



December 17, 2018

State Water Resources Control Board Hearing Officers
WaterFix Hearing Team

**Re: REQUESTS FOR OFFICIAL NOTICE AND FOR CEQA COMPLIANCE AND
JOINDERS IN OTHER FILINGS PERTAINING TO THE CALIFORNIA WATER FIX
PROJECT**

Dear WaterFix Hearing Officers and Hearing Team:

INTRODUCTION

Protestants Friends of the River (Friends) and Sierra Club California (Sierra Club) request official notice of significant new circumstances and changes in and affecting the California WaterFix Project that is the subject of the pending petition by the Department of Water Resources (DWR) and Bureau of Reclamation (Reclamation) to change points of diversion. Protestants request California Environmental Quality Act (CEQA) compliance with respect to the new circumstances and changes. A subsequent Environmental Impact Report (EIR) must be prepared addressing the changes and new circumstances before the Hearing could proceed.

As Winston Churchill said about Russia, this WaterFix project is now “a riddle wrapped in a mystery inside an enigma.”

JOINDER IN OTHER FILINGS

These protestants join in the letter filed earlier today, December 11, 2018, by Local Agencies of the North Delta et al., addressing “Re: Changes to Petition for California Water Fix/Delta Tunnels Project from Addendum to COA and Other New Agreements,” and the letter filed earlier today by the City of Stockton, Sacramento County, and Sacramento County Water Agency, addressing “Re: Substantial Changes to California WaterFix Project and Circumstances Surrounding Project from Addendum to Coordinated Operations Agreement (COA) and other New Agreements.”

CHANGES IN PROJECT AND CIRCUMSTANCES

Changes to Project and Circumstances from Addendum to COA and other New Agreements

These protestants adopt and incorporate herein by reference the letters by Local Agencies of the North Delta, et al., and by the City of Stockton et al., joined in above, and the exhibits attached and referred to therein. These letters set forth the known features of the recent changes as well as the fact that the changes “presage additional changes to the Project and/or information relevant to the key Hearing issues.” (City of Stockton et al. letter at p.3.)¹

Inconsistency of the Project with the Delta Plan

The project must be consistent with the Delta Plan adopted by the Delta Stewardship Council (DSC) in order to proceed. The DSC was created by the legislature by the Delta Reform Act of 2009, codified at Water Code §§ 85000 et seq. In preparation for the DSC public workshop on November 15, 2018, the DSC Staff recommended that DWR’s project be found *inconsistent* with the Delta Plan on several key grounds, including, absence of substantial evidence supporting findings to establish consistency with the coequal goals of the Delta Reform Act; absence of substantial evidence of compliance with requirement to show best available science; failure to demonstrate reduced reliance on the Delta; and failure to demonstrate compliance with Delta Flow Objectives or meet D-1641’s export-inflow ratio. (November 15, 2018, Agenda Item 1, DSC Report at p. 11 – 13.)

The Report stated (at. p. 1),

As summarized in the conclusion to this report and in the attached staff draft Determination, staff recommends that the Council conclude that substantial evidence does not exist in the record to support the Department’s findings that California Water Fix is consistent with the Delta Plan. Staff further recommends that the Council remand

¹ Official Notice is requested of all documents discussed in this letter, at the end with references.

the matter to the Department for reconsideration, pursuant to Water Code section 85225.25.

Following the November 15 DSC workshop, DWR withdrew its Certification of Consistency for WaterFix that it filed on July 27, 2018. (December 7, 2018, letter from DWR Director Karla Nemeth to Randy Fiorini, Chair, DSC.)

New Federal Policy to Maximize Exports Regardless of State Law or State Water Board Flow Objectives

With climate change fueling more severe and prolonged droughts, it is only a matter of time before the Tunnels would be used to take every last drop of water they can, just as Interior Secretary Ryan Zinke directed. On August 17, 2018, Secretary Zinke sent a memo to his staff with the Subject “California Water Infrastructure” that states:

Within 15 days, the Assistant Secretary - Water and Science, the Assistant Secretary for Fish and Wildlife and Parks, and the Solicitor shall jointly develop and provide to the Office of the Deputy Secretary an initial plan of action that must contain options for:

- o maximizing water supply deliveries; ...

The memo (copy attached) is posted on the website of California Congressman Jeff Denham at: https://denham.house.gov/uploadedfiles/8.17.18_doi_memo_on_california_water_infrastructure.pdf.

The same Memorandum from the Secretary of the Interior also directed Assistant Secretaries and the Solicitor to develop a plan of action for, among other things,

- *resolving issues with the State of California regarding the Coordinated Operations Agreement, the California Water Fix, and the potential enhancement of Shasta Dam;*
- *preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people; (Emphasis added.)*

It is imperative that a subsequent or supplemental EIR/EIS be prepared disclosing to the public the issues between the federal parties and DWR regarding the WaterFix project. The same is true with respect to measures that may be taken to maximize water supply deliveries.

There is more. On October 19, 2018, the president issued the *Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West*. (Copy attached.) The Presidential Memorandum in Section 2 (a) (ii) orders the Secretary of the Interior and the Secretary of Commerce to within 30 days designate one official to,

identify regulations and procedures that potentially burden the [California water infrastructure] project and develop a proposed plan, for consideration by the Secretaries, to appropriately suspend, revise, or rescind any regulations or procedures that unduly burden the project beyond the degree necessary to protect the public interest or otherwise comply with the law. For purposes of this memorandum, “burden” means to unnecessarily obstruct, delay, curtail, impede, or otherwise impose significant costs on must be the permitting, utilization, transmission, delivery, or supply of water resources and infrastructure.

