of service used:**

This protest was served by email on DWR to [David.Steffenson@water.ca.gov](mailto:David.Steffenson@water.ca.gov) on May 10, 2024.

The attached Supplemental Sheets to this Protest start on the next page:

**ATTACHED SUPPLEMENTAL SHEETS TO PROTEST**

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## **FACTS SUPPORTING THE ALLEGATIONS:**

### **I. THE PROPOSED ACTION WILL NOT BE WITHIN THE STATE WATER RESOURCES CONTROL BOARD'S JURISDICTION**

The Petition in fact seeks a new water right. That is not within the Board's jurisdiction over the Petition for change in point of diversion.

### **II. THE PROPOSED ACTION WILL NOT BEST SERVE THE PUBLIC INTEREST**

The Proposed Action will not best serve the public interest because essential quantities of freshwater that presently flow through the Delta before being diverted for export at the south, would instead be diverted upstream. The Delta is already in crisis violating water quality standards, with declining fish populations and faces further degradation as a result of climate change, less freshwater in the future, and increasing salinity due to sea level rise. The proposed upstream diversion would increase and accelerate degradation. Additionally, the Tunnel would cost many billions of dollars which would be an "opportunity cost" lost to modern water supply solutions such as development of recycling, conservation, drip irrigation for agriculture, and taking desert lands out of agricultural production which should not be farmed because of the resulting selenium pollution. "Water conservation in agriculture is crucial to reducing water consumption in California since agricultural water use represents about 80% of total annual human water use."<sup>1</sup>

The Water Board proposed Bay-Delta Plan update determined in September of 2023 that,

The face value, or total volume of water authorized for diversion, of the active consumptive post-1914 appropriative water right records in the Sacramento/Delta watershed is approximately 159 MAF/yr (Table 2. 7-1a), *which is over five times the total annual average unimpaired outflow for the entire Bay-Delta watershed.*<sup>2</sup> (Emphasis added.)

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<sup>1</sup> *Sierra Club California's Smart Water Alternatives: To The Bay Delta Conveyance Project* at p. 5, (December 2022)(**Exhibit 4**), citing Jeff Mount and Ellen Hanak, *Just the Facts: Water Use in California* Public Policy Institute of California (July 2016.)

<sup>2</sup> *Staff Report/Substitute Environmental Document in Support of Potential Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary for the*

If the water is diverted for the Water Tunnel upstream from the Delta, that will further reduce Delta freshwater flows degrading fish habitat and water quality, and increasing health risks for Delta residents and users by worsening harmful algal blooms. It would not serve the public interest to continue to base decisions on claimed “water rights” which exceed available water by more than five times with one hand while further degrading or destroying the largest estuary on the West Coast of the northern hemisphere with the other hand.

Tribal communities who have relied on the Delta since time immemorial have opposed the Project due to its potential to negatively impact cultural and religious resources and tribal beneficial uses, including but not limited to fish and other aquatic species, aquatic and riparian plants, and the water quality. Any impacts that occur within the Delta will affect the whole watershed and the many tribes upstream that rely on the Delta to provide clean and healthy resources. This includes not only those tribes who rely on the Sacramento River and its tributaries, but also the tribes that rely on the Trinity River and Klamath River.

What would instead best serve the public interest would be to not approve the new diversion points so that the freshwater ultimately exported from the south of the Delta would continue to flow through the Delta providing benefits for Delta water supply, Delta water quality, fisheries and fish habitat prior to being diverted for export. What would further serve the public interest would be to begin to reduce exports from the Delta to begin to improve Delta water supply and water quality conditions instead of continuing to worsen already bad conditions in the Delta by reducing freshwater flows through the Delta.

Detailed information about why the Proposed Action will not best serve the public interest is set forth in Sections III and IV of this Protest.

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*Sacramento River and its Tributaries, Delta Eastside Tributaries, and Delta*, Ch. 7.24, Table 7.24-1, p. 7.24-7 (September 28, 2023)

### III. THE PROPOSED ACTION IS CONTRARY TO LAW

#### A. DWR's Petition Fails to Include the Information Required by the Water Code

Water Code section 1701.2(c) requires a petition for change to among other things,

(c) *Include all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and Wildlife, concerning the extent, if any, to which Fish and wildlife would be affected by the change, and the statement of any measures proposed to be taken for the protection of Fish and wildlife in connection with the change. (Emphasis added.)*

DWR's Petition fails to "include all information reasonably available to the petitioner" "concerning the extent, if any, to which Fish and wildlife would be affected by the change,..."

The Water Board's April 15, 2020, comment letter on DWR's Notice of Preparation (NOP) for Environmental Impact Report (EIR) for the Project pointed out the prolonged decline of fish species in the Bay-Delta and the potential of the Project "to adversely affect aquatic resources by modifying the timing, volume, and duration of freshwater flows and tidal energy that influence the amount of aquatic habitat and water quality habitat conditions such as freshwater flow, salinity, dissolved oxygen, turbidity, and temperature." (SWRCB Letter pp. 5-6.)

The Water Board's *Staff Report/SED* of September 28, 2023, explained that "native fish species in the Bay-Delta ecosystem are experiencing an ecological crisis" and that reduction in flows and other issues "have led to severe declines, and in some cases extinctions, of native fish and other aquatic species." (*Staff Report/Substitute Environmental Document in Support of Potential Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary for the Sacramento River and its Tributaries, Delta Eastside Tributaries, and Delta.* (, Ch. 7.12, Hydrology and Water Quality, 7.12.1 Surface Water, p. 7.12.1-1, September 28, 2023) ("*Water Board Staff Report/SED*")

The *Water Board Staff Report/SED* also explained that "New or changed points of diversion could affect special-status fish species and interfere with the

movement of native resident or migratory fish during periods of diversion, if present.” (Ch. 7.22, p. 7.22-42.) Also, “For larger projects, new or modified reservoirs and points of diversion would require extensive analysis and evaluation and would likely have significant environmental impacts.” (*Id.* p. 7.22-5.)

The U.S. Environmental Protection Agency (EPA) concluded that, “*given that the status of many Delta fish species is threatened, endangered, or other description of impairment, further diversion of Sacramento River water under the Project could very well lead to greater impairment or extinction.*” (EPA Comment Letter on the Army Corps Draft EIS on Delta Conveyance Project, p. 5, detailed comments, March 16, 2023, copy furnished as **Exhibit 6.**) (Emphasis added.)

The EPA said in its January 19, 2024, comments on the *Water Board Staff Report/SED* that the Report recognized “that substantially more flow is needed in the Delta and Sacramento-San Joaquin watersheds to support aquatic life.” (EPA Comments at 1, EPA Comments furnished as **Exhibit 1.**) According to the EPA, habitat restoration is not sufficient. (EPA Comments at 9.) EPA said, “As cautioned by the State Water Board: ‘flow and physical habitat interact in many ways, but they are not interchangeable. The best available science suggests that current flows are insufficient to protect public trust resources.’” (EPA Comments at 6.)

DWR’s EIR admits “The project alternatives potentially would have negative impacts on critical fish habitat and special status species.” (Final EIR and Draft EIR, Ch. 30, p. 30-24.) The EIR admits the impacts of Project operations before mitigation will be significant on Fish and Aquatic Species. (Final EIR and Draft EIR, Executive Summary, p. ES-33, Impact AQUA-1.) The EIR makes specific admissions that Project operations will be significant on Sacramento River Winter-Run Chinook Salmon (*Id.*, Executive Summary, p. ES-33, Impact AQUA-2), Central Valley spring-run Chinook salmon (*Id.* p. ES-33, Impact AQUA-3), and on Central Valley steelhead, Delta smelt, and longfin smelt. (*Id.*, p. ES-34, Impacts AQUA-5, -6. -7.)

DWR’s EIR claims that the impacts after mitigation on Sacramento River winter-run Chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, Delta smelt, and longfin smelt though significant, would be less than significant after mitigation, which consists chiefly of habitat restoration (Final EIR and Draft EIR, Executive Summary, pp. ES-33, -34.)

The California Department of Fish and Wildlife (CDFW) commented on DWR’s Draft EIR that there is not sufficient substantiation for its determination that the effects of construction and operation of the Project will be less than significant with mitigation on the listed fish species. (CDFW Comment Letter, p. 23, December 16, 2022.) The Water Board commented that the Draft EIR did not provide evidence as to how the proposed habitat restoration would reduce significant operational impacts to less than significant on Delta smelt and longfin smelt. (Water Board Comment Letter. p. 13, December 16, 2022.)

The Water Board, EPA and CDFW information is discussed below in greater detail in sections IIIB2c and IIIB5 of this Protest. This information was made available to DWR *prior* to DWR submitting its Petition to the Water Board on February 22, 2024.<sup>3</sup> Most of this information was not included in or with DWR’s Petition. Consequently, DWR has failed to include the information required by Water Code section 1701.2(c) in or with its Petition. DWR *must* “include *all* information reasonably available to the petitioner” “concerning the extent, if any, to which Fish and wildlife would be affected by the change,..” (Water Code § 1701.2(c.) (Emphasis added.)

In addition, DWR must provide information responsive to the expert information and conclusions including that in the *Water Board Staff Report/SED*, and EPA letters. DWR must disclose whether it now agrees with information such as the EPA conclusion that “further diversion of Sacramento River water under the Project could very well lead to greater impairment or extinction” of threatened and endangered fish species. DWR response is likewise required with respect to information such as the *Water Board Staff Report/SED* explaining that “native fish species in the Day-Delta ecosystem are experiencing an ecological crises” that reduction in flows and other issues “have led to severe declines, and in some cases extinctions, of native fish and aquatic species” and “New or changed points of

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<sup>3</sup> DWR obtained the Water Board's comment letter on DWR's NOP on or about April 15, 2020. DWR obtained the Water Board's *Staff Report/SED* on or about September 28, 2023. That Report was also submitted to DWR with a Supplemental Comment letter from Sierra Club California et al. on DWR's Draft EIR on October 30, 2023. DWR obtained EPA's Comment Letter on the Army Corps Draft EIS on the Delta Conveyance Project directly from the Army Corps and also with Sierra Club California et al.'s Supplemental Comment Letter on DWR's Draft EIR on June 29, 2023. DWR obtained CDFW's Comment Letter and the Water Board's Comment Letter on the Draft EIR on or about December 16, 2022. Protestants believe DWR received EPA's Comment Letter on the *Water Board Staff Report/SED* prior to filing the Petition.

diversion could affect special-status fish species and interfere with the movement of native resident or migratory fish during periods of diversion, if present.”

**B. The Proposed Action is Contrary to CEQA and DWR has Failed to Include Information Needed to Consider DWR’s Petition**

DWR’s Petition refers to its EIR on the Project for all of its information furnished by the Petition. That includes information with respect to impacts on fish and wildlife, terrestrial species, and water quality. (Petition, Supplemental Information for Petition for Change in Point of Diversion pp. 8-14.)

Because DWR’s information is contained in its EIR for the Project, this section of the Protest necessarily focuses on the EIR. This section of the Protest provides detail showing why the Proposed Action is not in the public interest.

Moreover, Water Code section 1701.3 states,

- (a) After a petition is filed, the board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted under this chapter. The board shall provide a reasonable period for submitting the information.
- (b) The additional information may include, but need not be limited to, any of the following:
  - (1) Information needed to demonstrate that the change will not injure any other legal user of water.
  - (2) Information needed to demonstrate that the change will comply with any applicable requirements of the Fish and Game Code or the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.).
  - (3) Information needed to comply with Division 13 (commencing with Section 21000) of the Public Resources Code.

The Board must request DWR to submit additional information pursuant to Water Code section 1701.3(b)(2) to correct what DWR has submitted with respect to its claim that the diversion change will not have significant adverse impacts on endangered and threatened fish species

The Board must request DWR to submit additional information needed to comply with CEQA pursuant to Water Code section 1701.3(b)(3.)

**1) DWR's EIR does Not Disclose or Analyze under CEQA Project-related Changes to Surface Water or Water Supply and does Not Evaluate the Significance of the Changes under CEQA**

The Board states in its Form "ENVIRONMENTAL INFORMATION FOR PETITIONS"

Before the State Water Resources Control Board (State Water Board) can approve a petition, the State Water Board must consider the information contained in an environmental document prepared in compliance with the California Environmental Quality Act (CEQA).

DWR has submitted the Final Environmental Impact Report (EIR) it certified on December 21, 2023, for the Delta Conveyance Project to the Board by way of a link to its FEIR website.

DWR's EIR fails to include the information the Board must have in order to be able to lawfully consider approving the changes requested by DWR's Petition.

According to DWR's Final EIR, the Project is Alternative 5. (Final EIR, Executive Summary, p. ES-12.) The Project would increase deliveries, meaning diversions, by 543,000 acre-feet per year on average and 316,000 acre-feet per year in dry and critical water years. (Final EIR and Draft EIR, Executive Summary, p. ES-51, table ES-4. (All references to the Final EIR are to Volume 1 unless expressly cited to Volume 2.) The Final EIR admits, "there are consistent decreases among project alternatives in long-term average flows for all months on the Sacramento River north of Courtland (i.e., downstream of the proposed north Delta intakes)" ... due to the diversions of water at the proposed north Delta intakes. (Final EIR and Draft EIR, Ch. 5, pp. 5-2, 5-27.)

According to the Water Board's own *Staff Report/SED* of September 28, 2023, the Delta Conveyance Project would reduce Delta outflows by 758 TAF (thousand acre-feet) in wet years, 1061 TAF in above normal years, 649 TAF in below normal years, 326 TAF in dry years, and 156 TAF in critical years

The impacts of changing the diversion point which would reduce freshwater flows through the Delta on surface water are a critical subject for the Board. The Tunnel Project is a water project. It involves massive new intakes and a long tunnel to divert quantities of water from the Sacramento River that would decrease freshwater flows through the Delta downstream from the new intakes.

The diversions for the Tunnel are about water. Despite that, DWR's EIR does not evaluate the impacts of the diversions on *surface water*—volume, flows, temperature-- under CEQA. DWR's Final EIR did not consider changes to surface water resources as an impact of the Project alternatives under CEQA and did not evaluate the impacts of Project operations on surface water resources under CEQA. (Final EIR, Executive Summary, Ch. 5, p. 5-2, Draft EIR, Executive Summary, p. ES-48; Ch. 5, pp. 5-1,-2.)

According to the Board's own *Water Board Staff Report/SED*,

A review of the water right records in the Sacramento/Delta watershed included in the demand dataset shows that the total volume of water authorized for diversion in the Sacramento/Delta watershed exceeds the annual average unimpaired outflow from the Bay-Delta watershed. The total average unimpaired outflow from the Bay-Delta watershed is about 28.5 MAF [million acre-feet]/yr. The face value, or total volume of water authorized for diversion, of the active consumptive post-1914 appropriative water right records in the Sacramento/Delta watershed is approximately 159 MAF/yr (Table 2. 7-1a), which is over five times the total annual average unimpaired outflow for the entire Bay-Delta watershed. This total face value amount excludes statements of diversion and use (including riparian and pre-1914 appropriative claims), which are not assigned a face value amount, but account for many of the water right records in the Sacramento/Delta watershed. (*Water Board Staff Report/SED*, Ch. 2, p. 2-117.)

Despite the impacts of water diversions on water supply and the over-appropriation of over five times the annual average unimpaired outflow for the entire Bay-Delta watershed, DWR's EIR does not consider changes to *water supply* as an impact under CEQA and does not evaluate the changes to water supply under CEQA. (Final EIR and Draft EIR, Ch. 6, pp. 6-1,-2,-34.)

DWR's EIR stated that several EIR chapters including Chapter 5 on Surface Water, and Chapter 6 on Water Supply, did not determine the level of significance of change to the surface water resource or to water supply. (Final EIR, Ch. 4, p. 4-3.)

So, the Board cannot lawfully proceed to even consider approving the change in point of diversion sought by DWR unless and until either DWR or the Board has prepared and certified an EIR that discloses and analyzes the impacts of the change on surface water and on water supply. The Board should dismiss DWR's Petition to avoid the waste of time and resources by DWR, protestants, and



the Board and its staff by even considering a Petition that is not accompanied by an EIR disclosing and analyzing the critical subjects of the impacts of the proposed change in point of diversion on surface water and water supply under CEQA.

## **2) DWR's EIR Fails to Include the Range of Reasonable Alternatives Required by CEQA**

DWR admits the Project would have a number of significant and unavoidable adverse environmental impacts including conversion of agricultural land (Final EIR and Draft EIR, Executive Summary, Table ES-13, p. ES-81), aesthetics and visual resources (*id.* Table ES-16, p. ES-87), cultural resources (*id.* Table ES-17, p. ES-89), vehicle miles traveled (*id.* Table ES-18, p. ES-92), air quality exposure to localized emissions (Final EIR, Table ES-21, p. 101, Draft EIR, p. ES-100), noise and vibrations (Final EIR, Table ES-22, p. ES-104, Draft EIR, Table ES-22, p. 103), paleontological resources (Final EIR, Table ES-26, p. ES-112), Draft EIR, Table ES-26, p. ES-111), and Tribal cultural resources. (Final EIR, Table ES-27, p. ES-120, Draft EIR, Table ES-27, p. ES-119.)

When a project would have significant adverse environmental effects, agencies are “required to consider project alternatives that might eliminate or reduce the project’s significant adverse environmental effects.” (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873.) CEQA requires public agencies to refrain from approving projects with significant environmental effects if “there are feasible alternatives or mitigation measures” that can substantially lessen or avoid those effects. (Pub. Resources Code § 21002.)

The action alternatives in the Final EIR are simply nine variations on new Delta conveyance facilities ranging in conveyance capacities from 3,000 cfs to 7,500 cfs. (Final EIR, Executive Summary, pp. ES-13, -14.) Likewise, the action alternatives set forth in the Draft EIR were simply nine new Delta conveyance facilities ranging in conveyance capacities from 3,000 to 7,500 cfs. (Draft EIR, Executive Summary, pp. ES-13, -14.) All of the so-called “alternatives” were simply the same diversion project dressed up in different outfits.

An EIR must describe a reasonable range of alternatives to the project, or the location of the project, which could feasibly attain most of the basic objectives of the project while avoiding or substantially lessening any of the significant effects of the

project. (CEQA Guidelines § 15126.6(a) and (f).)<sup>4</sup> An EIR must contain a “quantitative, comparative analysis” of the relative environmental impacts of project alternatives. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 730-737.) “Evaluation of project alternatives and mitigation measures is ‘the core of an EIR.’” (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 at p. 937.)

Consideration of applicable regulatory regimes and limitations is central to an EIR’s identification of and analysis of feasible alternatives. (*Banning Ranch Conservancy*, 2 Cal.5th 918, 936-937; CEQA Guidelines § 15126.6(f)(1).)

