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**Sent:** Wednesday, October 07, 2015 10:58 AM

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**Subject:** RE: Letter re the segmentation of NEPA review of the Water Fix from Long-Term CVP & SWP Operations

Dear Federal Officers and Staff Members Carrying out or Reviewing the BDCP California Water Fix and/or the RDEIR/SDEIS:

Our attached joint letter of today, October 7, 2015, requests your help in requiring the Bureau of Reclamation and the California Department of Water Resources to cease their segmenting the NEPA and CEQA review of the BDCP Water Fix Delta Water Tunnels from the NEPA review of Long-Term Operations of the CVP and SWP. This is an obvious NEPA and CEQA segmentation of environmental review violation. This segmentation renders the separate Draft EIS's useless for the purpose of informed public and decision-maker review of the proposed agency actions.

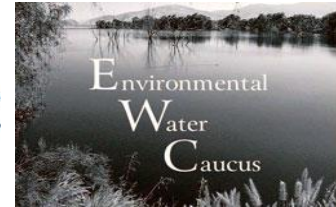
We hope it is not too much to expect scrupulous compliance with our environmental laws in determining the fate of the most controversial public works project in California history.

Our letter is already in the BDCP/Water Fix Record as of this morning and it has already been transmitted electronically to the addressees on the cover page. We request that you transmit our letter to everyone in your agency involved with approving or reviewing the BDCP/Water Fix project or its documentation pursuant to NEPA and/or CEQA.

We would try our best to answer any questions that any of you might have.

Sincerely,

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October 7, 2015

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**Re: Request for NEPA Compliance by Ceasing the Segmenting of Environmental Review of the BDCP/California Water Fix from the Environmental Review of the Coordinated Long-Term Operations of the CVP and SWP; RDEIR/SDEIS Comments re: Same**

Dear Secretary Laird, Director Cowin, Regional Director Murillo, and Federal and California Agencies, Officers, and Staff Members Carrying out and Reviewing the BDCP/Water Fix:

### *Introduction*

Friends of the River (FOR), Restore the Delta, the Center for Biological Diversity, the California Water Impact Network, the California Sportfishing Protection Alliance, and the Environmental Water Caucus (EWC) (a coalition of over 30 nonprofit environmental and

community organizations and California Indian Tribes) object to the segmenting (also referred to as piecemealing) of the environmental review of the proposed new Bay Delta Conservation Plan (BDCP)/Water Fix Delta Water Tunnels from the environmental review of the Coordinated Long-Term Operation of the Central Valley Project (CVP) and State Water Project (SWP).

It is difficult if not impossible to imagine a closer relationship for National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) purposes than that between the proposed Delta Water Tunnels and the long-term operations of the CVP and SWP. Planned long-term operations of the CVP and SWP system determine whether the Delta Water Tunnels might arguably make any sense for water supply purposes. In turn, whether or not the new conveyance proposed by the BDCP/Water Fix is approved will make a major difference in the actual long-term operations of the CVP and SWP system.

Despite this extremely close relationship, separate environmental review processes for the Water Fix Delta Water Tunnels on the one hand, and the long-term CVP and SWP operations on the other hand, are underway. A Draft EIS was issued in July on the Coordinated Long-Term Operation of the CVP and SWP, and the comment period closed September 29, 2015.<sup>1</sup> A separate Draft EIR/EIS and Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS) have been prepared for the Water Fix Tunnels with the comment period closing October 30, 2015. The Bureau of Reclamation is the federal lead agency for both of these NEPA processes. The California Department of Water Resources (DWR) is the State lead agency for the Water Fix NEPA/CEQA process.

This deliberate separation of the Water Tunnels NEPA and CEQA process from the NEPA compliance process for the Coordinated Long-term Operation of the CVP and SWP is segmentation –also referred to as piecemealing --of environmental review. That segmentation violates NEPA and CEQA.

### ***The Proposed Delta Water Tunnels Are Connected to Long-Term CVP and SWP Operations***

There would be no proposal to develop the massive and expensive Delta Water Tunnels if there were not to be long-term CVP and SWP operations. Likewise, long-term CVP and SWP long-term operations will be vastly different depending on whether or not the Delta Water

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<sup>1</sup> Our organizations commented on the Long –Term Operations Draft EIS on September 29, 2015. FOR submitted supplemental comments that same day raising the NEPA segmentation violation issue raised by this letter. Both of those comment letters were submitted to Mr. Ben Nelson of the Bureau of Reclamation, Bay-Delta Office, 801 I Street, Suite 140, Sacramento, California, as directed by the instructions for commenting on that Draft EIS.

Tunnels are developed. The Introduction to the Water Fix RDEIR/SDEIS includes among the Water Tunnels project objectives:

Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts held by SWP contractors and certain members of San Luis Delta Mendota Water Authority, and other existing applicable agreements. (Water Fix RDEIR/SDEIS Introduction, p. 1-9).

