ROR010 FOTR

From: Bob Wright [mailto:BWright@friendsoftheriver.org]
Sent: Monday, January 14, 2013 11:26 AM
To: comment, rulemakingprocess@DeltaCouncil; comments, recirculateddpeir@DeltaCouncil
Cc: Katy Cotter; troutnk@aol.com
Subject: recirculated Draft PEIR

Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council

Dear Ms Messer and Council Members:

Attached please find 3 items I will identify, that are objections to project approval and comments to be entered into the Record on behalf of Friends of the River for ***both*** your Rulemaking Process, and your proceedings on the Draft EIR and Recirculated Draft Program EIR. I have included the email addresses for ***both*** the Rulemaking Process and the Recirculated Draft Program EIR proceedings in the address line of this email:

Our January 11, 2013 seven page Comment letter including new Alternatives 2A and 2B. I provided this same comment letter to Angela for the Record at the public Hearing on January 11, 2013.

Our January 11, 2013 two page letter identifying three of the Exhibits I provided to Angela for the Record at the January 11, 2013 public Hearing.

Our new January 14, 2013 six page Comment letter which follows up on some of the comments I made orally at the public Hearing on January 11, 2013, and also confirms my providing the three exhibits referred to above and confirms my having provided a fourth exhibit for the Record to Angela at the public Hearing, not mentioned in the Exhibit letter above: the lengthy document and appendices entitled Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay, Contra Costa Water District Technical Memorandum WR 10-001 (February 2010). I have not previously provided a hard copy of this letter to you, and will bring a copy of it, as well as a copy of the 111 page Environmental Water Caucus comment letter dated today, to you in person later today.

Please call if you have questions about our comments. Also, please call if you have misplaced any of our comment letters or exhibits, and I will be happy to provide you with duplicates.

ROR010-1

Bob Wright
Senior Counsel
Friends of the River
Sacramento, CA
(916) 442-3155 x207

Response to comment ROR010-1

Comment noted.

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

FRIENDS OF THE RIVER
1418 20TH STREET, SUITE 100, SACRAMENTO, CA 95811
PHONE: 916/ 442-3155 • FAX: 916/ 442-3396
WWW.FRIENDSOFTHERIVER.ORG

January 11, 2013

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

Re: Comments on Final Draft Delta Plan (DP), Recirculated Draft Programmatic Environmental Impact Report (RDPEIR) and Proposed Delta Plan Rulemaking Package (Regulations) **including Presentation of New Alternatives 2A and 2B**

Dear Ms. Messer and Council Members:

This organization, Friends of the River, objects to approval of the Delta Plan (DP), RDPEIR, and Regulations. This organization is included as a commenter in the detailed comments submitted by the Environmental Water Caucus (EWC). These brief additional comments are submitted solely on behalf of this organization. A fundamental threshold CEQA violation carried out by the Delta Plan, RDPEIR and Regulations is that they call for carrying out the "alternative" of developing new conveyance facilities to divert huge quantities of freshwater from the Sacramento River upstream from the Delta for the benefit of exporters south of the Delta. These documents call for that even though no true alternative to developing new conveyance has ever been considered by either the Council or by the exporters creating the BDCP project. This failure to consider an alternative that would avoid or substantially lessen the massive environmental impacts that would occur with construction and operation of new water delivery conveyance must be remedied by full consideration of a reasonable range of alternatives in a recirculated Draft EIR.

ROR010-2

ROR010-3

Response to comment ROR010-2

Comment noted.

Response to comment ROR010-3

The range of alternatives analyzed in the EIR is a reasonable range of alternatives based on thorough consideration of public input and the requirements of CEQA. The Delta Plan does not include a Delta conveyance facility of the type described in the comment, and thus the EIR neither analyzes the impacts of such a facility nor considers alternatives to one. Regarding the relationship of BDCP and the Delta Plan, please see Master Response 1. Regarding the development and selection of the range of alternatives considered in the EIR, please refer to Master Response 3.

The Council Process Violates CEQA by Failing to Develop and Consider a Range of Reasonable Alternatives to Developing New Conveyance

Close to two years ago, the National Academy of Sciences declared in reviewing the draft BDCP that: "[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization— in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan." (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011).

In all that time, nothing has changed in this regard. The Council is still succumbing to the will of exporters who still want a conveyance that will take 15,000 cfs of freshwater out of the Sacramento River upstream from the Delta. The Delta would be left to face ever worsening salinity intrusion from the Bay due to a projected rise in the sea level by as much as 55" by 2100 (DP 80, 91) while the Revised Project further worsens salinity intrusion by taking out massive quantities of freshwater before it even reaches the Delta.

