

Friends of the River
1418 20th Street, Suite 100
Sacramento, CA 95811

March 20, 2017

Delta Stewardship Council Members and Staff
980 9th Street, Suite 1500
Sacramento, CA 95814 **via Email**

Re: Comments on Need to Comply with Delta Reform Act and CEQA for March 23, 2017, Delta Stewardship Council Meeting on Delta Plan Conveyance Amendment, Agenda Item 11

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

SUMMARY

Our public interest organizations¹ make these comments seeking compliance by the Delta Stewardship Council (DSC) with the Delta Reform Act (DRA) and the California Environmental

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, Planning and Conservation League, Restore the Delta, and Sierra Club California join in this letter.

Quality Act (CEQA) in the course of amending the Delta Plan. This letter pertains to the upcoming DSC meeting on March 23, 2017, Agenda Item 11 on conveyance. This follows up our previous comment letter of March 7, 2017, and is also based on what we learned at the DSC public workshop on conveyance, storage, and operations (CSO) held on March 9, 2017. Our March 7 letter remains applicable to the Delta plan amendment process, but to avoid repetition and length we do not repeat it here.

First, the DSC must do the planning before the plumbing. The DRA expressly requires “comprehensive review and analysis” of the “through-Delta” conveyance alternative. The Discussion Draft amendment on conveyance, however, selects and promotes the Water Fix Delta Water Tunnels alternative (“a dual-conveyance solution for the Delta by constructing new facilities for isolated, below-ground conveyance of . . .SWP. . .and. . . CVP water supplies from the Sacramento River to the South Delta via multiple intakes.”). Promoting the dual-conveyance Tunnels project *before* rather than *after* doing the DRA-required comprehensive review and analysis would violate both the letter and the spirit of the DRA and CEQA.

Second, benefit-cost analysis must be done *before* choosing between through-Delta conveyance and the Water Tunnels. Your Staff agrees that benefit-cost analysis of alternatives should be done. The Staff, however, contends that the Water Tunnels are not a “specific” project so that benefit-cost analysis need not be done before selecting the Tunnels as the preferred conveyance alternative. No. The Water Tunnels are specific enough to compare with the through-Delta water conveyance alternative, being the subject of an 80,000 page Final Environmental Impact Report/Environmental Impact Statement (FEIR/EIS) (December 2016). The benefit-cost analysis that has been done shows that the costs of the Water Tunnels project exceed the benefits. Evading benefit-cost analysis is simply an obvious attempt to inflict a bad project on the public. However much some consultants and contractors might benefit from receiving the billions of dollars that would be spent on the Water Tunnels, the task of the Council is to be good stewards on behalf of the public and the San Francisco Bay-Delta estuary.

The DSC Must do the Planning before the Plumbing

The discussion draft Delta Plan amendment for water conveyance, system storage, and the operation of both, plainly calls for the dual conveyance alternative, the Water Fix Delta Water Tunnels. The discussion draft states under the heading “NEW AND IMPROVED WATER CONVEYANCE:”

- A. Promote Options for New and Improved Infrastructure Related to Water Conveyance
 1. 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 for the Delta by constructing new facilities for *isolated, below-ground conveyance of State Water Project (SWP) and Central Valley Project (CVP) water supplies from the Sacramento River to the South Delta via multiple intakes*. The isolated conveyance should complement existing through-Delta conveyance to

improve operational flexibility and reduce conflicts with ecosystem needs. (DSC Agenda Item 12, Attachment 3, p. 5, February 23, 2017)(emphasis added).

The current plan is that the Staff anticipates asking the Council to approve a proposed draft amendment in April that “would be the preferred alternative for purposes of drafting the project description for the CEQA document that will be prepared for this” Delta Plan amendment on conveyance. (DSC Agenda Item 12, Information Item, p. 9, February 23, 2017).

CEQA requires analysis of a range of reasonable alternatives. The DRA requires “comprehensive review and analysis” of “*A reasonable range of Delta conveyance alternatives,*” including *through-Delta*, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines. (DRA² § 85320(b)(2)(B)(emphasis added).

