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ADMITTED IN CALIFORNIA

July 1, 2018

The Honorable Hannah-Beth Jackson  
California State Senate  
State Capitol, Room 2032  
Sacramento, CA 95814

Re: **Memorandum for July 3, 2018 Informational Hearing: Opposing Premature Curtailment of Legislative Oversight Over DWR's Risky Proposal to Redefine the State Water Project Under the Premise of "Contract Extension"**

Dear Senator Jackson:

As background for the informational hearing scheduled for the Senate Natural Resources and Water Committee on July 3, 2018, this memorandum, prepared at the request of the California Water Impact Network (CWIN), analyzes the need for careful and probing legislative oversight over proposals of the Department of Water Resources (DWR) to amend and redefine key elements of the State Water Project (SWP) applying through 2085 under the benign-sounding premise of a "contract extension." The full scope of proposed changes to long-term SWP contracts remains unknown, and environmental and fiscal reviews remain far from complete. Nonetheless, DWR abruptly requested on May 10, 2018 that the Joint Legislative Budget Committee (JLBC) schedule the *final* legislative hearing required under Water Code section 147.5 prior to approving renewal or extension of SWP contracts.<sup>1</sup> This analysis, focusing on several legal and practical problems, should be reviewed along with the attached June 26, 2018 letter submitted jointly by CWIN and 16 other organizations opposing DWR's request, which explains the fiscal and policy risks in greater detail.

A contrived sense of urgency accompanies DWR's request, which in essence asks the Legislature to exercise oversight over major changes meant to govern the SWP for more than six decades by ending it just as it begins. A child born this week will reach adulthood before the SWP contract held by the Santa Barbara Flood Control and Water

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<sup>1</sup> DWR's request is at <https://www.water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>.

Conservation District (Santa Barbara FCD) expires on February 26, 2038. All of the 29 SWP contracts are not scheduled to expire until 2035 to 2042.<sup>2</sup> All SWP contractors long before then may choose whether to seek renewal of contracts on current terms or agree to revisions. Any proposed changes demand careful consideration of long-term needs and risks. Despite reaching a non-binding “agreement in principle” (AIP) with most, but not all, of the SWP contractors in 2014, and releasing a 2016 Draft EIR, DWR has neither reached consensus on binding contract terms nor completed environmental review.

Far from ensuring responsible legislative oversight, moving quickly to the JLBC hearing under Water Code section 147.5 will more likely end it, emboldening DWR after a minimum of only sixty days to move, without further legislative review, toward “final approval of the renewal or extension” of water supply contracts with SWP contractors.<sup>3</sup> Curtailing legislative oversight over DWR’s proposed changes would shortchange legal, environmental and fiscal accountability over some of the foremost changes proposed in the SWP’s history. This review highlights several problems:

- **Incompleteness and Prematurity:** DWR has not released a Final EIR or responses to comments, despite major criticisms before DWR closed public comment on the Draft EIR in October 2016, and lacks consensus on complete and final amendments.
- **Facilitation of Delta Tunnels and Other Risky Projects:** DWR’s contract extension amendments, despite their label, would remove timing and facilities limitations on revenue bond debt for the Delta tunnels (CaliforniaWaterFix), and would make it easier for DWR and the largest SWP contractors to impose further debt for other costly and risky projects.
- **Piecemealing of Proposed Contract Terms:** Oversight of the proposed contract extension must include integrated consideration of all DWR’s proposed SWP amendments, including additional pending WaterFix SWP amendments lacking an EIR.
- **Compounding the SWP’s “Too Big to Fail” Problem:** DWR’s proposed extension amendments, including the redefinition of SWP facilities, are neither necessary nor helpful to ensure continued SWP water deliveries, extend the contract maturity dates, or responsibly address operation and maintenance needs. On the contrary, the

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<sup>2</sup> See the list of execution and termination dates posted on DWR’s website: [http://wdl.water.ca.gov/swpao/watercontractextension/docs/00024-Copy%20of%20Water\\_Supply\\_Contracts\\_Termination\\_Dates.pdf](http://wdl.water.ca.gov/swpao/watercontractextension/docs/00024-Copy%20of%20Water_Supply_Contracts_Termination_Dates.pdf).

