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FRIENDS OF THE RIVER

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April 22, 2013

Cindy Messer
Delta Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

VIA Personal Delivery and Email

Re: Comments on Proposed Delta Plan Modified Rulemaking Documents to the Text of the Proposed Regulations

Dear Ms. Messer and Council Members:

This organization, Friends of the River (FOR), objects to approval of the Delta Plan (DP), Draft EIR, RDPEIR, and Regulations and to approval of the modified text of the Regulations made available for a 15 day written comment period commencing April 8, 2013. We adopt and incorporate by this reference our prior comment letters of January 11, 14, and 24, 2013, the Environmental Water Caucus comment letters of January 14, and April 22, 2013, and the CSPA, C-WIN, and AquAlliance Comment letter of January 14, 2013. As we did in writing and orally on January 24, 2013, we propose two deletions and two additional short paragraphs as amendments to the Proposed Regulations that we believe would resolve our objections and allow the Council's actions to comply with the California Environmental Quality Act (CEQA). Our position is that you need to neutralize the Regulations so that they do not call for improved, meaning new, conveyance meaning the Delta Water Tunnels.

Both by way of actual language and by universally understood "code", the Regulations call for new conveyance, meaning the Delta Water Tunnels. The Regulations use terms such as "improved Delta conveyance and operations," "optimize diversions in wet years when more water is available," and "decrease the vulnerability of Delta water supplies to disruption by natural disasters, such as, earthquakes, floods, and levee failures." Modified Regulations § 5001(h)(1)(A) and (C). The Delta Water Tunnels-- the proposed project set forth in the Bay Delta Conservation Plan (BDCP)—are the understood way of carrying out these activities

according to the California Department of Water Resources. Moreover, these terms are used in the Regulations' definitions of the achieving of the co-coequal goals established by the Delta Reform Act. That is an unlawful effort to make the new upstream conveyance—the Delta Water Tunnels—the *only* BDCP alternative that would be consistent with the Delta Reform Act, the Delta Plan, and the Delta Plan Regulations.

SUMMARY OF SEVERAL CEQA VIOLATIONS

The recommended modifications to the text of the Regulations have done absolutely nothing to cure any of the many extremely serious CEQA violations that were brought to the Council's attention in the above referenced comment letters. In a nutshell, the Delta Plan and Regulations are running interference for— serving as a blocking back for—the massive Delta Water Tunnels by calling for improved, meaning new upstream conveyance. That violates CEQA because the environmental documents prepared in the Delta Plan and Regulations process have failed to even disclose that the Delta Water Tunnels are the true project, let alone evaluate the environmental impacts of developing and operating the Tunnels. As we have said before, there is a difference between filling a water bottle in the Sacramento River and diverting 15,000 cubic feet per second (cfs) of water from it and away from the Delta and the endangered fish species.

Recent “Red Flag” issues raised by the National Marine Fisheries Service ((NMFS) and the U.S. Fish and Wildlife Service concerning the Delta Water Tunnels are many, and include as just one example “potential extirpation of mainstream Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit. . . .” (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, p. 12, April 4, 2013). Those species of salmon are listed endangered species under the Endangered Species Act, 16 U.S.C. § 1531 et seq.

The potential impact of a project on endangered species is *per se* significant under CEQA. 14 Cal. Code Regs (CEQA Regulations) § 15065(a)(1). Recirculation of environmental documents is required when new information is provided showing substantial impacts on the environment including impacts on endangered species of salmon as a result of taking significant quantities of the water they live in. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447-449; CEQA Regulations § 15088.5(a).

A copy of the NMFS document setting forth these impacts is attached to the original of this comment letter personally delivered to the Council for consideration by the Council and inclusion in the Record. “Potential extirpation” of the salmon as a result of the Delta Water Tunnels is one of many significant environmental impacts that the Delta Plan Regulations CEQA process has failed to disclose let alone evaluate. Preparation and recirculation of a new Draft EIR are required here.

In fact, the Delta Plan, Regulations, and CEQA process violations of CEQA are now aggravated by the State's commencing on March 14, 2013 to actually release chapters of the proposed BDCP including the Delta Water Tunnels. The entire Delta Plan and Regulations CEQA process has failed to provide and disclose the CEQA required "accurate, stable and finite description" of the true project. (For details see EWC January 14, 2013 comment letter pp. 43-46). The true project has been and is the massive Delta Water Tunnels project as announced by the Resources Agency in June 2012 and the Governor in July 2012. The true project has become even more abundantly clear now that the State is releasing the BDCP Plan chapters including Chapter 4 describing the Delta Water Tunnels. A copy of Chapter 4 released March 14, 2013 is attached to the original of these comments personally delivered to the Council for the information of the Council and for the Record. It can be seen from Chapter 4 that there will be 3 intakes for the Tunnels between river miles 37 and 41 (near Clarksburg). (BDCP Ch. 4 p. 4-5). Construction of the intakes would take place December 2017 to August 2021 and each intake would have a capacity of 3,000 cfs. (Ch. 4, p. 4-6). The intakes, Tunnels and forebays would take up 2,700 acres and the Tunnels would be 45 miles long with a conveyance capacity of 9,000 cfs. (Ch. 4, p. 4-8)(Actually, the capacity of the dual Tunnels will be 15,000 cfs).