These federal actions directed by the president and the Secretary of the Interior must be disclosed and analyzed in a subsequent or supplemental EIR/EIS addressing project operations.

THE CHANGES IN THE PROJECT AND CIRCUMSTANCES REQUIRE PREPARATION OF A SUBSEQUENT OR SUPPLEMENTAL EIR

A Subsequent or Supplemental EIR must be Prepared Disclosing, analyzing, and assessing the Changes and the resulting Environmental Consequences

CEQA requires a subsequent or supplemental EIR if substantial changes are proposed in the project or substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions of the EIR, or new information which was not known and could not have been known at the time the EIR was certified, becomes available. Public Resources Code §21166(a), (b), and (c).

The CEQA Guidelines are codified at 14 Code Cal Regs §15000 et seq. Guideline §15162 requires a subsequent, not just a supplemental, EIR if any of the above circumstances are present. Guideline §15163 does allow a supplemental EIR if any of the above circumstances are present, and, “Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.” Guideline §15163(a)(2).

Here, the changes in the project and circumstances are substantial, requiring a subsequent, not just a supplemental, EIR. The changes range from the Addendum to the COA and other new agreements, to the withdrawal of DWR’s certification of consistency of the Project with the Delta Plan, to the new federal policies to maximize exports. Again, this Project is now “a riddle wrapped in a mystery inside an enigma.”

“While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can.” (Guidelines, §15144.)” *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 938. A primary goal of CEQA is “transparency in environmental decision-making.” *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136. “CEQA requires full environmental disclosure.”

Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, 88.

A subsequent EIR must be prepared to analyze the changes and reveal the unknowns. Otherwise, the State Water Board and the parties will be proceeding in the dark. The CEQA and NEPQ required task for DWR and Reclamation is to reveal, not to conceal.

There is no Accurate, Stable, and Finite Project Description

Pursuant to CEQA,

[a]n accurate, stable and finite project description is the *sine qua non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. Only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project’s benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 [bracket internal citations omitted].”

Now, a subsequent EIR must be prepared to provide the required accurate, stable, and finite project description given the changes in the Project and the circumstances.

Moreover, pursuant to CEQA an EIR:

must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.

And:

The future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (“paper water”) are insufficient bases for decision-making under CEQA. *Vineyard Area Citizens*, 40 Cal.4th 412, 432.

A subsequent EIR is necessary to provide accurate and complete information on water sources and the impacts of providing water for the Project.

The environmental review of the COA and other Changes is Segmented from environmental review of the Change Petition

In addition, CEQA prohibits the piecemealing or segmentation of environmental analysis.

A lead agency must not piecemeal the analysis of several smaller projects that are part of a larger

project, in order to ensure “that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.” *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592. Pertinent analysis of the changes in the project and circumstances set forth above, must be addressed in a subsequent EIR. It is not lawful under CEQA to isolate the change petition issues in a vacuum from changes to the COA and the new federal policies to maximize exports. CEQA’s policy is to conduct integrated review. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 939, 942.

REQUESTS FOR OFFICIAL NOTICE AND ATTACHMENTS

Agencies may take official notice of any facts which can be judicially noticed by courts. Government Code § 11515. “The Board or presiding officer may take official notice of such facts as may be judicially noticed by the courts of this state.” 23 Cal. Code Regs § 648.2. Official notice is requested of the following documents referred to above:

December 12, 2018, Addendum to the COA Agreement between the United States and the State of California, attached as Exhibit A to the December 17, 2018 letter from Local Agency of the North Delta et al., incorporated in this letter at p. 2. The Addendum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code § 452 (c.) The Addendum is also an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.)

December 18, 2018, Westlands Water District Board of Directors Meeting, Item 5, attached as exhibit B to the December 17, 2018 letter from Local Agency of the North Delta et al., incorporated in this letter at p. 2. The document’s contents are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, subject to judicial notice under Evidence Code § 452(h.)

December 12, 2018, Memorandum of Agreement, between DWR and Reclamation, attached as Exhibit D to the December 17, 2018 letter from Local Agency of the North Delta et al., incorporated in this letter at p. 2. The Memorandum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code § 452 (c.) The Memorandum

is also an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.)

November 15, 2018, DSC Report, Agenda Item 1, attached hereto, referred to above at p. 2.

The Report is an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.) The Report's contents are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, subject to judicial notice under Evidence Code § 452(h.)

December 7, 2018, letter from DWR Director to DSC Chair, attached hereto, referred to above at p. 3. The letter is an official act of the executive Department of this state, subject to judicial notice under Evidence Code § 452 (c.)

August 17, 2018, Secretary of the Interior Memorandum, attached hereto, referred to above at p.3. The Memorandum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code § 452 (c.)

October 19, 2018, Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West, attached hereto, referred to above at p. 3. The Memorandum is an official act of an executive Department of the United States, subject to judicial notice under Evidence Code §452 (c.)

CONCLUSION

In conclusion, a subsequent EIR is necessary to address changes in the Project and surrounding circumstances ranging from the Addendum to the COA, to the new federal policies to maximize exports. That is necessary before a meaningful Hearing on the Petition can resume. Respectfully submitted,



E. Robert Wright, Senior Counsel
Friends of the River