



To protect and restore California Rivers by influencing public policy and inspiring citizen action.

FRIENDS OF THE RIVER

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May 15, 2013

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

VIA Personal Delivery and Email

Re: URGENT, Comments on Proposed adoption of Delta Plan, Regulations, Findings and Statement of Overwriting Considerations, and Certification of Final Program Environmental Impact Report (PEIR)

Dear Ms. Messer and Council Members:

This organization, Friends of the River (FOR), objects to approval of the Delta Plan (DP), Regulations, Findings and Statement of Overriding Considerations for the Delta Plan. We urge you to reconsider your planned approval of this plan and its supporting documents at the hearings scheduled for May 16th and 17th pending development of a stable and accurate project description, an adequate alternatives analysis, and a complete understanding of the projects that the Council is endorsing. These documents set the wheels in motion for construction of new conveyance and storage, creating an irreversible momentum towards approval of such projects. The Council's failure to conduct an analysis of the likely environmental impacts that will result from its endorsement of new conveyance and storage frustrates the intent of and public participation goals of CEQA.¹

In a nutshell, the Delta Plan and Regulations are running interference for the Bay Delta Conservation Plan's (BDCP) massive Delta Water Tunnels by encouraging "construction and

¹ The Findings and Statement (Agenda Item 6a, Attachment 1) (hereafter "Findings") were just posted a few days ago. We adopt and incorporate by this reference our prior comment letters of January 11, 14, and 24, and April 22, 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.

operation of new reliable water supply, . . . projects.” (Findings, pp. 7, 8, 20, 21, 26, 57, and 58). The new water supply project is, of course, the Delta Water Tunnels.

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 mainstem 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. In light of these “red flag” comments and the predicted irreversible impacts to endangered species, the Council needs to halt the Delta Plan process, including rejection of adoption of the Delta Plan, Regulations, and Findings, and rejection of certification of the PEIR on May 16 and 17, 2013.

The entire Delta Plan process ranging up through the Findings has been predicated upon the false premise that the Delta Plan would somehow be good for the Delta and the endangered species of fish. The falsity of the claim that taking more freshwater away from the fish would somehow help rather than harm endangered species of fish has been commented on previously. The Deputy Secretary of the Resources Agency, Jerry Meral, has been the lead State official in charge of obtaining approval of the BDCP Delta Water Tunnels. It was reported on April 30, 2013, that Deputy Secretary Meral stated “BDCP is not about, and has never been about saving the Delta. The Delta cannot be saved.” (Sacramento Bee, p. A3, April 30, 2013). That statement is fully consistent with what Deputy Secretary Meral told the Council in responding to Council Member Nottoli’s question about Meral’s blog post where he spoke of permanent inundation of areas below sea level in the Delta, referencing sea level rise and also atmospheric river storms based on what he read in the January issue of Scientific American. (February 21, 2013 Council public meeting). That statement is also fully consistent with the comment from the Resources Agency that it posted on April 11, 2013, in response to the NMFS comment set forth above. The Resources Agency response includes: “In that document [NMFS comment referenced above] a specific comment (1.17, page 12) is made regarding the potential extirpation of winter-run Chinook salmon from the Sacramento River due to the cumulative effects of the project when combined with effects of climate change and other baseline conditions. . . .” The response claims that “climate change is going to cause challenging conditions for winter-run that BDCP alone cannot address. . . .”

Not only has the State now claimed in several instances that Delta ecosystem restoration is not possible, it has also admitted that new water delivery conveyance will have significant and unavoidable impacts that contradict the intent of the Delta Reform Act. There are admissions throughout the Findings about the numerous significant adverse effects of operating the new water supply project. These admitted adverse impacts include impacts on special status species

(Findings, p. 7), fish and wildlife habitat (Findings, p. 8), exposure of sensitive receptors to substantial pollutant concentrations (Findings, p. 26), conflicts due to climate change and sea level rise (Findings, p. 57), violations of water quality standards and degradation of water quality (Findings, p. 58), and cumulative impacts on water quality and biological resources (Findings, pp. 77, 78).

These statements that the Delta ecosystem cannot be saved is a complete shift in position by the State and demonstrate the false underlying premise that the Delta Plan and BDCP Delta Water Tunnels are intended to help save the Delta as required by the Delta Reform Act. The State now claims based on surmise and speculation that the Delta and the fish are doomed anyway so that the water might as well be exported.

