



To protect, restore, and sustain the natural and human environment
in Amador and Calaveras counties for the benefit of current and future
generations

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February 14, 2014

**Re: Foothill Conservancy Comments on the BDCP Plan and Draft EIR/EIS:
Concerns of delta tributary upper watershed.**

Dear Federal and California agencies, officers, and staff members carrying out
the BDCP:

My name is Reuben Childress, and I am submitting these comments on behalf of
the Foothill Conservancy.

Introduction

The Foothill Conservancy is a nonprofit organization with members who live and
work in the Mokelumne River watershed. The Foothill Conservancy seeks to
restore, protect, and sustain the natural and human environment in and around
Amador and Calaveras Counties. The Foothill Conservancy believes that through
community collaboration and smart land and water planning, we can solve our
resource woes. We do not believe in transferring environmental problems from
one region to another. We believe in regional self-sustainability and aim to
prevent the needless waste and destruction of the resources that make our
foothill region so unique.

We are concerned that the state is examining a project that will not solve the
state's water supply or ecosystem challenges.

As the amount of water diverted from the Delta increases, we are concerned that
the state will be looking for additional water supplies from the already over-
allocated tributaries and upper watersheds of the San Joaquin and Sacramento
Rivers.

Comments:

Chapter 5 – Water Supply:

- 1.) "The study area for the water supply analysis includes the Delta region, areas upstream of the Delta region that may experience changes in operations as a result of implementation of the BDCP alternatives, and the SWP and CVP Service Areas. The Delta watershed includes the tributary rivers that flow into the Delta from the Sacramento River and the San Joaquin River basins."¹

What is unknown is where additional sources of water will come from to restore the Delta when enough water to fill the pipes is diverted from the Sacramento River instead of being allowed to flow through the Delta. The DEIR does not fully cover the areas that could be threatened as future water sources for the tunnels.

The environmental effects that must be considered in an EIR include, direct and indirect effects, short and long-term effects, physical changes in an area, potential health and safety problems, changes in ecological systems, changes in population distribution and concentration, changes in land use, effects on public services, and effects on natural resources including water, scenic beauty, etc. (CEQA Guidelines, sec. 15126.2, subd. (a).) As the California Supreme Court has noted, a project description should account for reasonably foreseeable future phases of proposed projects if they may change the scope of the initial project or its environmental impacts. (*Laurel Heights Improvement Association of San Francisco v. Regents of the University of California*, (1988) 47 Cal.3d 376, 393-399 [253 Cal.Rptr. 426].)

It is particularly true for infrastructure projects, that an EIR must evaluate the impacts of not only the construction of the infrastructure (in this case the tunnels), but also the impacts of their use (in this case, filling them with water). "Construction of the road way and utilities cannot be considered in isolation from the development it presages." (*City of Antioch v. City Council of Pittsburgh* (1st Dist. 1986) 187 Cal.App.3d 1325 [232 Cal.Rptr. 507].) "It is obvious that constructing a large interchange on a major interstate highway in an agricultural area where no connecting road currently exists will have substantial impact on a number of environmental factors." (*City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 674-675.)

Furthermore, the EIR must also identify mitigation measures to address these impacts. In this case, the EIR must identify the origin of Delta mitigation flows. CEQA requires agencies to adopt feasible mitigation measures in order to substantially lessen or avoid otherwise significant environmental effects. (Pub. Resources Code, secs. 21002, 21081, subd. (a); CEQA Guidelines, secs. 15002, subd. (a)(3), 15021, subd. (a)(2), 15091, subd. (a)(1).)

¹ Ch: 5, sec. 5.1, pg. 5-1

Finally, the EIR must disclose any secondary impacts resulting from the mitigation. (CEQA Guidelines, sec. 15126.4, subd. (d).) In this case, there will be impacts to the natural and the human environment associated with taking water from existing uses to secure mitigation flows for the Delta. In fact, these impacts are likely to be among the most significant impacts of the project. This is because it is in these river and lake locations where the impact will hit the ground and not be further reduced. It is in these locations where the chain of cause and effect ends. It is in these locations, where the shell game of water transfers tries to hide the impacts. To the people who currently use those waters to live, to work, and to recreate; and to the fish, the wildlife and the ecosystems those waters sustain; these are the project impacts that count. In short, to avoiding impacts to the Delta, harm will be done to other places from which water will be taken.

Because these ultimate impacts are so serious, it is highly prejudicial to truncate the impact analysis without a commitment to specific mitigation measures, and a disclosure of the associated secondary impacts to the areas of origin from whence will come the mitigation flows for the Delta. Remember, "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau et al. v. City of Hanford* (5th Dist. 1990) 221 Cal.App.3d 692, 712 [270 Cal.Rptr. 650].)