Conclusions in an EIR must be supported by substantial evidence. CEQA Guidelines section 15384 defines substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." ROR010-4

All that the subject documents contain to support the Revised Project alternative and the call for improved, meaning new conveyance, is argument, speculation, and unsubstantiated opinion and narrative. A new Draft EIR must be prepared and recirculated 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 Guidelines, § 15088.5 (a)(4).) This entire process has been permeated from the outset with pre-decisional bias to develop the massive new conveyance capacity. As set forth in detail in the EWC comments there has been incomplete compliance with CEQA and there has been no public trust doctrine analysis performed.

We strongly support the EWC alternative which has been labeled Alternative 2. However, we present two additional alternatives in an attempt to help the Council and its EIR preparers to start down the road finally, of complying with CEQA and satisfying the obligations created by the public trust doctrine. These two alternatives are set forth below. Because the Council has been presented with three alternatives that substantially lessen significant and unavoidable impacts identified in the Draft Plan, recirculation of a new Draft EIR is now

Response to comment ROR010-4

Please refer to response to comment ROR010-3.

required. CEQA Guidelines section 15088.5(a)(3) requires recirculation when a feasible project alternative considerably different from others previously analyzed would clearly lessen significant environmental impacts of the project, but the project's proponents decline to adopt it. Alternative 2, 2A, and 2B are feasible alternatives that must be analyzed in a recirculated Draft EIR. ROR010-4

New Alternatives 2A and 2B Would Avoid the Adverse Impacts of the Revised Project

Alternative 2A: This alternative can be thought of as "think before you act." 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, set forth in the California Supreme Court's decision in Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412. The decision whether to call for new conveyance would also await your determination that would take into consideration a cost-benefit analysis and public trust doctrine analysis. The decision would also await the Council's preparation and circulation of a new Draft EIR so that the decision-making public agencies, and the public itself, would have the benefit of full environmental disclosure, consideration of the true project and its environmental impacts, and thus the ability to make an informed choice among reasonable alternatives.

The RDPEIR demonstrates the lengths the EIR preparers are willing to go to in order to reach the desired pre-decisional conclusion that the Revised Project is environmentally superior. They may assert that the detailed CEQA analysis, water availability determinations, and public trust doctrine analysis will and/or should be made by other agencies such as the BDCP lead and responsible agencies and/or the State Water Resources Control Board (SWRCB). On the contrary, in order to proceed in a manner required by law **some** public agency must make these critical determinations **before** the threshold choice of alternatives is made to call for new conveyance. If the Council is unable or unwilling to do this work, a policy or recommendation calling for new conveyance cannot lawfully be adopted unless and until the CEQA and public trust doctrine analysis has been done in the BDCP process and/or the SWRCB process. ROR010-5

We maintain that Alternative 2 is the environmentally superior alternative that should be adopted at this time. If, however, the Council does not do that, Alternative 2A must be adopted if any alternative is adopted because there has not been sufficient CEQA analysis and compliance or any cost-benefit and public trust doctrine analysis to support calling for, encouraging, or recommending new conveyance at this time. Alternative 2A would lessen the significant environmental impacts of the project by not calling for new conveyance and diversion of significant quantities of freshwater upstream from the Delta.

Response to comment ROR010-5

Regarding BDCP and potential alternatives thereto, please refer to response to comment ROR010-3. Regarding the selection of the environmentally superior alternative, please refer to Master Response 3.

Alternative 2B ("Phased Reduced Exports Alternative"): Alternative 2B is also similar to Alternative 2 in that no new conveyance would be recommended 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. This Alternative eases the practical constraints involved in reducing exports within a reasonable amount of time, given that any new conveyance would not be projected to be in operation before about 2026.

Analysis of these additional Alternatives would help the Council achieve its legal obligation to consider a reasonable range of alternatives. Thus far, the Council has failed to develop any reasonable alternatives to have more conveyance to export more water. Alternative 2 was presented to the Council by the EWC. As a public agency responsible for complying with CEQA, it is the Council that has the responsibility to **develop a reasonable range of alternatives**. The Council should not simply reject Alternative 2 by characterizing the export reductions as being too severe. Rather, the Council should undertake to develop an alternative that on the one hand, like Alternative 2 does not call for new conveyance, but on the other hand, does not reduce exports to as great a degree as is done by Alternative 2. For example, Alternative 2B could include assessing limitations of exports to a maximum of 3,500,000 acre-feet/year which is more than the exports under Alternative 2.

