

Friends of the River
1418 20th Street, Suite 100
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March 25, 2019

via email and regular mail

The Honorable Wade Crowfoot, Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

The Honorable Jared Blumenfeld
Secretary, CalEPA
1001 I Street
Sacramento, CA 95812

Re: **Rethinking California WaterFix**

Dear Secretary Crowfoot and Secretary Blumenfeld:

Our public interest organizations wish you both the very best in your efforts to protect and restore the San Francisco Bay-Delta estuary.¹ After years of frustration we were heartened by Governor Newsom's State of the State Address on February 12, 2019. Of special significance, the Governor said in addressing what he wanted to see,

And recycling projects like we're seeing in Southern California's Met Water District, expanding floodplains in the Central Valley, groundwater recharge, like farmers are doing in Fresno County. We need a portfolio approach to building water infrastructure and meeting long-term demand.

As the Governor said, "Our first task is to cross the finish line on real agreements to save the Sacramento-San Joaquin Bay Delta."

The San Francisco Bay-Delta watershed covers more than 75,000 square miles and includes the largest estuary on the West coasts of North and South America. It also contains the only inland Delta in the world. Virtually everyone involved recognizes that the Delta needs more freshwater flowing through it, not less. Presently, water for export is diverted from the south Delta. This is called "through-Delta conveyance." The proposed California WaterFix Delta Water Tunnel project would worsen the existing crisis in the Delta by diverting massive quantities of freshwater upstream from the Delta. The flows diverted upstream would no longer provide any benefits by first flowing through the already impaired Delta.

In addition to the environmental degradation that would be caused by diverting water for exports before rather than after the water flows through the Delta, there is a simple but often overlooked economic fact. The existing through-Delta conveyance is already operating and paid for. The proposed WaterFix Tunnel that would reduce freshwater flows through the Delta would be a massive new public works project costing billions of dollars. The billions of dollars spent on a Water Tunnel would not be available to provide clean drinking water for Californians and for development of modern 21st century water solutions including conservation and recycling.

A brief summary of key issues follows. *First*, it is time finally for the Department of Water Resources (DWR) to develop and consider the required range of reasonable alternatives to a Tunnel project. *Second*, the new reality is that the federal government is now committed to maximizing exports regardless of the consequences for the Delta making a Tunnel project a grave danger to the Delta. *Third*, an honest statewide benefit-cost analysis must be prepared on any proposed Water Tunnel project. *Fourth*, a subsequent EIR must be prepared on the changed

¹ AquAlliance, California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity, Environmental Justice Coalition for Water, Environmental Water Caucus, Friends of the River, Restore the Delta, and Sierra Club California join in this letter. This letter is also copied by email to DWR Director Karla Nemeth and CDFW Director Charlton Bonham.

project and circulated for public review and comment pursuant to CEQA. And, *fifth*, it is time to ensure that environmental justice communities are included in water decision-making.

Your Predecessors have Consistently Refused to Develop and Consider the Required Range of Reasonable Alternatives to a Tunnel Project

You may not be aware that your predecessors have never considered the common sense and CEQA (California Environmental Quality Act) required range of reasonable alternatives in the Bay Delta Conservation Plan (BDCP) now California WaterFix project process. This tunnel vision goes back eight long years. The National Academy of Sciences declared in reviewing the then-current version of the draft BDCP back in 2011 that,

[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization-- in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan. (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011.)

The Final WaterFix Environmental Impact Report/Environmental Impact Statement (EIR/EIS) (December 2016) did nothing to cure the persistent, stubborn failure to include the required range of reasonable alternatives in the previous Drafts that had been issued for public and decision-maker review. As admitted by the Final EIR/S,

The 18 action alternatives are variations of alternative water conveyance plans and restoration actions or Environmental Commitments that differ primarily in the location, design, conveyance capacity, and rules that would determine the operation of water conveyance facilities. For instance, the alternatives range from the proposed construction of one 3000-cubic foot per second (cfs) intake to five such intake facilities, representing a range of north Delta conveyance capacities from 3000 cfs to 15,000 cfs. (Water Fix Final EIR/S, Vol.I, Chapter 3, Alternatives, p 3-2.)

Instead of real alternatives, all there have been are the same project dressed up in different outfits. Our organizations have been unsuccessfully seeking to persuade your predecessors to include the obvious alternatives of increasing fresh water flows through the Delta by reducing exports for more than seven years now.

The Ninth Circuit Court of Appeals reversed a district court decision denying environmental plaintiffs' summary judgment because the challenged environmental document issued by the Bureau of Reclamation under NEPA (National Environmental Policy Act), "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*, 655 Fed.Appx. 595, 2016 WL 3974183*3 (9th. Cir., No. 14-15514, July 25, 2016) (Not selected for publication.) "Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of

discretion and the agency did not adequately explain why it eliminated this alternative from detailed study.” (*Id.* at *2.) 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.* at *3.)