<sup>3</sup> Wat. Code, § 147.5 provides, in pertinent part, that “[a]t least 60 days prior to the final approval of the renewal or extension of a long-term water supply contract between the department and a state water project contractor, the department shall present at an informational hearing before the Legislature the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts.”

amendments could result in costly escalation of SWP indebtedness, belying their ostensible purpose to make costs for repairs and retrofits of SWP facilities more manageable.

- **Continuing Use of “Paper Water” and Unsustainable Delta Exports:** DWR’s extension amendments avoid chronic problems still facing the SWP, which climate change will likely worsen in the decades ahead: inability to deliver all but half or less of the “paper” amounts referenced in Table A of the SWP contracts, and unsustainable exports of water out of the Delta despite legal mandates to reduce that reliance.

These concerns reflect my independent review of primary documents, legal research, and experience reviewing SWP contracts for more than two decades. I have closely followed and studied the roles and responsibilities of DWR and SWP contractors since 1995, when I represented petitioners in their successful challenge to environmental review of the Monterey Amendments.<sup>4</sup>

The points raised here, however, are not simply tied to concerns of critics of those earlier amendments, or of the Delta tunnels. The SWP ultimately serves the people of California rather than any individual contractor.<sup>5</sup> Supporters as well as detractors of California WaterFix and other projects are united by the need to ensure that over next 67 years, SWP operation proceeds consistently with other laws, including those protecting other water users, areas of origin, the Delta, and the environment, and that any revised SWP contract terms realistically address the needs of the 21st century rather than an “aura of unreality.”<sup>6</sup> Legislative oversight over DWR’s proposed contract extension, and avoiding premature termination of that oversight, can assist in ensuring that any changes in SWP contract terms, as well as other laws, match with these modern needs.<sup>7</sup>

### **Incompleteness and Prematurity**

Water Code section 147.5 requires disclosure of the “terms and conditions” of DWR’s proposed amendments. Here, those terms remain incomplete and subject to substantial revisions or additions. DWR has still not finished the environmental review it recognizes as required for the contract extension. Although DWR released its Water Supply Contract Extension Draft EIR in August 2016, it has yet to release its Final EIR. DWR’s Executive Summary supporting its request for legislative hearing recognizes that

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<sup>4</sup> See *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal. App. 4th 892 (*PCL v. DWR*).

<sup>5</sup> See, e.g., Wat. Code, § 12931.

<sup>6</sup> *PCL v. DWR*, 83 Cal.App.4th at 912.

<sup>7</sup> See, e.g., A. Rossmann, *Bring Us Laws to Match Our Rivers*, California Law and Policy Reporter 18:4 (January 2008), <http://landwater.org/wp-content/uploads/2014/02/Bring-Us-Law-To-Match-Our-Rivers.pdf>.

the Final EIR is the document that will “serve as the basis for DWR and the individual contractors to determine whether to approve the Extension Amendment,” and that DWR does not plan to release the Final EIR until after the JLBC holds its statutory hearing.<sup>8</sup>

Holding the final hearing before DWR has even completed its operative EIR would undercut the very point of Water Code section 147.5, making it impossible to know whether DWR’s “terms and conditions” will match what may eventually govern the contract extension. The eventual terms cannot be deemed a foregone conclusion in the absence of that EIR, which must serve as the “heart and soul” of CEQA’s “meticulous process designed to ensure the environment is protected.”<sup>9</sup> CEQA requires an “interactive process of assessment and responsive project modification that must be genuine.”<sup>10</sup>