The Findings falsely claim that “The Delta Plan will protect, restore and enhance the Delta ecosystem. . . .” (Findings p. 97). Instead, the State has admitted through the Resources Agency that it now claims, albeit based on surmise and speculation, that the “Delta cannot be saved.” Consequently, the failure to disclose this conclusion in the PEIR and Findings evades the “environmental full disclosure” required by the California Environmental Quality Act (CEQA). There is a day and night difference between claiming the Delta Plan will save the Delta and the claim that the Delta and the fish are doomed so the water might as well be exported. Moreover, the State executive branch abandonment of the goal of saving the Delta is now at odds with the express language of the Delta Reform Act which establishes policies and goals to “Restore the Delta ecosystem, including its fisheries and wildlife”, Water Code § 85020(c), reduce “reliance on the Delta in meeting California’s future water supply needs, Water Code § 85021, and the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem.” Water Code § 85084.

Instead of concluding the Delta Plan process later this week, the Council must reinstate the CEQA and public disclosure process with such threshold questions and environmental analysis as whether the Delta and the fish can be restored, as mandated by the Delta Reform Act. The Council must ask, how much would taking significant quantities of freshwater away from the fish contribute to the further decline or extinction of which endangered species of fish? Should the Council report back to the Legislature that it is not possible to meet the Delta Reform Act policies and goals of restoring and protecting the Delta ecosystem? The Council cannot reasonably adopt a Plan that relies on the false premise that taking more freshwater through the new water supply project will somehow help rather than hurt the Delta and the fish in the face of new opinions by the State BDCP expert that the Delta and the fish are doomed anyway.

At the very least, the Council must prepare a new draft EIR and recirculate it to address and adopt alternatives and mitigation for the long list of significant impacts to endangered species. The potential impact of a project on endangered species is *per se* significant under CEQA. 14 Cal. Code Regs (CEQA Guidelines) § 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 Guidelines § 15088.5(a). If the Delta Plan assumes that the Delta cannot be saved, then that assumption must be stated openly and incorporated in a new draft EIR to be circulated for public review and comment.

The Council has options other than blindly endorsing the Delta Tunnels project. The Council was presented with various alternatives that would ameliorate many of the likely impacts of the project. The Council at least considered Alternative 2, the Reduced Exports Alternative, proposed by the Environmental Water Caucus. The Council quickly dismissed this Alternative stating that it would not further water supply reliability goals enough. We hope that you will reconsider this Alternative as local water supply development is the most reliable option in terms of water delivery. The Council did not even consider our other two proposed Alternatives, Alternative 2A and 2B, proposed in FOR's letter on January 11, 2013. These alternatives gave the Council the option of reducing exports by a lesser amount than that offered by the EWC alternative and allowed the Council to abstain from endorsing new conveyance until proper environmental analysis has been done. The Council still overlooked these alternatives. Under Alternative 2A, the Delta Plan and the Regulations would not encourage or recommend new or improved conveyance, water intakes, conveyance facilities, exporting more water in the wet years, optimizing diversions in wet years, and the like at this time. The decision whether to call for new conveyance would await the determination of such fundamental issues as water supply availability and the environmental impacts of supplying the water under CEQA including a helpful guide as to what is necessary. Alternative 2B also would not recommend new conveyance prior to a robust CEQA, water supply and public trust doctrine analysis. This Alternative, however, lowers reduction in exports compared with Alternative 2, and/or, phases in reductions in exports over time by phasing out exports to impaired agricultural lands that will or should eventually cease production.

Analysis of these additional Alternatives would help the Council achieve its legal obligation to consider a reasonable range of alternatives. We urge the Council to reconsider this choice and conduct a full analysis of our proposed Alternatives 2A and 2B and to conduct a more complete analysis of Alternative 2. Approval of any calls for new conveyance, optimizing diversions in the wet years and the like must be deferred until CEQA has been complied with and the public trust doctrine analysis has been performed.

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 and environmental full disclosure including complete, and candid analysis of what threats water exports pose to the Delta and endangered species of fish and whether and how the Delta and the fish can be protected and restored. The Council's failure to conduct an analysis of the likely environmental impacts that will result from its endorsement of new conveyance and storage frustrates the intent of CEQA.

Please call if you have any questions about our comments.

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

Senior Counsel

/s/ Katy Cotter

Katy Cotter

Legal Counsel