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**Comments for April 28, 2017, Delta Stewardship Council Meeting, Agenda Item 14 (CSO)**

Dear Delta Stewardship Council Chair Fiorini and Council Members and Staff:

**SUMMARY**

We request that the Delta Stewardship Council (DSC) not go forward at this time with a Plan amendment and Draft EIR on conveyance, storage and operations (CSO). The reason is that

the required analyses and evaluations to lawfully and intelligently do so have not been done. As we said before, *the DSC must do the planning before the plumbing.*

Our public interest organizations<sup>1</sup> make these comments seeking compliance by the DSC with the Delta Reform Act (DRA) and the California Environmental Quality Act (CEQA) in the course of amending the Delta Plan. This letter pertains to the upcoming DSC meeting on April 28, 2017, Agenda Item 14 on Conveyance, Storage Systems, and the Operations of Both. This follows up our previous comment letters of March 7 and March 20, 2017, and our CEQA scoping letter to Staff, copied to Chair Fiorini, of April 13, 2017. These previous letters remain applicable to the Delta plan amendment and CEQA process, but to avoid repetition and length we do not repeat them here.

DSC Staff requests input from the Council at the April 28, 2017 DSC meeting on the following question: “Does the revised draft appropriately respond to the relevant comments received from the Council and the public?” (DSC Agenda Item 14, Information Item, p. 4). The answer to that question is –no, the revised Draft does not appropriately respond to relevant comments. The most important comments have been ignored. The unanimous comment from the large crowd in Brentwood last month was that the DSC *not* go forward with a Delta Plan amendment on conveyance at this time.

The revised DSC discussion Draft Plan amendment makes the dual conveyance Water Fix Tunnels the *promoted option* (DSC Agenda Item 12, attachment 3, p. 5, February 23, 2017 meeting, as revised, DSC Agenda Item 14, attachment 1, redline version, p. 19, April 28, 2017 DSC meeting):

The California Department of Water Resources (DWR) and the U.S. Department of the Interior, Bureau of Reclamation (Reclamation) should pursue a dual-conveyance (*solution*) option for the Delta (*by constructing new facilities for*). Dual conveyance should incorporate multiple intakes and facility improvements for both isolated, below-ground conveyance and through-Delta conveyance of State Water Project (SWP) and Central Valley Project (CVP) water supplies from the Sacramento River to the (South) south Delta (via multiple intakes.), as follows: (we show new additions underlined, new deletions in (*parentheses & italics*)).

And, the DSC documents make the Water Fix Tunnels the *proposed conveyance alternative* (DSC Notice of Preparation of Draft EIR for amendments to Delta Plan, p. 10, March 16, 2017):

Guided by Water Code Section 85304, the Delta Plan, and the 19 Principles, the Council now proposes to amend the Delta Plan to promote recommended options . . . Below is a summary of the promoted recommendations:

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<sup>1</sup> 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, Planning and Conservation League, Restore the Delta, and Sierra Club California join in this letter.

Options for New and Improved Water Conveyance and Diversion Infrastructure in the Delta, including the following:

*New intakes and diversions and conveyance facilities in the North Delta* to improve the quality and reliability of deliveries. . . ;

Conveyance improvements that allow use of multiple Delta intakes to increase operational flexibility . . . (emphasis added).

We request withdrawal of the proposed Delta Plan amendment on conveyance, storage, and operations. We request withdrawal of the March 16, 2017 Notice of Preparation (NOP) of Draft EIR on conveyance, storage, and operations. The DSC has not done the analyses necessary to be able to adopt, or to even consider adoption of, the dual conveyance Water Fix Tunnels alternative.

To summarize, *first*, the DSC consultants and Staff continue to *ignore* the Court Order determining the Delta Plan to be invalid in the documents they prepare for the Council and the public. It is reasonable to expect the DSC to comply with the Court Order and the Writs, including revising the Delta Plan to “include quantified or otherwise measurable targets associated with achieving *reduced* Delta reliance, . . .” *before* attempting to approve the Water Fix Tunnels which represent *increasing* reliance on water exports from the Delta.

*Second*, making the choice between through-Delta conveyance on the one hand and dual conveyance on the other hand should be the *last* piece of the puzzle. Instead, contrary to logic and common sense, the current discussion Draft plan amendment on conveyance makes the choice of dual conveyance the *first* piece of the puzzle. The same is true of the NOP. It is reasonable to expect the DSC to do the “comprehensive review and analysis” required by the Delta Reform Act *before* trying to make the California Water Fix Tunnels dual conveyance the preferred conveyance option and alternative under the DRA and CEQA. The Delta is already in crisis; there are crashing fish populations; there is degraded water quality; there is reduced mountain runoff and increasing sea level rise and salinity intrusion resulting from climate change. There will not be sufficient freshwater flows through the Delta to also accommodate massive new upstream diversions for the Water Fix Tunnels. Council members heard these self-evident truths from the large crowd that attended the DSC meeting in Brentwood on March 23, 2017.