DWR’s EIR fails to include the required range of reasonable alternatives including alternatives required by related regulatory regimes and limitations.

**a) DWR’s EIR Fails to Include a Delta Reform Act Focused Alternative**

The foundational alternatives in addition to tunnel alternatives, must, under CEQA, include whether other, no-tunnel and through-Delta alternatives would better protect the Delta. The policy of the State of California is set forth in the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), Water Code section 85000 et seq. Pursuant to the Delta Reform Act, the established State policy is “to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved water supplies, conservation, and water use efficiency.” (Water Code § 85021) (Emphasis added.). Another policy established by the Act is to, “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” (Water Code § 85020(c.) “‘Coequal goals’ means the two goals of providing a more reliable water supply for California *and protecting, restoring, and enhancing the Delta ecosystem.* The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Water Code § 85054) (Emphasis added.)

The Act *expressly requires* that a new conveyance project, previously called the Bay Delta Conservation Plan (BDCP), evaluate “[a] reasonable range of Delta conveyance alternatives, including through-Delta,” as well as dual or isolated conveyance alternatives. (Water Code § 85320(b)(2)(B).) “Through-Delta” means

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<sup>4</sup> The CEQA guidelines are codified at 14 Cal. Code Regs § 15000 et seq.

no-tunnel alternatives continuing to use the Sacramento River and Delta as the pathway for water to be exported from the south Delta.

The Delta Reform Act also mandates, “The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” (Water Code § 85023.)

There is also the requirement to develop instream flow needs for the Delta pursuant to Water Code section 85086(c) discussed in section IIIC1 of this Protest.

Delta Reform Act focused alternatives restoring the Delta, “should have been central to the” “analysis of feasible alternatives” to the Delta Conveyance Project. (*Banning Ranch Conservancy*, 2 Cal.5<sup>th</sup> 918, 936-937.) Instead of complying with CEQA, DWR developed nine faux “alternatives” that are simply the same Delta Conveyance Project dressed up in different outfits. DWR also ignored the Delta Reform Act’s mandate to evaluate “through- Delta” alternatives. The Project would do the opposite of reducing reliance on the Delta. The Project would instead spend billions of dollars to increase reliance on the Delta in meeting future water supply needs.

#### **b) DWR’s EIR Fails to Include a Climate Change Legislation Focused Alternative**

The first objective stated by DWR for the project is, “To help address anticipated rising sea levels and other reasonably foreseeable consequences of *climate change* and extreme weather events.” (Final and Draft EIR, Ch.2. p. 2-2) (Emphasis added.) DWR’s Petition states, “The objectives of the Project include responding to sea level rise and climate change,..” (Petition, Supplemental information for Petition for Change in Point of Diversion p. 2.)

Effective January 1, 2016, Assembly Bill 1482 (Stats. 2015, c. 603) added part 3. 7, Climate Change and Climate Adaptation, to Division 34, Environmental Protection, of the Public Resources Code. That climate change part includes Public Resources Code section 71154(c)(2) which states,

When developing infrastructure to address adaptation [to climate change], where feasible, *a project alternative should be developed* that utilizes existing natural features and ecosystem processes or the restoration of

natural features and ecosystem processes to meet the project's goals.  
(Emphasis added.)

DWR is part of the California Natural Resources Agency. The Resources Agency is the agency responsible (Pub. Res. Code § 71150(a) for updating every three years “the state’s climate adaptation strategy, known as the plan.” (Pub. Res. Code § 71153.) The Resources Agency has published the 2021 update of the climate adaptation strategy required by the legislation at:

<https://resources.ca.gov/Initiatives/Building-Climate-Resilience/2021-State-Adaptation-Strategy-Update> .

The 2021 update under “PRIORITY: Bolster Public Health and Safety to Protect Against Increasing Climate Risks” establishes “GOAL A: Reduce urgent public health and safety risks posed by climate change.” Action 2 under that goal is “Conserve water.” (2021 Update at p. 6.) Under “PRIORITY” the text of the update states, “Nature-based climate solutions are actions that work with and enhance nature to build climate resilience and/or contribute to carbon neutrality.” (2021 Update at p. 12.) GOAL A under that priority is, “Increase the pace and scale of nature-based climate solutions.” Action 12 under that goal is, “In the Sacramento-San Joaquin Delta watershed, build climate resilience through restoration.” (2021 Update at p. 13.) GOAL C under that priority is, “Integrate nature-based climate solutions to relevant infrastructure and investments.” Action 3 under that goal is, “Prioritize the use of natural infrastructure in efforts to protect and restore watersheds, coast, marine waters, and ecosystems.” (2021 Update at p. 14.)

DWR’s EIR failed to include the required project alternative focused on conserving water and that utilizes existing natural features and ecosystem processes or the restoration of natural features and ecosystem processes to meet the project’s goals.

**c) DWR’s EIR Fails to Include a California Endangered Species Act (CESA) Focused Alternative**

The California Supreme Court said in *Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4<sup>th</sup> 105, 125, “For example, CESA establishes a policy adding significant weight to the CEQA balancing scale on the side favoring protection of a listed species over projects that might jeopardize them or their

habitats. (Fish & G. Code, § 2053.)” Fish and Game Code section 2053 states “Legislative findings and declarations; alternative state agency projects” as follows,

(a) The Legislature further finds and declares that it is the policy of the state that public agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent *alternatives* available consistent with conserving the species or its habitat which would prevent jeopardy.

(b) Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent *alternatives shall be developed* by the department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible. (Emphasis added.)

CEQA establishes the policy of the state to, “Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-prepetuating<sup>1</sup> levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.” (Pub. Res. Code § 21001(c).) Pursuant to CEQA Guidelines section 15065(a)(1), a “potential substantial impact on endangered, rare or threatened species is per se significant.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449.)

The SWRCB declared in its April 15, 2020, comment letter on the Notice of Preparation (NOP) for EIR for the Project,

The Bay-Delta ecosystem and freshwater ecosystems and tributary watersheds are in a state of prolonged decline. Fish species in the Bay-Delta have continued to experience precipitous declines in recent years. In the early 2000’s, scientists noted a steep and lasting decline in population abundance of several native estuarine fish species, which continued and worsened during the sustained drought during 2012-2016. Simultaneously,

natural production of all runs of Central Valley Chinook salmon and steelhead remains near all-time low levels. (SWRCB Letter at pp. 5-6.)<sup>5</sup>

The SWRCB also pointed out,

...the Project also has the potential to adversely affect aquatic resources by modifying the timing, volume, and duration of freshwater flows and tidal energy that influence the amount of aquatic habitat and water quality habitat conditions such as freshwater flow, salinity, dissolved oxygen, turbidity, and temperature. In particular, adding new water diversion facilities closer to the major migratory routes of vulnerable fish populations, such as Sacramento River Chinook salmon (all runs), has the potential to expose these species to greater risks and impacts as compared to current conditions. Sacramento River Chinook salmon, sturgeon, and other species such as Sacramento splittail are not currently exposed at close proximity to diversion facilities of the proposed size and capacity of the new intakes, which may modify flow signals and impact habitat characteristics. (SWRCB Letter at p. 6.)

Chapter 7 of the September 28, 2023, *Water Board Staff Report/SED* sets forth the Environmental Analysis for that Document. The Chapter explains, “The Sacramento/Delta update to the Bay-Delta Plan is critically important to the health and survival of the Bay-Delta ecosystem. Native species in the Bay-Delta ecosystem *are experiencing an ecological crisis.*” (Ch. 7.12, Hydrology and Water Quality, 7.12.1 Surface Water, p. 7.12.1-1) (Emphasis added.) The Chapter goes on to explain the quality of water in the channels has been degraded and,

There has been a substantial overall reduction in flows and significant changes in the timing and distribution of those flows, and species have been cut off from natal waters. These issues have led to severe declines, and in some cases extinctions, of native fish and other aquatic species. The overall health of the estuary for native species is in trouble, and expeditious action is needed on the watershed level to address the crisis, including actions by the State Water Board, fisheries agencies, water users, and others to address the array of issues affecting the watershed. (*Id.*)

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<sup>5</sup> The SWRCB letter identified the following CESA and federal ESA endangered and threatened fish species as follows: CESA and ESA Endangered Sacramento River winter-run Chinook salmon, CESA and ESA Threatened Central Valley spring-run Chinook salmon, ESA Threatened Central Valley Distinct Population Segment (DSP) steelhead, ESA Threatened Green Sturgeon southern DPS, ESA Endangered Killer whale Southern Resident DSP, ESA Threatened Delta smelt, and CESA Threatened Longfin smelt. (SWRCB Letter p. 7.)

Chapter 7.23 of the Environmental Analysis explains in similar fashion,

The Delta is experiencing an ecological crisis in the watershed and the prolonged and precipitous decline in numerous native species of spring-run and winter-run Chinook salmon, longfin smelt, Delta smelt, Sacramento splittail, and other species, and the factors involved in those declines...Failing to take actions proposed by the proposed Plan amendments could result in the loss of Delta function beyond restoration of its original function and, therefore, would result in a significant irreversible environmental change. (Ch. 7.23, Cumulative Impact Analysis, Growth-Inducing Impacts, and Significant Irreversible Environmental Changes, p. 7.23-69.)

According to the *Water Board Staff Report/SED*, “The species evaluations indicate that multiple aquatic species in the Bay-Delta estuary are in crisis. Recovery of native species would require both habitat restoration and increased flow in Central Valley tributaries and the Delta. Successful recovery of native species is not possible without parallel investment in both efforts.” (Id. p. 3-134.) The fish species mentioned so far are listed as endangered or threatened under the federal Endangered Species Act (ESA) and/or the California Endangered Species Act (CESA.)

The *Water Board Staff Report/SED* also informs that “Based on available information regarding several proposed water diversion and conveyance projects and pending water right applications that propose surface water diversions during the wet season, it is assumed that stream flows may be reduced during the winter and spring under the no project alternative, which could result in potentially significant impacts on aquatic and terrestrial species and habitats in the Sacramento/Delta watershed.” (Ch. 7.24, Alternatives Analysis, p. 7.24-9.)

The *Water Board Staff Report/SED* establishes that increasing Delta outflows is necessary to prevent more extinctions of endangered and threatened fish species. The Delta Conveyance Project, however, would actually reduce Delta outflows by 758 TAF (thousand acre-feet) in wet years, 1061 TAF in above normal years, 649 TAF in below normal years, 326 TAF in dry years, and 156 TAF in critical years. (Ch. 7.24, Table 7.24-1, p. 7.24-7.) A related project, the Sites Reservoir Project, would further reduce Delta outflows by 275 TAF in wet years, 227 TAF in above normal years, 121 TAF in below normal years, 25 TAF in dry years, and 20 TAF in critical years. (*Id.*)

The *Water Board Staff Report/SED* establishes the dangers posed by new diversions and points of diversion. “New or changed points of diversion could affect special-status fish species and interfere with the movement of native resident or migratory fish during periods of diversion, if present.” (Ch. 7.22, p. 7.22-42.) “For larger projects, new or modified reservoirs and points of diversion would require extensive analysis and evaluation and would likely have significant environmental impacts. New or modified reservoirs and points of diversion would require State Water Board approval of either a new water right, or a change of an existing right.” (Id. p. 7.22-5.) Operation of points of diversion can affect biological resources and pose potential long-term adverse effects on aquatic biological resources. (Id. pp. 7.22-40-41.) Adverse effects of new points of diversion pose “likely long-term significant impacts on hydrology and water quality.” (Id. p. 7.22.100.)

According to the *Water Board Staff Report/SED*, “altered flow regimes can reduce or eliminate important geomorphic processes and floodplain inundation, decrease habitat conductivity, alter temperatures to the detriment of cold water species, and alter salinity gradients and circulation patterns in the Delta. Importantly, the purpose of the proposed Plan amendments is to restore a more natural hydrologic flow regime to protect the ecosystem that supports fish and wildlife beneficial uses.” (Ch. 7.22, p. 7.22-100.)

The U.S. Environmental Protection Agency (EPA) said in its January 19, 2024, comments (**Exhibit 1**) on the Board’s *Staff Report/SED* that with respect to fish species needs,

The Staff Report along with previous State Water Board reports in which the State Water Board compiled and analyzed a significant amount of comprehensive scientific information, recognize that substantially more flow is needed in the Delta and Sacramento-San Joaquin watersheds to support aquatic life. Currently, six fish species (Delta smelt, longfin smelt, green sturgeon, Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead) are listed or proposed as threatened or endangered under the Endangered Species Act. Scientific consensus indicates that native fish population abundance is positively associated with flow volumes (e.g., Jassby et al. 1995,



Sommer et al. 1997, Mac Nally et al. 2010, Tamburello et al. 2019) and that largescale increases in both flow and habitat restoration are needed to recover and protect these and other native species. (EPA Comments at 1.)<sup>6</sup>

EPA added,

EPA recommends the State Water Board consider scientific studies published since the State Water Board’s 2017 Final Scientific Basis Report was released in the final Staff Report to support draft plan amendments. Studies published after 2017 may refine the State Water Board’s identification of critical flow thresholds that benefit native fish species and estuarine habitat. For example, recent studies on flow-survival relationships for Chinook salmon in the Sacramento River and Delta provide scientific support for the positive relationship between flow and outmigration survival and recruitment of Chinook salmon, including for late-fall, fall, and winter-run salmon (Michel, 2019), late-fall run and spring-run smolts (Cordoleani et al., 2018; Henderson et al., 2019; Michel et al., 2021; Perry et al., 2018), wild origin salmon fry (Munsch et al., 2020), and winter-run juveniles (Hassrick et al., 2022). Furthermore, since the 2016 draft Scientific Basis Report and the 2017 Final Scientific Basis Report identified a flow range of 11,400-29,200 cfs as protective of fish and wildlife uses for the February-June period, recent research has demonstrated that even greater flow magnitudes over a period longer than February-June are needed to be protective of zooplankton populations (Hassrick et al. 2023), which are a foundational group in the food web to support species at higher trophic levels, including listed salmonids.(EPA Comments at 3-4)(Emphasis added.)

There is more. EPA also said,

As cautioned by the State Water Board: “flow and physical habitat interact in many ways, but they are not interchangeable. The best available science suggests that current flows are insufficient to protect public trust resources.” Further, scientific consensus indicates that native fish population abundance is positively associated with increasing flow volumes (e.g., Jassby et al. 1995, Sommer et al. 1997, Mac Nally et al. 2010, Tamburello et al. 2019) and that largescale increases in both flow and habitat restoration are needed to recover and protect these and

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6. Letter and 14 page enclosure from Tomas Torres, Director, Water Division, EPA Region 9 to State Water Resources Control Board, Division of Water Rights, Attn: Bay-Delta Hearings Branch, Submitted via Email: SacDeltaComments@waterboards.ca.gov

other native species. Clearly, flow is a critically important driver of the health of the Bay-Delta watershed. (EPA Comments at 6.)

According to EPA, habitat restoration is not sufficient,

This Staff Report does not demonstrate that suitable habitat area in the Sacramento and Delta watersheds is a limiting factor on estuarine and anadromous fish population growth, nor does the Staff Report provide an adequate scientific rationale to demonstrate that habitat restoration assets will increase fish abundance without meaningful increases in tributary flows protected as Delta outflows. Any improvements in habitat will likely be achieved only if pursued alongside substantial increases in flow rates, because flow is strongly and positively correlated with many indicators of native fish survival, including for salmon survival out-migrating from natal tributaries (Michel, 2019, Henderson et al. 2019), salmon survival in and through the Delta (Perry et al. 2018), and Delta Smelt post-larval survival (Polansky et al. 2021). Targeted habitat restoration with insufficient flow, on the other hand, is associated with low salmonid inhabitation (Munsch et al. 2020). (EPA Comments at 9.)

The Delta Smelt, listed as a threatened species in 1993, is on the verge of extinction with none being found by the California Department of Fish and Wildlife (“CDFW”) in its annual searches for them since 2017. (**Exhibit 2**, CDFW 2022 Fall Midwater Trawl annual fish abundance and distribution summary, at p. 2)(CDFW summary furnished to DWR with Sierra Club California et al. June 29, 2023 Supplemental Comment Letter on DWR’s Draft EIR.)

DWR’s EIR fails to include any CESA, and CEQA § 21001(c) policy, alternative focused on conserving the endangered and threatened fish species and their critical habitat. That omission is astonishing given the ever worsening crisis for the endangered and threatened fish species and the need to increase flows, not reduce flows, as declared by the Water Board’s *Staff Report/SED* and the EPA’s comments on that Report.

#### **d) The Public Trust Doctrine was Not Central to the EIR’s Analysis of Feasible Alternatives**

The Delta Reform Act mandates, “The longstanding constitutional principle of reasonable use *and the public trust doctrine* shall be the foundation of state water

management policy and are particularly important and applicable to the Delta.” (Water Code § 85023) (Emphasis added.)

The California Supreme Court made it clear in the Mono Lake case, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446, that “The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, *and to protect public trust uses whenever feasible.*” (Emphasis added.)

Moreover,

Once the state has approved an appropriation, the public trust imposes a duty of *continuing supervision* over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, *the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.*

*The state accordingly has the power to reconsider allocation decisions* even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses. (*National Audubon*, 33 Cal.3d 419, 447) (Emphasis added.)

DWR ignored the public trust doctrine in setting forth the purpose of the project “to restore and protect the reliability of SWP water deliveries...” (Final ER and Draft EIR, Ch. 2, p. 2-2.) A purpose or objective was required to effectuate DWR’s duty to exercise continuing supervision over water diversions and deliveries “which may be incorrect in light of current knowledge or inconsistent with current needs.” As shown above, the SWRCB comment letter on the NOP noted the “precipitous declines in recent years” of fish species in the Bay-Delta. The SWRCB comment letter also noted, “Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane, [and *ten* other named items], and toxicity.” (SWRCB Letter at p. 8) (Emphasis added.)

DWR’s EIR fails to include an alternative focused on protecting the Bay-Delta watershed public trust resources.

**e) The Principle of Reasonable Use was Ignored in DWR’s EIR Analysis of Feasible Alternatives**

The Delta Reform Act mandates, “The longstanding *constitutional principle of reasonable use* and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” (Water Code § 85023) (Emphasis added.)

As just one example of applicable State law, Article X of the California Constitution states:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water... (Cal. Const. art. X, § 2.)

DWR has frozen water allocations to the existing contractual allocations for state water contractors. There should have been searching scrutiny of whether exports can be reduced as certain uses or methods of use have become unreasonable because of current and forecasted shortages of available water caused by climate change on the one hand, and technological improvements and innovations such as conservation, recycling, and drip irrigation on the other hand. DWR’s EIR fails to include an alternative based on reducing exports based on certain uses or methods of use having become unreasonable.