The failure to provide an accurate project description and evaluate the environmental impacts of the true project—the Delta Water Tunnels--also violates CEQA by unlawfully segmenting and postponing environmental review from the adoption of the Delta Plan and Regulations calling for improved, meaning new upstream conveyance. (For details see FOR comment letter, January 14, 2013).

The CEQA Guidelines (14 Cal. Code Regs 15,000 et seq.) define a "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . . ." Guideline § 15378. "All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, **and operation.**" Guideline § 15126. (Emphasis added). Instead of doing what CEQA requires, the Delta Plan and Regulations unlawfully make the most fundamental planning decision ever to be made in the history of the Delta— calling for improved, meaning new, upstream conveyance— without any CEQA analysis of the impacts of that new, upstream conveyance in all phases of the project including **operation**. "CEQA's informational purpose 'is not satisfied by simply stating information will be provided in the future.'" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 441. *Accord, Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 502-504 (not proper to defer portion of environmental analysis to approve a plan by a statutory deadline).

There has also been complete failure to identify and properly consider a reasonable range of alternatives to the Delta Water Tunnels, including the EWC alternative (alternative 2) calling

for reduced exports, no new upstream conveyance, and emphasis on water conservation and recycling to efficiently and effectively meet water supply needs. (For details see EWC January 14, 2013 comment letter pp. 39-67). No other alternative, including the EWC alternative has been compared to the true project—the Delta Water Tunnels. The RPDEIR concluded that alternative 2 is slightly environmentally inferior to the proposed project. The NMFS, however, finds that the proposed project involves the “potential extirpation” of two populations of Chinook salmon. Consequently, the EWC alternative is environmentally superior to the proposed project. The failure to disclose and evaluate this and other significant adverse impacts of the proposed project and the failure to conduct reasoned, unbiased analysis of alternatives constitutes failure to proceed in a manner required by law under CEQA.

The CEQA violations are so numerous and so extreme that they cannot be cured or evaded by responses to comments on the draft environmental documents. Unless our proposed or equivalent amendments are adopted, it will be necessary for the Council to require preparation and recirculation of a new Draft EIR. That is because: “The draft EIR [and RPDEIR] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” CEQA Regulations § 15088. 5(a)(4).

PROPOSED AMENDMENTS

The following deletions and new Regulations Section are proposed to allow the Council to adopt a Delta Plan and Regulations without violating CEQA by calling for new conveyance—the Delta Water Tunnels. Our suggested language is as follows:

Delete from § 5001(h)(1)(A) the phrase “and improve Delta conveyance and operations.”

Delete § 5001(h)(1)(C) in its entirety including “improving conveyance in the Delta” and “to optimize diversions in wet years when more water is available.”

Add new Section where the Council thinks best:

§ _____ Delta Plan and Regulations do not Call for New Conveyance

(a) In the absence of “comprehensive review and analysis” including “a reasonable range of Delta conveyance alternatives, including through-Delta”, “the potential effects of climate change, possible sea level rise up to 55 inches,” “the potential effects on migratory fish and aquatic resources”, and the “potential effects of each Delta conveyance alternative on Delta water quality” (Draft EIR 23-3, 4) supposedly to be provided in the future by the BDCP CEQA process; and in the absence of water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water required by CEQA as determined by the California Supreme Court’s decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412; it is not possible at

this time for the Council to lawfully call for, plan for, encourage, recommend, or require development of new conveyance upstream from the Delta for the exporters.

(b) These Regulations and the Delta Plan do not call for, plan for, encourage, recommend, or require development of new conveyance, intakes, tunnels, canals and/or diversions upstream from the Delta for the exporters, improved Delta conveyance and operations, or optimizing diversions in wet years when more water is available. Nothing in these Regulations and the Delta Plan, or the draft EIR or RPDEIR establishes support for any future decision including but not limited to the BDCP process to favor selection of an alternative of development of new conveyance and diversions upstream from the Delta including the Delta Water Tunnels as opposed to other alternatives such as reducing exports and/or maintaining through-Delta conveyance. This provision is necessary to ensure that the Delta Plan and these Regulations do not violate CEQA and/or lead to development of or creation of momentum for a project or projects such as the Delta Water Tunnels prior to comprehensive CEQA analysis of the true project. This subsection and subsection (a) of this Section control over any provision or provisions in these Regulations, Delta Plan, Draft EIR and/or RPDEIR in actual or arguable conflict with this subsection and/or subsection (a) of this Section.

CONCLUSION

The most important and fundamental planning decision made in the history of the Delta will be whether or not to develop massive, new upstream conveyance from the Delta. That is a planning decision that cannot even be considered rationally, let alone made, until after comprehensive CEQA analysis of the true project—the Delta Water Tunnels— has been performed.

Please call if you have any questions about our comments.

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

Senior Counsel