

February 26, 2024

Michael Jewell, Chief, via email
Regulatory Division, USACE
Sacramento District
Michael.s.jewell@usace.army.mil

Janet Coit via email
Assistant Administrator for NOAA Fisheries
NOAA Fisheries Directorate
Janet.Coit@noaa.gov

Martha Williams via email
Director of US Fish and Wildlife Service
Martha_Williams@fws.gov

Re: Supplemental Comments on USACE Draft EIS for the Delta Conveyance Project

909 12th Street, Suite 202, Sacramento, CA 9581
(916) 557-1100 FAX (916) 557-9669 www.sierraclubcalifornia.org

Dear Michael Jewell, USACE, Janet Coit, Assistant Administrator, NOAA Fisheries, and Martha Williams, Director, U.S. Fish and Wildlife Service:

By this letter, our public interest organizations add to the written comments we submitted on January 17, 2024, and on February 16, March 14, March 30, and July 6, 2023, on the U.S. Army Corps of Engineers Draft Environmental Impact Statement (EIS) on the California Department of Water Resources' (DWR) Delta Conveyance Water Tunnel Project.

“There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” (NEPA Regulations, 40 C.F.R. § 1502.9(d)(1)(ii.) The significant new circumstances and information add to the new circumstances and information our organizations have previously called to your attention, requiring the Army Corps to prepare a supplemental Draft EIS on DWR’s Delta Conveyance Project. Issuing a Final EIS for the Project without having first issued a supplemental Draft EIS would violate the National Environmental Policy Act (NEPA.) The public interest organizations joining in this supplemental comment letter are Sierra Club California, AquAlliance, California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity, Environmental Water Caucus, Friends of the River, Planning and Conservation League, and Restore the Delta..

I. THERE ARE SIGNIFICANT NEW INFORMATION AND CIRCUMSTANCES CREATED BY THE EPA’S COMMENTS ON THE STATE WATER RESOURCES CONTROL BOARD’S SACRAMENTO/DELTA DRAFT STAFF REPORT

On January 19, 2024, the U.S. Environmental Protection Agency (EPA) issued a Comment Letter (“EPA Letter”) to the California Water Resources Control Board on the Board’s “Sacramento/Delta Draft Staff Report.”¹ A copy of EPA’s letter and its 14 page Enclosure, EPA Comments on the September 28, 2023 *Draft Staff Report in support of updates to the Water Quality Control Plan for the San Francisco Bay-Sacramento-San Joaquin Delta Estuary for the Sacramento River and Delta watersheds* (“EPA Comments”), is attached as the **Exhibit** to this supplemental comment letter.

¹ Letter from Tomas Torres, Director, Water Division, EPA Region 9 to State Water Resources Control Board, Division of Water Rights, Attn: Bay-Delta Hearings Branch, Submitted via Email: SacDeltaComments@waterboards.ca.gov .

DWR's proposed Delta Conveyance Tunnel Project would do the opposite of what the EPA says is required. The Project would significantly *reduce* Delta water flows and outflows. Instead, according to the expert EPA, Delta flows and outflows must be significantly *increased* to protect endangered and threatened fish species and also to protect public health. The Army Corps must prepare a supplemental Draft EIS disclosing the EPA's comments and also analyzing the impacts of project operations on the endangered and threatened fish species and also on the public health of Delta residents and users.

The Army Corps is the federal lead agency for the Project. (**Draft EIS**, ES.1, p. ES-1.) The National Marine Fisheries Service and U.S. Fish and Wildlife Service are cooperating agencies in the NEPA process for the Project. (**Draft EIS**, Ch. 1, 1.6.2, p. 1-6.) The Army Corps must also obtain comments from the expert National Marine Fisheries Service and U.S. Fish and Wildlife Service given EPA's comments on the need to *increase* Delta flows --which is the opposite of *reducing* Delta flows-- for the subject Project to prevent the extinction of the endangered and threatened fish species. Also, NEPA requires those two agencies to comment on the supplemental Draft EIS, or Draft EIS if the Army Corps refuses to issue a supplemental Draft EIS.