The requirement under NEPA (also true under CEQA) to consider the alternative of reducing exports to increase flows through the Delta is so obvious that the Ninth Circuit’s decision was not selected for publication because no new legal analysis was required to reach the decision. The decision pertained to interim two-year contract renewals. If the alternative of reducing exports must be considered during renewal of two-year interim contracts, it most assuredly must be considered during the course of the epic decision faced now whether to build and operate an expensive Water Tunnel.

Alternatives reducing exports must be considered given the mandates of the Delta Reform Act. (Water Code §§ 85000 et seq.) The Act establishes the policy of the State of California “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 Act establishes co-equal goals meaning “the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Water Code § 85054.) The Act expressly requires that the BDCP, now called the WaterFix, evaluate “A reasonable range of Delta conveyance alternatives, including through-Delta,” as well as new dual or isolated conveyance alternatives. (Water Code § 85320(b)(2)(B).)

Your new Administration has the opportunity to apply common sense and comply with CEQA by developing and considering real alternatives to a WaterFix Tunnel.

The New Reality is that the Federal Government is now Committed to Maximizing Exports Regardless of the Consequences for the Delta

In the real world the governing political landscape has changed. As has been said as to other issues, “hope is not a plan.” Until recently, however naïve it might have been, the hope was that if the WaterFix Tunnel project was approved and constructed federal and state agencies would act in good faith to keep too much water from being diverted so as to cause even further damage to the already impaired Delta. There is no longer any basis for such hope with respect to the federal government.

With climate change fueling more severe and prolonged droughts, it would only be a matter of time before a Water Tunnel would be used to take every last drop of water possible, just as former Secretary of the Interior Ryan Zinke directed in his August 17, 2018, memorandum to his staff on the subject “California Water Infrastructure.” The Memorandum stated, within 15 days, the Assistant Secretaries “shall jointly develop and provide to the Office of the Deputy Secretary an initial plan of action that must contain options for: maximizing water

supply deliveries; . . .” That same memorandum included a directive to develop a plan of action for “preparing legislative and litigation measures that may be taken to maximize water supply deliveries to people; . . .”

On October 19, 2018, the president issued the *Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West*. (83 Fed.Reg. 53961, October 25, 2018.) The *Presidential Memorandum* in Section 2(a)(ii) ordered 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 the permitting, utilization, transmission, delivery, or supply of water resources and infrastructure.

Under the Constitution, the federal government can, and sometime does, preempt State laws to control a subject by federal law. Congress joined the war against California State law and environmental protection last year. A rider in the Interior Appropriations bill would have exempted the WaterFix project from Federal or State judicial review “under any Federal or State law.” The bill passed the House of Representatives. The House Appropriations Committee added another rider last year that would have exempted the Central Valley Project (CVP) and State Water Project (SWP) from judicial review. California Attorney General Xavier Becerra, former Resources Secretary John Laird, and Senators Feinstein and Harris opposed the Riders.² Fortunately, the Riders did not make it through the Senate.

If a Water Tunnel is approved and constructed, given the federal powers of preemption under the Constitution, there is a serious risk that the Tunnel would be used to maximize water exports no matter how great the resulting damage would be to Delta freshwater flows and water quality. The federal government now claims it can override California environmental protection laws and State Water Resources Control Board water allocations and protections. The new federal policy is to maximize water exports from the Delta. The only certainty is that the risk can be avoided by California *not* approving and constructing a Water Tunnel.

An Honest Statewide Benefit-Cost Analysis Must be Prepared on any Proposed Water Tunnel Project

DWR has never prepared a statewide benefit-cost analysis consistent with DWR’s economic analysis guidelines. Instead, DWR’s consultants prepare economic analyses narrowly focused on participating water agencies. This deception has been going on for years. Your new

² Secretary Laird letter, July 17, 2018. Attorney General Becerra letter, July 31, 2018.

State Administration now has the opportunity to require an honest statewide benefit-cost analysis. Up until now, Californians have been told that the beneficiaries of the project would pay all costs. The State's own concealed economic analyses show that a substantial public subsidy would be required because the project costs would greatly exceed project benefits.

Honest economic analysis is essential to allow informed decision-making. Every billion of the billions of dollars that would be spent on a Water Tunnel would not be available for modern 21st century alternatives such as water efficiency and demand reduction programs including urban and agricultural water conservation, recycling, and storm water recapture and reuse. Every billion of the billions of dollars that would be spent on a Water Tunnel would not be available to provide the clean drinking water for more than a million Californians called for by Governor Newsom in his February 12, 2019 State of the State Address.

Moreover, accurate economic information is required by NEPA and CEQA. In *Natural Resources Defense Council v. U.S. Forest Service* (9th Cir. 2005) 421 F.3d 797, 811, 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." Accurate economic analysis is required "to allow an informed comparison of the alternatives considered in the EIS." 421 F.3d at 813.