Here, the “terms and conditions” DWR proposes for the SWP contracts will not only affect the environment in a narrow sense, but also the public accountability and financial integrity of a water project serving millions of Californians. Moreover, CEQA is just one of numerous laws and legal precedents that did not yet exist when the original SWP contracts were executed. In any extended contract period, DWR and the SWP contractors must also exercise caution to ensure that contracts meet the requirements of other laws, including the foundational doctrines of public trust and reasonable use and the statutory mandate to “reduce reliance on the Delta.”<sup>11</sup> Accordingly, it also matters that the still-incomplete EIR process protects “informed self-government” as well as the environment.<sup>12</sup>

DWR’s hearing request and supporting documents fail to address comments on the contract extension amendments. Missing from DWR’s supporting materials are detailed comments, some with hundreds of pages of exhibits, which should be posted on

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<sup>8</sup> DWR, March 9, 2018, Executive Summary, p. 4, posted at <https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>.

<sup>9</sup> *PCL v. DWR*, 83 Cal.App.4th at 911.

<sup>10</sup> *County of Inyo v. City of Los Angeles* (VI) (1984) 160 Cal.App.3d 1178, 1185.

<sup>11</sup> Wat. Code, § 85021 (“The policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency”); Wat. Code, § 85023 (the constitutional principle of reasonable use and the public trust doctrine are “foundations of state water management policy” that are “particularly important and applicable to the Delta”).

<sup>12</sup> *Laurel Heights Improvement Assn. v. Regents* (1988) 47 Cal.3d 376, 392.

DWR's website and made available to committee members before any further hearings are held. Commenters identified still-unstudied project impacts and alternatives, and criticized DWR's continuing failure to ensure that its approach to the SWP contracts realistically conforms to the physical, environmental and legal constraints the SWP will face in the decades ahead.<sup>13</sup> They also noted how the amendments proposed by DWR, including its expanded definition of facilities, could negatively affect the financial integrity of the SWP, increasing the likelihood of subjecting taxpayers and ratepayers to costly new debt obligations for projects such as the Delta tunnels.

DWR has also failed to address other major concerns about the proposed contract extension predating these 2016 EIR comments. For example, during the scoping process for the contract extension nearly four years ago, Santa Barbara County Public Works requested DWR to "include in the EIR an analysis of the economic and legal impacts and implications relative to the continued pre-Prop 13 taxing authority with the Contract Extension Project; i.e., what are the impacts of assuming an extension of pre-Prop 13 taxing authority. The county is concerned that if a contractor default should occur, the County would be liable for covering the default without taxation ability that exists under the current contract because of its pre-Prop 13 legal status."<sup>14</sup> DWR has yet to provide the economic and legal analysis requested, and has also still not addressed other substantial criticisms raised in scoping comments.<sup>15</sup>

### **Facilitation of Delta Tunnels and Other Risky Projects**

DWR's effort to portray its proposed contract extension amendments as a prudent attempt to keep SWP costs reasonable largely hinges on its often-repeated claim that "the proposed project is separate and independent from the California WaterFix project."<sup>16</sup> In DWR's portrayal, the contract extension amendments are unrelated to the Delta tunnels,

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<sup>13</sup> For examples of significant comments with extensive supporting documents, see, e.g., Comments of Planning and Conservation League, PCFFA and Environmental Water Caucus, dated October 17, 2016, <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>; Comments of Center for Food Safety, dated October 17, 2016; [https://www.centerforfoodsafety.org/files/2016-10-17-water-supply-contract-extension-project-comments--final--reduced-1\\_70236.pdf](https://www.centerforfoodsafety.org/files/2016-10-17-water-supply-contract-extension-project-comments--final--reduced-1_70236.pdf).

<sup>14</sup> Santa Barbara County's comments are among the scoping comments posted at <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension/Files/Appendix-BNotice-of-Preparation-and-Comment-Letters-Received.pdf>.

<sup>15</sup> *Id.* (see, e.g., scoping comments of Central Delta Water Agency, PCL, and NRDC, among others).

<sup>16</sup> Contract Extension Draft EIR, p. 6-3.

and can be considered and acted on without waiting for a separate bundle of contract amendments that are expected, when completed, to reflect DWR's ongoing negotiations with SWP contractors on California WaterFix issues.