The RDEIR/SDEIS for the Water Fix states:

Generally, Delta hydrodynamics are defined by complex interactions between tributary inflows, in-Delta diversions, and *SWP and CVP operations, including conveyance, pumping plants, and operations of channel barriers and gates*. The degree to which each variable impacts the overall hydrology of the Delta varies daily, seasonally, and from year to year, depending on the magnitude of inflows, the tidal cycle, and *the extent of the pumping occurring at the SWP and CVP pumping plants*. (Water Fix RDEIR/SDEIS Introduction, p. 1-11) (emphasis added).

It is clear that the California Water Fix will cause changes in SWP and CVP operations—since the very point of the California Water Fix is to feed more water into the SWP and CVP network. The foregoing statement on the Water Fix RDEIR/SDEIS, establishes that these changes in SWP and CVP operations will affect, among other natural habitats, Delta hydrodynamics—i.e., they will have an environmental impact.

The Draft EIS for the Long-Term Operation of the CVP and SWP states:

The purpose of the Coordinated Operation Agreement (COA) (Public Law 99-546) is to ensure that the CVP and SWP each manage respective water rights from the Delta and share the obligations to protect other beneficial uses of water in the Sacramento Valley and the Delta. The State Water Resources Control Board (SWRCB) has placed conditions on the CVP and SWP water right permits and licenses to meet water quality and operational criteria within the Delta. Reclamation and DWR coordinate the operation of the CVP and SWP to meet these and other operating requirements pursuant to COA. (Draft EIS Long-Term Operations, p. ES-2).

The Water Fix RDEIR/SDEIS describes the need for Reclamation to ultimately “adjust CVP operations and/or flow requirements, in coordination with SWP operations.” (Water Fix RDEIR/SDEIS at 1-13). Similarly, the SWP/CVP DEIS states that: “There are numerous water supply and water quality projects and actions that could be potentially affected by changes in the coordinated long-term operation of the CVP and SWP, or could affect the CVP and SWP

operations.” SWP/CVP DEIS at 3-45. The Water Fix is one these “numerous” projects. *See Id.* at 3-46.

Consequently, the interconnection between the Delta Tunnels and the State’s water system is readily apparent. Again, a primary purpose of the Water Fix is to deliver more higher quality water to the CVP and SWP while resulting in lower water quality in the Delta. Additionally, the future adjustments that will have to be made in the CVP and SWP as a result of increased inflow “will likely change” the project’s environmental effects, since CVP and SWP flow schedules affect wildlife and natural habitat throughout the State.

The U.S. Environmental Protection Agency (EPA) commented last year during the BDCP environmental review process that:

Upstream/Downstream Impacts

The Federal and State water management systems in the Delta are highly interconnected, both functionally and physically. The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and *require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated.* We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts. (EPA comments on Draft Environmental Impact Statement for the Bay Delta Conservation Plan, San Francisco Bay Delta, California (CEQ# 20130365), p. 3, August 26, 2014)(emphasis added).<sup>2</sup>

The subjects of the two separate processes are connected.<sup>3</sup> They are inextricably intertwined.

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<sup>2</sup> In its detailed comments attached to the letter, EPA further explained that:

The Draft EIS does not include a comprehensive description of the CVP and SWP with and without new North Delta intake facilities or through-Delta operations. Such information as needed to assist the reader in understanding how the water delivery system operates under Existing Conditions and how it would change under CM1 [Delta Water Tunnels] alternatives. (Detailed Comments, p. 22).

<sup>3</sup> As explained by the Delta Independent Science Board in its comments of September 30, 2015, The operating guidance for the new [Water Fix] alternatives seems isolated from the many other water management and environmental activities in and upstream of the Delta likely to be important for managing environmental and water supply resources related to Delta diversions. (DISB Review of BDCP/Water Fix Partially Recirculated Draft EIR/Supplemental Draft EIS at. p. 14).

***The Segmentation of Environmental Review of Long-Term Operations from the Proposed Delta Water Tunnels Violates NEPA and CEQA***

The NEPA Regulations are codified at Title 40 of the Code of Federal Regulations (C.F.R.). The NEPA Regulations specify that “Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. . . . Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” (40 C.F.R. § 1502.4(a).<sup>4</sup>

Pursuant to NEPA Regulation 40 C.F.R. § 1508.25(a), multiple federal actions must be evaluated in the same environmental impact statement if they are connected, cumulative, or similar. Here, the long-term operations on the one hand, and proposed Delta Water Tunnels on the other hand, are all three. They are connected, cumulative, and similar. When two proposals or parts of proposals are so closely connected that they effectively constitute a single course of action, an agency must analyze both proposals in a single EIS. *Id.* A three-part test determines whether two proposals are so connected.

“Actions are connected if they: (i) [a]utomatically trigger other actions which may require environmental impact statements, (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously, and (iii) are interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1).