**f) The Delta Not Meeting Water Quality Standards was Ignored in DWR’s EIR Analysis of Feasible Alternatives**

The SWRCB comment letter on the NOP noted, “Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane,[and *ten* other named items], and toxicity.” (SWRCB Letter at p. 8.)

Agencies that have some form of regulatory authority or input on the proposed Project include the EPA, U.S. Army Corps of Engineers, SWRCB, and the San Francisco Regional Water Quality Control Board. (Draft EIR, Executive Summary, p. ES-11.) DWR's EIR fails to include an alternative focused on meeting water quality standards even though that will be a key issue for approving and responsible agencies.

**g) DWR's Artificially Narrow Project Objectives Failed to Comply with CEQA**

In *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669, the court held an EIR improperly omitted alternatives by an "artificially narrow" definition of the program objective. The same is true here. DWR stated in the Delta Conveyance Project NOP, its purpose in proposing the project is,

to develop new diversion and conveyance facilities in the Delta necessary to restore and protect the reliability of State Water Project (SWP) water deliveries and, potentially, Central Valley Project (CVP) water deliveries south of the Delta, consistent with the State's Water Resilience Portfolio. (Draft EIR, NOP p. 2)

Pursuant to the Delta Reform Act and other related regulatory regimes, project objectives needed to include reducing reliance on the Delta, restoring the Delta ecosystem and utilization of natural processes, preventing the extinction of listed fish species, and other conservation objectives. With those objectives in mind, an alternative was required that would reduce reliance on the Delta and begin to restore the Delta ecosystem by reducing exports to increase freshwater flows through the Delta.<sup>7</sup> Likewise, an alternative was required utilizing existing natural resource processes. Instead, *all* of DWR's "alternatives" do the opposite. They further degrade the already impaired Delta by adding a massive new upstream diversion of freshwater flows from the Sacramento River. DWR foreclosed alternatives required by CEQA, the Delta Reform Act, the climate change legislation, CESA and other related regulatory regimes.

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<sup>7</sup> In *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163-1167, the court held failure to examine an alternative reducing exports was not unlawful because that alternative would not achieve the program objective of water supply reliability. That decision was handed down on June 5, 2008. The Delta Reform Act became effective February 3, 2010. The court's holding as to objectives has been superseded by the Legislature's adoption of the Delta Reform Act setting forth California's water policies and objectives.

The court explained in *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5<sup>th</sup> 467, 546, “Examining alternatives begins with project objectives because it is these objectives that a proposed alternative must be designed to meet.” In this case alternatives already foreclosed were required by the Delta Reform Act and other laws and policies. In the *Golden Door Properties* case there were objectives to reduce vehicle miles traveled, “VMT,” to meet goals lowering greenhouse gas, “GHG,” emissions. The court held,

In light of this consistently clear mandate to reduce VMT to help achieve target GHG emission reductions, it is reasonable to expect at least one project alternative in the SEIR to have been focused primarily on significantly reducing VMT. [Citation omitted.] The SEIR’s failure to do so is prejudicial because it precludes informed public participation and decisionmaking. (*Golden Door Properties*, 50 Cal.App. 5<sup>th</sup> 467, 548.)

Here, it is reasonable to expect at least one alternative to have been focused primarily on significantly reducing exports in order to increase instead of reduce freshwater flows through the Delta.

In *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4<sup>th</sup> 1059, 1086-1090, the court held a city violated CEQA because the EIR failed to analyze a reduced development alternative. The city had argued that no discussion of an alternative was required if it would not meet a project objective. The court explained, 183 Cal.App.4<sup>th</sup> at 1087,

This premise is mistaken. It is virtually a given that the alternatives to a project will not attain all of the project’s objectives. [Citations omitted.] Nevertheless, an EIR is required to consider those alternatives that will ‘attain most of the basic objectives’ while avoiding or substantially reducing the environmental impacts of the project. (CEQA Guidelines, § 15126.6(a).)

DWR’s artificially narrow project objectives unlawfully facilitated the EIR’s omission of the required range of reasonable alternatives to the Project.

## **h) Alternatives that were Presented to DWR and are Furnished to the Water Board**

Most of these protestants were included on joint comment letters on DWR's Draft EIR presenting two reasonable no-tunnel alternatives complying with the requirement that applicable regulatory regimes such as the Delta Reform Act be central to an EIR's identification and analysis of feasible alternatives. Though DWR ignored the alternatives they are furnished to the Water Board with this Protest.

Sierra Club California, the Center for Biological Diversity, Friends of the River, the Planning and Conservation League and 4 other public interest organizations submitted an alternative to the Delta Conveyance Project to DWR with their joint comment letter of December 15, 2022. This alternative is entitled the *Environmental Water Caucus Alternative To The Delta Conveyance Project*. A copy of this alternative is furnished to the Water Board as **Exhibit 3**. This alternative includes reducing exports out of the Delta to not more than 3 million acre-feet per year. Reasonable alternatives will include other variants on that quantity. This alternative also includes abandoning infrastructure projects including the Delta Conveyance Project and new reservoirs and instead of using bond funds and ratepayer dollars for these projects, developing and funding water conservation, water recycling, ecologically responsible farmland retirement including drainage-impaired lands, and other such modern measures. The alternative also includes reducing quantities in the SWP and CVP contracts and renegotiating Table A allocations in the SWP contracts to reflect safe field water availability, climate change analysis, and allocation of public trust resources.

Sierra Club California, the Environmental Justice Coalition for Water, the California Indian Environmental Alliance, and four other public interest organizations submitted an alternative to the Delta Conveyance Project to DWR with their joint comment letter of December 16, 2022. This alternative is entitled *Sierra Club California's Smart Water Alternatives: To The Bay Delta Conveyance Project*. A copy of this alternative is submitted to the Water Board as **Exhibit 4**. This alternative includes Potential Water Savings/Additional Supplies from a Portfolio of Resilient Strategies including agricultural water use efficiency, urban water use efficiency, recycled municipal water, storm water capture and groundwater storage *leading to a total savings of water supplies from 10.4 to 16.8 million acre-feet of water per year.* (**Exhibit 4** at p. 2.)

Alternatives such as the Environmental Water Caucus and Sierra Club California alternatives show there is no need to inflict the Delta Conveyance Project's environmental harm on the already impaired Delta. Such alternatives also show there is no need to transfer billions of dollars from homeowners and renters to contractors to build the massive, destructive Delta Conveyance Tunnel Project.

### **i) Alternatives Conclusion**

Contrary to the requirements of *Banning Ranch Conservancy* and Guidelines section 15126.6(f)(1), DWR has foreclosed alternatives required by California's water policies and objectives established by the Delta Reform Act and other conservation legislation.

The Ninth Circuit has rejected agency decisions which failed to meaningfully consider a full range of alternatives. That court reversed a district court decision denying environmental plaintiffs summary judgment because the challenged environmental document issued by the Bureau of Reclamation under the National Environmental Policy Act (NEPA) "did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities." (*Pacific Coast Federation of Fishermen's Assn's v. U.S. Dept. of the Interior* (9th Cir. No. 14-15514, July 25, 2016) 655 Fed.Appx. 595 (not selected for publication).)<sup>8</sup> The court noted Reclamation's "reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts." (*Id.*)<sup>9</sup>

DWR has failed to include a Delta Reform Act focused alternative that would be a no-tunnel project reducing exports to begin to save and restore the Delta. Likewise, DWR failed to include a climate change legislation focused alternative utilizing natural processes or a CESA focused alternative. DWR's

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<sup>8</sup> Unpublished federal opinions may be cited in California state courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18; *Coleman v. Medtronic, Inc.* (2014) 223 Cal.App.4th 413, 432, fn.6.)

<sup>9</sup> "Recognizing that CEQA was modeled on the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) 'we have consistently treated judicial and administrative interpretation of the latter enactment as persuasive authority in interpreting CEQA.' (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 201, 132 Cal.Rptr. 377,553 P.2d 537.)" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566, fn.4.)



“failure to do so is prejudicial because it precludes informed public participation and decisionmaking.” (*Golden Door Properties*, 50 Cal.App.5<sup>th</sup> 467, 548.)

The Board cannot lawfully proceed to even consider approving the change in point of diversion unless and until either DWR or the Board has prepared and certified an EIR that includes the required range of reasonable alternatives including Delta Reform Act, Climate Change Legislation, and CESA focused alternatives.

### **3) DWR’s EIR Fails to Adequately Analyze the Environmental Impacts of Diversions for the Project Coupled with the Continually Worsening Impacts of Climate Change**

Climate change impacts fit squarely within a cumulative impacts analysis. (*Ctr. for Biological Diversity v. Nat. Highway Traffic Safety Admin.* (9th Cir. 2008) 538 F.2d 1172, 1217.) CEQA requires public agencies to ensure their analyses with respect to climate change “stay in step with the evolving scientific knowledge in state regulatory schemes.” (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504; *County of Butte v. Department of Water Resources* (2023) 90 Cal.App.5th 147, 161.) The EIR and the Findings, however, do not adequately address the Project’s foreseeable cumulative impacts on the Bay Delta watershed in light of future climate change, particularly with regards to water supplies in the context of sea level rise, changes in storm patterns, and watershed run-off. The EIR fails to adequately address the Project’s cumulative impacts on the environment of the Bay Delta watershed in a situation that includes less river inflow and higher evaporation and transpiration rates throughout the watershed. The EIR fails to adequately disclose or analyze expected changes in hydrologic conditions and water supply forecasted for the 21st century. The cursory treatment in the EIR does not adequately inform the Board about these expected impacts.

The first stated objective for the Project is “To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events.” (Final EIR and Draft EIR, Ch. 2, p. 2-2.) Despite that, the EIR claimed climate change “is not considered an environmental impact under CEQA.” (*Id.*, Ch. 4, p. 4-3.) Thus, Chapter 30 on Climate Change, does “not determine the level of significance of change.” (*Id.*) “[N]o CEQA significance conclusions are presented for potential impacts [after 2040], and no mitigation measures are recommended to reduce potential impacts” after 2040. (*Id.*, Ch. 4, pp. 4-5, -6.) DWR’s hydrologic modeling primarily focused on conditions in 2040. (*Id.*, Ch. 30, Climate Change, pp. 30-2, -24, -25.) DWR’s

EIR fails to include any consideration of climate change impacts when the Project is projected to actually begin operations and diverting enormous quantities of water in the face of reduced freshwater flows and increasing sea level rise.

According to the Final EIR:

The 2070 scenario used in this appendix is not predictive and should not be construed as such. It is assumed that changes expected under No Project conditions in 2040, primarily climate change, would continue and increase in scale and scope by 2070. Climate is a primary influencing factor on water supplies. Changes in the amount of precipitation directly affect water supplies. In addition, changes in the seasonality of precipitation and the amount of precipitation falling as snow versus rain will affect the ability to store runoff in State Water Project (SWP)/Central Valley Project (CVP) reservoirs, which in turn will affect the water supply available to meet many competing needs. Increasing temperatures will result in earlier and faster snowmelt. Drier soil profiles in upper watersheds will absorb greater amounts of precipitation and reduce runoff. Increasing temperatures will increase reservoir evaporative losses. These conditions associated with climate change and sea level rise will make operating the SWP and CVP in 2070 more difficult. (Final EIR, App. 4A, p. 4A-1.)

According to the Final EIR, the Project would become operational in 2040. (Final EIR and Draft EIR, Ch. 30, p. 30-20.) The “alternative diversion point in the north Delta for Delta exports” would result in “increases in SWP and CVP deliveries during long-term average, dry, and critical water years (see Chapter 6, *Water Supply*.)” (Final EIR and Draft EIR, Ch. 30, p. 30-26.) Nonetheless, the EIR fails to disclose and evaluate the potential for the combination of climate change and Delta Conveyance Project operations, including reduced Delta inflows, reduced Delta outflows, and increased water exports, to worsen and exacerbate surface water conditions in the already impaired Delta.

The EIR acknowledges some of the adverse effects of climate change on water resources, including decreased snowpack and “lower spring and summer stream flow;” increased wildfire risk, which “heightens the risk of catastrophic fire impacts to water supply and quality;” “[d]ecreased water quality in estuaries during droughts;” and “[i]ncreased saltwater intrusion in the San Francisco Bay Area and the Sacramento-San Joaquin Delta as sea level rises.” (Final EIR and Draft EIR, Ch. 30, p. 30-11.) “By 2050, extreme Delta drought conditions are projected to occur five to seven times more frequently (Delta Stewardship Council 2021:5-62).” (Final EIR and Draft EIR, Ch. 30, pp. 30-18, -19.)

The EIR's discussion and analysis of the effect of climate change in the areas of changing snowpack, increased water temperature, increased evapotranspiration, rim dam water management, flood flows, and upstream fishery habitat is inadequate. DWR's EIR admitted "Future surface water conditions are expected to change considerably when compared to existing conditions as a result of climate change and sea level rise." (Final EIR and Draft EIR, Ch. 5, p. 5-16.) DWR's EIR also admitted that climate change "will affect water quality in the Delta in the future and may require changes in in-Delta water use patterns and upstream reservoir management." (*Id.*) DWR's CEQA Findings made similar admissions including that Delta inflows will be reduced during future dry periods. (CEQA Findings, pp. 8-4, -5.) DWR's EIR admitted that "The project alternatives potentially would have negative impacts on critical fish habitat and special status species." (Final EIR and Draft EIR, Ch. 30, p. 30-24.) DWR's EIR focused on climate change sea level rise threats to project operations being able to divert water at intakes for the Project instead of the environmental threats climate change poses to the Delta region. (Final EIR and Draft EIR, Ch. 30, p. 30-23.) The failure of the EIR to adequately analyze potential climate change effects on Delta hydrology makes it impossible for the Board to evaluate the alternatives, the mitigations, and the true nature of the environmental impacts of the Project, all of which are violations of CEQA's full disclosure requirements to afford the fullest possible protection of the environment. (Pub. Res. Code § 21001(a).)

On May 25, 2023, the California State Auditor issued its audit report, *Department of Water Resources Its Forecasts Do Not Adequately Account for Climate Change and Its Reasons for Reservoir Releases Are Unclear*. ("Auditor Report.") The Auditor Report is furnished as **Exhibit 5**.

The Auditor Report explained that DWR's water supply forecasts do not adequately account for the effects of climate change and continue to rely on historical climate data instead of the shifts taking place in hydrology without incorporating data relevant to climate change including temperature and soil moisture. The Auditor Report also explained DWR has not developed a long-term plan for the SWP for responding to the more frequent or more severe future droughts that will take place due to climate change. According to the Auditor Report, "DWR has not updated its 2010 drought plan "which does not incorporate the assessment of more severe future droughts as FEMA [Federal Emergency Management Agency] and NDMC [National Drought Mitigation Center] recommend." (Auditor Report p. 27.) DWR's 2010 drought plan "does not identify how the expected, more severe impacts of drought may specifically strain the

State Water Project's responsibilities to meet water quality and flow standards for the protection of wildlife. It also does not describe whether DWR may need to take new actions to address these more severe impacts or the challenges it might face in doing so." (Auditor Report p. 28.) New information shows "We are not in an era of global warming; but as UN Secretary General Guterres says, 'global boiling.'" (State of the Cryosphere 2023 Report, International Cryosphere Climate Initiative (ICCI Report, p. 2, November 16, 2023.)

DWR's EIR fails to disclose and evaluate the Auditor Report's determination that DWR's water supply forecasts are based on inaccurate and outdated climate change analysis. The EIR fails to disclose and evaluate the effects that worsening climate change coupled with Project operations diverting water pose to surface water, water supply, listed fish species, water quality, and public health, including worsening harmful algal blooms. DWR's EIR fails to disclose and evaluate the risk that worsening climate change coupled with updated Water Board requirements to reduce exports in order to increase freshwater flows through the Delta may result in a constructed, expensive Delta Conveyance Project that may not be able to operate effectively over the long-term starting in 2040. The climate change information in DWR's EIR has failed to stay in step with the evolving scientific knowledge.

DWR or the Board must prepare and certify an EIR disclosing and evaluating both the environmental risks to the Delta environment by Project operations coupled with worsening climate change *and* the risks the expensive Project would be inoperable much or all of the time during its long lifespan due to ever worsening water supply coupled with new requirements to protect the Delta environment, Delta water quality, listed fish species, and public health. That must be done before the Board considers approving DWR's Petition seeking a change in the point of diversion for the Project.

#### **4) DWR's EIR Fails to include Adequate Quantification of Water Available for Diversion and Export**

With respect to SWP deliveries, DWR calculated the firm yield of existing SWP facilities is approximately 2.4 million acre-feet per year, based on the historical dry period from 1928 through 1934. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 912-913.) The original long-term contracts between DWR and the water contractors were, however, predicated on the state's plan to build out the SWP so as to deliver 4.23 million acre-feet of water to the contractors annually. (*Planning and Conservation League*, 83 Cal.App.4th 892, 908 fn. 5.) There is

a huge gap between what is promised and what can be delivered because the actual, reliable water supply from the SWP is more in the vicinity of 2 to 2.5 million acre-feet of water annually. (*Id.*) The contractual amounts are sometimes referred to as “paper water.” (*Id.* at 914.) DWR’s EIR explains DWR has contracts with 29 public water agencies for up to a maximum amount of 4.17 million acre-feet of water per year. (Final EIR and Draft EIR, Ch. 6, p. 6-12.) Deliveries, however, have averaged only 2.9 million acre-feet over the past 10 years. (*Id.*) According to DWR’s CEQA Findings, deliveries have averaged 1.96 million acre-feet per year from 2009 to 2018. (CEQA Findings p. 5-1.) “DWR’s fundamental purpose in proposing to develop new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP water deliveries and, potentially, CVP water deliveries south of the Delta, consistent with the State’s Water Resilience Portfolio in a cost-effective manner.” (Final EIR and Draft EIR, Ch. 2, Purpose and Project Objectives, p. 2-2.)

Quantification is necessary to allow determination of whether a particular environmental impact is significant. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com’rs* (2001) 91 Cal.App.4th 1344, 1370-1371.) The face value, or total volume of water authorized for diversion in the Sacramento River/Delta watershed is approximately 159 million acre-feet per year, which is over 5 times the total annual average unimpaired outflow for the entire Bay-Delta watershed not even including riparian and pre-1914 appropriative claims. (*Water Board Staff Report/SED* Ch. 2, p. 2-117.) DWR’s fundamental purpose in proposing this Project is to deliver about twice as much water as is actually available—to one of several potential user groups. Water allocated to SWP contractors is not available for alternative uses including increasing or at least maintaining in-stream and Delta flows. Allocating a fixed supply to one group of users—SWP contractors—results in water being unavailable to other users and the environment. Quantification of the water available for diversion and export is essential for evaluating this and other Project impacts.