*Third*, the Water Fix Tunnels dual conveyance option/alternative is *infeasible*. DRA § 85089<sup>2</sup> prohibits initiation of “construction of a new Delta conveyance facility” unless the exporters have made arrangements to pay for all costs including planning, design, construction, and mitigation. All evidence in the Record shows that the costs exceed the benefits of the project. The August 2016 *Benefit-Cost Analysis of The California Water Fix* demonstrates that “the Water Fix costs are four times larger than its benefits, and thus the project is not economically justified.”<sup>3</sup> Because the costs of the project exceed the benefits, the exporters are unwilling to pay for the Water Fix Tunnels. Because State law prohibits a subsidized new Delta

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<sup>2</sup> All DRA sections cited are codified in the California Water Code with the section number set forth herein.

<sup>3</sup> The draft Cal Water Fix Economic Analysis (November 15, 2015) prepared for the California Natural Resources Agency by David Sunding of the Brattle Group, concealed by the State, was attached to our March 7, 2017 letter. The August 2016 Benefit-Cost Analysis prepared by Dr. Jeffrey Michael of the University of Pacific was attached to our March 20, 2017 comment letter.

conveyance facility, the project is infeasible. It makes no sense to choose a conveyance alternative—an infeasible one at that— *before* doing the analysis to determine *which* alternative would be best.

*Fourth*, DSC revisions to the Delta Plan must be integrated with related environmental review requirements. There must be environmental full disclosure. Instead, the consultants and Staff propose evasion. The Water Fix is a specific, definite project for the purpose of comparing conveyance alternatives, being the subject of the 80,000 page Final Environmental Impact Statement/Environmental Impact Report (FEIR/EIS) issued in December 2016. Thus in calling for the dual below-ground conveyance and new intakes and diversions and conveyance facilities in the North Delta, the discussion Draft and the Notice of Preparation are in fact calling for the specific Water Fix Tunnels project. Again, the DSC consultants and Staff ignore the Court Order. They also ignore the concerns expressed by the public at the March 23, 2017 DSC meeting in Brentwood, and by several Council members at both the February and March DSC meetings.

*Fifth*, we continue to have concerns about process. We had set forth some concerns about process in our March 20, 2017 letter (p. 8). The consultants and Staff are engaging in their continued effort to obtain early, predecisional approval of the Water Fix Tunnels project. That is not appropriate for a “Stewardship” Council charged by State law with protecting the Delta.

*Sixth*, two Council members, Skip Thomson and Ken Weinberg, expressed interest at the March 23, 2017 DSC meeting in developing a possible grand compromise. It would be an outstanding development if the Council members require ending the current DSC drive toward predecisional approval of the Water Fix Tunnels. It would be an outstanding development for the Council members to require the next step instead being to conduct a comprehensive review and analysis to develop the *factual Record* upon which a conveyance decision, including a possible compromise, could be lawfully and intelligently considered.

*Finally*, the revised Draft keeps the dual conveyance Water Fix Tunnels as the promoted option and preferred alternative. The changes have been to simply add more arguments as to why the Draft does what it does. The misrepresentation continues by pretending the dual conveyance option is not the Water Fix Tunnels. During the March 23, 2017 DSC meeting in Brentwood, DSC Chair Randy Fiorini: “clarified that the Council did not give staff direction that dual conveyance was the preferred alternative.” (DSC Agenda Item 5, Summary of March 23, 2017 DSC Meeting, p. 5). Since that is the case, it should be easy now for the Council members to require the withdrawal of the Draft Plan CSO amendment and Notice of Preparation of Draft EIR. The Council members can put the Staff to work instead on developing the targets associated with achieving reduced reliance on the Delta and restoring more natural flows as required by the DRA and the Court Order. After that and the other required tasks have been completed, that last piece of the puzzle—conveyance—can be lawfully and intelligently addressed. And addressed by adopting a whole Delta Plan at one time as suggested by Council member Skip Thomson. No one of sound mind who is acting in good faith would promote new conveyance upstream from the Delta without first finding out if there will be enough water for that while also increasing through Delta flows to restore the Delta.

***The Council Members need to take Control and Require Compliance with the Court Order determining the Delta Plan to be Invalid***

The DSC has been furnished with the Court Order determining the Delta Plan to be invalid on several occasions from May 2016 on yet the DSC consultants and Staff ignore the Court decision. Language in the Decision (May 18, 2016, pp. 26, 38) includes ordering the DSC to revise the Delta Plan and any applicable regulations to:

Include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act.