The Water Fix and the coordinated operation of the SWP and CVP are clearly connected. Under (i), the Water Fix, which describes as a primary purpose “restor[ing] and protect[ing] the ability of the SWP and CVP to deliver up to full contract amounts,” will automatically trigger increased flow diversions to the SWP and CVP. (Water Fix RDEIR/SDEIS at ES-6). Close to a decade’s worth of litigation has indicated that alterations to flow levels in the SWP and CVP will

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<sup>4</sup> In *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 972-73 (2d Cir. 1976), the court explained that:

To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA. [citations omitted]. The guidelines of the Council on Environmental Quality make it clear that the statutory term “major Federal actions” must be assessed “with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated.” 40 C.F.R. s 1500.6(a) (1975). The transfer decision is plainly a consequential, if not an inseparable, feature of the construction project.

likely necessitate environmental impact statements. See BUREAU OF RECLAMATION, *Coordinated Long-Term Operation of the CVP and SWP* (Aug. 2, 2015, 1:50 PM), <http://www.usbr.gov/mp/BayDeltaOffice/Documents/Ito.html>.

Under (ii), the water diversions proposed in the Water Fix cannot occur unless SWP and CVP operations adjust flow levels. Indeed, the Water Fix RDEIR/SDEIS states: “SWP operation of new conveyance facilities and/or flow patterns proposed under the [California Water Fix] would *require changes in existing CVP operations.*” Water Fix RDEIR/SDEIS at 1-11 (emphasis added). For (iii), the California Water Fix and the coordinated operation of the SWP and CVP are clearly “interdependent parts of a larger action.” Namely, they are both part of the same effort to manage the CVP and SWP.

The inextricable connection between the projects thus requires that both be analyzed in the same EIS. Reclamation and DWR’s ongoing failure to do this constitutes a violation of NEPA. 40 C.F.R. § 1502.4(a); 40 C.F.R. § 1508.25(a)(1).<sup>5</sup>

The rules under CEQA are similar to those under NEPA in prohibiting segmenting environmental review. CEQA requires that “an agency must use its best efforts to find out and disclose all that it reasonably can” about a project being considered and its environmental impacts. *Vineyard Area Citizens v. City of Rancho Cordova*, 40 Cal.4<sup>th</sup> 412, 428 (2007). Under CEQA a “project” is defined as “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. . . .” 14 Code Cal. Regs (CEQA Guidelines) § 15378(a). The courts have explained that:

Theoretical independence is not a good reason for segmenting environmental analysis of the two matters. Doing so runs the risk that some environmental impacts produced by the way the two matters combine or interact might not be analyzed in the separate environmental reviews. *Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4<sup>th</sup> 1214, 1230 (2007).

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<sup>5</sup> The NEPA Regulations also require that agencies “Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.” § 1500.2(c). See also § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”).

It should come as no surprise that the diversion of millions of acre-feet of fresh water from the north to the south has the potential to affect a number of the State's sensitive fish species.<sup>6</sup> For this very reason, Reclamation and DWR cannot lawfully segment two interrelated actions into separate environmental analyses. The coordinated operation of the CVP/SWP and the Water Fix are both part and parcel of the same project because they both combine to cause "a direct physical change in the environment." Cal. Code Regs. Tit. 14 § 15378. Thus, the current Water Fix RDEIR/SDEIS violates CEQA and will continue to violate CEQA until a new Draft EIR/EIS for the Water Fix analyzes both the environmental impact of the Water Tunnels and the operation of SWP and CVP.

To proceed in the manner required by NEPA and CEQA, the Bureau of Reclamation must cease these two separate environmental review processes. Reclamation and DWR must instead prepare and issue for public review one new Draft EIR/EIS comprehensively analyzing in one environmental review process and one Draft EIR/EIS the environmental impacts of both the Coordinated Long-Term Operation of the CVP and SWP and the proposed BDCP/Water Fix Delta Water Tunnels. Because of the segmentation, the Draft EIR/EIS and RDEIR/SDEIS is "so inadequate as to preclude meaningful analysis," in violation of NEPA. 40 C.F.R. § 1502.9(a)." Likewise, it is "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded," in violation of CEQA, 14 Cal. Code Regs § 15088(a)(4).

### *Conclusion*

The Bureau of Reclamation and DWR, in order to comply with NEPA and CEQA, must prepare and issue for public and decision-maker review and comment one Draft EIR/EIS on both the coordinated long-term operation of the CVP and SWP, and the proposed BDCP Water Fix Delta Water Tunnels.

Should you have any questions, please contact Conner Everts, Co-Facilitator, Environmental Water Caucus at (310) 394-6162 ext. 111 or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or [bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org).

Sincerely,

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<sup>6</sup> See, e.g. Felicity Barringer, *Effort Falters on San Francisco Bay Delta*, N.Y. TIMES, Dec. 14, 2010, <http://www.nytimes.com/2010/12/15/science/earth/15delta.html?src=me> ("environmentalists and fishermen note that the years of abundant water for farms and Southern California cities corresponded to years when fish populations crashed—in the case of the smelt, almost to the vanishing point").



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/s/ Bill Jennings  
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