An EIR must "describe **a range** of reasonable alternatives to the project, . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." CEQA Guidelines, § 15126.6(a) (emphasis added). "Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Public Resources Code Section 21002.1), the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." CEQA Guidelines, § 15126.6, subd. (b). The Council has not described **a range** of reasonable alternatives to the project which would avoid the adverse impacts of adding large new diversions of freshwater upstream from the Delta even though these alternatives would not reduce exports as much as would be accomplished by Alternative 2. This deficiency in the CEQA process is so profound that a new Draft EIR describing and considering new alternatives 2A and 2B must be prepared and circulated. Adopting the Delta Plan, Regulations, and certifying a Final EIR without doing so would be failure to proceed in a manner required by CEQA. These are not violations that can be cured simply by responding to comments in a Final EIR. ROR010-6

Response to comment ROR010-6

The range of alternatives analyzed in the EIR is a reasonable range of alternatives based on thorough consideration of public input and the requirements of CEQA. Please see response to comment ROR010-3 above as well as Master Response 3.

Finally, the Council may continue to make the lulling statements already made in the subject CEQA documents claiming, so to speak, that the Council is not really doing anything now in terms of developing new conveyance and that environmental impact analysis will take place in the future. It appears that the Council is trying to mislead the public into believing that the Delta Plan is not a real threat to the Delta, but that later on, the BDCP preparers will jump up and say that the Delta Tunnels are consistent with the Delta Plan call for new conveyance and that the threshold decision to develop new conveyance was made in the Delta Plan. Unless the Council eliminates the call for improved, new, conveyance and the like from the Delta Plan and Regulations, it will be necessary to challenge the Delta Plan, RDPEIR, and Regulations if approved and adopted, in court to prevent that "not now, not ever" unlawful end run on CEQA from being successful. 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. ROR010-6

Failure to Effectively Require Mitigation or Describe a Truly Environmentally Superior Alternative under CEQA and the Endangered Species Act

As pointed out in detail in the EWC comments, the RPDEIR concedes that the Revised Project would have significant and unavoidable environmental impacts including violation of water quality standards and adverse effects on special status species. (RPDEIR 24-10). Alternative 2 (and 2A and 2B), however, would result in far fewer significant and unavoidable environmental impacts than any of the other alternatives analyzed in the PDEIR or RPEIR. The RPDEIR concedes that "Alternative 2 contributes more to improving conditions for biological resources and arresting ecosystem decline than the Revised Project." (RPDEIR 25-7). Alternative 2 clearly meets the project objectives reducing reliance on the Delta in meeting the state's future water needs through regional self-reliance, is consistent with the Delta Reform Act, is implementable in a comprehensive, concurrent, and interrelated fashion, and can be accomplished as rapidly as realistically possible without jeopardizing ultimate success. Under CEQA, if an alternative is presented that meets project objectives and can reduce significant impacts to a less than significant level, the lead agency must adopt this alternative if feasible. Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 134. "CEQA compels government first to identify the [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives." Sierra Club v. State Board of Forestry (1994) 7 Cal.4th 1215, 1233, Pub. Resources Code, § 21002. To simply accept such significant impacts while ignoring viable alternatives violates CEQA. ROR010-7

The proposed mitigation measures offered by the Plan also fail to meet CEQA's standards. Proposed mitigation is not sufficient unless such mitigation is implemented as a condition of future development. In its current state, there are no repercussions if subsequent ROR010-8

Response to comment ROR010-7

As discussed in Master Response 4 and section 25 of the Recirculated Draft PEIR, Alternative 2 is not environmentally superior to the Revised Project (the Final Draft Delta Plan), because it would bring about more uncertainty regarding water supply and more conversion of agricultural land to non-agricultural uses than the Revised Project.

Response to comment ROR010-8

Mitigation Measures listed in the EIR are made enforceable through Delta Plan policy G P1, which makes mitigation a requirement of Delta Plan consistency, as further explained in Master Response 3. Equally effective measures may be substituted by future lead agencies, but these would remain mandatory. Moreover, future lead agencies will have the obligation under CEQA to mitigate the significant impacts of projects regardless of bond measures or any other circumstances.