Having lost the case, the DSC appealed. The appeal lacks merit. The DRA requires that the Delta Plan “*Include quantified or otherwise measurable targets* associated with achieving the objectives of the Delta Plan.” DRA § 85308(b). (Emphasis added). The DRA establishes State policy to: “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” § 85020(c). Moreover, “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. . .” § 85021. (Emphasis added). “The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem” including: “viable populations of native resident and migratory species” “reduced threats and stressors on the Delta ecosystem” and “conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.” § 85302 (c)(1), (4), and (5). “[S]ubgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan” including “*restore Delta flows* and channels to support a healthy estuary and other ecosystems” and “improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.” § 85302(e)(4) and (5). (Emphasis added).

The Trial Court carefully read the DRA and handed down Rulings enforcing that law. As shown by the above paragraph, *the language in the Court ruling* requiring “quantified or otherwise measurable targets associated with achieving reduced reliance on the Delta” and “restoring more natural flows” *comes right out of the express language of the DRA*. Whether one likes the DRA is not the point. In America we have established governments of laws not rulers. It is time, now, for the Council members to implement the Court Order and the pertinent DRA provisions relied upon by the Court. That can only be done by making the next planning steps the setting of quantified or otherwise measurable targets associated with achieving reduced Delta reliance and also restoring more natural flows. It is only *after*, not *before*, that has been done that the question of what conveyance alternative to choose can be lawfully and intelligently analyzed.

***The Conveyance Decision is the Last, not the First, Piece of the Delta Restoration Puzzle***

DSC member Skip Thomson raised the following question at the March 23, 2017 DSC meeting in Brentwood; why is the conveyance portion of the plan being developed separately instead of developing all portions as part of one plan? A related question is, why do the conveyance Plan amendment now, since the Water Fix would eventually be reviewed by the DSC as a “covered action?” This is predecisional. The only apparent reason for the segmentation

is to make a predecisional determination in favor of the Water Fix Tunnels while evading the CEQA requirement to provide project-level environmental review for the specific Water Fix Tunnels project. This also evades the “comprehensive review and analysis” required by the DRA, § 85320(b)(2) that might, or as we say, would, demonstrate the undesirability or infeasibility of the Water Fix project. This also is clear evasion of the Court determination requiring revision of the Delta Plan to include among other things, “quantified or otherwise measurable targets associated with achieving reduced Delta reliance, . . .” (Set forth in the preceding section of this letter). Plainly, those targets must be developed *before* considering a decision to make dual conveyance the promoted conveyance option and preferred conveyance alternative because the targets could, we would say, would, make dual conveyance infeasible given the remaining amount of water available for export.

The DSC cannot lawfully consider, let alone adopt, a Plan amendment on conveyance until *after*:

*doing* the “comprehensive review and analysis” of “A reasonable range of Delta conveyance alternatives” “including through-Delta, dual conveyance, and isolated conveyance alternatives. . .” *required* by the DRA, § 85320(b)(2)(B);

*revising* the Delta Plan to provide a flow policy that includes “quantified or otherwise measurable targets associated with achieving reduced Delta reliance” and “restoring more natural flows” as *required* by the Court Order and the DRA;

the State Water Resources Control Board *adopts* new Delta flow criteria that “will be more stringent than petitioners” [the exporters] current obligations<sup>4</sup> ; and

*doing* benefit-cost analysis to determine if the Water Fix Tunnels is even a *feasible* alternative given the existing evidence that costs exceed the benefits requiring a public subsidy whereas subsidy is *prohibited* by DRA § 85089 prohibiting initiation of “construction of a new Delta conveyance facility” unless the exporters have made arrangements to pay for all costs including planning, design, construction, and mitigation.

The DSC staff prepared documents recite that the call for the new dual conveyance is “Guided by Water Code Section [DRA] 85304, the Delta Plan, and the 19 Principles, . . .” (NOP at p. 10, March 16, 2017). In fact, there is no such “guidance” provided by these things. DRA § 85304 does not call upon the DSC to promote dual conveyance and the Water Tunnels. Section 85304 states:

The Delta Plan shall promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals.

There is nothing in that statutory language pointing toward or even mentioning dual conveyance. The language does suggest that it is time to finally consider calling for improvement to the fish screens for the existing pumps in the South Delta. The exporters and

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<sup>4</sup> State Water Board Ruling, p. 4, February 11, 2016

DWR do not want to make those improvements because they like to bootstrap from the inadequate existing fish screens to make an argument for new conveyance. But the DSC Council members are supposed to be good stewards for the Delta as opposed to being salespersons for the Water Tunnels.