However, DWR's claim that its contract extension amendments are independent of California WaterFix is misleading and demonstrably wrong. In fact, DWR has long been aware that revenue bonds could not be issued covering expenditures for the Delta tunnels without enacting contract amendments. That is partly because financing for this multibillion-dollar tunnels project could not realistically fit within the current expiration dates of 2035 to 2042.

Beyond the time frame for repayment, facilities limitations in the existing SWP contracts would otherwise prevent the coverage of the Delta tunnels project, including California WaterFix or earlier variants such as BDCP. That existing contractual limitation on covered facilities, included in article 1(hh)(8) of the SWP contracts,<sup>17</sup> is specifically proposed for removal in DWR's contract extension amendments. Through the "extension" amendments, DWR proposes new authorization for "SWP revenue bonds to be issued to: (1) finance repairs, additions, and betterments to most facilities of the SWP without regard to whether the facilities were in existence prior to January 1, 1987, which is the current Contract requirement in Article 1(hh)(8); and (2) finance other capital projects (not already in the list in Article 1(hh) for which revenue bonds could be sold) when mutually agreed to by DWR and at least 80 percent of the affected Contractors."<sup>18</sup> When discussing revenue bonds in connection with the proposed Delta tunnels project, then called BDCP, "DWR's legal counsel" concluded that "BDCP is not on the list of approved projects that are eligible for funding, including through bond financing."<sup>19</sup>

Put another way, by enabling the financing and addition of new SWP facilities not meeting this earlier facilities limitation, the contract extension amendments would tangibly facilitate addition of the Delta tunnels to the SWP, and also make it easier for DWR and the most powerful SWP contractors to add further debt to finance other costly new facilities of their choosing. The prospect of enabling approximately additional \$17 billion in initial capital costs and \$47 billion in further financing costs for the Delta

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<sup>17</sup> See, e.g., Santa Barbara County Flood Control and Water Conservation District's SWP contract (Santa Barbara SWP Contract), art. 1(hh)(8), <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Santa-Barbara-County-Flood-Control-and-Water-Conservation-District/Files/Santa-Barbara-CC.pdf?la=en&hash=50978D6A89B5D21854ECA6CC160E3CAB9B9BFFAE>.

<sup>18</sup> Contract Extension Draft EIR, p. 4-5.

<sup>19</sup> See, e.g., Letter from Jake Campos, STIFEL, to Mary Lou Cotton, SWPCA at 4 (March 19, 2014, included as Exhibit A to PCL's EIR comments, *supra* fn. 13).

tunnels alone<sup>20</sup> belies DWR’s claim of fiscal prudence, and is likely to come at odds with more responsible and productive investments in 21<sup>st</sup> century water reliability and sustainability. Functioning as a wolf in sheep’s clothing, the neutral sounding “contract extension” amendments, as currently proposed, add to rather than reduce the costs and risks associated with the SWP, and SWP contractors will foreseeably seek to have taxpayers absorb those costs.<sup>21</sup> Rather than placing the SWP on “sounder financial footing going forward,” as DWR claims,<sup>22</sup> these amendments weaken accountability, offering contractual cover to make the SWP even more risky and costly for taxpayers and ratepayers.

### **Piecemealing of Proposed Contract Terms**

Rushing forward to the final legislative hearing would also facilitate piecemealed decision-making, at odds with CEQA and prudent planning. Doing so would frustrate integrated consideration of the Delta tunnels in the context of further California WaterFix-specific contract amendments under negotiation lacking even draft environmental review. These further proposed amendments, tied to ongoing efforts to revive the foundering financing for the troubled Delta tunnels project, are likely to propose new transfer provisions, among others, compounding the cumulative risks of proceeding with the contract extension. Legislative oversight over the contract extension should continue to allow for an integrated understanding of all the related contract amendments proposed to govern SWP contracts in the decades ahead.