The EIR is not intended to, and could not, provide take authorization under the federal Endangered Species Act for the Delta Plan or for any project encouraged by the Delta Plan. The Delta Plan's significant adverse impacts related to biological resources, including special-status species, are discussed in Section 4 of the EIR. Regarding the EIR's analysis of alternatives to the Delta Plan, please see Master Response 3.

project proponents choose to adopt some mitigation measures but not others or no mitigation measures at all. Proposed mitigation cannot be mere suggestions, and instead must be fully enforceable. Federation of Hillside & Canyon Assn. v. City of Los Angeles (2d Dist. 2000) 83 Cal.App.4th 1252, 1259.

The failure to require mitigation for endangered species impacts also violates the Federal Endangered Species Act. There is no discretion under the Endangered Species Act to authorize a project that would jeopardize survival of listed fish or adversely modify critical habitat. Center for Biological Diversity v. United States Bureau of Land Management(Ruby Pipeline Case), 698 F.3d 1101 (9th Cir. 2012). In the Ruby Pipeline case, the Fish and Wildlife Service's Biological Opinion analyzing the impacts of a natural gas pipeline incorporated voluntary conservation actions as mitigation measures which factored into its determination that the project would not jeopardize the continued existence of several endangered species and would not adversely affect critical habitat. The Ninth Circuit found the Service's determination to be arbitrary and capricious because the conservation measures were mislabeled and unenforceable. The Ruby Pipeline case confirms the standard that valid mitigation measures must be enforceable under the Endangered Species Act and may not be simply voluntary suggestions. ROR010-8

If the Fish and Wildlife Service concludes that jeopardy or adverse modification is likely, then any take resulting from the proposed action is subject to Section 9 liability. See Sierra Club v. Babbitt, 65 F.3d 1502, 1505 (9th Cir. 1995). In its discussion of section 7 of the ESA in TVA v. Hill, the Supreme Court made clear that "Congress considered and rejected language that would have permitted an agency to weigh the preservation of species against the agency's primary mission." Ctr. for Biological Diversity, supra, pp.1115-16, citing Sierra Club v. Marsh (1987) 816 F.2d 1376. Thus, the Council may not summarily reject alternatives and mitigation measures that would avoid impacts to endangered species simply because the Council would rather increase export conveyance capacity.

In addition, mitigation measures here are dependent on actions that may never come to pass. Bond measures that have already been pulled from the ballot twice and that may never pass are not the effective mitigation required under the Endangered Species Act. Mitigation measures must be an integrated part of the project, so that if a measure is not implemented, re-initiation of consultation under the Endangered Species Act is automatically triggered. Sierra Club v. Marsh (1987) 816 F.2d 1376. The Delta Plan allows exporters to avoid all costs of the worsening salinity intrusion in the Delta that will result from the BDCP and shifts those costs on to the taxpayers. The problem for the Council in that regard is that mitigation must be real and assured. In the words of the Ninth Circuit, "any risk to listed species thereby created [by the project] 'must be borne by the project, not by the endangered species.'" Center for Biological Diversity, 698 F.3d 1101, 1115.

No comments

- n/a -

The EIR Fails to Adequately Analyze the Impacts to Upstream Areas that Will Result from the Delta Plan Policies.

The EIR does not include an analysis of how the proposed BDCP conveyance will affect upstream reservoir operations, and how regulatory restrictions on these reservoirs will affect proposed project operations. Such an omission frustrates the public participation goals of CEQA. The decision in Friends of the Eel River v. Sonoma County Water Agency (2003) 108 Cal.App.4th 859, held an EIR insufficient to comply with CEQA in analyzing cumulative impacts with respect to a proposed increase in an agency's withdrawal of water from the Russian River. By failing to consider possible curtailment of water from the Eel River, the EIR failed to alert decision-makers and the public "to the possibility that the Agency will not be able to supply water to its customers in an environmentally sound way." 108 Cal.App.4th at 871. The failure to discuss the nature of altered reservoir operations and the related environmental impacts has frustrated the ability of public to understand the true nature of the Delta Plan, and has resulted in a failure to develop accurate mitigation measures and a reasonable range of alternatives. ROR010-9

Please call if you have any questions on our comments. ROR010-10

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

Senior Counsel

/s/ Kathryn Cotter

Kathryn Cotter

Legal Counsel

Response to comment ROR010-9

Please refer to response to comment ROR010-3.

Response to comment ROR010-10

Comment noted.

