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ADMITTED IN CALIFORNIA

December 11, 2018

Karla Nemeth, Director
California Department of Water Resources
1416 9th Street, Room 1115
Sacramento, CA 9581

via email (Janiene.Friend@water.ca.gov)

Re: Prematurity of Final Decision By Lead or Responsible Agencies to Authorize
DWR's Proposed "Contract Extension" Amendments

Dear Ms. Nemeth:

We represent counties and other agencies from the Delta region and northern Sacramento Valley in the coordinated proceeding in Sacramento County Superior Court on DWR's proposed California WaterFix project (JCCP 4942), including the Counties of San Joaquin, Contra Costa, Solano, Yolo, Butte, and Plumas, as well as Central Delta Water Agency, Contra Costa County Water Agency, Plumas County Flood Control and Water Conservation District, and Local Agencies of the North Delta. In DWR's pending WaterFix validation action in JCCP 4942, these public agencies, among others, dispute DWR's authority to impose billions of dollars in revenue bond debt for California WaterFix under the State Water Project (SWP) contracts and other laws.

DWR's efforts to impose binding debt for the Delta Tunnels project (a.k.a. "WaterFix") also relate closely to its proposed "contract extension" amendments to SWP contracts set to expire starting in 2035. The beleaguered and massively expensive Delta Tunnels project is and remains, the proverbial elephant in the room. The amendments not only extend the contracts through 2085; they also propose to remove existing constraints on covered "facilities" that would otherwise prevent imposing revenue bond debt for WaterFix, and potentially other costly projects opposed by some contractors and the public. Four members of Congress, noting that "it is clear that DWR's request for a contract extension is rooted in its desire to bond the cost of WaterFix," recently warned that making "such a significant and costly decision" would be premature and risky prior to determination of the validation action (Exhibit 1). Moreover, proceeding to final approval

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would piecemeal consideration of the extension amendments from a second set of “water supply” contract amendments facilitating WaterFix, for which Draft EIR comments are not due until January 9, 2019.

When DWR certified its Contract Extension Final EIR on November 13, 2018, it did not make a final project decision, and instead indicated that the State Water Project Analysis Office and Office of Chief Counsel would first issue a “follow-on” memorandum and recommendation. Metropolitan Water District of Southern California (MWD) and Santa Clara Valley Water District (SCVWD) appear to have improperly calendared the contract extension for consideration as responsible agencies without even waiting for the lead agency’s evaluation and project decision, much less any opportunity for public review and discussion. To avoid a high potential for confusion, uncertainty, and prejudice, decisions must clearly inform the public of the timing of any Notices of Determination under CEQA, and any final authorizations subject to the requirements of the validation statute (Code Civ. Proc., §§ 860, et seq.).

As detailed below, it is both premature and risky for DWR as lead agency, or any responsible agencies, to finally authorize DWR’s proposed contract extension amendments at this time. First, deficiencies in the record preclude final determination by both lead and responsible agencies under CEQA. Absent from the documents referenced in DWR’s November 13, 2018 certification memorandum and the responsible agency agenda items are the complete hearings, oral and written testimony (including testimony from one of the undersigned counsel attached in written form as Exhibit 2), and correspondence from closely related legislative hearings on DWR’s proposed contract extension. Hearings before the Senate Natural Resources and Water Committee (SNRWC) on July 3, 2018 and the Joint Legislative and Budget Committee (JLBC) on September 11, 2018, bear directly on the environmental review for the contract extension.¹ This includes the foundational issue of the extension project’s relationship to the Delta Tunnels and the separately reviewed Water Supply Contract Amendments—yet this critically important relationship is not analyzed in DWR’s Final EIR and certification.²

¹ See, e.g., DWR’s Water Supply Contract Extension web page, including all linked documents (<https://water.ca.gov/Programs/State-Water-Project/Management/Water-Supply-Contract-Extension>); SNRWC’s web page, including all linked documents for July 3, 2018 hearing and web link to video recording of hearing (<https://sntr.senate.ca.gov/content/2018-informationaloversight-hearings>); JLBC’s web page, including all linked documents for September 11, 2018 hearing and cancelled August 30, 2018 hearing (<https://www.senate.ca.gov/legislativebudget>); video link to September 11, 2018 JLBC hearing on proposed SWP contract extension (http://calchannel.granicus.com/MediaPlayer.php?view_id=2&clip_id=5820).