Our organizations July 6, 2023, supplemental comment letter was devoted to the NEPA requirement that the Army Corps obtain the comments of the National Marine Fisheries Service and U.S. Fish and Wildlife Service on the Draft EIS. Our July 24, 2023, letter to the Assistant Administrator for NOAA Fisheries and numerous other NOAA Fisheries persons was devoted to the NEPA requirement that the National Marine Fisheries Service comment on the Army Corps' Draft EIS. Our July 24, 2023, letter to the Director of the U.S. Fish and Wildlife Service and numerous other Fish and Wildlife Service persons was devoted to the NEPA requirement that the Fish and Wildlife Service comment on the Army Corps' Draft EIS.

According to EPA, "The State Water Board identified the need to comprehensively review and, if necessary, amend flow objectives in response to growing concern over deteriorating aquatic life conditions, climate change, and pelagic organism decline." (**EPA Letter** at 1.) Also, "EPA notes that water quality standards for the waterbodies covered in this Staff Report were last updated in 1995, despite a Clean Water Act requirement that States consider and as appropriate, make such updates at least once every three years. CWA § 303(c)(1)." (**EPA Letter** at 1 fn. 1.)

EPA said with respect to fish species needs,

The Staff Report along with previous State Water Board reports in which the State Water Board compiled and analyzed a significant amount of comprehensive scientific information, recognize that substantially more flow is needed in the Delta and Sacramento-San Joaquin watersheds to support aquatic life. Currently, six fish species (Delta smelt, longfin smelt, green sturgeon, Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead) are listed or proposed as threatened or endangered under the Endangered Species Act. *Scientific consensus indicates that native fish population abundance is positively associated with flow volumes* (e.g., Jassby et al. 1995, Sommer et al. 1997, Mac Nally et al. 2010, Tamburello et al. 2019) *and that largescale increases in both flow and habitat restoration are needed to recover and protect these and other native species.* (EPA Comments at 1)(Emphasis added.)

EPA added,

EPA recommends the State Water Board consider scientific studies published since the State Water Board’s 2017 Final Scientific Basis Report was released in the final Staff Report to support draft plan amendments. Studies published after 2017 may refine the State Water Board’s identification of critical flow thresholds that benefit native fish species and estuarine habitat. For example, *recent studies on flow-survival relationships for Chinook salmon in the Sacramento River and Delta provide scientific support for the positive relationship between flow and outmigration survival and recruitment of Chinook salmon, including for late-fall, fall, and winter-run salmon* (Michel, 2019), *late-fall run and spring-run smolts* (Cordoleani et al., 2018; Henderson et al., 2019; Michel et al., 2021; Perry et al., 2018), *wild origin salmon fry* (Munsch et al., 2020), *and winter-run juveniles* (Hassrick et al., 2022). Furthermore, since the 2016 draft Scientific Basis Report and the 2017 Final Scientific Basis Report identified a flow range of 11,400-29,200 cfs as protective of fish and wildlife uses for the February-June period, *recent research has demonstrated that even greater flow magnitudes over a period longer than February-June are needed to be protective of zooplankton populations* (Hassrick et al. 2023), *which are a foundational group in the food web to support species at higher trophic levels, including listed salmonids.*(EPA Comments at 3-4)(Emphasis added.)

There is more. EPA also said,

As cautioned by the State Water Board: “flow and physical habitat interact in many ways, but they are not interchangeable. *The best available science suggests that current flows are insufficient to protect public trust resources.*”

Further, scientific consensus indicates that native fish population abundance is positively associated with increasing flow volumes (e.g., Jassby et al. 1995, Sommer et al. 1997, Mac Nally et al. 2010, Tamburello et al. 2019) and that largescale increases in both flow and habitat restoration are needed to recover and protect these and other native species. Clearly, flow is a critically important driver of the health of the Bay-Delta watershed. (EPA Comments at 6)(Emphasis added.)