Other subsections under DRA § 85320(b)(2) expressly require consideration of the potential effects of climate change on the *conveyance alternatives*; potential effects on migratory fish and aquatic resources; and “The potential effects of *each Delta conveyance alternative* on Delta water quality.” (Subsections (C), (D), and (G) (emphasis added).

Making the dual conveyance alternative the promoted conveyance option and/or preferred alternative *before* rather than *after* conducting the “comprehensive review and analysis” required by the DRA of the through-Delta alternative on the one hand, and the dual conveyance alternative on the other hand, puts the cart before the horse.

The DSC did not do the required “comprehensive review and analysis” before in adopting the Delta Plan back in 2013. 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).

Since evaluation of environmental consequences of conveyance alternatives was not done then, it must be done now.

The Sacramento County Superior Court Ruling finding the Delta Plan invalid under the DRA determined among other things that the Delta Plan must be revised to “Provide a flow policy that includes ‘quantified or otherwise measurable targets.’” (May 18, 2016 Ruling, p. 38). The Court also determined that the Delta Plan must “Include quantified or otherwise measurable targets associated with achieving reduced Delta reliance.” (May 18, 2016 Ruling, pp. 26, 38).

The State Water Resources Control Board has found that “The appropriate Delta flow criteria will be more stringent than petitioners’ [the exporters] current obligations and may well

² All Delta Reform Act sections cited are codified in the California Water Code with the section number shown herein.

be more stringent than petitioners' preferred project [the Water Tunnels]." (Water Board Ruling, p. 4, February 11, 2016).

Our March 7, 2017 letter set forth a number of recent developments making it clearer than ever that *increasing* freshwater flows through the Delta is necessary which is the opposite of creating a massive new upstream conveyance to further *reduce* freshwater flows through the Delta. (Letter, pp. 8 – 12).

It also puts the cart before the horse to anoint the Water Fix Tunnels the promoted conveyance option and/or preferred alternative *before* rather than *after* developing the quantified flow and reduced Delta reliance targets required by the Court decision enforcing the DRA. Likewise, it makes no sense to make the Water Fix Tunnels the promoted option *before* the State Water Board makes its determinations regarding the more stringent Delta flow criteria.

Portions of the DSC materials talk about the *19 Principles for Water Conveyance in the Delta, Storage Systems, and for the Operation of Both to Achieve the Coequal Goals*. We have commented on those in the past. To be crystal clear, just as was the case when the Court found the Delta Plan to be invalid, it is the DRA (and also CEQA) that Delta Plan revisions must comply with. The validity of Delta Plan revisions, should it prove necessary to challenge them, will be determined under the DRA and CEQA, not the 19 Principles.

In America we are fortunate to have governments of laws not rulers. No matter how badly some consultants, water exporters, or politicians may want the Water Fix Tunnels, the task of the DSC is to work with open minds grounded on sound science and economics to develop "the comprehensive long-term management plan for the Delta." (DRA § 85059 defining the Delta Plan). That is why the DSC was created. That means performing the required "comprehensive review and analysis" of the through-Delta conveyance alternative as well as the dual-conveyance alternative, *before* announcing any kind of preference for dual conveyance.

We expect that comprehensive review and analysis when done will lead the DSC to ultimately choose the through-Delta conveyance alternative along with reducing exports. But the point now is that there is no legitimate basis at this point in time for the DSC to prefer dual conveyance over through-Delta conveyance.

There must be Honest Benefit-Cost Analysis before Promoting the Water Tunnels New Conveyance over through-Delta Conveyance

First, DWR and Reclamation have consistently represented to the public over the years that the beneficiaries of the Water Tunnels project would pay all project costs. It turns out that is false and DWR's own secret *Cal WaterFix Economic Analysis* shows that a substantial public subsidy would be necessary. *Second*, the only benefit cost study done for the project shows that the costs would exceed the benefits by four to one. The project makes no economic sense. *Third*, given the usual enormous cost overruns for megaprojects, the project if carried out will be a fiscal catastrophe for ratepayers and taxpayers. *Fourth*, the project would cost at least *3 or 4 times* the absurdly low \$17 billion dollar estimate. That will drastically magnify the amount of the necessary public subsidy. *Finally*, § 85089 of the DRA 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.³ The water exporters know how to count. The exporters are not willing to pay all costs for the Water Tunnels given that the costs exceed the benefits as shown by the State's own secret *Economic Analysis*.