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FRIENDS OF THE RIVER
1418 20TH STREET, SUITE 100, SACRAMENTO, CA 95811
PHONE: 916/ 442-3155 • FAX: 916/ 442-3396
WWW.FRIENDSOFTHERIVER.ORG

January 11, 2012

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

Re: Exhibits referred to in Comments on Recirculated Draft Programmatic Environmental Impact Report (RDPEIR)

Dear Ms. Messer and Council Members:

Please include the attached three documents in the Administrative Record in your CEQA proceedings on the Final Draft Delta Plan and RDPEIR. These three documents have been or are being referred to in the written comments of the Environmental Water Caucus and/or Friends of the River and are as follows:

Release and Report in Brief, National Academy of Sciences, A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan (May 5, 2011);

Eberhardt School of Business Forecasting Center, Benefit-Cost Analysis of Delta Water Conveyance Tunnels (July 12, 2012);

California Natural Resources Agency, Gov. Brown and Obama Administration Outline Path Forward for Bay Delta Conservation Plan, "The elements of a preferred proposal include the construction of water intake facilities with a

ROR010-11

Response to comment ROR010-11

The documents noted here are attachments to the letter submitted on the RDPEIR and do not require a response.

total capacity of 9000 cubic feet per second. . . and a conveyance designed to use gravity flow. . .” (July 25, 2012).

ROR010-11

Sincerely,

E. Robert Wright
Senior Counsel
Friends of the River

No comments

- n/a -

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FRIENDS OF THE RIVER

1418 20TH STREET, SUITE 100, SACRAMENTO, CA 95811

PHONE: 916/ 442-3155 • FAX: 916/ 442-3396

WWW.FRIENDSOFTHERIVER.ORG

January 14, 2013

Cindy Messer

Delta Stewardship Council

980 Ninth Street, Suite 1500

Sacramento, CA 95814

Re: Additional Comments on Final Draft Delta Plan (DP), Recirculated Draft Programmatic Environmental Impact Report (RDEIR) and Proposed Delta Plan Rulemaking Package (Regulations)

Dear Ms. Messer and Council Members:

As set forth in our letter of January 11, 2013, this organization, Friends of the River, objects to approval of the Delta Plan (DP), RDEIR, and Regulations. This organization is also included as a commenter for the detailed comments submitted by the Environmental Water Caucus (EWC), and I commented orally at the public hearing on January 11, 2013, on behalf of Friends of the River, Restore the Delta, and EWC. I submit this additional, supplemental letter on behalf of Friends of the River as it pertains to a critically important subject that I did not address or completely address at the Hearing.

The Delta Plan and Regulations adopt the Revised Project alternative, and call for, recommend, or encourage "improving Delta conveyance and operations" "improving conveyance in the Delta", "optimizing diversions in wet years when more water is available" and establishing new diversions upstream from the Delta to transport water around or under the Delta to the pumping plants in the south Delta and the exporters. The RDEIR and Draft EIR have failed to consider the whole of the action and its ROR010-12

Response to comment ROR010-12

Comment noted.

impacts and the Delta Plan CEQA process has unlawfully segmented the project and conducted piecemeal environmental review. ROR010-12

The RDEIR discloses that the Revised Project "seeks to improve water supply reliability by encouraging various actions which, if taken, could lead to construction and/or operation of projects that could provide a more reliable water supply." (RDEIR 2-5). Such projects could include "surface water projects (water intakes, treatment and conveyance facilities, reservoirs, hydroelectric facilities)." (RDEIR 2-5). The Executive Summary for the RDEIR refers to "improve management of Delta water supplies using increased storage and improved Delta conveyance." (ES-2).

The proposed regulations call for action to "improve Delta conveyance and operations" and states that "This will be done by improving conveyance in the Delta...to optimize diversions in wet years when more water is available". (§5001(e) (A),(C).

It is being pointed out in the extensive written comments this same date by EWC, that in view of the specifics of the BDCP Delta Tunnels project announced by both the Governor and the DWR Deputy Director during the summer of 2012, the Delta Plan CEQA process has failed to provide an accurate, stable and finite project description which is required by CEQA. In addition to that violation, CEQA is also violated by unlawfully segmenting, also referred to as piecemealing, project approval and environmental review.