According to EPA, habitat restoration is not sufficient,

This Staff Report does not demonstrate that suitable habitat area in the Sacramento and Delta watersheds is a limiting factor on estuarine and anadromous fish population growth, nor does the Staff Report provide an adequate scientific rationale to demonstrate that habitat restoration assets will increase fish abundance *without meaningful increases in tributary flows protected as Delta outflows. Any improvements in habitat will likely be achieved only if pursued alongside substantial increases in flow rates, because flow is strongly and positively correlated with many indicators of native fish survival, including for salmon survival out-migrating from natal tributaries (Michel, 2019, Henderson et al. 2019), salmon survival in and through the Delta (Perry et al. 2018), and Delta Smelt post-larval survival (Polansky et al. 2021). Targeted habitat restoration with insufficient flow, on the other hand, is associated with low salmonid inhabitation (Munsch et al. 2020). (EPA Comments at 9)(Emphasis added.)*

With respect to public health, EPA said,

The Bay-Delta and its watersheds have also experienced increased frequency of harmful algal blooms (HABs) affecting aquatic life and human health. Restoration of higher flow volumes may address key drivers of HABs, including increased stream temperature and water residence time (Kudela et al. 2023; Berg & Sutula 2015, Lehman et al. 2013). EPA reiterates that swift action is needed to address the imperiled state of the Delta and the species, communities, and economies that depend on this ecosystem for survival. (EPA Comments at 1-2)(Emphasis added.)

Our organizations January 17, 2024, supplemental comment letter pointed out that in glaring contrast to the needs to *increase* Delta outflows, the Delta Conveyance Project would significantly *reduce* Delta outflows. (Sierra Club California et al. Supplemental Comment Letter at 13-14, January 17, 2024.) EPA's Comments provide significant new information and circumstances requiring the Army Corps to prepare a supplemental Draft EIS.

II. THE SIGNIFICANT NEW INFORMATION AND CIRCUMSTANCES SET FORTH IN THE EPA’S COMMENTS ON THE STATE WATER RESOURCES CONTROL BOARD’S SACRAMENTO/DELTA DRAFT STAFF REPORT REQUIRE PREPARATION OF A SUPPLEMENTAL DRAFT EIS AND COMMENTS BY THE NATIONAL MARINE FISHERIES SERVICE AND U.S. FISH AND WILDLIF SERVICE

The NEPA Regulations require that,

(d) *Supplemental environmental impact statements*. Agencies:

(1) *Shall* prepare *supplements* to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) *There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts*. (NEPA Regulations § 1502.9(d)(1)(i) and (ii) (Emphasis added.)

The significant new information in EPA’s comments on the State Water Resources Control Board’s Draft Staff Report constitutes significant new circumstances and information requiring preparation and publication of a supplemental Draft EIS by the Army Corps pursuant to NEPA Regulation section 1502.9(d)(1)(ii.)

The case law under NEPA is as clear in this regard as the plain language of the supplemental EIS NEPA Regulations. The Supreme Court explained, “The CEQ [Council on Environmental Quality] regulations, which we have held are entitled to substantial deference, [citations omitted], impose a duty on all Federal agencies to prepare supplements to either draft or final EIS’s if there ‘are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.’” (*Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989); *see also Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557-558 (9th Cir. 2000.)) The Ninth Circuit has explained, “Given the limited public input opportunities attendant to the issuance of a final EIS, satisfying this directive” requiring agencies to submit proposed actions for public comment prior to making a final decision requires a supplemental draft EIS when necessary to allow outside reviewers to give meaningful consideration to the environmental issues involved. (*State of California v. Block*, 690 F.2d 753, 770 (9th Cir.1982.)) (Requiring preparation and circulation of a supplemental draft EIS.) See also, *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1034-1035 (2d Cir. 1983)(Upholding district court ruling that the Army Corps or the Federal Highway Administration prepare a supplemental or amended EIS on fisheries issues.)