We continue to request development and consideration of the *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015) alternative, as discussed in more detail in our March 7, 2017, letter (at p. 13). We are not alone in such requests. The California Department of Fish and Wildlife made similar requests in its recent CEQA scoping letter to the DSC:

We recommend the PEIR analyze improved through-Delta conveyance, dual conveyance, and isolated conveyance options and evaluate the potential for improving fish screens at the state and federal water project export facilities in the south Delta. We also recommend evaluating water conservation, water recycling and reuse to build regional water supply self sufficiency ("portfolio approach") in both the Planning Area and Extended Planning Area to further reduced [sic] reliance on the Delta.<sup>5</sup>

The Delta Plan does *not* point toward dual conveyance and the Water Fix Tunnels. As we pointed out in our March 20, 2017 letter, the Final EIR on the Delta Plan stated:

the proposed Delta Plan does *not* make any recommendations regarding conveyance at this time because the Council has determined that the BDCP agencies are in the best position to complete the planning process, including defining acceptable ranges of exports and through-Delta flows. *Accordingly, the PEIR does not evaluate the potential environmental consequences of various BDCP options that DWR may be considering.* (FEIR, p. 3-15, May 2013) (emphasis added).

The 19 Principles were adopted by the DSC in November 2015. That was six months *before* the Court determined the Delta Plan to be invalid under the DRA. If it is necessary to again seek judicial relief because of refusals by the DSC to comply with the DRA, judicial review will be based upon the DRA, CEQA, and the prior Court decision. Judicial review will not be based upon the 19 Principles.

Instead of making the conveyance decision the first piece of the puzzle, this should be the last piece of the puzzle. Instead of fulfilling its statutory role of stewardship over the Delta, the efforts of the consultants and Staff to date appear to simply be acting as proponents for the Water Fix project. The DSC needs to function as good stewards and comprehensive long-term management planners for the Delta. It is time for a course correction ensuring compliance by the DSC with the DRA and CEQA.

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<sup>5</sup> Letter from Scott Cantrell, Chief, Water Branch, CDFW to Cassandra Enos-Nobriga, Deputy Executive Officer DSC, at p. 4 (April 14, 2017).

***The Water Fix Project is not a Feasible Alternative because Subsidized new Conveyance is prohibited by the DRA***

Project proponents often argue that alternatives to projects they seek to carry out do not have to be analyzed because they are infeasible. *Here there is an extraordinary situation in which the proposed project is demonstrably infeasible.* The DRA requires that the exporters pay all costs for a new Delta conveyance facility. Because the costs greatly exceed the benefits of this giant boondoggle, the exporters are not willing to pay all costs. Thus the project is not feasible under California law. The DRA provides in § 85089 as follows:

Construction of a new Delta conveyance facility shall *not* be initiated *until* the persons or *entities that contract to receive water* from the State Water Project and the federal Central Valley Project or joint powers authority representing those entities have made arrangements or entered into contracts *to pay for both of the following*:

(a) *The costs of the environmental review, planning, design, construction, and mitigation, including mitigation required pursuant to Division 13 (commencing with [Section 21000 of the Public Resources Code](#)), required for the construction, operation, and maintenance of any new Delta water conveyance facility.* . . .(emphasis added).

As explained in our March 7 and 20, 2017 letters, the State's own study, the *Water Fix Economic Analysis* (November 15, 2015) prepared for the California Natural Resources Agency by David Sunding, showed that a subsidy would be necessary for the project. Not liking the answer, the State hid that analysis and it took many months to get it by making demands under the Public Records Act. We attached the *Benefit-Cost Analysis of The California Water Fix* (August 20, 2016), prepared by Dr. Jeffrey Michael of the University of the Pacific to our March 20, 2017 letter. That analysis showed "the Water Fix costs are four times larger than its benefits, and thus the project is not economically justified."

California has proven to be an impressive offender in inflicting megaproject fiascoes on taxpayers. The recent Oakland-San Francisco Bay Bridge reconstruction exploded from a projected \$1 billion project to a project costing over \$6 billion riddled with defects. And there have been huge cost overruns during the construction of the \$4 ½ billion Trans Bay Transit Center in San Francisco. Willie Brown, former San Francisco mayor and speaker of the California State Assembly has written about that project: "We always knew the initial estimate was way under the real cost. . . The idea is to get going. Start digging a hole and make it so big, there's no alternative to coming up with the money to fill it in." Willie L. Brown, Jr., *When Warriors Travel to China, Ed Lee Will Follow* (San Francisco Chronicle, July 27, 2013); Jacques Leslie, *The Trouble with Megaprojects* (The New Yorker, p. 4, April 11, 2015); Chris Edwards and Nicole Kaeding, *Federal Government Cost Overruns* (Cato Institute, Tax & Budget Bulletin, September 2015).

This rush to get the Water Fix Tunnels project going *before* rather than *after* doing the required analyses and evaluations is part of a scheme to "start digging a hole and make it so big, there's no alternative to coming up with the money to fill it in." That would be contrary to the mission of the DSC to be good stewards and comprehensive long-term term planners for the Delta.