### **Compounding the SWP’s “Too Big to Fail” Problem**

The statewide concern about DWR’s contract amendments redefining project facilities to enable indebtedness for the Delta tunnels and other projects raises particular concerns in Santa Barbara County. C-WIN has elsewhere documented its concerns that the SWP has not delivered water to Santa Barbara County’s South Coast water districts and cities “in a cost-effective and reliable manner,” and that new SWP indebtedness for the Delta tunnels “could result in vast economic hardship and financial turmoil” for the county’s agencies and ratepayers while diverting resources that could be better spent on

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<sup>20</sup> Goldman and Sachs, Water Fix Financing Strategies, p. 5 (March 17, 2017).

<sup>21</sup> See, e.g., Wat. Code, § 11652 (SWP contractors “shall, whenever necessary, levy upon all property in the state agency not exempt from taxation, a tax or assessment sufficient to provide for all payments under the contract”); article 34 of SWP Water Supply Contracts.

<sup>22</sup> DWR, Executive Summary (March 9, 2018), p. 2, posted at <https://www.water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>.

local efforts to improve water supply reliability.<sup>23</sup> As other letters have discussed as well, the Delta tunnels project remains seriously deficient in project definition and in its lack of a viable financing plan in compliance with laws.

DWR nonetheless argues that its proposed contract amendment extension is needed to spread payments past 2035 to 2042, and thereby avoid higher annual costs, for repairs and improvements in dams and other existing project facilities. This argument, however, is untenable on several grounds. First, the argument does not justify the broad amendments facilitating the Delta tunnels that DWR has actually proposed. Had DWR's priority been stabilizing expenses for operation and maintenance, it could have proposed narrower extension language, but did not.

Second, the claim that any of the SWP contractors, the Legislature or the public need to uncritically accept DWR's proposed extension language is not supported by the facts or by the language of the existing SWP project contracts. Article 4 of the current SWP contracts contains what is commonly known as the Evergreen Clause. That clause enables any SWP contractor, at least six months before SWP contracts are set to expire, to elect to receive continued service for an extended period, and sets forth the procedure in which DWR is to honor the request, including specific conditions noted "unless otherwise agreed to."<sup>24</sup>

The Evergreen Clause provides that "[o]ther terms and conditions of the continued service shall be reasonable and equitable and shall be mutually agreed upon. In the event that said terms and conditions provide for continued service for a limited number of years only, the Agency shall have the same option to receive continued service here provided for upon the expiration of that and each succeeding period of continued service."<sup>25</sup> This provision helps establish that to receive continued water service or ensure workable periods to cover expenditures for SWP operation and maintenance, SWP contractors—and the Legislature—need not hastily accede to DWR's proposed extension

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<sup>23</sup> See, e.g., C-WIN, *The Unaffordable and Unsustainable Twin Tunnels: Why The Santa Barbara Experience Matters* 7, 9, 18 (July 2016); ECONorthwest, *California WaterFix: Potential Costs to Santa Barbara County* (July 2016).

<sup>24</sup> See, e.g., Santa Barbara SWP contract, *supra*, article 4, at p. 12. The conditions, unless "otherwise agreed to," are:

(1) Service of water in annual amounts up to and including the Agency's maximum annual entitlement hereunder. (2) Service of water at no greater cost to the Agency than would have been the case had this contract continued in effect. (3) Service of water under the same physical conditions of service, including time, place, amount and rate of delivery, as are provided for hereunder. (4) Retention of the same chemical quality objective provision as is set forth herein. (5) Retention of the same options to utilize the project transportation facilities as are provided for in Articles 18(c) and 55, to the extent such options are then applicable.

<sup>25</sup> *Id.*

provisions, including those that could make the SWP more costly and risky. And although SWP contracts are substantially uniform, it is notable that two of the SWP contracts have retained pre-Monterey Amendments contract language.