The purpose of NEPA, the NEPA Regulations, and the NEPA cases are clear. The Army Corps must prepare a supplemental Draft EIS so the public will have the opportunity to review and comment on the assessment of the environmental impacts of Project operations on listed fish species and public health that must be, but was not, provided by the Draft EIS.

Moreover, the information in EPA's comments regarding the need to increase flows to protect endangered and threatened fish species accentuates the violation by the Army Corps of NEPA's requirement to obtain the comments of the expert National Marine Fisheries Service and the U.S. Fish and Wildlife Service on the Draft EIS. (42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.1(a.) That violation was a subject of our organizations supplemental comment letter of January 17, 2024 (at 29), and the subject of our organizations supplemental comment letter of July 6, 2023. (at 1-11.)

The Army Corps has a duty under NEPA to obtain the comments of the Fisheries Service and the Fish and Wildlife Service on the Army Corps' Draft EIS. And the Fisheries Service and Fish and Wildlife Service have duties under NEPA to comment on the Draft EIS. The District of Columbia Circuit explained in *Nevada v. Department of Energy*, 457 F.3d 78, 89 (D.C. Cir. 2006),

NEPA imposes a duty on the agency to consult with and obtain written comments from the appropriate federal agencies. *See* 42 U.S.C. § 4332(2)(C); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1022 (9th Cir.1980) ('[T]he statute imposes on the agency a duty to obtain written comments.'). And the CEQ regulations implementing NEPA not only require the proposing agency to 'obtain the comments' of federal agencies with jurisdiction and/or expertise, *see* 40 C.F.R. § 1503.1(a)(1), but also affirmatively require those agencies to comment, *see* 40 C.F.R. § 1503.2. *See Warm Springs Dam Task Force*, 621 F.2d at 1022.

The Ninth Circuit held, "the Corps violated NEPA by not obtaining the written official comments of USGS [U.S. Geological Survey]..." on the Draft S-EIS. (*Warm Springs Dam Task Force*, 621 F.2d 1017, 1022.) The Court explained in *Warm Springs Dam Task Force*, 621 F.2d 1017, 1021,

But informal consultation alone is not sufficient compliance with the statute. Section 4332(2)(C) [of the NEPA statute] requires each agency possessing special expertise to comment in writing on its official view of the environmental consequences of the proposed action. This requirement is essential to maintain the integrity and regularity of the decisionmaking process. By requiring the commenting agency to take an official position, even if it be 'no comment,' Congress encourages the agency to direct the draft EIS for study to those

personnel within its organizational structure most likely to bring to light any additional facts that should be considered or to raise any reasoned disagreement with the draft's conclusions. Regular review procedures are thereby established. If the proposing agency could comply with the statutory requirement merely by selecting individuals within the commenting agency to serve as consultants, as the Corps suggests, there would be too great a risk that the only individuals contacted would be those the proposing agency considered most likely to support its proposal. Some official consideration by the independent 'expert' agency is clearly called for.

NEPA Regulation § 1503.1 requires in pertinent part,

- (a) *After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:*
 - (1) *Obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or is authorized to develop and enforce environmental standards. (Emphasis added.)*

So, the Corps must obtain the comments of the National Marine Fisheries Service and U.S. Fish and Wildlife Service on the Draft EIS. And, those two agencies must comment on the Draft EIS and Supplemental Draft EIS before the Corps issues a Final EIS on the Delta Conveyance Project. (40 C.F.R. § 1503.2.)²

Instead of carrying out their prescribed duties under NEPA to comment in writing on the Draft EIS, the Fisheries Service and Fish and Wildlife Service are simply standing by, doing nothing and saying nothing in public.