CEQA was modeled on the National Environmental Policy Act (NEPA). California courts treat NEPA decisions as persuasive authority on CEQA issues when the statutes are parallel.<sup>6</sup> In *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 811 (9<sup>th</sup> Cir. 2005), the Ninth Circuit held under NEPA 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.”

The CEQA Guidelines, 14 Cal. Code Regs § 15364, define “feasible” to mean:

“Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account *economic, environmental, legal, social, and technological* factors. (Emphasis added).

The Water Fix Tunnels new conveyance is not feasible because it is not legal. The DRA prohibits a subsidized new conveyance project. The Tunnels new conveyance is also not feasible because the Record demonstrates that the costs would greatly exceed the benefits of the project. In addition, it would not be possible to determine whether the Tunnels new conveyance would be environmentally feasible without doing CEQA required project-level environmental analysis and doing the comprehensive review and analysis of the through-Delta conveyance and dual conveyance alternatives required by the DRA.

***The Current proposed Draft Plan Amendment on Conveyance is the specific Water Fix Tunnels Project***

The Notice of Preparation (NOP) of the Draft Program EIR for Proposed Amendments to the Delta Plan (March 16, 2017) misleads the public about the project. The NOP states “The Council is not proposing, nor would the proposed Delta Plan Amendments require, specific projects at specific locations. While the Program EIR will review the potential physical environmental effects of potential types and locations of reasonably foreseeable compliance responses, it will not provide project-level environmental review for any specific projects.” (NOP p. 13).

At the February 23, 2017 DSC meeting, several DSC members raised questions about the Draft Plan amendment on conveyance, storage and operations. “Member Weinberg asked if we are advocating for new facilities and storage and what is the role of groundwater storage? He said it was not clear to him if the Council is advocating for these as part of the solution.”<sup>7</sup> “Mr. Weinberg suggested considering more discussion in the problem statement regarding the status quo in order to make the case as to why this action is needed. Specifically, more details about why these recommendations are being made and tying the recommendations to the problem statement; be clear that we are interested in reducing reliance on the Delta; better define regions; and develop metrics and performance measures that are consistent with our goals.” “Member

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<sup>6</sup> In *Wildlife Alive v. Chickering*, 17 Cal.3d 190, 201 (1976) the California Supreme Court explained: “We have previously relied upon federal cases construing NEPA in determining the scope of application of parallel provisions of CEQA [citation omitted]. Recognizing that the California act was modeled on the federal statute, we have consistently treated judicial and administrative interpretation of the latter enactment as persuasive authority in interpreting CEQA.”

<sup>7</sup> All references in this paragraph are to the DSC Meeting Summary of the February 23, 2017 DSC meeting, Agenda Item 6, March 23, 2017, p. 12.

Johnston concurred with Member Weinberg's point regarding the document's need to stand on its own by providing justification for the recommendations. The tone of the document needs to be balanced; it is currently framed as a water exporter would frame it. The tone needs to shift in order for us to address the coequal goals effectively. We need to make the case for environmental improvement not just a mitigation necessity." "Judge Damrell echoed Member Johnston's comment regarding tone and balance and suggested looking at the problem statement to address this." "Member Thomson referred to page 5, line 15, and asked why the Council is making recommendations on specific projects? Ms. Pearson responded that is the way staff is interpreting 'promoting options.'"

The DSC members heard about the destruction new upstream conveyance would inflict on the Delta from the large crowd in Brentwood at the March 23, 2017 DSC meeting. After extensive comments by many members of the public, Council members made some comments. Member Weinberg said there were many very clear and specific comments that were appreciated, and the public had given the Council members a lot to process. He said that was particularly the case with respect to impacts on water quality, flows, and businesses if the project were to be implemented.<sup>8</sup> Member Gatto said the members had heard the concerns today loud and clear. Member Thomson raised the issue of whether the Twin Tunnels is the preferred alternative or is being promoted. He also said that at the Workshop, DSC Staff confirmed that cost-benefit analysis should be done but since there is no project, it is not being done. He said the cost of the Twin Tunnels would be somewhere from \$17 billion to \$65 billion. Staff, Deputy Executive Officer Cassandra Enos-Nobriga, again responded that Staff is not recommending a specific project. Member Thomson replied that 80,000 pages sounded like a specific project. He said that it looked like the DSC is promoting the Twin Tunnels project.

DSC Chair Fiorini had opened Member comments following the close of the public comments by saying to the public that their comments do matter. So far, there is no indication that public comments have mattered whatsoever to the DSC. Moreover, there is no evidence so far that concerns expressed by Council members have mattered either. Just as the consultants and Staff have completely ignored the Court Order, so have they completely ignored concerns and comments expressed by the public and by several of the Council members.