The dual conveyance WaterFix is not a feasible alternative because the DRA prohibits initiation of construction of subsidized new conveyance. The Water Fix Tunnels would be an environmental nightmare for Delta freshwater flows, water quality, fish, fish habitat, and agriculture. Beyond that, the dual conveyance alternative is not a feasible alternative because it is prohibited by State law. But all that is necessary at this point is to recognize that it would not be responsible long-range comprehensive planning to make dual conveyance the promoted conveyance option and/or preferred conveyance alternative *before* rather than *after* doing the "comprehensive review and analysis" of the through-Delta and the dual conveyance alternatives required by the DRA.

DSC Staff, Deputy Executive Officer Cassandra Enos-Nobriga, agreed at the March 7, 2017 public workshop that benefit-cost analysis should be a part of alternatives analysis. She confirmed that benefit-cost analysis has not been done for the conveyance alternatives. She asserted, however, that the dual conveyance alternative was not a specific project so that benefit-cost analysis need not be done as to the decision among the three basic conveyance alternatives. In fact, the dual conveyance alternative is specific enough for benefit-cost purposes to compare to the through-Delta alternative. The Water Fix Tunnels *are* the dual conveyance alternative. The Tunnels are the subject of more than 80,000 pages of the December 2016 FEIR/EIS.

There has been much discussion around our nation recently of such things as "alternative" facts. Presumably the DSC wishes to conduct planning in the world of true facts not "alternative" facts. Because the DRA requires the exporters to pay all costs for new conveyance they are only willing to pay the enormous costs if they conclude the benefits sufficiently exceed the costs to make the project worthwhile to them. Feasible new conveyance alternatives under both the DRA and CEQA are therefore constrained by what the exporters are willing to pay for. The choice between through-Delta conveyance and new dual conveyance is the single most important, foundational issue facing the DSC and the Delta. It is by orders of magnitude more important for benefit-cost analysis to be performed as part of this epic, foundational choice than for what will be far less important decisions down the road on far smaller and non-precedent setting projects.

The only reasonable conclusion that can be made is that there is an effort afoot to evade benefit-cost analysis. Evasion is in the wind because benefit-cost analysis demonstrates the fiscal folly of adopting the new conveyance Water Fix Tunnels alternative.

We continue with a few details backing up these points.

Reclamation and DWR have always represented that the users of water conveyed by the project would pay all project costs. It turns out, however, that in November of 2015, the economic consultant for the project, David Sunding of The Brattle Group, prepared a draft *Cal*

³ The Water Fix FEIR/EIS (December 2016) explains: "However, because the California Water Fix is not an HCP/N CCP, it would not qualify for public funding. Instead, the public water agency beneficiaries would pay the costs of the environmental review, planning, design, construction, and mitigation for the California Water Fix as required under Section 85089 of the Water Code [DRA]." (Volume II, Master Response 31 at p. 1 – 275).

Water Fix Economic Analysis for the California Natural Resources Agency. (November 15, 2015). That *Economic Analysis*, purporting to justify the economic feasibility of the project, assumed that the federal government or some other entity would need to provide a subsidy of \$6.5 billion to make the Water Tunnels a breakeven proposition for agricultural users of the water. (*Economic Analysis* pp. 2-4).⁴ That is more than one third of the projected \$17 billion in construction and mitigation costs. Honest project proponents would have made that *Economic Analysis* immediately available to the public. Instead, there was a cover up. The *Economic Analysis* was concealed from the public. It took many months including demands under California's Public Records Act (the State equivalent of the Federal Freedom of Information Act) to obtain the suppressed *Analysis*. Concealment of material facts is the essence of fraud.