The Delta Reform Act requires quantification. That Act in Water Code section 85320 requires that a project such as this not be incorporated into the Delta Plan and the public benefits associated with it not be eligible for state funding unless specific requirements are met. At the time the Legislature adopted the Delta Reform Act, the Project was known as the Bay Delta Conservation Plan. Water Code § 85320(b)(2)(A) requires the Project to comply “with Division 13 (commencing with Section 21000) of the Public Resources Code [CEQA], including a comprehensive review and analysis of all of the following:”

A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.

Water Code section 85320(b)(2)(A) requires quantification of flows necessary to recover the Delta ecosystem and to identify the remaining water available for export and other beneficial uses.

The omission of quantification in DWR's EIR requires either DWR or the Board to prepare and certify an EIR that includes quantification.

The Delta Reform Act requires that any order approving a change in the point of diversion of the SWP from the south Delta to a point on the Sacramento River, as operation of the Project will require, "shall include appropriate Delta flow criteria ... ." (Water Code § 85086(c)(2).)

The EIR does not include or evaluate appropriate Delta flow criteria and does not consider alternatives that include such criteria. Instead, the EIR relies on Delta flow standards that were developed nearly three decades ago. The EIR's failure to include or evaluate appropriate Delta flow criteria renders it inadequate as an informational document in support of the Board's review of DWR's Petition for change of the point of diversion for the Project.

#### **5) DWR's EIR Claims Falsely that Admitted Significant Impacts on Listed Fish Species will be Mitigated**

Potential substantial impact on endangered, rare, or threatened species is per se significant. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449; CEQA Guidelines § 15065(a)(1).)

The EIR admits "The project alternatives potentially would have negative impacts on critical fish habitat and special status species." (Final EIR and Draft EIR, Ch. 30, p. 30-24.) The EIR admits the impacts of Project operations before mitigation will be significant on Fish and Aquatic Species. (Final EIR and Draft EIR, Executive Summary, p. ES-33, Impact AQUA-1.) The EIR makes specific admissions that Project operations will be significant on Sacramento River Winter-Run Chinook Salmon (*Id.*, Executive Summary, p. ES-33, Impact AQUA-2),

Central Valley spring-run Chinook salmon (*Id.* p. ES-33, Impact AQUA-3), and on Central Valley steelhead, Delta smelt, and longfin smelt. (*Id.*, p. ES-34, Impacts AQUA-5, -6. -7.) Winter-run Chinook salmon are a state- and federally-listed endangered species; Central Valley spring-run Chinook salmon are a federally-listed threatened species; Central Valley steelhead are a federally-listed threatened species; Delta Smelt are a federally-listed threatened species; and longfin smelt are a state-listed threatened species and are proposed for federal listing as endangered.

The court held in *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1117 that “Law is not required to abandon common sense.” The court held common sense informed it that the mitigation measures would not effectively replace the water that could be lost to the neighboring landowners. DWR’s EIR claims that the impacts after mitigation on Sacramento River winter-run Chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, Delta smelt, and longfin smelt though significant, would be less than significant after mitigation, which consists chiefly of habitat restoration (Final EIR and Draft EIR, Executive Summary, pp. ES-33, -34.) Those claims defy common sense and are not supported by substantial evidence. The fish need increased, not reduced flows to survive, yet the EIR proposes no measures that address the Project’s acknowledged and substantial diminution of flows. There is no substantial evidence that proposed mitigation is capable of reducing the impacts of diminished flows on the endangered and threatened fish species to less than significant levels. CDFW commented on DWR’s Draft EIR that there is not sufficient substantiation for its determination that the effects of construction and operation of the Project will be less than significant with mitigation on the listed fish species. (CDFW Comment Letter, p. 23, December 16, 2022.) The Water Board commented that the Draft EIR did not provide evidence as to how the proposed habitat restoration would reduce significant operational impacts to less than significant on Delta smelt and longfin smelt. (Water Board Comment Letter, p. 13, December 16, 2022.)

The EPA concluded that, “given that the status of many Delta fish species is threatened, endangered, or other description of impairment, further diversion of Sacramento River water under the Project could very well lead to greater impairment or extinction.” (EPA Comment Letter on The Army Corps Draft EIS on Delta Conveyance Project, p. 5, detailed comments, March 16, 2023, **Exhibit 6**.) The *Water Board Staff Report/SED* provided significant new information about the dangers posed by new diversions and points of diversion for water quality and listed fish species, and the need to reduce exports to increase freshwater flows through the Delta. (Discussed above in section IIIB2c.) DWR claims “mitigation in the form of habitat restoration’s proposed offset potential operational impacts to fish.” (Petition, Supplemental information for Petition for Change in Point of Diversion p. 9.) The EPA pointed out that increased flows are necessary and that habitat restoration alone will not be sufficient. (Exhibit 1 discussed above in section IIIB2c.)

CEQA defines “significant effect on the environment” to mean “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, *water*, minerals, flora, *fauna*, ambient noise, and objects of historic or aesthetic significance.” (CEQA Guidelines § 15382, emphasis added.)

DWR’s EIR defies common sense in claiming that a project constructed for the purpose and with the capacity to take away freshwater flows from the Sacramento River in a significant amount compared to the typical entire freshwater flow of the Sacramento River at the point of diversion would not substantially and unavoidably adversely change, regardless of claimed mitigation measures, downstream water quality, fisheries, and fish habitat including designated critical habitat for listed threatened and endangered species of fish.

DWR or the Board must prepare and certify an EIR that accomplishes environmental full disclosure of the substantial and unavoidable adverse impacts on Delta water quantities, water quality, fish, and fisheries resulting from diversions for the Project. DWR’s Petition cannot be considered until the CEQA required disclosure and analysis has been accomplished.

#### **6) DWR’s EIR Fails to adequately Disclose and Analyze Project Impacts on Water Quality**

The EIR implausibly claims the massive water Project and its new diversions upstream from the already impaired Delta would have no significant environmental impacts on water quality. (Final EIR, Executive Summary and Draft EIR, pp. 32-33.) The EPA, however, said in its March 16, 2023, comments on the Army Corps Draft EIS on the Project, “EPA continues to believe that the operation of the proposed project has the potential to cause or contribute to long-term exceedances of regulatory water quality standards.” (**Exhibit 6**, EPA Letter p. 2.) EPA’s detailed comments included, “EPA’s review of the proposed project, as evaluated in the Draft EIS, indicates potential secondary effects include, but are not limited to: (1) changes in the salinity gradient and the location and volume of the low salinity zone in all seasons (40 CFR 230.25); (2) adverse effects on water quality including the amplification of water quality impairments;”. (EPA detailed comments, first page.)

The EIR fails to adequately disclose and analyze the impacts to water quality and contaminant control by diverting large amounts of water in the north Delta. Water quality and quantity are flip sides of the same coin; changes in flow change assimilative capacity, residence time and the fate and transport of contaminants. Hydrologic changes modify constituent concentration and bioavailability, which in turn can adversely impact



the aquatic ecosystem and other beneficial uses. Over mere decades, water project operations have deprived the Delta estuary of half its flow, turning the natural hydrograph on its head, reducing temporal and spatial variability, eliminating crucial habitat, complexity and diversity, and depriving the estuary of dilution necessary to assimilate pollutant mass loading. Water from the Sacramento River is the largest source of inflow to the Delta and is significantly less polluted than water entering the Delta from the San Joaquin River. Sacramento River water drawn across the Delta to the existing export pumps is a major reason water quality in the central and south Delta is better than it would otherwise be. Diversion of millions of acre-feet of better quality Sacramento River water will increase the concentration of numerous constituents in the water remaining in the Delta. It will also increase the residence time of water in the Delta, thereby enhancing the opportunity for pollutants to interact with the environment. This effect is exacerbated in tidal environments where pollutants tend to move back and forth with the tides.

Exceedances of human health criteria have direct adverse impacts to people. Exceedances of criteria protecting other identified beneficial uses of water will adversely impact those who rely on the beneficial use. Multiple exceedances of a pollutant within a waterway qualify the waterway for listing as an impaired waterbody and/or significantly impact issuance of federal Clean Water Act and California Waste Discharge Requirements. DWR's modeling for the EIR is inadequate.

The EIR lacks discussion or attempted quantification regarding the uncertainty of conclusions. Nor is there any discussion of how heavily criticized comparative models, used outside their temporal, spatial and resolution limits, may or may not be sufficient for making explicit determinations regarding the potential effects of the Project on constituents and impacts to water quality standards caused by a modified hydrology, reduced dilution and increased residence time. The EIR fails to comply with prevailing standards for technical analysis, which is why the environmental assessment is inappropriate, technically invalid, unsupported by substantial evidence, and fails to meet the full disclosure requirements of CEQA.

Evaluation of water quality and the Project's potential adverse impacts is flawed because the EIR fails to analyze the potential to exceed water quality standards with respect to permitting requirements pursuant to the federal Clean Water Act.

The Water Board April 15, 2020, comment letter on the Notice of Preparation (NOP) explained,

The EIR should include comprehensive water quality analyses to estimate potential impacts to beneficial uses that may occur as a result of the Project and identify specific mitigation measures to reduce, mitigate, or avoid adverse impacts potential for the Project to cause or contribute to potential significant environmental impacts related to salinity, submerged and floating aquatic vegetation, harmful algal blooms, mercury, nutrients, dissolved oxygen, dissolved organic carbon, turbidity, temperature, and other water quality constituents. The environmental analysis should assess the effects of any changes in water residence time and flows within Delta waterways, in the Stockton Deep Water Ship Channel, and south Delta channels in particular. Mitigation measures should be proposed for adverse impacts to water quality conditions including dissolved oxygen, frequency and severity of harmful algal blooms, and excessive aquatic weed growth.

The EIR should evaluate the effects of water quality changes, such as increases in salinity, on the multiple beneficial uses that are protected through water quality objectives. For example, salinity should be evaluated with respect to the potential for significant environmental impacts to municipal and industrial uses, agricultural uses, and ecological habitat for pelagic fish species, and specific operational constraints and mitigation measures should be identified to avoid significant impacts.

Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane, chlorpyrifos, DDT (dichlorodiphenyltrichloroethane), diazinon, dieldrin, electrical conductivity, Group A pesticides, invasive species, mercury, PCBs (polychlorinated biphenyls), and toxicity. The EIR should reference the most current 303(d) list and requirements contained in existing TMDLs for the Sacramento-San Joaquin Delta within the EIR, discuss any potential short-or long-term effects of these pollutants from project activities, and discuss mitigation measures, including monitoring and best management practices, to reduce potential impacts. If the project has the potential to affect mercury or methyl mercury concentrations in the Delta, acceptable mitigation options should include actions to reduce mercury entering the Project area. (Water Board Letter p. 8.)

The Water Board's December 16, 2022, comment letter on DWR's EIR explained,

Throughout Section 9.3.3, the Draft EIR states that for whichever water quality constituent is being analyzed, project alternatives would not cause more frequent exceedance of the Bay-Delta Plan objectives for the constituent because project facilities would be operated to objectives as implemented through D-1641. However, since D-1641 was implemented, water quality and Delta outflow objectives have not been achieved during drought conditions and DWR and Reclamation have requested temporary urgency changes to water right requirements to relax those requirements. The EIR should demonstrate how the Project will be operated to avoid the need for future temporary urgency change petitions (TUCPs) and future violations of water quality and flow requirements. Additionally, D-1641 does not account for all possible water quality concerns in the Bay-Delta, such as harmful aquatic blooms. (Water Board Letter pp. 9-10.)

DWR's Draft EIR admitted,

When the effects of implementing any one of the project alternatives on water quality are considered together with the potential effects of all past, present, and reasonably foreseeable future projects, including the projects listed in Table 9-54, the cumulative water quality condition in the Delta for the following constituents could be significant.

- Boron
- Bromide
- EC
- Mercury
- Organic Carbon
- Pesticides
- Selenium
- CHABS (Draft EIR, Ch. 9, Water Quality, p. 9-198.)

The Delta is an impaired waterbody because of numerous pollutants including unknown toxicity and, in effect, is a gigantic mixing bowl for an astonishing array of chemicals; DWR's EIR failed to consider the additive and synergistic impacts of multiple pollutants mixing together. If two or more constituents are present together in water, they may exert a combined adverse effect on beneficial uses of water even though none of the constituents individually exceeds a water quality standard. The Central Valley Regional Water Quality Control Board's Central Valley *Water Quality Control Plan for the Sacramento and San Joaquin River Basins* includes an implementation policy regarding assessment of additive and synergistic effects.

The EIR lacks discreet, defensible analysis of the Project's consistency with antidegradation policies and requirements, as required by CEQA. Section 101(a) of the Clean Water Act, the basis for the antidegradation policy, states that the objective of the Act is to "restore and maintain the chemical, biological and physical integrity of the nation's waters." Section 303(d)(4) of the Clean Water Act carries this further, referring explicitly to the need for states to satisfy the antidegradation regulations before taking action to lower water quality. These regulations (40 CFR § 131.12(a)) describe the federal antidegradation policy and dictate that states must adopt both a policy at least as stringent as the federal policy as well as implementing procedures. The Clean Water Act requires the full protection of identified beneficial uses. The federal antidegradation policy states "[t]he antidegradation policy and implementation methods shall, at a minimum, be consistent with the following: (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." (40 CFR § 131.12.) U.S. EPA Region 9's guidance on implementing antidegradation policy states, "[a]ll actions that could lower water quality in Tier II waters require a determination that existing uses will be fully maintained and protected." (EPA, Region 9, Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12, page 7.) The Delta is classified as a Tier II "high quality," waterbody by EPA and the Water Board. California's antidegradation policy is composed of both the federal antidegradation policy and the State Board's Resolution 68-16 (State Water Resources Control Board, Water Quality Order 86-17, p. 20; Memorandum from Chief Counsel William Attwater, SWRCB to Regional Board Executive Officers, "Federal Antidegradation Policy," pp. 2, 18 [Oct. 7, 1987] ["State Antidegradation Guidance"].)

Implementation of the state's antidegradation policy is guided by the State Antidegradation Guidance, SWRCB Administrative Procedures Update 90-004, 2 July 1990 ("APU 90-004") and USEPA Region IX, "Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12" (3 June 1987, Region IX Guidance), as well as Water Quality Order 86-17. The state must apply the antidegradation policy whenever it takes an action that will lower water quality. (State Antidegradation Guidance, pp. 3, 5, 18, and Region IX Guidance, p. 1.) Application of the policy does not depend on whether the action will actually impair beneficial uses. (State Antidegradation Guidance, p. 6.) As noted above, federal antidegradation policy requires full protection of beneficial uses. California's antidegradation policy (Resolution 68-16) requires, among other things, that existing high quality water will be maintained until it has been demonstrated that any change will be with the maximum benefit to the people of the State; that the change will not unreasonably affect present and anticipated

beneficial uses; and that the change will not result in water quality less than prescribed in the policies.

The Project, as defined by the alternatives described in the EIR, will result in reduced flows and lower water quality in the Delta for numerous constituents. The Project will require a number of waste discharge permits from the State or Regional Water Quality Control Boards for construction and operation. As the Project will require a Clean Water Act section 404 permit from the Army Corps, it will also require a Clean Water Act section 401 Water Quality Certification, which is necessary for any “federal license or permit to conduct an activity...[that] may result in any discharge into navigable waters.” (33 U.S.C. § 1341(a)(1).) In order to obtain a 401 certification, a project must meet the water quality requirements of Clean Water Act section 303 (33 U.S.C. § 1341(d).)

The state cannot issue a section 401 Certification if there is no reasonable assurance that the Project will meet water quality standards. As confirmed by the Supreme Court, section 401 Certification considers the impacts of the entire activity and not simply the impacts of a particular discharge that triggers section 401. (*PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).) Water quantity is related to water quality because a sufficient lowering of the water quantity in a waterbody can destroy its designated uses, which the Clean Water Act is designed to prevent. Since water quality standards consist of both the water quality criteria and the designated uses of the navigable waters involved, an antidegradation analysis is required to ensure that the “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” (40 CFR § 131.12.) An antidegradation analysis must analyze whether: such degradation is consistent with the maximum benefit to the people of the state; the activity is necessary to accommodate important economic or social development in the area; the highest statutory and regulatory requirements and best management practices for pollution control are achieved; and resulting water quality is adequate to protect and maintain existing beneficial uses.

There is no such analysis in the EIR. There is no comprehensive analysis of why degradation of water quality is consistent with the maximum benefit to the people or evidence showing why diminished water quality is necessary to accommodate important economic or social development in the area. Nor is there any analysis of whether the highest statutory and regulatory requirements and best management practices for

pollution control have been achieved and whether such requirements are likely to be successful in the future or that resulting water quality is adequate to protect and maintain beneficial uses, especially in the face of collapsing fishery populations. The EIR's failure to conduct the required antidegradation analysis is inconsistent with CEQA's analytical and disclosure requirements.

The EIR's analysis of electrical conductivity ("EC"), a measure of salinity, does not comply with CEQA's requirements. The diversion of millions of acre-feet of low EC water from the Sacramento River and corresponding increase in the percentage of high EC San Joaquin River water in the interior and southern Delta coupled with decreased dilution and increased residence time indicate that EC will likely increase throughout the Delta with operation of the Project. Nor does the EIR adequately survey, analyze or discuss the impacts of EC, modified hydrology and increased residence time on freshwater invertebrates (especially their egg and sensitive life stages) in the eastern and southern Delta and lower San Joaquin River. Zooplankton is a critical source of food for numerous fish species. Different zooplankton species tend to inhabit freshwater, low salinity zones or high salinity zones. Populations of native copepod and mysid species have plummeted by magnitude. The same concerns apply to the phytoplankton community. The EIR's failure to adequately analyze and discuss the potential impacts of increased and elevated concentrations of EC is inconsistent with CEQA's analytical and disclosure requirements.

In *AquAlliance v. U.S. Bureau of Reclamation* (E.D. Cal. 2018) 287 F.Supp.3d 969, 1036-1037, the court explained that under CEQA, "In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (Citing *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120, disapproved of on other grounds by *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109 n.3.)

Either DWR or the Water Board must prepare and certify an EIR that includes adequate disclosure and analysis of the Project's adverse impacts on water quality before DWR's Petition can be considered.