In the Final EIR, please identify where additional sources of water will come from to restore the Delta. Please identify the secondary impacts of the mitigation.

2.) "Variability and uncertainty are the dominant characteristics of California's water resources."²

This is a conclusory statement unsupported by citation to substantial evidence in the record. If you retain this statement in the Final EIR, please explain the statement. Please provide examples of the alleged "dominant uncertainty" to support the assertion. Please provide specific references to substantial evidence in the record to support the assertion. "The EIR shall cite all documents used in its preparation including, where possible, the page and section number." (CEQA Guidelines, sec. 15148.)

A better approach would be to remove this assertion from the Final EIR. Such a loaded statement seems inappropriate for an objective and interdisciplinary impact analysis. EIR's are not supposed to spout hyperbole that advocate for a

² Ch: 5, sec. 5.1.1, pg. 5-1

particular project or alternative.

- 3.) "Local surface storage and deliveries, together with reuse, account for about 40% of the state's developed water supplies. Groundwater is also a significant resource, supplying about 35% of the state's water needs, and during droughts, 40% or more. Imported water from the Colorado River provides 10% of the state's developed water supply, serving communities in Southern California. A small amount is attributed to recycled water and other local reuse projects (California Department of Water Resources 2009)."³

Please note that some water supply components are missing from the analysis, since 40% + 35% + 10% \neq 100%. This statement does not adequately report what is currently being supplied from recycled water and reuse projects.

EIRs should "emphasize feasible mitigation measures and alternatives to projects." (Pub. Resources Code, sec. 21003, subd. (c).) An EIR must evaluate a range of reasonable alternatives to the project capable of eliminating any significant adverse environmental effects of the project, or reducing them to a level of insignificance, even though the alternatives may somewhat impede attainment of project objectives, or may be more costly. (Pub. Resources Code, sec. 21002; CEQA Guidelines, sec. 15126, subd. (d); *Citizens for Quality Growth v. City of Mount Shasta* (3d Dist. 1988) 198 Cal.App.3d 433, 443-445 [243 Cal.Rptr. 727].) "The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making." (CEQA Guidelines, sec. 15126.6 subd. (f).)

The Final EIR should cover all viable alternatives and assess conservation/reclamation options for sources of water as in depth as all other alternatives.

- 4.) "efficient groundwater basin management will be necessary to avoid additional overdraft and to take advantage of opportunities to store water underground and eliminate existing overdraft."⁴

Yes, fund this type of project. In the Final EIR, please identify which alternatives would include projects that will look at opportunities to store water underground and eliminate existing overdraft. The BDCP does not create any new water. It simply moves it from one location where it is already in short demand to another area where it will be used much less efficiently.

³ Ch: 5, sec. 5.1.1.2, pg. 5-2-3

⁴ Ch: 5, sec. 5.1.1.2, pg. 5-4

- 5.) "Retrofitting is expensive, can conflict with existing infrastructure and may cause a disruption for the public. For new developments, dual plumbing of homes and facilities makes implementing recycled water use more cost-effective. Another area of emerging water reclamation is agricultural drain water."⁵

This is part of the short and conclusory paragraph dedicated to Water Reuse. This really doesn't give this information in a detailed, documented, and un-biased way.

CEQA requires a "quantitative, comparative analysis" of the relative environmental impacts and feasibility of project alternatives. (*Kings County Farm Bureau et al. v. City of Hanford* (5th Dist. 1990) 221 Cal.App.3d 692, 730-737 [270 Cal.Rptr. 650].) "Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process." (*Laurel Heights Improvement Association of San Francisco v. Regents of the University of California* (1988) 47 Cal.3d 376, 404 [253 Cal.Rptr. 426].) "A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues [citation] but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.'" (*People v. County of Kern* (5th Dist 1974) 39 Cal.App.3d 830, 841-842 [115 Cal.Rptr. 67], quoting *Silva v. Lynn* (1st Cir. 1973) 482 F.2d 1282, 1285.)

We hope that before spending what could be \$67 billion, options such as reuse and conservation will be evaluated as even-handedly and with as much detail as other alternatives.