The public, including Delta residents and users whose health is threatened by the Project, and persons concerned about the threatened extinction of endangered and threatened fish species, is entitled to know and comment on the issues raised by the expert EPA's comments. The public is also entitled to know the views of the expert National Marine Fisheries Service and U.S. Fish and Wildlife Service given EPA's comments.

² NEPA Regulation section 1503.2 requires in pertinent part, "Cooperating agencies and agencies that are authorized to develop and enforce environmental standards *shall comment* on statements within their jurisdiction, expertise, or authority within the time period specified for comment in [§ 1506.11](#) of this chapter." (Emphasis added.)

CONCLUSION

The U.S. Army Corps of Engineers is the federal lead agency for NEPA review of DWR's massive proposed water project. Four other federal agencies including the Fisheries Service and Fish and Wildlife Service are NEPA cooperating agencies in the NEPA process. The *only* EIS to be prepared for this massive Project is the Army Corps' EIS. The Army Corps must prepare and publish a supplemental Draft EIS covering Project operations and the significant new circumstances and information since the Draft EIS was issued including impacts on listed fish species and public health. The National Marine Fisheries Service and U.S. Fish and Wildlife Service must comment on the supplemental Draft EIS, or the Draft EIS if the Army Corps refuses to issue a supplemental Draft EIS. The supplemental comments must disclose and analyze the issues involved in the Project significantly *reducing* flows whereas the EPA and the Water Board Staff Report say flows must be significantly *increased*.

The contact for this supplemental comment letter is E. Robert Wright, Counsel, Sierra Club California (916) 557-1104 or bwrightatty@gmail.com . We will do our best to answer any questions you may have.

Sincerely,



*E. Robert Wright, Counsel
Sierra Club California*



*Erin Wooley, Senior Policy Strategist
Sierra Club California*



*Howard Penn, Executive Director
Planning and Conservation League*



*Conner Everts, Facilitator
Environmental Water Caucus*



*John Buse, Senior Counsel
Center for Biological Diversity*



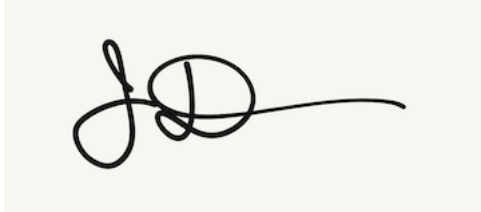
*Carolee Krieger, Executive Director
California Water Impact Network*



*Barbara Vlamis, Executive Director
AquAlliance*



*Chris Shutes, Executive Director
California Sportfishing Protection
Alliance*



*Jann Dorman, Executive Director
Friends of the River*



*Barbara Barrigan-Parrilla, Executive
Director, Restore the Delta*

cc. DLL-DCP-EIS@usace.army.mil
Zachary.M.Simmons@usace.army.mil
Deborah.L.Lewis2@army.mil
Samuel.rauch@noaa.gov
Richard.Spinrad@noaa.gov
Evan.Sawyer@noaa.gov
Garwin.Yip@noaa.gov
scott.farley@noaa.gov
cathy.marcinkevage@noaa.gov
amanda.cranford@noaa.gov
Robert.anderson@sol.doi.gov
Shannon_Estenez@fws.gov
Paul_souza@fws.gov
Kayle_allen@fws.gov
Jana_affonso@fws.gov
Steven_detwiler@fws.gov
Chan.Janice@epa.gov
Gordon.StephanieS@epa.gov
Diane.Riddle@waterboards.ca.gov
Paige.Uttley@wildlife.ca.gov
Melissa.Farinha@wildlife.ca.gov
Edmund.Yu@deltacouncil.ca.gov
DeltaCouncilSB@deltacouncil.ca.gov

EXHIBIT: EPA Comments on the September 28, 2023 *Draft Staff Report in support of updates to the Water Quality Control Plan for the San Francisco Bay-Sacramento-San Joaquin Delta Estuary for the Sacramento River and Delta watersheds* (January 19, 2024)