The Water Fix proponents know what the DSC consultants and Staff are doing. At the March 2017 meeting of the Metropolitan Water District Special Committee on the Bay Delta, Mr. Stan Arakawa, Manager of MWD's Bay-Delta Initiatives Program explained: "As the California Water Fix has been moving forward, the Stewardship Council has been talking about how do they now go through their decision making process, given that it's no longer a Bay Delta Conservation Plan, it's now a proposed California Water Fix," he said. "They adopted some principles a couple of years ago when they initiated a process to amend the Delta Plan so that they could be in a position to deal with this proposed project and that's what we're talking about when we're talking about conveyance, storage, and operations. It deals with not only the facilities themselves related to Cal Water Fix, but operations and storage and how the three of those work together." "The amendments would promote options for new and improved

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<sup>8</sup> References to comments by DSC members at the March 23, 2017 DSC meeting are based upon our best effort with the DSC video and audio rendition of the meeting. Description here is approximate, any errors are unintentional and we have not attempted to reproduce everything that Council members said.

conveyance including dual conveyance, and that's what California Water Fix is by definition," Mr. Arakawa said.<sup>9</sup>

The DSC consultants and Staff are simply doing what the Water Fix proponents want, trying to rush through adoption of the Water Fix Tunnels project. At the March 24, 2017 CEQA scoping meeting the Staff showed a schedule under which the Draft EIR would be issued in the summer of 2017; followed by a 45 day public review period; and concluding with issuance of the Final EIR in Fall/Winter 2017.

The rush schedule shows the intent to quickly get the Draft and Final EIR's issued *before* any of the analyses would be done that could, we would say would, demonstrate the infeasibility or undesirability of dual conveyance. This appears to be an effort to violate the CEQA Guidelines, § 15384 requirement that conclusions be based on "substantial evidence." Conclusions are not to be based on "argument, speculation, unsubstantiated opinion or narrative, evidence which is erroneous or inaccurate . . ." *Id.* The wrongful intent here is to get the DSC members to make the decision adopting the Water Fix Tunnels new conveyance alternative in the absence of the substantial evidence that would be developed by doing the above analyses.

But then there is the law. The California courts have repeatedly held under CEQA that:

An accurate, stable and finite project description is the *sine qua non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. [citation deleted]. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. [citation deleted]. 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. *E.g., San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4<sup>th</sup> 645, 654 (2007) (project description held unstable and misleading) (internal quotation marks deleted).

The most recent California Supreme Court CEQA decision reminds that ". . . 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*, \_\_ Cal.4<sup>th</sup> \_\_, 2017 WL 1174436 \*11 (March 30, 2017)(reversing and holding EIR inadequate). The State Supreme Court emphasized that "*To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.*" *Id.*, 2017 WL 1174436 \*9; CEQA Guidelines, 14 Cal. Code Regs §§ 15124(d)(1)(C); 15006(i). And, of course, "Evaluation of project alternatives and mitigation measures is '[t]he core of an EIR.'" *Id.*, 2017 WL 1174436 \*10.

In contrast to what CEQA requires, here there is an inaccurate, misleading project description. The Water Fix is a specific, definite project for CEQA alternatives analysis purposes, being the subject of the 80,000 page December 2016 FEIR/EIS. Here, the Draft Plan Amendment and the NOP instead of making full disclosure try to misrepresent that the promoted conveyance option and preferred conveyance alternative is not a specific project. 80,000 pages

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<sup>9</sup> Discussion reported online in Maven's Notebook (April 4, 2017).

are specific enough to compare the Water Fix Tunnels alternative with retaining through-Delta conveyance. Instead of “integrating” the Delta Plan Amendment CEQA review with the actual project proposed by DWR and Reclamation, DSC documents issued so far try to pretend that this is just a program and not a specific project. The DSC consultants and Staff are trying to get the DSC to adopt the Water Fix Tunnels conveyance alternative while pretending that is not what they are doing. The apparent purpose of this misrepresentation is to evade a fair and accurate comparison of the through-Delta and the dual conveyance alternatives based on the facts and science.

Through misrepresentation and segmentation, the effort here is to grease the skids for the Water Fix Tunnels by looking at dual conveyance in a vacuum divorced from reality. The dual conveyance project *is* the Water Fix Tunnels. There is a difference between having a small dog or an elephant in a room. Likewise, there is a difference between filling a water bottle upstream from the Delta, or constructing giant Tunnels with the capacity to divert the entire typical summer freshwater flow from the Sacramento River upstream from the Delta.

The next DSC step should not be aiding and abetting the Water Tunnels fiasco by trickery. Instead, the next step must be complying with the Court Order to revise the Delta Plan to provide a flow policy that includes “quantified or otherwise measurable targets associated with achieving reduced Delta reliance” and “restoring more natural flows.” That needs to be done first, not later after the horse is out of the barn.