## **7) DWR's EIR Claims Falsely that the Impacts of Project operations on Public Health will Not be Significant**

Except for vector-borne diseases the EIR claims project operations would have no significant adverse environmental impacts on public health. (Final and Draft EIR, Executive Summary, p. ES-45, Impacts PH 2-4.) That includes PH-5, "Impact Public Health Due to an Increase in Microcystis Bloom Formation." (*Id.*)

One of the public health issues in the Delta is cyanobacteria harmful algal blooms (CHABs). "*Microcystis* is the most common and well-studied cyanobacteria in the Delta and typically comprises a large percentage of the Delta cyanobacteria community. *Microcystis* blooms are widespread throughout the Delta and have occurred at varying concentrations and frequency throughout the Delta since it was first detected in 1999 (Figure 9E-1; ESA 2022;5)." (Draft EIR, Appendix 9E, Cyanobacteria Harmful Algal Blooms, p. 9E-1.) According to the Draft EIR, the "five primary environmental factors that provide favorable conditions for *Microcystis* to outcompete other phytoplankton in the water column of Delta waters" are higher water temperatures, low channel velocities, long residence times, water column irradiance and sufficient nutrient availability. (Draft EIR, Appendix 9E, p. 9E-3.)

"[H]igher flow rates (generally associated with higher channel velocities) make it difficult for *Microcystis* to form dense collections of colonies at the water surface." (Draft EIR, Appendix 9E, p. 9E-4.) "Areas with high flushing rates (i.e., short residence times) are characterized by relatively high velocities that result in turbulent, well-mixed channels where cyanobacteria generally cannot outcompete green algae or diatoms." (Draft EIR, Appendix 9E, p. 9E-5.) Microcystin concentrations continue to increase in extent and severity in the Delta. (Draft EIR, Appendix 9E, p. 9E-8.)

In other words, diversions for the Project reducing flows through the Delta will contribute to exacerbating harmful algal blooms in the Delta. "It is expected that the frequency and intensity of CHABs will increase with the increased frequency and intensity of droughts with climate change [citations omitted]." (Draft EIR, Ch. 26, Public Health, p. 26-9.) "In addition to increased water temperatures, other variables associated with drought conditions such as water stratification, evaporation, hydraulic residence time, salinization, and duration of

the summer season will likely favor the formation of algal blooms [citations omitted].” (Draft EIR, Ch. 26, Public Health, p. 26-10.)

The Draft EIR admits,

Human exposure to cyanotoxins in freshwater has the potential to occur during recreational activities (e.g., swimming, boating) through direct contact, by inhaling aerosolized toxins near a contaminated water body, or through accidental ingestion of (or oral exposure to) contaminated water (U.S. Environmental Protection Agency 2019a). There are many reports of a variety of health effects in addition to liver damage (e.g., diarrhea, vomiting, blistering at the mouth, headache) following human exposure to cyanotoxins in drinking water or from swimming in water in which cyanotoxins are present. Such health effects can occur within minutes to days following exposure to cyanotoxins (U.S. Environmental Protection Agency 2019b:4). (Draft EIR, Ch. 26, p. 26-9.)

That is mild compared to what the EPA has to say. According to the EPA, Harmful algal blooms can:

- *Produce extremely dangerous toxins that can sicken or kill people and animals*
- Create dead zones in the water
- Raise treatment costs for drinking water
- Hurt industries that depend on clean water (U.S. EPA website <https://www.epa.gov/nutrientpollution/harmful-algal-blooms> February 7, 2022)

On September 1, 2019, the Bay City News Service reported,

A buildup of blue-green algae (cyanobacteria), commonly called an algae bloom, along the Sacramento-San Joaquin River Delta has prompted a safety warning from Contra Costa Environmental Health Services.

The department is advising people out for holiday weekend recreation on the Delta that contact with blooms can make people and pets very sick. Cyanobacteria create a green, blue-green, white or brown coloring on the surface of slow-moving waterways.



Advisory notices have been posted at the kayak launch and around the fishing dock at Big Break Regional Shoreline in Oakley after cyanobacteria was detected in the water.

It warns users to stay out of the water, and do not touch algae scum in the water or on the shore, do not use the water for drinking, cleaning or cooking; do not let pets or livestock enter or drink the water; and do not eat fish or shellfish from the water.

A caution advisory has also been posted near the boat ramp around the mouth of Mormon Slough by the California State Water Resources Control Board.

Stockton urban waterways are stagnant and thick with algal scum and toxins. Algae blooms are regularly found from Stockton to Discovery Bay with smaller ones becoming visible in sloughs between the cities. Adding enormous new diversions upstream from the Delta combined with climate change will reduce freshwater flows and increase the buildup of these dangerous algal blooms.

The CHABs public health situation also involves environmental justice. According to a Restore the Delta Report,

Percentage-wise, the Delta region has the largest environmental justice community in California, with parts of Stockton hitting the 95<sup>th</sup> percentile for economic distress, and small Delta towns comprised of 52% of residents for whom English is not their first language. The economic distress of many Stockton environmental justice communities exceeds that of all other environmental justice communities of California.<sup>10</sup>

Girls and boys, men and women, in economic distress do not have swimming pools and do not belong to clubs that have swimming pools. Many do not have air-conditioning at home. The Delta region is extremely hot in the summer. Residents in economic distress are the most likely to cool off in Delta waters. Some of these residents fish in Delta waters for part of their food supply. The Project's exacerbation of the existing CHABs public health situation in the Delta will have a bad public health impact on the Delta's environmental justice community. Tribal communities are also impacted because CHABs prevent ceremonial use of water

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<sup>10</sup> *Climate Equity and Seismic Resilience for the San Francisco Bay-Delta Estuary*, p. 6, Restore the Delta (2019.)

and impact aquatic plants that are harvested for cultural use, which can prolong exposure since those materials continue to be used once harvested.

The Draft EIR also admits “Future climate change will result in reduced Delta inflows and increased average Delta water temperatures during the summer and early fall months, as discussed in Chapter 9, *Water Quality*. (Draft EIR, Ch. 26, p. 26-64.) In addition, “Because water temperatures, and possibly residence times in some portions of the Delta, are expected to increase in the future due primarily to sea level rise and climate change (which will favor CHABs), the future cumulative condition for *Microcystis* (and thus microcystin concentrations) as well as other cyanobacterial species, would be significant in the Delta.” (*Id.*) The Draft EIR also admits, “Reduced Delta outflow may increase the potential for negative effects from flow -related stressors (e.g., *Microcystis*.) (Draft EIR, Ch. 26, p. 26-59.)

Yet the Draft EIR claims the Projects’ “individual contributions to the significant cumulative condition for CHABs in the Delta would not be cumulatively considerable and, thus, would not be significant.” (*Id.*) That is both conclusory and preposterous. “[W]hen a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users.” (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4<sup>th</sup> 369, 377-378.)

The 6000 cfs capacity of the intakes for the Project is almost 1/3 of the annual average summer River flow at that location, and almost 1/2 of the annual dry/critical flow there. DWR defies common sense by claiming the flow reductions from Project operations would not be at the very least cumulatively considerable for CHABs in the Delta.

The EIR admitted that any of the Project alternatives together with other reasonably foreseeable projects could have cumulatively significant water quality effects on several constituents including Cyanobacteria Harmful Algal Blooms, Boron, Bromide, Chloride, Electrical Conductivity, Mercury, Organic Carbon, Pesticides, and Selenium. (Final EIR, Ch. 9, Water Quality, p. 9-201, Draft EIR, Ch. 9, p. 9-108.) The EIR admits that higher water temperatures, lower flows, longer residence times and other factors provide favorable conditions for CHABs

[Cyanobacteria Harmful Algae Bloom] including Microcystis bloom formation. (Final EIR and Draft EIR, Appendix 9E, p. 9E-3.) One of the causes of those factors is reducing flows by diversions for exports. The EIR admits that the frequency and intensity of CHABs will increase with the increased frequency and intensity of droughts with climate change. (Final EIR, Ch. 26, Public Health, pp. 26-9,-10, Draft EIR, Ch. 26, p. 26-9.) The EIR admits there are public health effects following human exposure to CHABs in drinking water or from recreational activities. (*Id.*) The EIR admits reduced Delta outflow may increase the potential for negative effects from flow -related stressors such as Microcystis. (Final EIR, Ch. 26, p. 26-57, Draft EIR, Ch. 26, p. 26-59.)

EPA said in its March 16, 1023, comments on the Army Corps Draft EIS on the Project,

The Draft EIS states that cyanobacteria harmful algal blooms (CHABs) already occur in the Delta so there would not be a significant increase in the frequency and magnitude of CHABs from construction of any of the Action alternatives (p. 3.17-40). There is limited analysis of the frequency or severity of current HABs and cyanotoxins, or the anticipated increases due to climate change, so the Draft EIS analysis assumes HABs are there and will be there, instead of any in-depth assessment of CHAB species occurrence (changes in species presence), variations, or the duration, severity or aerial extent of CHAB occurrence. Numerous CHAB species are known to occur in the Delta as well as other cyanotoxins (e.g., anatoxins), with quite varied public health effects. Operations of the project could affect HABs, but this is not included in the Draft EIS.

The analysis in the Draft EIS inappropriately focuses on CHABs from Microcystis (and thus microcystin concentrations) (p. 3.17-52). “Compensatory mitigation would not result in markedly higher electrical conductivity (EC) levels in the Delta, Suisun Marsh, Suisun Bay, San Francisco Bay, or the SWP/CVP export service areas. Therefore, this impact does not appear to be significant” (p. 3.21-7). Operation of the project will change flows in the Delta and thus Delta assimilative capacity for EC. Higher EC is linked to the occurrence of another type of Harmful alga called *Prymnesium parvum* (also called Golden Algae) that causes fish kills and is present in Californian lakes. The Draft EIS acknowledges that “while these discussions estimate recreational effects on the statutory Delta as a whole, it is possible that recreational opportunities and quality in specific areas within the Delta would be affected by activities of the action alternatives more than the Delta as a whole” (p. 3.17-13).

The Draft EIS states that CHABs are not problematic in Cache Slough or Yolo Bypass based on visual observations of Microcystis collected by the applicant and the California Department of Fish and Wildlife. Visual observation of microcystis in Cache Slough is not a sufficient measure for the presence of CHABs. While visual observations may identify microcystis, there are other forms of CHABs where this is insufficient. Furthermore, the visual observations may be useful for identifying pervasive, high levels of microcystis but it does not effectively assess the presence, trends, and therefore risks of microcystis in a waterbody (p. 3.21-17). In addition, the Draft EIS misrepresents the impacts and mitigation measures of HABs when it says, “the presence of vegetation would generally decrease the potential for CHAB formation because plants would likely outcompete cyanobacteria for nutrients and sunlight.” In actuality, Cyanobacteria tends to out compete native vegetation. Therefore, relying on the vegetation in the tidal habitat is not an adequate means of mitigating CHAB concerns.

The Draft EIS further states “the design of the tidal habitats is such that there would be daily hydrologic exchange that would ensure that there would not be substantially increased residence time compared to adjacent habitats... Based on the above findings, under all action alternatives the effects on CHABs resulting from compensatory mitigation does not appear to be significant.” (p. 3.21-17 & 18). The HAB event in San Francisco Bay this summer as well as regular blooms in the Delta demonstrate that mixing gradients and residence time do not prevent substantial cyanobacteria production.

The Draft EIS acknowledges that the project proposes to create waterbodies - the construction of one or two north Delta intake facilities between River Mile (RM) 42 (south of Freeport) and RM 37 (north of the town of Courtland), the Twin Cities Complex, other tunnel launch, reception, and maintenance sites, and the Southern Complex or Bethany Complex. Additionally, “certain tidal habitats could create new “seed” areas for CHABs. This could result in long-term increases in the frequency and size of CHABs within the Delta in the vicinity of new tidal habitats, relative to the No Action Alternative and, therefore, could potentially increase health risks to people recreating in the vicinity.” (p. 3.17-41). “Mitigation Measure WQ-14: Develop and Implement a CHAB Management and Monitoring Plan would be implemented with the goal to mitigate the potential for increases in CHAB formation and, thus, human exposure to cyanotoxins, within compensatory mitigation sites” (p. 3.17-53). However, the analysis incorrectly says “types of compensatory mitigation (i.e., valley/foothill

riparian, freshwater emergent perennial wetland, seasonal wetland, lake/pond)... would not be hydrodynamically connected with Delta channels... As such, these other types of new habitats would not affect CHAB formation within the Delta, relative to the No Action Alternative.” (p. 3.17-41). Hydraulic connection is not necessary for these areas to form CHABs and cyanotoxins that could impact public health e.g., thru direct contact, aerosol transport and other mechanisms of release of the CHABs or cyanotoxins, and the likelihood of CHABs should be addressed in the analysis. (**Exhibit 6**, EPA Comments pp. 7-8.)

The Water Board said in its December 16, 2022, comments on DWR’s Draft EIR,

As noted in the Draft EIR, cyanobacteria blooms are a significant water quality concern in the Delta. The severity and frequency of blooms has increased in the last decade, as have the types of cyanobacteria toxins detected. The Draft EIR concludes that the project would have no significant impact on cyanobacteria blooms. The potential impact is difficult to determine however, because the analysis is incomplete. The impacts of project operations on cyanobacteria blooms were determined by an assessment of changes in bloom drivers at nine assessment locations concentrated in western and north central channels and mainstem rivers.

However, the assessment locations did not encompass small and mid-sized tributary channels in the eastern, central, and southern portions of the Delta. The impacts analysis should directly examine potential impacts in small and mid-sized channels (e.g., Disappointment Slough, Turner Cut, North Fork Mokelumne and Grant Line Canal) where responses to subtle changes in water residence time, source water proportion, and water temperature are expected to have greater effects on cyanobacteria growth and persistence than in main river segments. Without assessing potential for increasing cyanobacterial harmful algal blooms (CHABs) across the entire Delta, it is difficult to determine impacts of the proposed Project operations. (Water Board Letter p. 10.)

The EIR conclusions regarding public health risks, in particular the risks posed by CHABs to Delta residents and users, defy common sense and are not supported by substantial evidence. DWR or the Water Board must prepare and certify an EIR to include a health risk assessment and quantification on the risk to Delta residents including the environmental justice community, and users, from CHABs exacerbated by diversions for the Project. (*See Berkeley Keep Jets Over*

*the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1370, 1371.)

**8) DWR's EIR Fails to Include Disclosure and Analysis of Indirect, Cumulative and Worst Case Impacts**

**a) Failure to Disclose and Analyze Indirect Changes in the Environment that would Result from the Project**

An agency must consider reasonably foreseeable indirect physical changes in the environment resulting from the proposed action. (CEQA Guidelines §15064(d)(1),(2).)

The Delta Conveyance Project would remove a physical barrier to exporting more water. The Project is the key that would unlock California rivers for proposed projects such as the Sites Reservoir, the Shasta Dam raise, the Temperance Flat Reservoir, the Delta-Mendota Canal and the Mid-Valley Canal. These other projects enabled by the Delta Conveyance Project would result in reasonably foreseeable indirect significant physical changes in the environment.

DWR's EIR has failed to disclose and evaluate the indirect physical changes in the environment including upstream impacts resulting from the Delta Conveyance Project that would be caused by projects enabled and facilitated by the Delta Conveyance Project such as the Sites Reservoir, Shasta Dam raise, and Temperance Flat Reservoir.

DWR's EIR has failed to disclose and evaluate the growth inducing impacts that would result from the Delta Conveyance Project and the projects enabled and facilitated by the Delta Conveyance Project

DWR or the Water Board must prepare and certify an EIR that discloses and evaluates the indirect physical changes in the environment resulting from the Delta Conveyance Project before the Board can consider DWR's Petition.

**b) Failure to Disclose and Analyze Cumulative Impacts on the Environment that would Result from the Project**

An EIR must discuss cumulative impacts, or the collectively significant changes in the environment resulting from the incremental impacts of the project "when added to

other closely related past, present, and reasonably foreseeable probable future projects.” (Guidelines, §§ 15355(b), 15130(a)(1).) An agency must use standards of practicality and reasonableness as well as its best efforts to fully disclose cumulative impacts of a project. (Guidelines, §§ 15130(b), 15144, 15151.)

The EIR fails to adequately consider the Project’s cumulative effects by focusing solely on the Project while ignoring the Project’s relationship to the long-term operations of the CVP and SWP facilities, including operation of the upstream CVP and SWP reservoirs. The EIR’s failure to consider these impacts also constitutes unlawful piecemealing.

Planned long-term operations of the CVP and SWP system determine whether the Tunnel might arguably make any sense for water supply purposes. In turn, whether or not the new conveyance proposed by the Project is approved will make a major difference in the actual long-term operations of the CVP and SWP system. Despite this extremely close relationship, separate environmental review processes for the Project and the long-term operation of the CVP and SWP were conducted. The EIR fails to adequately consider the environmental review conducted for the Coordinated Long-Term Operation of the CVP and SWP.

There is complete interconnection of the Project and the long-term operation of the CVP and SWP, but the EIR fails to adequately analyze the cumulative impacts of these projects as a whole. The Federal and State water management systems in the Delta are highly interconnected, both functionally and physically. The EIR does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated.

The EIR fails to properly analyze cumulative impacts in that it provides an unduly limited cumulative projects list and fails to include continuing SWRCB proceedings as a cumulative project. It also fails to sufficiently analyze cumulative impacts on Delta, upstream and downstream water and biological resources, and fails to properly analyze cumulative impacts regarding changing storm patterns, sea level rise, and other impacts of climate change.

The EIR systematically failed to adequately analyze new upstream facilities, Shasta Dam enlargement, a new Temperance Flat dam and reservoir on the San Joaquin

River, and the Sites Reservoir adjacent to and dependent upon the existing Sacramento River water supply, all of which are proposed to be constructed in the foreseeable future, with reasonably foreseeable and potentially significant cumulative environmental effects in combination with the Project. The Sites project, approved in November 2023, will divert large volumes of Sacramento River water during fall, winter, and spring for storage in a new reservoir with a capacity of about 1.5 million acre-feet, placing a significant stress on and adversely affecting listed salmon in the same system from which the Delta Conveyance Project will extract water. The Shasta Dam enlargement, which is the subject of a Supplemental EIS, has not been approved, but proposes to raise Shasta Dam to add up to 634,000 acre-feet of storage capacity to the CVP. As the Delta Conveyance Project would not create new water, it is dependent on projects like Sites and the Shasta Dam enlargement in order to claim it achieves its stated purposes.

DWR or the Water Board must prepare and certify an EIR that adequately addresses cumulative impacts before the Board can consider approving DWR's Petition.

### **c) Failure to Include Worst Case Analysis in the EIR**

DWR failed to include worst case analysis in either the Draft or Final EIR. It would be possible to operate the Project intakes to divert up to 6,000 cfs of fresh water from the Sacramento River. In the past, the Water Board has approved temporary urgency change petitions sought by DWR and or the U.S. Bureau of Reclamation always or almost always. There will be pressure including political pressure in the future to grant such petitions or otherwise seek maximum diversions for the SWP and CVP from the Project intakes.