It gets worse. A far greater public subsidy would be required for the project than is admitted in DWR's secret *Economic Analysis*. The first comprehensive benefit-cost analysis of the Water Fix shows that the project would only provide \$.23 of benefits for each dollar of cost. *Benefit-Cost Analysis of the California WaterFix*.⁵

This analysis is based on data and assumptions in the revised environmental documents produced by DWR to support the proposal's environmental review. The results show the WaterFix costs are four times larger than its benefits, and thus the project is not economically justified.⁶

It makes no sense to proceed with a massive public works boondoggle where the costs exceed the benefits by a factor of four. As the *Benefit-Cost Analysis* points out (at p. 2):

The Water Fix is the most costly water proposal in California history, so it is unusual that the California Department of Water Resources (DWR) has not followed its own planning guidelines and issued a benefit-cost analysis of the proposal.

Presently, the proposed project, which is 70 tunnel miles, is budgeted at about \$500 million per mile. Only 10% of the needed geotechnical work to arrive at an accurate cost estimate has been completed. Planners believe that tunneling firms will pay for the 10-12 tunnel boring machines needed, helping the state to avoid cost overruns. However, private firms are not willing to absorb such significant risk. Moreover, in sworn testimony at the California State Water Resources Control Board, project planners stated that only a 10% contingency was built into the \$17 billion price tag for the project, yet Metropolitan Water District officials are telling their member water districts that a 36% contingency has been built into the budget. Officials

⁴ A copy of the *Economic Analysis* was attached to our March 7, 2017 letter (p. 11, fn. 7). Dr. Jeffrey Michael, Director of the Center for Business and Policy Research at the University of the Pacific has explained (Comments, September 12, 2016) that "The report actually refers to the subsidy as \$3.9 billion, but this figure is in present value terms including a 3% real discount rate. This is equivalent to \$4.6 billion in actual costs, which is the appropriate figure to compare to the nearly \$16 billion in construction and mitigation costs." He also explained that "the report finds an additional \$1.9 billion subsidy would be needed to make the tunnels a break-even proposition for agriculture."

⁵ By Dr. Jeffrey Michael, Executive Director, Center for Business and Policy Research, Eberhardt School of Business and McGeorge School of Law, University of the Pacific (August 2016). A copy of this Benefit-Cost Analysis is attached.

⁶ *Benefit-Cost Analysis of The California WaterFix* at 2.

leading the project are not being honest with the public about the real costs of the proposed Tunnels.

It gets still worse. A recent Op-Ed in the Los Angeles Times, Jacques Leslie, *The delta tunnels-a project only engineers can love*, reminds us all of what The Mercury News reported back in December 2013:

Most notably, the number [\$17 billion cost estimate] doesn't include financing costs which given the tunnels' decade-long projected construction time and probable reliance on interest-bearing bonds, are expected to be enormous.

The Mercury News reported in December 2013 that a staff member of the wealthy Westlands Water District, which was an early project advocate, and a Citigroup bond consultant told the Westlands board that including long-term financing, the project would cost between \$51 billion and \$67 billion. The reporter checked the figures with Water Resources Director Mark Cowin, who 'confirmed the estimates are accurate.'

The same Op-Ed makes clear what is at stake:

The imbalance of costs and benefits is only one reason to object to WaterFix. The tunnels represent a failure of imagination. . . The tunnels would not only exacerbate the environmental crisis [in the Delta], they would divert funding and attention from other better, cheaper sources of water.

Los Angeles, Santa Monica and many other of the state's communities are pioneers in 21st century 'soft path' approaches that mimic or reinforce natural resource processes instead of trying to overcome them: storm water recapture, wastewater recycling and plain old conservation. These strategies-not an absurdly expensive project that serves chiefly to perpetuate the existence of the bureaucracies that support it-would reduce pressure on the Delta while showing the way to California's water future.

On March 12, 2017, former Council member and Delta Counties and Sacramento County Board of Supervisors Chairman Don Nottoli, and San Joaquin County Supervisor Kathy Miller, put details on what would be lost by spending billions of dollars for the Water Tunnels. (Op Ed, *We can find water solutions together*, Sacramento Bee, March 12, 2017). Using the low \$15 billion Tunnels estimate, every mile of levees along the metropolitan areas of Sacramento and Stockton could be reengineered for \$4 billion. With the remaining \$11 billion, levees in the Delta and south of the Delta could be strengthened; the Oroville spillway could be repaired; underground water banking opportunities could be pursued; and conservation measures such as rainwater collection, water recycling and storm water capture could be implemented.