### ***Continued Concerns about Process***

We raised concerns that “there may have been a change at the DSC whether brought about by the consultants or otherwise in terms of basic fairness” in our March 20, 2017 letter (p. 8). We are not alone in our concerns. Member Thomson expressed disappointment at the March 23, 2017 DSC meeting in Brentwood that it took Public Records Act requests to get the State’s economic analysis showing that the Water Fix project would require a public subsidy. He did not understand why the Staff had not presented the *Benefit-Cost Analysis of the California Water Fix* showing that costs exceed the benefits of the project by four to one. So, he handed out the *Analysis* to the other Council members. Member Damrell said he was troubled by the notion of confusion and that Staff had the responsibility to set forth clearly what happened at the Workshop and what the DSC is trying to do.

The DSC summaries of the workshops and the Brentwood DSC meeting appear to deliberately misrepresent the basic thrust of the comments. That is, that the DSC not go forward with a Delta Plan amendment on conveyance at this time for reasons too numerous to repeat yet again.

The ignoring of the Court Decision determining the Delta Plan to be invalid is especially troubling. Everyone knows that the proponents and some contractors want the Water Fix Tunnels project regardless of the resulting environmental destruction and economic waste. So far, there has been only one official determination by a responsible and respected neutral of the validity of the DSC’s actions. That is the Decision by the Honorable Michael P. Kenny, Superior Court of the State of California, County of Sacramento, based upon the crystal-clear language in the DRA that the DSC must revise the Delta Plan to include “quantified or otherwise measurable targets associated with achieving reduced reliance on the Delta” and “restoring more natural flows.” If

the DSC is the good steward of the Delta it is supposed to be, it would do what the Court told it to do first before even considering let alone promoting or selecting the dual conveyance alternative. If the DSC is the good steward of the Delta it is supposed to be, it would not keep pretending that it is not doing precisely what it is doing—that being selecting and promoting the Water Fix Tunnels project.

It is time for the Council members to take control. The consultants and the Staff have not listened to the Court, the public, or concerned Council members. It is time for the Council members to withdraw the proposed Plan Amendment on conveyance and the Notice of Preparation of Draft EIR on conveyance. It is time for the Council members to direct consultants and Staff to begin work on proposed quantified or otherwise measurable targets achieving reduced reliance on the Delta and restoring more natural flows.

### ***Possibility of a Compromise***

Council member Skip Thomson brought up the idea of a possible grand compromise at the March 23 DSC meeting in Brentwood. Council member Ken Weinberg expressed interest in that idea. The present course of trying to steamroll the Water Fix Tunnels project through the DSC provides no possibility for any kind of compromise. The present course is in essence a declaration of war against the Delta, the law, the Court Order, common sense, the environment, and the bank accounts of California taxpayers and ratepayers.

If the Council members require the withdrawal of the proposed Delta Plan amendment on conveyance, storage and operations, and withdrawal of the March 16, 2017 Notice of Preparation of Draft EIR, that would afford the opportunity to find out if a grand compromise is possible. By proceeding first to begin work on proposed quantified or otherwise measurable targets achieving reduced reliance on the Delta and restoring more natural flows as well as the other work discussed herein, a factual basis would be developed sufficient to explore the possibility of a compromise grounded on the facts, science, sound economics, and implementation of the DRA.

### ***The Revised Discussion Draft Is the Same as Before in Promoting the dual conveyance Water Fix Tunnels Except the Revisions made it Worse***

We set forth the revised Draft plan promoted option on new conveyance in the Summary. DSC Staff changed a few words in describing the promoted option. The revised Draft says DWR and Reclamation “should pursue a dual-conveyance option for the Delta. Dual conveyance should incorporate multiple intakes and facility improvements for both isolated, below-ground conveyance and through-Delta conveyance of State Water Project (SWP) and Central Valley Project (CVP) water supplies from the Sacramento River to the south Delta. . .” (Agenda Item 14, Attachment 1, redline version at p. 19). We set forth the Notice of Preparation of Draft EIR in the Summary which has not been changed at all.

The revised Draft has actually made things worse. The February draft required analyses that include “A reasonable range of *Delta* conveyance alternatives, through-Delta, dual-conveyance, and isolated conveyance alternatives, . . .” The revised Draft instead calls for “A reasonable range of *dual*-conveyance alternatives, including options for the number and location of new intakes, a range of isolated conveyance capacities, through-Delta conveyance improvements, and other facilities. . .” (DSC Agenda Item 14, attachment 1, Discussion Draft

Delta Plan amendments for Conveyance, redline version p. 21) (emphasis added). In other words, the revised Discussion Draft does not even require analysis of the through-Delta alternative as *the* conveyance alternative, instead calling for "a reasonable range of dual-conveyance alternatives."