DWR's EIR includes neither worst-case scenario analysis or even realistic analysis of the quantities of freshwater reasonably likely to be diverted by the Project no matter how bad future conditions are in terms of both the upstream watersheds and in the Delta.

DWR or the Water Board must prepare and certify an EIR that includes worst case analysis before the Board can consider DWR's Petition.

### **9) DWR's EIR Fails to Provide Full Environmental Disclosure**

“CEQA requires full environmental disclosure...” (*Communities for a*



*Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88.) Pursuant to CEQA, agencies must use their best efforts to find out and disclose all that they reasonably can. (*Banning Branch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 938; CEQA Guidelines, §§ 15144; 15151.)

DWR failed to use its best efforts to find out and disclose all that it reasonably could with respect to such environmental impacts as impacts on surface water, water supply, endangered and threatened fish species, water quality, and public health, as well as the combined effects resulting from Project operations reducing freshwater flows coupled with future climate change reductions of freshwater flows in either the Draft or Final EIR.

DWR's CEQA Findings admitted that "While late letters have been reviewed and considered by DWR, DWR did not include late letters, or responses thereto, in the Final EIR." (CEQA Findings, p. 5-11.) Consequently, DWR never disclosed in either a revised Draft or the Final EIR the information in the September 28, 2023, *Water Board Staff Report/SED* that exports must be reduced in order to increase freshwater flows through the Delta. DWR also never disclosed in either a revised Draft or the Final EIR the May 25, 2023, Auditor Report explaining DWR's deficiencies in accounting for the effects of climate change on future water supplies. DWR never disclosed in either a revised Draft or the Final EIR that the EPA had explained on March 16, 2023, that the diversion of Sacramento River water for the Project could very well lead to greater impairment or extinction of threatened and endangered fish species. DWR never disclosed in a revised Draft or the Final EIR any of the new information it received in the form of supplemental comment letters after December 16, 2022, regardless of its significance. DWR also did not provide any public comment period on the Final EIR it issued on December 8, 2023.

DWR's failure to disclose the impacts of Project operations on such resources as surface water, water supply, endangered and threatened fish species, water quality, and public health, as well as the combined effects resulting from Project operations reducing freshwater flows coupled with future climate change reductions of freshwater flows constitutes a failure to make the good faith effort to provide full environmental disclosure required by CEQA.

DWR's failure to disclose information no matter how significant provided to DWR by supplemental comment letters or by sister agencies after December 16,

2022, constitutes a failure to make the good faith efforts to provide full environmental disclosure required by CEQA.

DWR or the Water Board must prepare and certify an EIR that makes the full environmental disclosure required by CEQA before the Board can consider DWR's Petition.

**10) Substantial Changes have Occurred with respect to the Circumstances under which the Project is being Undertaken so that Preparation of a Subsequent EIR is Required**

CEQA requires preparation of a subsequent EIR when substantial changes occur with respect to the circumstances under which the project is being undertaken that will require major revisions in the EIR. Public Resources Code section 21166 states,

When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

DWR's EIR was based on the claim that the diversions for Project operations would be lawful under existing standards including flow objectives for the protection of fish and wildlife established by the Water Board in 1995, by Water Board Decision D-1641. (DWR's CEQA Findings, pp. 8-9, Findings Exhibit A, p. 11.)

The Water Board's *Staff Report/SED* explained that the last major update to the flow objectives for the protection of fish and wildlife in the Sacramento River watershed and the Delta occurred in 1995. (*Staff Report/SED*, Ch. 5, p. 5-3.) The Water Board is currently updating the flow objectives to increase freshwater flows by reducing exports.

The impacts of the Project’s diversions, which would not commence until 2040 at the earliest, are being measured against out of date standards which are now being strengthened by the Water Board. DWR’s EIR does not address this anachronism, but instead expressly relies on the standards that are nearly three decades old. A subsequent EIR is required pursuant to the plain language of Public Resources Code section 21166(b.)

DWR or the Water Board must prepare a subsequent EIR to address the changed circumstances under which the proposed Project is being undertaken before the Board can consider DWR’s Petition.

### **11) DWR’s Failure to Prepare a Cost-Benefit Analysis Before Approving the Project Facilitated DWR’s Deception of the Public**

DWR’s Draft EIR stated, “DWR’s fundamental purpose in proposing to develop new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP water deliveries and, potentially, CVP water deliveries south of the Delta, consistent with the State’s Water Resilience Portfolio *in a cost-effective manner.*” (Final and Draft EIR, Ch. 2, Purpose and Project Objectives, p. 2-2)(Emphasis added.)

Accurate economic information is required by both NEPA and CEQA. In *Natural Resources Defense Council v. U.S. Forest Service*, 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.” (421 F.3d 797, 811 (9th Cir. 2005)). Accurate economic analysis is required “to allow an informed comparison of the alternatives considered in the EIS.” (421 F.3d at 813.) California courts where appropriate cite NEPA decisions in deciding issues under CEQA.<sup>11</sup>

DWR gave final approval to the Project prior to preparing a cost-benefit analysis for the public including the ratepayers and potentially the taxpayers who

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<sup>11</sup> “Recognizing that CEQA was modeled on the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) ‘we have consistently treated judicial and administrative interpretation of the latter enactment as persuasive authority in interpreting CEQA.’” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566, fn.4, internal citations omitted.)

would have to pay the billions of dollars to construct the Project. DWR is not expected to issue a cost-benefit analysis for the Project before mid-2024.

No rational individual or couple would decide which house or condominium to buy without considering the comparative costs and benefits of each of the several homes they were considering. DWR, however, deliberately refused to consider any no-tunnel alternative and deliberately refused to prepare a cost-benefit analysis before giving final approval to its desired Tunnel Project.

It will not be possible for the Water Board to determine whether the proposed action will best serve the public interest unless and until DWR has developed the CEQA-required range of reasonable alternatives including alternatives prescribed by related regulatory regimes and has also prepared publicly available cost-benefit analysis of the alternatives.

In conclusion, DWR should not be allowed to inflict this Petition procedure on protestants and the public given DWR's refusal to prepare an honest and accurate EIR, its refusal to have included the required range of reasonable alternatives in its EIR, and its refusal to have prepared and issued a cost-benefit analysis prior to giving final approval to its desired Tunnel Project.

### **12) DWR's EIR Wrongfully Narrows the Geographic Scope of its Environmental Analysis, and thus Failed to Analyze All Potential Project Impacts**

The EIR did not adequately consider upstream impacts of the Project and its operation, and instead wrongly narrows the geographic scope of its environmental analysis. The geographic scope includes only the Project footprint, the Delta, and CVP/SWP project areas. Water resources, supply and demand dynamics, and environmental resources are interconnected. The current project scope does not adequately capture reasonably foreseeable direct and indirect impacts to upstream communities and riverine systems as a result of the project and subsequent increased exports.

Specifically, the EIR did not identify or analyze the potential for the Tunnel to facilitate new dams and diversions in the North state by reducing constraints on exports. With such constraints reduced, south-of-Delta water interests are more likely to find attractive new water storage projects on Northern California rivers.

Such reservoir expansions or new dams and diversions, in the absence of the Tunnel, would otherwise be poor or risky investments. In fact, several major water interests south of the Delta have stated on record their unwillingness to invest in water storage north of the Delta without Delta “conveyance.” Some poorly conceived projects even include dams and diversions that conflict with state and federal laws to protect the extraordinary values and free-flowing character of wild and scenic rivers. The EIR provided no mitigation or assurances for these threats.

The comments of Friends of the River (FOR) et al. on the Draft Environmental Impact Report for the Delta Conveyance Project details imminent threats imposed by the Tunnel to the American River, Eel River, Klamath River, McCloud River (Shasta Dam Raise), Sacramento River (Sites Reservoir), San Joaquin River, Trinity River, and the Yuba River. These comments, incorporated herein, also discuss the EIR’s inadequate geographic scope, its failure to disclose or mitigate upstream impacts, and its failure to adequately consider the growth-inducing impact of the Tunnel.

### **13) DWR’s EIR Did Not Adequately Consider Operational Impacts of the Tunnel, and thus Failed to Analyze Critical Project Impacts**

The State Water Project (SWP) and Central Valley Project (CVP) are incomplete projects, and thus their ultimate project operations, configurations, and water deliveries are uncertain. DWR did not adequately consider how the Tunnel would facilitate additional water exports or growth of these projects.

SWP and CVP exports are routinely less than contracts and water rights. The SWP and CVP each have some proportion of paper water — rights to water that can't actually be appropriated and delivered due to operational constraints or drought conditions. Project beneficiaries hope that the Delta Tunnel can reduce regulatory constraints on project operations within their existing water rights permits. Their contractors have made clear their hope that this will increase diversions from SWP and CVP reservoirs. Without anything but a change in conveyance, paper water in the system would become "wet" water.

Since additional exports are often releases from storage, SWP and CVP project operators will have more discretion to decrease north-state reservoir storage — again with adverse implications on cold-water pools, downstream fisheries, and recreation both in and below reservoirs.

Further, SWP and CVP project exports and operations are uncertain because the projects are not in their final forms. Both the SWP and the CVP have unmet demand in their project areas. The SWP has contracts for somewhere north of four million acre-feet in its service areas with a significant shortfall in deliveries due to lack of water availability. The SWP has an authorized but unconstructed major south-of-Delta reservoir, the 1.73 million acre-foot Los Banos Grandes reservoir. Further, the SWP is listed as a customer or beneficiary in proposed Sites Reservoir and Shasta Dam Raise projects. Reclamation has initiated environmental review on the proposed Temperance Flat Dam (San Joaquin River), spearheaded the proposed Shasta Dam Raise, and is a participant in the proposed Sites Reservoir and San Joaquin Valley Blueprint.

Growing unmet demand paired with these potential projects in *advanced* planning stages suggest that the SWP and CVP will become significantly larger operations than reflected in current Delta Conveyance Project analysis. Unmet demand paired with the aforementioned new facilities, then coupled with some degree of operational discretion, suggest that the Delta Conveyance Project could likely be a conduit to the loss of and harm to public trust resources in Northern California rivers and reservoirs. DWR did not analyze this in its EIR.

### **C. The Proposed Action is Contrary to Other Laws in Addition to CEQA**

#### **1) The Proposed Action is Contrary to the Delta Reform Act**

The Project is in conflict with the declared water policy of the State of California established by the Delta Reform Act including, but not limited to, the policy “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.) The Project would instead increase reliance on the Delta in meeting California’s future water supply needs by increasing the capacity to divert more water from the Delta than is presently being diverted.

The Project is in conflict with the declared policy of the State of California confirmed by the Delta Reform Act that “[t]he long-standing constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” (Water Code § 85023.) The Project would instead make maximizing exports the foundation of

state water management policy applicable to the Delta.

The Project is in conflict with the law established by the Delta Reform Act that the “‘BDCP’ means a multi-species conservation plan.” (Water Code § 85053.) The Project as modified as approved is now simply a water diversion project and is not a multi-species conservation plan.

The Project is in conflict with the Delta Reform Act which mandates that:

“Coequal goals” means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.  
(Water Code § 85054.)

The Project does not provide a more reliable water supply for California by determining actual water rights as opposed to “paper” water rights, and the operational requirements and flows necessary for recovering the Delta ecosystem in order to identify the remaining water available for export and other beneficial uses. The Project would further degrade instead of protecting, restoring, and enhancing the Delta ecosystem by taking away from the Delta substantial quantities of freshwater flows that presently flow through the Delta before being diverted at the south Delta.

The Project is in conflict with the Delta Reform Act which mandates that the BDCP could not be incorporated into the Delta Plan and could not be eligible for state funding unless among other things, the BDCP complies with CEQA, and includes “a comprehensive review and analysis of” (among the listed subjects):

- operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses. (Water Code § 85320(b)(2)(A).)
- A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines. (Water Code § 85320(b)(2)(B).)
- The potential effects of each Delta conveyance alternative on Delta water quality. (Water Code § 85320(b)(2)(G).)

DWR's Project and the Project approval process have not determined the operational requirements and flows necessary to recover the Delta ecosystem in order to identify the remaining water available for export and other beneficial uses; have not developed a reasonable range of Delta conveyance alternatives including through-Delta; and have not determined the potential effects of alternatives on Delta water quality.

The Delta Reform Act requires establishment of instream flow needs for the Delta *before* the Board can approve a change in the point of diversion. Water Code section 85086(c) requires in pertinent part:

(c)(1) For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions. The flow criteria shall be developed in a public process by the board within nine months of the enactment of this division. The public process shall be in the form of an informational proceeding conducted pursuant to Article 3 (commencing with Section 649) of Chapter 1.5 of Division 3 of Title 23 of the California Code of Regulations, and shall provide an opportunity for all interested persons to participate. The flow criteria shall not be considered predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP.

(2) Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section. The flow criteria shall be subject to modification over time based on a science-based adaptive management program that integrates scientific and monitoring results, including the contribution of habitat and other conservation measures, into ongoing Delta water management.

DWR admits that required Delta flow criteria have not been adopted. (Petition, Supplemental Information for Petition for Change in Point of Diversion pp. 14-15.) The Board must develop and adopt the required Delta flow criteria



before it could consider approving the proposed action. The Board must comply with CEQA in developing and adopting the required Delta flow criteria.

The Project is in conflict with the Delta Reform Act which prohibits initiation of “construction of a new Delta conveyance facility” unless the exporter beneficiaries have made arrangements to pay for all costs including planning, design, construction, and mitigation. (Water Code § 85089.) Instead of the exporters paying for all costs, a substantial public subsidy would be necessary to make the Project, which is estimated to cost up to \$67 billion, a breakeven proposition for agricultural users of the water.

## **2) The Proposed Action is Contrary to the Climate Change Legislation**

The first stated objective for the Project is “To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events.” (Final EIR and Draft EIR, Ch. 2, p. 2-2.)

The climate change legislation includes Public Resources Code section 71154(c)(2) which states,

When developing infrastructure to address adaptation [to climate change], where feasible, *a project alternative should be developed* that utilizes existing natural features and ecosystem processes or the restoration of natural features and ecosystem processes to meet the project’s goals. (Emphasis added.)

DWR refused to develop or consider an alternative that would utilize the existing Sacramento River and Delta to meet the Project’s goals. DWR’s proposed action is contrary to the climate change legislation.

## **3) The Proposed Action is Contrary to the California Endangered Species Act (CESA)**

The California Supreme Court said in *Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4<sup>th</sup> 105, 125, “For example, CESA establishes a policy adding significant weight to the CEQA balancing scale on the side favoring protection of a listed species over projects that might jeopardize them or their habitats. (Fish & G. Code, § 2053.)” Fish and Game Code section 2053 states

“Legislative findings and declarations; alternative state agency projects” as follows,

(a) The Legislature further finds and declares that it is the policy of the state that public agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent *alternatives* available consistent with conserving the species or its habitat which would prevent jeopardy.

(b) Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent *alternatives shall be developed* by the department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible. (Emphasis added.)

CEQA establishes the policy of the state to, “Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.” (Pub. Res. Code § 21001(c).) Pursuant to CEQA Guidelines section 15065(a)(1), a “potential substantial impact on endangered, rare or threatened species is per se significant.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449.)

The ever worsening crisis for endangered and threatened fish species caused by diversions of freshwater flows and the need to increase instead of reducing flows explained by the Water Board and the EPA were set forth above in section IIIB2c of this Protest.

The proposed action is contrary to CESA because DWR has failed to develop and consider an alternative consistent with conserving the species and their habitat.

#### 4) The Proposed Action is Contrary to the Public Trust Doctrine

The Delta Reform Act mandates, “The longstanding constitutional principle of reasonable use *and the public trust doctrine* shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” (Water Code § 85023) (Emphasis added.)

The California Supreme Court made it clear in the Mono Lake case, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446, that “The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, *and to protect public trust uses whenever feasible.*” (Emphasis added.)

Moreover,

Once the state has approved an appropriation, the public trust imposes a duty of *continuing supervision* over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, *the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions* even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses. (*National Audubon*, 33 Cal.3d 419, 447) (Emphasis added.)

DWR ignored the public trust doctrine in setting forth the purpose of the project “to restore and protect the reliability of SWP water deliveries...” (Final and , Ch. 2, p. 2-2.) A purpose or objective was required to effectuate DWR’s duty to exercise continuing supervision over water diversions and deliveries “which may be incorrect in light of current knowledge or inconsistent with current needs.” The Water Board’s April 15, 2020, comment letter on the NOP noted the “precipitous declines in recent years” of fish species in the Bay-Delta. The SWRCB comment letter also noted, “Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane, [and *ten* other named items], and toxicity.” (SWRCB Letter at p. 8) (Emphasis added.)

The Water Board must consider “public trust values in the balancing of all beneficial uses of water” and in doing so must consider tribal beneficial uses. The tribal beneficial uses have been defined by the Water Board and are being considered for the Bay-Delta Water Quality Control Plan which encompasses the Project area. Since the Project will impact traditional homelands of multiple tribes, the impacts to tribal beneficial uses must be considered

The Water Board must either require DWR to conduct public trust analysis regarding the proposed action or conduct the public trust analysis itself prior to considering DWR’s Petition.

### **5) The Proposed Action is Contrary to Article X of the California Constitution**

The Delta Reform Act mandates, “The longstanding *constitutional principle of reasonable use* and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” (Water Code § 85023) (Emphasis added.)

Article X of the California Constitution states:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that *the waste or unreasonable use or unreasonable method of use of water be prevented*, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. *The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water...* (Cal. Const. art. X, § 2.)

DWR has frozen water allocations to the existing contractual allocations for state water contractors. There should have been searching scrutiny of whether exports can be reduced as certain uses or methods of use have become unreasonable because of current and forecasted shortages of available water caused by climate change on the one hand, and technological improvements and innovations such as conservation, recycling, and drip irrigation on the other hand.

Moreover, the *Water Board Staff Report/SED* established that the total volume of water authorized for diversion “is over 5 times the total annual average unimpaired outflow for the entire Bay-Delta watershed.” (*Water Board Staff Report/SED*, Ch. 2, p. 2-117.)

The proposed action is in conflict with Article X of the California Constitution because DWR has failed to take any action to preclude unreasonable use and method of use of water including by unreasonable agricultural practices in areas receiving exported water. The Water Board must conduct or require DWR to conduct thorough analysis of the use and method of use particularly in agricultural areas before considering whether to approve DWR’s Petition.

#### **6) The Proposed Action is in Conflict with the Fully Protected Bird Statute**

The Fully Protected Bird Statute, Fish and Game Code section 3511, lists the avian species that are considered “fully protected.” Several such fully protected bird species, including the greater sandhill crane and white-tailed kite, occur in areas affected by the Project.

Except for limited exceptions not applicable here, “fully protected birds or parts thereof may not be taken or possessed at any time.” (Fish & G. Code, § 3511 (a)(1).) DWR’s approval of the Project is subject to this prohibition.

