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ADMITTED IN CALIFORNIA

September 10, 2018

The Honorable Holly Mitchell  
Chair, Joint Legislative Budget Committee  
California State Senate  
State Capitol, Room 5080  
Sacramento, CA 95814

**Re: The Joint Legislative Budget Committee Hearing Set for September 11, 2018,  
Cannot Lawfully Serve as the Legislative Hearing Required Before DWR  
Finally Approves Amendments Extending its Water Supply Contracts**

Dear Senator Mitchell:

Critics throughout California have wisely called for postponement of the prematurely rescheduled Joint Legislative Budget Committee hearing set for September 11. To the Department of Water Resources, this hearing will tripwire an end to legislative oversight over its misnamed “contract extension” amendments, which propose risky redefinition of the State Water Project facilities eligible for bond financing. These amendments are structured to include financing of the Delta tunnels and make it easier to impose debt for other risky projects through 2085. They would bundle major new risks and costs into the State Water Project under the misleading rubric of an “extension,” making it harder, not easier, to address problems of debt compression and responsibly cover operation, maintenance and repairs of the existing project.

This letter focuses on an even more basic problem. DWR is including the Committee in a risky gamble that the draft amendments DWR furnished to the Committee on May 10, 2018 meet DWR’s duty under Water Code 147.5 to present to 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.” Nothing in the history of section 147.5 suggests anything other than what these terms say. The “terms and conditions” must be the operative ones providing this template, not drafts subject to modification after responding to comments and completing review of related terms. But DWR’s draft extension amendments, which failed consensus even among the state water contractors and have garnered an outpouring of still-unanswered public criticism across the state, are far from ready for prime time.

To borrow a soccer analogy, if DWR relies on the Committee’s scheduled September 11 hearing, even if held, to fulfill its duties under Water Code section 147.5, it would amount to the legal equivalent of scoring an own goal. As confirmed in the Committee’s background paper for the September 11 hearing (page 3), DWR has no plans to complete the final EIR “until after the hearing has taken place”—an event DWR understands as ending Legislative oversight over any of its proposed amendments related to the Delta tunnels. But DWR’s own actions belie the urgency it attributes to completing “extension” of contracts that start to expire in 2035. Although DWR closed the public comment period on its Contract Extension Draft EIR in October 2016, DWR has yet to respond to these comments, and omitted them from its website and background documents for the legislative hearings. ([https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension.](https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension))<sup>1</sup>

Nothing in Water Code section 147.5, or any other law entitles DWR to schedule the required hearing without responding to comments and completing required review. Indeed, to suggest otherwise would stand the CEQA process on its head. As DWR has conceded, the still-unreleased Final EIR must “serve as the basis for DWR and the individual contractors to determine whether to approve the Extension Amendment.” ([https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension.](https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension))

No extension amendments can be adopted until after DWR later completes this process under CEQA and other requirements. Basing the Committee’s required hearing on the current draft would serve no purpose, other than to foment an avoidable legal dispute over whether any eventual “terms and conditions” match current ones. Relying on a premature hearing could also prejudice CEQA review, creating a disincentive to make constructive changes reducing environmental and financial risks in response to public comments. As DWR has learned the hard way after approving earlier contract amendments, the EIR must serve as the “heart and soul” of CEQA’s “meticulous process designed to ensure the environment is protected.” (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911.)

Other requirements of law also must be met before holding the required Legislative hearing. As outlined in the Delta Counties Coalition’s June 11, 2018 letter requesting hearing postponement, DWR has failed to completed disclosures and financial analysis required under Water Code 147, and piecemealed assessment of its two related sets of contract amendments. ([http://www.delta.saccounty.net/content/Documents/2018-06-11%20Letter%20to%20Joint%20Legisaltive%20Committee%20Re%20DWR.PDF\\_](http://www.delta.saccounty.net/content/Documents/2018-06-11%20Letter%20to%20Joint%20Legisaltive%20Committee%20Re%20DWR.PDF_))

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<sup>1</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>;

DWR seeks to rush through the contract extension without confronting the elephant in the room, already challenged in pending litigation by water contractors, counties and cities, and environmental critics: whether DWR lacked authority to impose the costs of the WaterFix tunnel project without reaching agreement to modify the water supply contracts. (See Delta Counties Coalition letter, *op cit.*) The Committee's background paper (page 3) reports DWR's latest attempt to avoid the elephant: "[t]he department believes that Article 1(ap) of the existing contracts, which defines 'Water System Facilities' for which revenue bonds may be sold, already authorizes the sale of bonds to finance construction of Water Fix facilities."

This statement needs deciphering. In the current contracts, Article 1(ap) does not exist. "Water system facilities" are defined in Article 1(hh).<sup>2</sup> The importance of this would have been clearer if DWR had disclosed and addressed comments on the 2016 Contract Extension Draft EIR. Commenters warned that DWR's "extension" amendments would remove Article 1(hh)'s major obstacle to covering revenue bonds for the Delta tunnels. (See, e.g., PCL, et al.'s October 17, 2016 comments on Contract Extension Draft EIR, p. 6.)<sup>3</sup> DWR knew what this meant. The March 19, 2014 STIFEL memo, Exhibit A to PCL's comments, page 4, noted that "DWR's legal counsel has concluded that BDCP is not on the list of approved projects that are eligible for funding, including through bond financing."

DWR did not simply conjure Article 1(ap). That is where the expanded definition of "water system facilities" appears in DWR's markup of the SWP contract to include its proposed extension amendments.<sup>4</sup> The provision is real, but only to describe the authority DWR wished it already had. In short, rather than providing a sounder financial footing, DWR's proposed amendments weaken accountability, offering contractual cover to make the State Water Project more risky and costly for taxpayers and ratepayers. We should only be at the beginning, not the end, of legislative oversight.

Respectfully,



Roger B. Moore

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<sup>2</sup> <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/The-Metropolitan-Water-District-of-Southern-California/Files/MWDSC-CC.pdf?la=en&hash=94D08E5487EED0E12E0119EA2D5C2EC0365C1FEF>.

<sup>3</sup> <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>.

<sup>4</sup> <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/CalWaterFix-contract-amendment/Files/Cont-Ext---Model-ConsolidatedContract-Final-for-Leg-4-10-18.pdf?la=en&hash=C90B58FD840FE055F7ADD5F9E3DBC9223B3827DF>.