- 6.) "East Side Division"⁶ What does this heading mean? The section goes on to discuss west-slope rivers. This is unclear. On page 5-14 the DEIR states that the "2009 NMFS BiOp Action III.1.3 requires Reclamation to make releases from the East Side Division reservoirs to achieve minimum flows below Goodwin Dam." –

Is this referring to the east side of the Central Valley? Please clarify this in the Final EIR. Please provide a map indicating the location of relevant reservoirs and rivers. The description of the local and regional environmental setting must be sufficient to provide an understanding of the significant effects of the proposed project and its alternatives. (CEQA Guidelines, sec. 15125.) In addition, "EIRs shall be written in plain language and may use appropriate graphics so that decision makers and the public can rapidly understand the documents." (CEQA Guidelines, sec. 15140.)

- 7.) "CVP operations reflect provisions of the CVPIA. CVPIA provisions relate in part to environmental uses of water including dedication of [_____] of CVP yield annually to fish, wildlife, and habitat restoration under Section

⁵ Ch: 5, sec. 5.1.1.2, pg. 5-4

⁶ Ch: 5, sec. 5.1.2, pg. 5-12-14

3406(b)(2) of the CVPIA issued by the Department of the Interior.”⁷

There is a blank in this section of the DEIR. The Final EIR should report the number. Otherwise the sentence has no meaning. "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process." (Kings County Farm Bureau et al. v. City of Hanford (5th Dist. 1990) 221 Cal.App.3d 692, 712 [270 Cal.Rptr. 650].)

- 8.) “This plan consists of many activities including storage, conveyance, ecosystem restoration, levee integrity, watersheds, water supply reliability, water use efficiency, water quality, water transfers, and science.”⁸

How are watersheds, water supply reliability, water use efficiency, water quality, and science activities? Listing science or watersheds as an activity is a bit broad and unclear. What activities will be going on in the watersheds? Please provide more specificity regarding these activities in the Final EIR. "The courts have favored specificity and use of detail in EIRs." (Whitman v. Board of Supervisors (2d Dist. 1979) 88 Cal.App.3d 397, 411 [151 Cal.Rptr. 866].)

Chapter 11 – Fish

- 9.) “Workplan activities include a suite of actions and are divided into nine broad elements that address:(4) the BDCP, water rights, and other requirements to protect fish and wildlife beneficial uses;”⁹

What workplan activities are planned for water rights? Will the project be seeking additional sources of water from upstream tributaries of the Sacramento and San Joaquin Rivers? In the Final EIR, please provide more detail regarding this aspect of the project description. "An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR." (County of Inyo v. City of Los Angeles (3d Dist. 1977) 71 Cal.App.3d 185, 193, [139 Cal.Rptr. 396].) "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decisionmakers balance the proposal's benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (i.e. the 'no project' alternative) and weigh other alternatives in the balance." (*Id.* at pp. 192-193.)

Chapter 13 – Land Use

- 10.) “Alternative 1A – Dual Conveyance with pipeline/tunnel and Intakes

⁷ Ch: 5, sec. 5.2.1.1, pg. 5-32, line 35-36

⁸ Ch: 5, sec. 5.2.1.1, pg. 5-33-34

⁹ Ch: 11, sec. 13.2.3.11, pg 11-175, line 3

1-5 (15,000 cfs; Operational scenario A)¹⁰

If this tunnel takes 15,000 cfs from the Delta, where is the water to restore the Delta going to come from? The time for identifying mitigation measures is now. "The CEQA process demands that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena." (*Oro Fino Gold Mining Corporation v. County of El Dorado* (3d Dist. 1990) 225 Cal.App.3d 872, 884-885 [274 Cal.Rptr. 720].)

In the Final EIR, please identify the potential source of the mitigation flows, and any secondary impacts associated with this mitigation. "If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed." (CEQA Guidelines, sec. 15126.4, subd. (d); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986.)

11.) "Such effects are discussed in other chapters throughout this EIR/EIS."

This statement is needlessly vague. In the Final EIR, please follow this statement with a listing of the potential physical effects of the tunnels on the environment, and with specific references to the chapters where such effects are discussed in detail. An EIR must be "organized and written in a manner that will be meaningful and useful to decisionmakers and to the public." (Pub. Resources Code, sec. 21003, sub. (b).)

If this EIR has shown any significant results it makes clear that California's water system's that deliver water from areas that produce it to areas that do not, are already heavily redundant. Spending billions of dollars on a project that cannot show how much water would actually be available to the tunnels in the DEIR shows that the BDCP is not a viable option for the state both financially or strategically. Planning and policy that involves new sources of water through conservation or reclamation and ensuring that our limited "variable and uncertain"¹¹ water supply is only put to beneficial and efficient, not greedy use, would accomplish much more good for the people and future of the state for remarkably less money.

¹⁰ Ch: 13, sec. 13.3.3.2 pg 13-54, line 26

¹¹ Ch: 5, sec. 5.1.1, pg. 5-1