DWR’s authorization of the Project will result in the unauthorized and prohibited take of greater sandhill cranes and white-tailed kites through, among other things, collisions with transmission lines, noise and other harassing activities, and the destruction and modification of essential crane habitat associated with the construction and operation of the Project.

Measures proposed by DWR purporting to conserve greater sandhill cranes will not fully avoid take of cranes associated with the Project.

The Proposed Action is in conflict with the Fully Protected Bird Statute.

## **7) The Proposed Action is in Conflict with the Clean Water Act**

The new diversion for the Delta Conveyance Project is in conflict with the federal Clean Water Act. The Water Board's April 15, 2020, comment letter on the Notice of Preparation (NOP) explained that "Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane, chlorpyrifos, DDT (dichlorodiphenyltrichloroethane), diazinon, dieldrin, electrical conductivity, Group A pesticides, invasive species, mercury, PCBs (polychlorinated biphenyls), and toxicity." The EPA said in its March 16, 2023, comment letter on the Army Corps Draft EIS for the Project, "EPA continues to believe that the operation of the proposed project has the potential to cause or contribute to long-term exceedances of regulatory water quality standards." (EPA Letter p. 2.)

Further details on why the diversions of water for the project would violate the Clean Water Act are set forth above in section IIIB6 of this Protest.

## **8) The Proposed Action is Contrary to the California Wild and Scenic Rivers Act**

The proposed Delta Conveyance Project does not include any additional safeguards for state- or federally-designated Wild and Scenic Rivers, or safeguards to prevent rivers protected by Wild & Scenic Rivers Acts from being undesignated and dammed due to increased conveyance capacity through the Delta. Instead, the proposed project and scope for environmental analysis relies on current conditions and legal obligations, which ignores the historical context of Delta conveyance.

An isolated facility to convey water supply through the Delta has long wetted the appetites of export interests, even to the extent that such interests have sought to repeal protections embedded in the state's Wild and Scenic Rivers Act, or have attempted to pre-empt the Act through federal law. The following excerpt serves as a reminder of the purpose of this body of California law:

It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. *The*

*Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water...*  
Public Resources Code § 5093.50) [Emphasis added].

The Department of Water Resources failed to meet its obligation under the California Wild and Scenic Rivers Act. Public Resources Code (PRC) § 5093.61 mandates that all departments and agencies of the state shall exercise their powers granted under any other provision of law in a manner that protects the free-flowing state of each component of the system and the extraordinary values for which each component was included in the system. However, as mentioned above and throughout this protest, DWR did not consider impacts of the Tunnel on upstream development, including the potential to facilitate the Shasta Dam Raise, which would destroy a section of the McCloud River protected by the Wild and Scenic Rivers Act. DWR also did not consider or mitigate impacts to the Wild and Scenic Lower American River. DWR also failed to meet its responsibilities under PRC § 5093.542(d) and § 5093.542(c).

Protecting state wild and scenic rivers is clearly in the public interest and an affirmative responsibility of state agencies and even political subdivisions of the state. Impacts to Wild and Scenic Rivers are detailed in the comments of FOR et al. on the Draft Environmental Impact Report for the Delta Conveyance Project, incorporated herein.

#### **IV THE PROPOSED ACTION WILL HAVE ADVERSE ENVIRONMENTAL IMPACTS**

The Proposed Action will have adverse environmental impacts. This section of this Protest also shows why the Proposed Action is not in the public interest.

##### **A. Proposed Action Adverse Environmental Impacts Admitted by DWR**

DWR admits the Project would have a number of significant and unavoidable adverse environmental impacts including conversion of agricultural land (Final EIR and Draft EIR, Executive Summary, Table ES-13, p. ES-81), aesthetics and visual resources (*id.* Table ES-16, p. ES-87), cultural resources (*id.* Table ES-17, p. ES-89), vehicle miles traveled (*id.* Table ES-18, p. ES-92), air quality exposure to localized emissions (Final EIR, Table ES-21, p. 101, Draft

EIR, p. ES-100), noise and vibrations (Final EIR, Table ES-22, p. ES-104, Draft EIR, Table ES-22, p. 103), paleontological resources (Final EIR, Table ES-26, p. ES-112), Draft EIR, Table ES-26, p. ES-111), and Tribal cultural resources. (Final EIR, Table ES-27, p. ES-120, Draft EIR, Table ES-27, p. ES-119.)

## **B. Proposed Action Obvious Adverse Environmental Impacts Evaded by DWR**

### **1) Diversions for the Project would Obviously have Adverse Environmental Impacts on Surface Water**

The new upstream diversion of water for the Delta Conveyance Tunnel Project would have obvious adverse impacts on surface water by reducing freshwater flows through the already impaired Delta. Instead of honestly admitting the truth and analyzing and quantifying the adverse impacts on surface water DWR instead evaded providing the required full environmental disclosure required by CEQA.

The Project will include two intakes with a combined conveyance capacity of 6,000 cubic feet per second (“cfs”). (Final EIR, Executive Summary, Table ES-1, p. ES-16, Draft EIR, Ch. 6, pp. 6-48, 49.) That capacity is almost one third of the total average Sacramento River flow of 21,464 cfs north of Courtland, the location of the proposed intakes. (Final EIR and Draft EIR, Ch. 5, Surface Water, Table 5, p. 5-3.) That capacity is almost half of the dry/critical Sacramento River flow of 12,484 cfs at that location. (*Id.*) The Tunnel conveying this diverted flow would be 45 miles long, with an inside diameter of 36 feet. (Final EIR, Ch. 3, p. 3-15, Table 3-2, Draft EIR, Ch. 3, p. 3-16, Table 3-2.)

DWR’s Final EIR admits, “there are consistent decreases among project alternatives in long-term average flows for all months on the Sacramento River north of Courtland (i.e., downstream of the proposed north Delta intakes)”... due to the diversions of water at the proposed north Delta intakes. (Final EIR and Draft EIR, Ch. 5, pp. 5-2, 5-27.)

According to the Water Board’s own *Staff Report/SED*, the Delta Conveyance Project would reduce Delta outflows by 758 TAF (thousand acre-feet) in wet years, 1061 TAF in above normal years, 649 TAF in below normal years, 326 TAF in dry years, and 156 TAF in critical years. (*Water Board Staff Report/SED* Ch. 7.24, Table 7.24-1, p. 7.24-7.)



Section IIIB5 above in this Protest includes information from the Water Board and EPA about adverse impacts of the flow reductions on fish species. Section IIIB6 includes information from the Water Board and EPA about the adverse effects of flow reductions on water quality.

Despite the obvious adverse impacts of DWR's Project on surface water, DWR's EIR did not consider changes to surface water resources as an impact of the Project alternatives under CEQA and did not evaluate the impacts of Project operations on surface water resources under CEQA. (Final EIR, Executive Summary, Ch. 5, p. 5-2, Draft EIR, Executive Summary, p. ES-48; Ch. 5, pp. 5-1,-2.)

The Final EIR stated that several EIR chapters (Chapter 5, *Surface Water*, Chapter 6, *Water Supply*, Chapter 30, *Climate Change*, and Chapter 31, *Growth inducement*) "have a slightly different chapter structure or approach to impact analysis," and "may describe potential changes to a resource where change to that resource alone is not considered an environmental impact under CEQA. Additionally, these resource chapters do not determine the level of significance of change." (Final EIR, Ch. 4, p. 4-3.) Accordingly, the EIR did not determine the level of significance of change to the surface water resource. (*Id.*)

So, the substantial diversion capacity of DWR's Project together with common sense establish that if operated, DWR's Project would have significant adverse impacts on surface water. Because DWR evaded analyzing the impacts on surface water in its EIR; it is unknown how significant the adverse impacts would be. Likewise, DWR has provided no quantification regarding the impacts.

Even if DWR's EIR had truthfully labeled the Project's impacts on surface water as being significant; DWR would have been required to do more. Even when an agency's EIR does designate a particular adverse environmental effect as "significant" that alone is not sufficient. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5<sup>th</sup> 502, 514.) An EIR must include "some effort to explain the nature and magnitude of the impact." (*Sierra Club*, 6 Cal.5<sup>th</sup> at 519.)

Finally, the purpose of the Delta Conveyance Project is to remove and consume freshwater from the proposed new intakes in the north Delta from the Sacramento River. There is no known way to restore the diverted freshwater flows. The diversion of the water is an environmental impact, an irreversible significant effect on the environment, and an irretrievable commitment of the diverted freshwater flows since the water diverted is both removed and consumed. Though the very purpose of the water project is

to use and consume enormous quantities of freshwater; the water diversions are not included on the EIR's list of irreversible environmental impacts.

CEQA requires an EIR to,

include a detailed statement setting forth *all* of the following:

- (1) *All* significant effects on the environment of the proposed project.
- (2) In a separate section:
  - (A) *Any* significant effect on the environment that cannot be avoided if the product is implemented.
  - (B) *Any* significant effect on the environment that would be irreversible if the project is implemented. (Pub. Res. Code § 21100(b)(1.) (Emphasis added.)

DWR's EIR not only hides the fact that the effects of its Project on surface water would be significant. DRW's EIR also hides the facts that the significant effects including reduction of surface water cannot be avoided and would be irreversible if the project is implemented.

## **2) Diversions for the Project would Obviously have Adverse Environmental Impacts on Water Supply**

The new upstream diversion of water for the Delta Conveyance Tunnel Project would have obvious adverse impacts on water supply. The water diverted for the Project would not be available for other uses. The water supply available for other uses would be substantially reduced by the Project.

Despite the impacts of water diversions on water supply and the over-appropriation of over five times the annual average unimpaired outflow for the entire Bay-Delta watershed as explained by the *Water Board Staff Report/SED* (Ch. 2, p. 2-117), DWR's EIR did not consider changes to water supply as an impact under CEQA and did not evaluate the changes to water supply under CEQA. (Final EIR and Draft EIR, Ch. 6, pp. 6-1,-2,-34.) DWR's EIR did not determine the level of significance of change to water supply. (Final EIR, Ch. 4, p. 4-3.)

## **3) The Diversions for the Project Coupled with Reduced Freshwater Flows as a result of Climate Change would Obviously have Adverse Environmental Impacts on surface water, water supply, listed fish species, water quality and public health**

The first stated objective for the Project is "To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme

weather events.” (Final EIR and Draft EIR, Ch. 2, p. 2-2.) Despite that, the EIR claimed climate change “is not considered an environmental impact under CEQA.” (*Id.*, Ch. 4, p. 4-3.) Thus, Chapter 30 on Climate Change, does “not determine the level of significance of change.” (*Id.*) “[N]o CEQA significance conclusions are presented for potential impacts [after 2040], and no mitigation measures are recommended to reduce potential impacts” after 2040. (*Id.*, Ch. 4, pp. 4-5, -6.) DWR’s hydrologic modeling primarily focused on conditions in 2040. (*Id.*, Ch. 30, Climate Change, pp. 30-2, -24, -25.) DWR’s EIR fails to include any consideration of climate change impacts when the Project is projected to actually begin operations and diverting enormous quantities of water in the face of reduced freshwater flows and increasing sea level rise.

The EIR acknowledges some of the adverse effects of climate change on water resources, including decreased snowpack and “lower spring and summer stream flow;” increased wildfire risk, which “heightens the risk of catastrophic fire impacts to water supply and quality;” “[d]ecreased water quality in estuaries during droughts;” and “[i]ncreased saltwater intrusion in the San Francisco Bay Area and the Sacramento-San Joaquin Delta as sea level rises.” (Final EIR and Draft EIR, Ch. 30, p. 30-11.) “By 2050, extreme Delta drought conditions are projected to occur five to seven times more frequently (Delta Stewardship Council 2021:5-62).” (Final EIR and Draft EIR, Ch. 30, pp. 30-18, -19.)

The EIR’s discussion and analysis of the effect of climate change in the areas of changing snowpack, increased water temperature, increased evapotranspiration, rim dam water management, flood flows, and upstream fishery habitat is inadequate. DWR’s EIR admitted “Future surface water conditions are expected to change considerably when compared to existing conditions as a result of climate change and sea level rise.” (Final EIR and Draft EIR, Ch. 5, p. 5-16.) DWR’s EIR also admitted that climate change “will affect water quality in the Delta in the future and may require changes in in-Delta water use patterns and upstream reservoir management.” (*Id.*) DWR’s CEQA Findings made similar admissions including that Delta inflows will be reduced during future dry periods. (CEQA Findings, pp. 8-4, -5.) DWR’s EIR admitted that “The project alternatives potentially would have negative impacts on critical fish habitat and special status species.” (Final EIR and Draft EIR, Ch. 30, p. 30-24.)

The California Water Plan 2023 Update issued April 3, 2024, states at the very beginning,

In the five-year period since the publication of California Water Plan Update 2018 (Update 2018), climate change has put unprecedented stress on natural and human systems. During that time, Californians experienced increased wildfires, rising sea levels, and highly variable precipitation and runoff patterns that manifested as historic droughts and floods — all of which increased socio-economic uncertainty. Although climate change certainly is not the only water-related challenge disrupting natural and human systems, all water sectors are vulnerable to its interrelated impacts. Moreover, California’s frontline communities, those most vulnerable to climate-driven impacts, are anticipated to face them earlier and more severely. (Executive Summary, p. ES-1.)

The reduced freshwater flows resulting from diversions for the Delta Conveyance Project coupled with reduced freshwater flows resulting from climate change will have significant adverse effects on surface water, water supply, listed fish species, water quality and public health.

### **C) Additional Proposed Action Adverse Environmental Impacts**

#### **1) The Proposed Action would have Significant Adverse Environmental Impacts on Listed Fish Species**

Potential substantial impact on endangered, rare, or threatened species is per se significant. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449; CEQA Guidelines § 15065(a)(1).)

The EIR admits “The project alternatives potentially would have negative impacts on critical fish habitat and special status species.” (Final EIR and Draft EIR, Ch. 30, p. 30-24.) The EIR admits the impacts of Project operations before mitigation will be significant on Fish and Aquatic Species. (Final EIR and Draft EIR, Executive Summary, p. ES-33, Impact AQUA-1.) The EIR makes specific admissions that Project operations will be significant on Sacramento River Winter-Run Chinook Salmon (*Id.*, Executive Summary, p. ES-33, Impact AQUA-2), Central Valley spring-run Chinook salmon (*Id.* p. ES-33, Impact AQUA-3), and on Central Valley steelhead, Delta smelt, and longfin smelt. (*Id.*, p. ES-34, Impacts AQUA-5, -6. -7.) Winter-run Chinook salmon are a state- and federally-listed endangered species; Central Valley spring-run Chinook salmon are a federally-listed threatened species; Central Valley steelhead are a federally-listed threatened species; Delta Smelt are a federally-listed threatened species; and longfin smelt are a state-listed threatened species and are proposed for federal listing as

endangered.

The impacts of diversions of freshwater flows for the Project would be significant and cannot be mitigated for the reasons set forth above in sections IIIB2c and IIIB5 of this Protest.

## **2) The Proposed Action would have Significant Adverse Environmental Impacts on Terrestrial Biological Resources**

Potential substantial impact on endangered, rare, or threatened species is per se significant. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449; CEQA Guidelines § 15065(a)(1).)

The EIR admits the Project would result in impacts to numerous special-status invertebrate species, including federally-listed threatened vernal pool fairy shrimp and federally-listed endangered vernal pool tadpole shrimp (Draft EIR, Ch.13 p. 140, Impact BIO-14), federally-threatened valley elderberry longhorn beetle (Draft EIR, Ch. 13, p. 157, Impact BIO-18) and CESA candidate Crotch's bumble bee (Draft EIR, Ch 13, p. 169, Impact BIO-21). Impacts include habitat loss, habitat fragmentation, potential for injury or mortality, and disruption of normal behaviors.

The EIR also admits that all project alternatives would result in impacts to many special-status vertebrate species, including the federally-threatened California tiger salamander (Draft EIR, Ch 13, p. 179, Impact BIO-22), western spadefoot toad, which was recently proposed as threatened under the federal ESA (Draft EIR, Ch 13, p. 191, Impact BIO-23), federally-threatened California red-legged frog (Draft EIR, Ch 13, p. 201, Impact BIO-24), western pond turtle, which was recently proposed as threatened under the federal ESA (Draft EIR, Ch 13, p. 212, Impact BIO-25), federally-threatened giant garter snake (Draft EIR, Ch 13, p. 240, Impact BIO-30), federally-threatened western yellow-billed cuckoo (Draft EIR, Ch 13, p. 252, Impact BIO-31), greater sandhill crane and lesser sandhill crane (Draft EIR, Ch 13, p. 277-278, Impact BIO-32), federally-endangered California least tern (Draft EIR, Ch 13, p. 293, Impact BIO-34), state-threatened Swainson's hawk (Draft EIR, Ch 13, p. 341, Impact BIO-39), CESA candidate burrowing owl (Draft EIR, Ch 13, p. 351-352, Impact BIO-40), federally-endangered least Bell's vireo (Draft EIR, Ch 13, p. 374, Impact BIO-42), state-threatened tricolored blackbird (Draft EIR, Ch 13, p. 386-387, Impact BIO-44), and federally-endangered San Joaquin kit fox (Draft EIR, Ch 13, p. 408, Impact BIO-46). Impacts include habitat loss (including roosting and nesting sites and foraging habitat),

habitat fragmentation, barriers to dispersal, potential for injury or mortality, and disruption of normal behaviors, all of which should be considered significant.

Each of the impacts listed above can individually impact population stability for these threatened and endangered species; together, such a suite of impacts is likely to push local and regional populations closer to extirpation. For species such as these that are already declining due to multiple (and often synergistic) threats, any decline—no matter how localized—diminishes the species’ resiliency and makes it that much harder to avoid extinction. The impacts to sensitive species that the DEIR outlines are therefore significant.

The EIR also admits that many special-status plant species will be impacted by the Project. These species include, but are not limited to, alkali milk-vetch, brittlescale, recurved larkspur, Jepson’s button-celery, Delta button-celery, diamond-petaled California poppy, San Joaquin spearscale, Boggs Lake hedge-hyssop, woolly rose-mallow, Delta tule pea, legenera, Heckard’s peppergrass, Mason’s lilaepsis, shining navarretia, California alkali grass, Sanford’s arrowhead, long-styled sand-spurrey, Susuin marsh aster, saline clover, and caper-fruited tropidocarpum—all of which are assigned the highest California Rare Plant Ranking for extant species (1B), indicating rare, threatened, or endangered species (DEIR Appendix 13A). Impacts include direct take and habitat loss, either of which would significantly impact plant populations. For rare, threatened, and endangered species, which often experience compounding threats, the loss of any individual can represent a significant cost, reducing the species’ ability to persist. Habitat loss also greatly impacts these species. Many endemic California plant species are expected to experience range reductions of 80% or greater within a century due to climate change effects including increased temperatures and changes in precipitation. Destroying or damaging the limited habitats that currently exist sets our sensitive native plants up for extinction in the future.