Lastly, DWR's argument that costly improvements are needed for repairs, seismic retrofitting and the like is poorly matched with an extension proposal that, as discussed above, may end up weakening accountability over DWR and others seeking costly expansion of new facilities within the SWP. Although DWR mentions repairs needed at Oroville, the recent dam crisis at Oroville hardly seems like a sound basis to weaken oversight over DWR, as well as other contractors, when they wish to add costly new facilities that may even crowd out available resources for operation and maintenance. Rather, the Oroville crisis underscores the importance of listening to independent voices willing to ask difficult questions of DWR and other state water contractors needed to improve economic and environmental sustainability.<sup>26</sup> In a recent article focusing on hydropower issues and water projects, Professor Joshua Viers noted that "[l]arge scale water management systems in general, and California's water management system in particular, provide a good analogue to the financial system."<sup>27</sup> As was the case when financial systems appeared to some "too big to fail," a prudent system manager should not respond to crises by making it easier to add indebtedness on expensive new facilities, potentially at the expense of constructive steps to better manage existing ones.

Notably, the Delta tunnels project has prompted major criticisms and rethinking of "water reliability" paradigms from unexpected sources. In a recent op-ed piece, the mayor of Los Angeles warned that "we cannot rely solely on 20<sup>th</sup> century engineering for our 21<sup>st</sup> century water needs." Mayor Garcetti called for a new "Mulholland moment" focused upon local supplies and sustainability.<sup>28</sup>

### **"Paper Water" and Unsustainable Delta Exports**

In *PCL v. DWR*, the Court of Appeal rejected CCWA's attempt, with DWR's acquiescence, to stand in for DWR in reviewing the Monterey Amendments. The court criticized CCWA for neglecting water contractors and members of the public "not invited

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<sup>26</sup> See, e.g., Independent Forensic Team report, *Oroville Dam Spillway Incident* (2018), [https://drive.google.com/file/d/15fmj836-EnyYgPgf7\\_a\\_JIoK0N8J-mZE/view](https://drive.google.com/file/d/15fmj836-EnyYgPgf7_a_JIoK0N8J-mZE/view); R. Stork, et al., *The Oroville Dam 2017 Spillway Incident* (2017), [https://drive.google.com/file/d/15fmj836-EnyYgPgf7\\_a\\_JIoK0N8J-mZE/view](https://drive.google.com/file/d/15fmj836-EnyYgPgf7_a_JIoK0N8J-mZE/view).

<sup>27</sup> J. Viers and D. Nover, *Too Big to Fail: Limiting Public Risk in Hydropower Licensing*, 24 *Hastings Environmental L.J.* 143, 144 (2018).

<sup>28</sup> <https://www.dailynews.com/2018/03/03/los-angeles-new-mulholland-moment-for-safe-and-adequate-water-eric-garcetti/>.

to the table” and for failing to analyze elimination of a safeguard against reliance on “paper water” contract entitlements “worth little more than a wish and prayer.”<sup>29</sup>

Effective legislative oversight, rather than a hasty final hearing, should assist in ensuring that through any extended contract period, DWR finally, if belatedly, addresses seriously two continuing and systemic problems within the SWP. The first is the wide gap that continues to exist between Table A amounts in the SWP contracts and reliable water deliveries.<sup>30</sup> The second is that California has thus far failed, and in many respects barely begun, to fulfill the mandate of the 2009 Delta Reform Act and other laws requiring reliance on reduced water supplies from the Delta. When the California Supreme Court narrowly upheld the 2000 CALFED EIR, it candidly observed that the CALFED program was premised on the “unproven” theory that it was “possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta water exports through the CVP and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced.”<sup>31</sup>

Respectfully,

/s./

Roger B. Moore

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<sup>29</sup> *PCL v. DWR*, 83 Cal.App.4<sup>th</sup> at 905, 914-915.

<sup>30</sup> See, e.g., DWR, SWP Delivery Capacity Report, p. 21 (Dec. 15, 2017).

<sup>31</sup> Wat. Code, § 85021 (state policy of reducing Delta exports); see also *In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2000) 43 Cal.4th 1143, 1168.