It is time finally to require DWR to prepare an honest statewide benefit-cost analysis, on any proposed Water Tunnel Project.

A Subsequent EIR Must be Prepared and Circulated for Public Review and Comment pursuant to CEQA

The change from a two Tunnel project to a one Tunnel project announced in the Governor's State of the State Address, constitutes a substantial change in the project which will require major revisions of the EIR. CEQA requires preparation of a subsequent or supplemental EIR when there are substantial changes. Pub. Res. Code § 21166(a), (b), (c.) The CEQA Guidelines, 14 Code Cal.Reg. § 15162 require a *subsequent*, not just a *supplemental*, EIR when substantial changes are proposed in a project or substantial changes occur with respect to the circumstances under which the project is being undertaken.³

Major revisions will be required to the EIR for several reasons. The change in the project from two Tunnels to one Tunnel is enormous including changes to benefit-cost analysis. Given the changed political climate, the surrounding circumstances require honest analysis of the dangers posed by the new federal policies to maximize exports regardless of the consequences for the Delta. And with respect to alternatives, more even than before, it is essential to finally include in a subsequent EIR circulated for public review and comment, real alternatives

³ A supplemental EIR is only permissible if "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).)

including alternatives that would begin to reduce exports and increase instead of reduce freshwater flows through the Delta.

As an example of such alternatives, our organizations presented *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015) during BDCP and WaterFix public review periods as a reasonable alternative to Water Tunnels. By way of summary, the *Sustainable Water Plan* alternative includes reducing exports out of the Delta to 3,000,000 acre-feet, or other variants on that quantity. Also included are: spending funds on such modern water measures as water conservation, water recycling, groundwater treatment and desalination and agricultural water conservation including conversion to drip irrigation in export areas, annual crops in export areas that can be fallowed in drought years, and staged removal from production of drainage-impaired lands in export areas that worsen water quality by such consequences as selenium discharge.⁴

A subsequent EIR including analysis of the new federal policies to maximize exports, and real alternatives to the project, must be prepared and circulated for public review and comment.

It is Finally Time to Ensure that Environmental Justice Communities are Included in Water Decision-Making

As important as the environment, Delta freshwater flows, Delta water quality, Delta agriculture, and fisheries are, even more is at stake than all of that. It is time finally to evaluate the WaterFix “through the Human Right to Water and environmental justice lenses to ensure that environmental justice communities are being included and treated as partners in water decision-making.” ([The Fate of the Delta: Impacts of Proposed Water Projects and Plans on Delta Environmental Justice Communities](#))(at p. 94) (Restore the Delta, September 17, 2018.) The Delta includes large environmental justice communities that would be harmed by the construction and operation of a WaterFix Tunnel. Harms would include worsened water quality and increased toxic algae blooms.

Finally, we have endeavored to keep this letter as short as possible, understanding the numerous important issues you are facing at the outset of your new California State Administration. For those of you who can take the time, and for other officials in your agencies working largely or full-time on California and Delta water issues, the report cited above, *The Fate of the Delta: Impacts of Proposed Water Projects and Plans on Delta Environmental Justice Communities* is, we believe, the most comprehensive and current explanation of Delta water issues. The report, not including appendices, is 96 pages long. You can click on the name

⁴ We will be glad to send a copy of the Plan to any California official requesting same. We have attached the Plan and earlier versions of it many times over the years to comment letters seeking compliance by DWR with the duty created by CEQA to develop and present in BDCP and WaterFix Draft and Final EIRs the required range of reasonable alternatives.

of the report in the paragraph above this one and immediately get to this invaluable resource document.

Conclusion

No matter what you have been told, from the time the BDCP/WaterFix process started two administrations ago, your predecessors have never actually considered or presented any true alternatives. It is time to finally embrace the Delta Reform Act and “begin with a true accounting of water availability within the Delta watershed to determine how much water could be safely exported from the estuary.” (*The Fate of the Delta*, p. 94.) It is time to finally develop and present for public review and comment the required range of reasonable alternatives including ones that would increase freshwater flows through the Delta by reducing exports. A Water Tunnel alternative should be evaluated in a fair and open comparative process with other alternatives, including ones that would increase freshwater flows by reducing exports.

We appreciate very much your taking the time to read our letter. We would welcome an invitation to speak with you in person so that we could answer any questions you may have. For years now we have been telling the truth, the whole truth, and nothing but the truth about California and Delta water issues.

Sincerely,



E. Robert Wright, Senior Counsel
Friends of the River



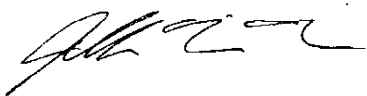
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cc: Karla Nemeth, Director, Department of Water Resources, via email
Charlton Bonham, Director, Department of Fish and Wildlife, via email