### **3) The Proposed Action would have Significant Adverse Environmental Impacts on Water Quality**

The diversions of freshwater flows for the Project would have significant adverse impacts on water quality. The Water Board April 15, 2020, comment letter on the Notice of Preparation (NOP) explained,

The EIR should include comprehensive water quality analyses to estimate potential impacts to beneficial uses that may occur as a result of the Project

and identify specific mitigation measures to reduce, mitigate, or avoid adverse impacts potential for the Project to cause or contribute to potential significant environmental impacts related to salinity, submerged and floating aquatic vegetation, harmful algal blooms, mercury, nutrients, dissolved oxygen, dissolved organic carbon, turbidity, temperature, and other water quality constituents. The environmental analysis should assess the effects of any changes in water residence time and flows within Delta waterways, in the Stockton Deep Water Ship Channel, and south Delta channels in particular. Mitigation measures should be proposed for adverse impacts to water quality conditions including dissolved oxygen, frequency and severity of harmful algal blooms, and excessive aquatic weed growth. (Water Board Letter p. 8.)

DWR's Draft EIR admitted,

When the effects of implementing any one of the project alternatives on water quality are considered together with the potential effects of all past, present, and reasonably foreseeable future projects, including the projects listed in Table 9-54, the cumulative water quality condition in the Delta for the following constituents could be significant.

- Boron
- Bromide
- EC
- Mercury
- Organic Carbon
- Pesticides
- Selenium
- CHABS (Draft EIR, Ch. 9, Water Quality, p. 9-198.)

The Water Board's December 16, 2022, comment letter on DWR's Draft EIR explained,

Throughout Section 9.3.3, the Draft EIR states that for whichever water quality constituent is being analyzed, project alternatives would not cause more frequent exceedance of the Bay-Delta Plan objectives for the constituent because project facilities would be operated to objectives as implemented through D-1641. However, since D-1641 was implemented, water quality and Delta outflow objectives have not been achieved during drought conditions and DWR and Reclamation have requested temporary

urgency changes to water right requirements to relax those requirements. The EIR should demonstrate how the Project will be operated to avoid the need for future temporary urgency change petitions (TUCPs) and future violations of water quality and flow requirements. Additionally, D-1641 does not account for all possible water quality concerns in the Bay-Delta, such as harmful aquatic blooms. (Water Board Letter pp. 9-10.)

The EPA said in its March 16, 2023, comments on the Army Corps Draft EIS on the Project, “EPA continues to believe that the operation of the proposed project has the potential to cause or contribute to long-term exceedances of regulatory water quality standards.” (EPA Letter p. 2.) EPA’s detailed comments included, “EPA’s review of the proposed project, as evaluated in the Draft EIS, indicates potential secondary effects include, but are not limited to: (1) changes in the salinity gradient and the location and volume of the low salinity zone in all seasons (40 CFR 230.25); (2) adverse effects on water quality including the amplification of water quality impairments;.. (**Exhibit 6**, EPA detailed comments, first page.)

Section IIIB6 above of this Protest contains additional information on the significant adverse impacts on water quality that will be caused by the diversions of freshwater flows for the Project.

Finally, the very first page of DWR’s Petition submission on February 22, 2024, says respect to climate change conditions including “extreme heat waves” that “These changes are likely to reduce water quality in the Delta,..” So, the Proposed Action reduction of Delta flows will further worsen the climate change reduced Delta water quality. The Delta Conveyance Project will have adverse impacts on water quality.

#### **4) The Proposed Action would have Significant Adverse Environmental Impacts on Public Health**

By reducing freshwater flows through the Delta, the diversions for the Project would have significant adverse environmental impacts on public health by increasing harmful algal blooms. The Water Board said in its December 16, 2022, comments on DWR’s Draft EIR,

As noted in the Draft EIR, cyanobacteria blooms are a significant water quality concern in the Delta. The severity and frequency of blooms has increased in the last decade, as have the types of cyanobacteria toxins detected. The Draft EIR concludes that the project would have no



significant impact on cyanobacteria blooms. The potential impact is difficult to determine however, because the analysis is incomplete. The impacts of project operations on cyanobacteria blooms were determined by an assessment of changes in bloom drivers at nine assessment locations concentrated in western and north central channels and mainstem rivers.

However, the assessment locations did not encompass small and mid-sized tributary channels in the eastern, central, and southern portions of the Delta. The impacts analysis should directly examine potential impacts in small and mid-sized channels (e.g., Disappointment Slough, Turner Cut, North Fork Mokelumne and Grant Line Canal) where responses to subtle changes in water residence time, source water proportion, and water temperature are expected to have greater effects on cyanobacteria growth and persistence than in main river segments. Without assessing potential for increasing cyanobacterial harmful algal blooms (CHABs) across the entire Delta, it is difficult to determine impacts of the proposed Project operations. (Water Board Letter p. 10.)

Section IIIB7 above of this Protest contains additional information on the adverse public health impacts of harmful algal blooms that will be caused by the diversions of freshwater flows for the Project.

The diversions of freshwater flows for the Project would have significant adverse impacts on public health by worsening the harmful algal blooms already occurring in the Delta.

#### **5) The Proposed Action would result in Adverse Indirect Physical Changes in the Environment**

The Delta Conveyance Project would allow the exporting of more water from the watershed. The development of other projects including the Sites Reservoir, Shasta Dam raise, Temperance Flat Reservoir, Delta-Mendota Canal, and Mid-Valley Canal will likely occur if the Delta Conveyance Project is developed. These other water projects would result in foreseeable indirect physical changes in the environment.

##### **a) The Delta Conveyance Project Will Increase Pressure for Projects that Dam and Divert North-State Rivers**

A consequence of the Delta Tunnel is that its beneficiaries (SWP and CVP contractors and potentially others) will be more likely to invest in additional water storage in Northern California due to the perception of greater and more reliable

transport capacity through the Delta. Put simply, investments in increased north-state reservoir capacity and diversions will be more attractive to export customers. This will also be true regarding non-SWP/CVP reservoirs.

Land dedicated to reservoirs becomes denuded of natural vegetation and becomes a biological desert relative to historical ecology. Dams fragment ecosystems, block fish passage, and have major impacts on riparian habitat. Dam operations alter flows in natural channels and can cause temperature changes that negatively impact native fish species, riparian vegetation, and on-river recreation. These impacts are consequential and reasonably foreseeable results of the Tunnel.

The intent of Delta “conveyance,” has always been to meet unmet demand. This was true for the Trans-Delta System, the Peripheral Canal, California WaterFix, and remains true for the current iteration, the Delta Tunnel. Incumbent in efforts to export more water is the addition of new dams and diversions in the North state. If built, the Tunnel will remove the bottleneck that currently limits water exports – operational and ecological constraints in the Delta – and thus will remove a major barrier to new dams and diversions. Previously uneconomic or otherwise infeasible projects will become more attractive because they may pencil out with increased delta export capacity.

Thus, the Tunnel will directly threaten the Sacramento River (major proponents and investors in the proposed Sites Reservoir and Shasta Dam Raise have stated on record that the Tunnel would make these projects more feasible/attractive), and the North Coast Wild and Scenic Rivers (in recent years Tulare County has advocated to remove the Wild and Scenic status of these rivers). Thus, the Delta Tunnel will cause indirect changes in the physical environment, which will harm North state rivers, water resources, and aquatic ecosystems.

The tendency for the Tunnel to increase pressure to dam and divert North state rivers is discussed in detail in the comments of Friends of the River et al. on the Draft Environmental Impact Report for the Delta Conveyance Project, incorporated herein.

#### **6) The Proposed Action would negatively impact the Trinity River and Lower Klamath River**

The Delta Conveyance Project would allow the export of more water from the Trinity River watershed. The SWP/CVP Joint Point of Diversion will allow additional Trinity River water to be diverted through the Clear Creek Tunnel to the Sacramento

River and shipped south through the DCP. The Trinity River has inadequate temperature protection to prevent temperature dependent mortality of federal and state threatened Coho salmon, state threatened Spring Chinook and the tribal, commercial and recreationally important Fall Chinook. A 2017 Bureau of Reclamation Record of Decision allows use of Trinity River water to prevent a repeat of the catastrophic 2002 Lower Klamath River fish kill where 65,000 adult salmon perished. Depletion of the Trinity Reservoir cold water pool as a result of the Delta Conveyance Project will further jeopardize salmon runs on the Klamath River and negate dam removal efforts.

### **7) The Proposed Action would result in Adverse Cumulative Environmental Impacts**

The approval of the new point of diversion for the Delta Conveyance Project would result in adverse cumulative impacts in conjunction with other related projects including the Sites Reservoir, Shasta Dam raise, Temperance Flat Reservoir, Delta-Mendota Canal, and Mid-Valley Canal. The approval for the Delta Conveyance Project will also result in adverse cumulative impacts resulting from changes in SWP and Central Valley Project (CVP) operations reflecting approval of the Delta Conveyance Project.

#### **a) The Proposed Action would result in Adverse Cumulative Impact on Demand**

The demands for consumptive water South of the Delta have often exceeded the amount that would sustainably support beneficial uses in the San Francisco Bay-Delta estuary. The consequent increases in temperature and reduction in flows through the Trinity watershed, Sacramento watershed, and the Delta has led to ecological collapse of California fisheries, riparian environments, and an estuary of national significance. Each new diversion, large and small, cumulatively contributes to the degradation of water quality, including temperature standards, and the degradation of beneficial uses of water in California.

The impacts of climate change, aridification in the west, and the increasing use of surface water to restore depleted groundwater resources will further stress fragile aquatic ecosystems and surface water supplies. Building the Delta Conveyance Project, and increasing conveyance capacity from the North state to the South state will increase the capacity for even more harmful North to South diversions. This is the opposite of encouraging local and sustainable water supply

sources, and will not promote a resilient water future in California. Instead, it will promote a culture of increased dependence on distant water supplies. Similar to adding more lanes to a freeway, this will ultimately result in increasing the traffic.

Meeting the increased capacity-driven demand can create environmental harm in two ways: 1) by the construction of marginally productive and environmentally harmful upstream projects, including, but not limited to: the proposed Sites Reservoir, Shasta Dam Raise, and the continued devastating Trinity River operations, and 2) Lucrative water sales and water transfers from local communities that enrich local water agencies but impoverish the environment and the community.

**b) The Proposed Action would result in Adverse Cumulative Impact on Flows and Flow Regime**

The Delta Conveyance Project will decrease flows through the Delta by 758 TAF (thousand acre-feet) in wet years, 1,061 TAF in above normal years, 649 TAF in below normal years, 326 TAF in dry years, and 156 TAF in critical years. (Ch. 7.24, Table 7.24-1, p. 7.24-7.). Upstream of the proposed point of diversion, a related project, the Sites Reservoir Project, would further reduce Delta outflows by 275 TAF in wet years, 227 TAF in above normal years, 121 TAF in below normal years, 25 TAF in dry years, and 20 TAF in critical years. Cumulatively, these two projects alone stand to divert over 1 million acre-feet of Delta inflow in some years (Table FOR 1).

**Table (FOR 1) Modeled decreases in Delta inflows caused by the Delta Tunnel and Sites Reservoir, by water year type (acre-feet).<sup>a</sup>**

	Delta Tunnel	Sites Reservoir	Cumulative (Sites and Delta Tunnel)
Wet	758,000	275,000	1,033,000
Above Normal	1,061,000	227,000	1,288,000
Below Normal	649,000	121,000	770,000
Dry	326,000	25,000	351,000
Critical	156,000	20,000	176,000

<sup>a</sup> Data source: Draft Staff Report for the Sacramento/Delta Update to the Bay-Delta Water Quality Control Plan, Chapter 7.24 Alternatives Analysis, Table 7.24-1: Change in Delta Outflow (TAF per year) that Could Occur as a Result of Several Water Infrastructure Projects. [Access online.](#)

The combined operations of the major water projects upstream of the Bay-Delta, including the Central Valley Project and State Water Project, are currently not able to meet scientific criteria for temperature, volume, or timing of flow to sustain regimes capable of supporting the ecosystems needed by fish, wildlife, and people. The cumulative reductions in flow and increased distortion of natural flow regime will add to the already catastrophic ongoing environmental impacts. The Board has identified the need for restoration of flow through the Bay-Delta watershed to address the decline of Bay-Delta aquatic ecosystems.<sup>12</sup> Additional and cumulative reductions in flow have the potential to irreparably harm Bay-Delta aquatic ecosystems and the communities that rely on them.

**c) The Update and Implementation of the Bay Delta Water Quality Plan Should be a Pre-Condition to Consideration of a Change in Point of Diversion**

The cumulative environmental impacts of the Delta Conveyance Project operations with the existing and proposed upstream water project operations (Sites Reservoir, Shasta Dam raise, Temperance Flat Reservoir, Delta-Mendota Canal, and Mid-Valley Canal), have the potential to devastate the watershed. The current scope of operational discretion for the Sites Reservoir Project alone is dangerously broad, and allows for harmful diversion of flows during times of drought and scarcity. It also allows for discretionary releases based on the business needs of the storage owners, without consideration of the needs of the environment. The Sites Authority has yet to publish an operational plan to address the many questions regarding how the project will be operated, and has yet left unsubstantiated most claims that the project will provide environmental benefits. The update and implementation of the BDWQ plan should be a pre-condition for considering any water rights or change in diversion for the DCP.

**8. The Proposed Action would result in Adverse & Cumulative Economic Impact**

The claimed projected cost of the Delta Conveyance Project is approximately \$16 billion. In 2020, The Natural Resources Defense Council (NRDC) estimated that the Metropolitan Water District of Southern California

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<sup>12</sup> Draft Staff Report for the Sacramento/Delta Update to the Bay-Delta Water Quality Control Plan, Chapter 1.3.1 Purpose and Need for Bay-Delta Update, pg. 1-9, 2023.

could be responsible for meeting 65% of the total \$15.9 billion cost (\$10.335 billion), which could end up with Southern California paying around \$450 million per year for 40 years for the cost of the tunnel (assuming low 3% interest rates and a 40-year borrowing term). This cost burden has the potential to dramatically increase the costs of imported water for Southern California residents. (*The Cost of the Delta Tunnel Threatens Social's Water Future*, Doug Obegi, October 30, 2020, <https://www.nrdc.org/bio/doug-obegi/cost-delta-tunnel-threatens-socials-water-future>)

The projected cost of the Sites Reservoir Project is approximately \$4.4 billion. Board documents of the Sites Authority indicate the allocated debt service combined with estimated average annual operating costs, would be approximately \$215 million per year. (*Joint Reservoir Committee & Authority Board Agenda Item 3.2, Plan of Finance / Big 3 Questions Update, May 19, 2023*) The cost of water in an average year with 260,000 AF of deliveries would be over \$800 AF. In critically dry years with lower deliveries, the costs per AF would increase dramatically. Adding these costs to the cost burdens of the Delta Conveyance Project will dramatically increase the costs of imported water to the South. The financial impact to rate-payers, particularly vulnerable communities would be significant.

## **9. The Proposed Action would result in Adverse Economic and Environmental Impacts to the Upper Watersheds of the Sacramento and San Joaquin Rivers**

The Delta Conveyance Project will add approximately 6000 cfs North to South conveyance capacity. Climate change is already bringing increased water market price volatility, particularly during times of shortages.

Spot water market price history in recent years shows the speed and magnitude of price changes from lows between \$200-\$400 AF during times of availability, rising approximately 400% to \$1200 during times of scarcity. (Analysis by [NASDAQ Veles Water Index](https://www.nasdaq.com/solutions/nasdaq-veles-water-index), <https://www.nasdaq.com/solutions/nasdaq-veles-water-index>.) For community water agencies with the ability to sell or transfer water this combination of price and feasibility factors represents a tremendous arbitrage opportunity.

However, this arbitrage opportunity must be balanced with the value of keeping the water in the rivers, streams, communities and counties of origin. The

upper watershed ecosystem values and the value of the local economy from recreation, tourism, family farms and vineyards can far outweigh any gains to the local water agency. As an example, the El Dorado Irrigation District would like to divert and transfer or sell more water out of the county. While this would undoubtedly benefit the EID itself, the people of El Dorado County not so much. A recent study of the Ecosystem value of the Upper American River Watershed found the watershed is a natural capital asset worth \$1.6 trillion over a 100 year period, based off a \$14.9 billion annual value. A companion analysis of the impact and value of outdoor recreation in the Upper American Watershed found the total economic output in the watershed resulting from visitor spending reached \$607 million in 2022. Direct consumer spending supported roughly 2,500 jobs in the region. Cumulatively, this resulted in over \$118 million in wages. Visitor spending generated nearly \$27 million in local and state taxes. The value of water in its own watershed can far exceed the value to ship it far away. The Delta Conveyance Project will make the short-term gains from water sales and transfers even more attractive, at a time when the much greater value of local economies and ecosystem values needs to be protected. (El Dorado Water Agency, An Incentive to Invest: Understanding the Economic Value of the Upper American River Watershed, March 2024) (Outdoor Recreation in the Upper American River Watershed: An Analysis of Economic Impact and Value, February 20, 2024)

## **CONCLUSION**

DWR's Petition for change in the point of diversion is premature. DWR has failed to provide the Water Board with an honest, accurate, comprehensive, and adequate EIR which would be the starting point for the Board's analysis. DWR's EIR fails to include CEQA analysis of the impacts of the Project on surface water or water supply. DWR's EIR fails to include the required range of reasonable alternatives. DWR's EIR fails to include honest and accurate CEQA analysis of the impacts of the Project on listed fish species, water quality, and public health. The Board should dismiss DWR's Petition or at least suspend all action on it unless and until DWR or the Board prepares and certifies an adequate EIR. In no event can DWR's Petition for change in point of diversion be approved by the Board. The Proposed Action is not in the public interest.

**Exhibits** furnished separately due to volume:

1. EPA Comment Letter, January 19, 2024, on *Water Board Staff Report/SED*
2. California Department of Fish and Wildlife 2022 Fall Midwater Trawl annual fish abundance and distribution summary
3. *Environmental Water Caucus Alternative To The Delta Conveyance Project*
4. *Sierra Club California's Smart Water Alternatives: To The Bay Delta Conveyance Project*
5. State Auditor Report, *Department of Water Resources Its Forecasts Do Not Adequately Account for Climate Change and Its Reasons for Reservoir Releases Are Unclear*
6. EPA Comment Letter, March 16, 2023, on USACE Draft EIS on the Delta Conveyance Project