² See, e.g., SNRWC Background Brief to July 3, 2018 hearing, p. 17 (referencing the recognition of SWP contractors and DWR that the proposed contract extension amendments are “a necessary, but not sufficient condition to incorporate WaterFix into

Second, 2018 comments, mainly referenced to legislative hearings, underscore the prematurity of final approval. Public agency critics throughout California, from Plumas County and the Delta Counties Coalition to San Diego County, criticized DWR's efforts to finalize the contract extension without integrated review of all DWR's proposed amendments related to the Delta Tunnels, including the Water Supply Contract Amendments still awaiting public comment and completion of review. (Exhibit 3.) The Legislative Delta Caucus observed that these "poorly defined" amendments would have "potential adverse impacts far beyond their apparent scope. There is much that remains unknown regarding the extensive changes to the SWP contracts that are being proposed and how the changes will impact property taxes, water rates, the fiscal integrity of the SWP and General Fund." (Exhibit 4.) Following the 2018 legislative hearings, more than a dozen organizations identified numerous changed circumstances requiring additional environmental review since public comment closed in October 2016, only to have DWR, in its November 13, 2018 certification memo, respond with the *non-sequitur* that the general issue areas were discussed in 2016 (Exhibit 5). Commentary in major newspapers criticized the defective process and lack of transparency surrounding the contract extension, as well as DWR's attempts to leverage WaterFix indebtedness without adequate review and debate (Exhibit 6).

Third, testimony at the September 11, 2018 JLBC hearing undermines the premise of independence from WaterFix upon which DWR's separate Contract Extension Final EIR is founded. That includes your own testimony on DWR's behalf, following questioning from Senator Richard Pan, that DWR plans to "use these amendments to finance WaterFix," and the testimony of Rachel Ehlers of the Legislative Accounting Office that the contract extension amendments would "affect and facilitate" WaterFix.³ Facilitation of WaterFix through the contract extension amendments is also addressed in the testimony of Congressman McNerney and of Roger Moore at the same hearing.

Fourth, DWR sidesteps meaningful analysis of a major project element. (See, e.g., *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 904-920 (requiring CEQA analysis prior to amending contract provision).) As addressed in the legislative testimony of Roger Moore, echoing commenters on the Draft EIR (Exhibit 2), DWR's extension amendments would eliminate limitations on covered "facilities" under article 1(hh)(8) of current SWP contracts that would otherwise render WaterFix ineligible for revenue bond financing. The Final EIR fails to address public comments on impacts that would reasonably result from such a change in language. (See, e.g., PCL, et al.'s October 16, 2016 EIR Comments, p. 6, and Ex. A, p. 4.) By contrast, DWR's assurance that projects facilitated by the contract

the SWP," and the contention of many organizations that contract amendments remain premature while WaterFix issues are unresolved).

³ Video link to September 11, 2018 JLBC hearing, *op cit.*; see also Exhibit 5, pp. 2, 5, fn. 2, 16-17 (quoting DWR Director's testimony) and p. 13, fn. 46 (referencing testimony of Roger Moore).

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extension will be covered by separate CEQA review (e.g., FEIR 2-10, 134) ring hollow. DWR's Delta Tunnels EIR and project approval neither admitted nor analyzed dependence on a subsequent SWP contract amendment. Critically, CEQA review of later-approved projects would come too late to address the consequences of redefining covered "facilities," because the current contract language would already be eliminated.

Fifth, the FEIR undermines its premise that the contract extension amendments proposed by DWR have independent utility as a "separate, independent project" addressing debt compression problems. (FEIR, 2-9.) Debt compression is based on the comparatively short maturity dates of existing SWP contracts. (*id.*) And the FEIR recognizes that the Evergreen Clause in Article 4 of the SWP contracts already provides a way to extend these dates. (E.g., FEIR, 2-3 to 2-5, 2-33.) DWR has not shown its version of the amendments, including the proposed facilities redefinition, to be necessary to ensure continued water deliveries or responsibly address operation and maintenance needs. By facilitating the issuance of potentially billions of dollars to construct the Delta Tunnels project, and perhaps other projects not currently eligible, DWR may under the guise of risk reduction force a risky escalation of indebtedness.

Sixth, as addressed in the written testimony of Roger Moore and the comments of the Delta Counties Coalition (Exhibits 2, 3), Water Code prerequisites for proceeding to finality on the extension amendments (Wat. Code, §§ 147, 147.5) still have not been met.

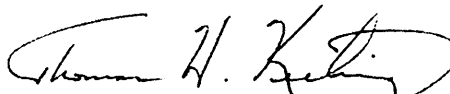
Lastly, to avoid the piecemealing problem discussed in Plumas County's letter (Exhibit 3), all DWR's proposed amendments must be reviewed and considered together prior to finality, including the proposed extension amendments and Water Supply Contract Amendments.

Respectfully,

Roger B. Moore
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Thomas H. Keeling
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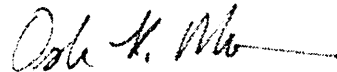


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County of Yolo, County of Butte, County of
Plumas, and Plumas County Flood Control
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cc: Metropolitan Water District of Southern California
Santa Clara Valley Water District
State Water Contractors, Inc.

EXHIBIT 1