What the Staff has done has simply been to add more argument in evading the duty to engage in rational planning and make the determinations required by the DRA and the Court Order. Thus Staff argues in conclusory fashion that: "Limitations of current through-Delta conveyance to further the coequal goals are described on pages 12-13. . ." (DSC Agenda Item 14, Information Item, p. 3, April 28, 2017).

The misrepresentation continues. The Frequently Asked Questions DSC document states: "The draft Delta Plan CSO amendment is not promoting Water Fix or other specific projects. One of the conveyance options promoted by the Council is a dual conveyance option. . ." (DSC Agenda Item 14, Attachment 3, p. 5, April 28, 2017).

As pointed out above, this violates CEQA by being an inaccurate, misleading project description. There is only one dual conveyance option out there in the real world and that is the DWR and Reclamation Water Fix Tunnels project that is the subject of 80,000 pages. As pointed out above, *"To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements."* *Banning Ranch Conservancy v. City of Newport Beach*, \_\_Cal.4<sup>th</sup> \_\_, 2017 WL 1174436 \*11 (March 30, 2017). "Integrate" means what it says. Here, the Discussion Draft Plan amendment does the opposite. Instead of *integrating* its CEQA and DRA review with the real dual conveyance project—the Water Fix Tunnels-- the real project is ignored. The reason for the trickery is to try to say yes to dual-conveyance and no to the existing operating and paid for through-Delta conveyance.

According to the DSC Meeting Summary, Chair Fiorini: "clarified that the Council did not give staff direction that dual conveyance was the preferred alternative." (DSC Agenda Item 5, Summary of March 23, 2017 DSC Meeting, p. 5). That is good news. It should be easy now for the Council members to direct the withdrawal of the Draft Plan CSO amendment and NOP, and direct Staff to instead, as its next step, begin work on developing the quantified or otherwise measurable targets associated with achieving reduced Delta reliance and restoring more natural flows as required by the DRA and the Court Order. Council member Thomson is correct that the Delta Plan should be developed as a whole. There is no good faith reason to rush the conveyance alternative selection. The only reason to do so would be bad faith promotion of the Water Fix Tunnels project while falsely pretending that is not being done.

## CONCLUSION

The Draft Plan amendment makes the choice of dual conveyance-- which is the Water Fix Tunnels-- the first piece of the puzzle. The choice of new, frightfully expensive and environmentally destructive dual conveyance, or retaining existing and already paid for through-Delta conveyance must await the comprehensive review and analysis of these alternatives required by both the DRA and CEQA. That should be enough to convince all that it is time to think first and act later instead of acting first and thinking later. If an additional reason is necessary to withdraw the proposed Plan amendment on conveyance and the NOP, the new Delta conveyance alternative is infeasible because the DRA requires the exporters to pay all costs. That

will not happen because the only benefit-cost analysis performed so far demonstrates that “the Water Fix costs are four times larger than its benefits, and thus the project is not economically justified.”

Finally, if a majority of the DSC members nevertheless intend to proceed on the present course calling now for the new Delta dual conveyance alternative, there must be the environmental full disclosure required by CEQA. The Plan Amendment and NOP language would have to be revised to be honest and disclose that the DSC conveyance alternative is the Water Fix Tunnels. Contrary to the NOP (p. 13), project-level environmental review would have to be provided in the DSC Draft EIR for that project. Contrary to what Staff says, benefit-cost analysis would have to be performed including comparing the Water Fix Tunnels with through-Delta conveyance.

It is reasonable for the public to expect the DSC to do the necessary work before even considering whether to choose or promote the dual conveyance Water Fix Tunnels alternative. We request that the DSC members withdraw the proposed Delta Plan amendment on conveyance, storage and operations. We request that the March 16, 2017 Notice of Preparation of Draft EIR on conveyance, storage, and operations be withdrawn. Should you have any questions, please contact Conner Everts, Facilitator, Environmental Water Caucus at (310) 804-6615 or [connere@gmail.com](mailto:connere@gmail.com), or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or [bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org).

Sincerely,



E. Robert Wright, Senior Counsel  
Friends of the River



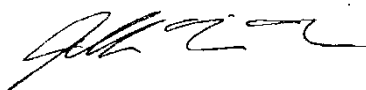
Bill Jennings, Executive Director  
California Sportfishing Protection Alliance



Barbara Barrigan-Parrilla, Executive Director  
Restore the Delta



Conner Everts, Facilitator  
Environmental Water Caucus



Jeff Miller, Conservation Advocate  
Center for Biological Diversity



Carolee Krieger, Executive Director  
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Barbara Vlamis, Executive Director  
AquAlliance



Kyle Jones, Policy Advocate  
Sierra Club California



Colin Bailey, Executive Director  
Environmental Justice Coalition for Water



Jonas Minton, Senior Water Policy Advisor  
Planning and Conservation League