The DSC was not created to be yet another salesperson for the Water Tunnels. Promoting the option of dual-conveyance needs to be dropped from the draft Delta Plan amendment for water conveyance. The DSC needs to instead perform the comprehensive review and analysis required of the through-Delta conveyance alternative as well as the dual-conveyance alternative before jumping to premature conclusions about what to promote or make the preferred alternative. The required task is, after all, to develop "the comprehensive long-term management plan for the Delta."

Additional Concerns about Process

We are concerned that there may have been a change at the DSC whether brought about by the consultants or otherwise in terms of basic fairness. At the March 9 workshop we pointed out that at least two of the Council members had not received our March 7 comment letter. We also pointed out that the Council used to have some copies of comment letters out on the tables outside the meeting room for the benefit of the public. We were told in front of everyone by a consultant that our letter was available online. To our knowledge, that was not correct. We checked as of this morning, March 20 as to what is available on line in terms of correspondence. The most recent correspondence to the Council we saw were letters dated February 24, 2017. Thus almost two weeks *after* our letter, the public does not have access to our detailed March 7, 2017 comment letter or the March 7, 2017 comment letter of the South Delta Water Agency supporting our comment letter. Moreover, availability online is no substitute for making sure that the Council members get copies of comment letters in advance of the subject meetings and that there are some copies available for members of the public at the meetings. It is things like this along with premature selection of the Water Fix Tunnels as the promoted conveyance option and DSC focus on the 19 Principles instead of the DRA that causes us concern that something is trying to cause the DSC to only tell one side of the story—the Water Tunnels side.

There is more. The Staff report on Agenda Item 11 attempts to downplay the significance of making the Water Tunnels the promoted option. The Staff report states:

One issue raised in the workshops involved the public's concern that the Council would, through a vote in the near future, identify—too early—the proposed Delta Plan amendment as the preferred alternative. Staff wants to clarify that future action by the Council will not be a project approval, but will consist of providing direction to staff about the project description (proposed project to be analyzed in the EIR) which, under CEQA, is a required part of an EIR. (CEQA Guidelines section 15124.)

This appears to be an effort to use early action; the 19 Principles and now the promoted option; to make the Water Tunnels the inevitable selected alternative. And to do so *before* rather than *after* conducting the comprehensive review and analysis required by the DRA and by CEQA.

CONCLUSION

There is no legitimate basis at this time to make new conveyance, dual conveyance, the Water Fix Tunnels, the promoted option and/or preferred alternative going forward. We have governments of laws not rulers. It is time to comply with the DRA and CEQA by doing the hard work first, before jumping to conclusions. It is time to perform the comprehensive review and analysis, and also benefit-cost analysis *before* making any decision preliminary or otherwise to promote dual-conveyance or make that the preferred alternative. The DSC Members need to keep open minds that after all is said and done through-Delta conveyance coupled with reducing exports thereby reducing reliance on the Delta, may be the best conveyance alternative. Though we know that is the case, whether we are correct is not the issue now. The issue is simply that the DSC not put the cart before the horse by prematurely favoring dual conveyance.

Should you have any questions, please contact Conner Everts, Facilitator, Environmental Water Caucus at (310) 804-6615 or connere@gmail.com, or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org.

Sincerely,



E. Robert Wright, Senior Counsel
Friends of the River



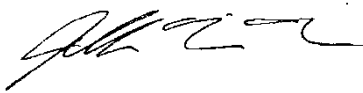
Bill Jennings, Executive Director
California Sportfishing Protection Alliance



Barbara Barrigan-Parrilla, Executive Director
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Jeff Miller, Conservation Advocate
Center for Biological Diversity



Carolee Krieger, Executive Director
California Water Impact Network



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

ATTACHMENT:

August 20, 2016, *Benefit-Cost Analysis of the California WaterFix*