The Draft EIR had anticipated that a public draft of the BDCP and the related EIR/EIS would be released by mid-2012. (Draft EIR 23-3). The Draft EIR had stated that the BDCP must comply with CEQA including "a comprehensive review and analysis" of critical issues including "a reasonable range of flow criteria, rates of diversion, and other operational criteria... and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses", "a reasonable range of Delta conveyance alternatives, including through-Delta", and "the potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the EIR. The potential effects on migratory fish and aquatic resources. The potential effects of each Delta conveyance alternative on Delta water quality". (Draft EIR 23-3, 4). ROR010-13

The release of a public draft of the BDCP and its EIR/EIS did not happen in mid-2012 and still has not happened as of today. The DWR Deputy Director stated at the BDCP public meeting of December 18, 2012 that the public drafts will not be released before the late spring of 2013. Consequently, neither the decision-makers nor the public has had anything before them to allow informed evaluation of the pros and cons of creating a massive and expensive public works project to divert enormous quantities of water upstream from the Delta for export without first flowing through the Delta. That would be done even though the Delta is already undergoing significant environmental degradation including a trend of increasing diversions already, deteriorating water quality, increasing salinity intrusion, and declining fish populations including those of endangered fish species.

In addition to public and the decision makers not having had the benefit of whatever information and analysis that would have been included in the BDCP environmental documents, there has been no water supply availability analysis, quantification, or analysis of the environmental impacts of supplying specific quantities of water, in violation of the California Supreme Court's decision in *Vineyard Area*

Response to comment ROR010-13

The proposed BDCP is a reasonably foreseeable future project that is not part of the Delta Plan. It is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impact of the proposed BDCP, are described in EIR Sections 22 and 23. Please refer to Master Response 1.

Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 429, 430, 434, 440-441.

The Council's CEQA process has unlawfully segmented the threshold issue and alternative of ***whether to create new diversions and conveyance upstream from the Delta*** for the exporters from analysis and consideration of the water supply, water quality, endangered fish species, and other environmental issues arising from future operation of the facilities taking enormous quantities of freshwater away from the Delta.

These violations are fundamental and extremely serious. The CEQA Guidelines (14 Cal. Code Rags. 15000 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 citations are to the CEQA Guidelines unless otherwise indicated). "All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, ***and operation***." (Guideline § 15126 (emphasis added). According to the Draft EIR, once adopted, the BDCP must be included in the Delta Plan. (Draft EIR 23-1). The Draft EIR declares that "it is anticipated that the BDCP will include actions to. . . modify SWP and CVP Delta water conveyance facilities and operations in the Delta. . . ." (Draft EIR 23-2). As set forth in detail in the EWC written comments, and my oral comments, there has been no detailed, comprehensive identification, let alone analysis of the environmental impacts of diverting massive quantities of water for the exporters, upstream from the Delta.

All the RDEIR does is concede that the Revised Project would have significant and unavoidable environmental impacts including "water resources, violate any water quality standards or waste discharge requirements or substantially degrade water quality." (RDEIR 24-10). Likewise, the RDEIR concedes that another significant and unavoidable environmental impact would be "substantial adverse effects on sensitive natural communities, substantial adverse effects on special-status species; substantial adverse effects on fish or wildlife species habitat; interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established natural resident or migratory wildlife corridors." (RDEIR 24-10). Similarly, the RDEIR admits that "operations of new water supply facilities whether in-stream, such as pipelines, tunnels, canals, pumping plants, water intakes or diversions may create long-term changes in local mixtures of source waters within water bodies." (RDEIR 3-3). ROR010-13

Such admissions of the obvious are virtually useless vague generalities. There is a difference between catching a cold and developing a terminal illness. The point being that there is a difference between diverting a small amount of water from a healthy body of water, and taking an enormous quantity of water from a body of water that is already seriously degraded and is in crisis stage. Such vague, boilerplate statements might, arguably, constitute the start of an Initial Study under CEQA to begin identifying environmental impacts of a project for consideration. They most certainly do not constitute the kind of comprehensive environmental analysis required in a legally sufficient EIR. Moreover, these are the types of deficiencies that cannot be remedied simply by responding to comments in a Final EIR. Unless the Council drops the call for improved conveyance, new conveyance upstream from the Delta, optimizing diversions in the wet years, and so forth, it will be necessary for the Council to prepare and recirculate a new Draft EIR. That is because "The draft EIR [and RDEIR] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Guideline § 15088.5(a)(4).

No comments

- n/a -

The RDEIR seeks to justify failure to perform any meaningful environmental analysis of the project by self-serving argument that "the Revised Project would not directly result in construction or operation of projects or facilities, and therefore would result in no direct impacts on many resources. The Revised Project could, however, result in or encourage implementation of actions or development of projects, including construction and operations of facilities or infrastructure. The severity and extent of project specific impacts on the physical environment would depend on the type of action or project being evaluated, its specific location, its size, and a variety of project and specific factors that are undefined at the time of preparation of this program-level study. Project-specific impacts would be addressed in project-specific environmental studies conducted by the lead agency at the time the projects are proposed for implementation." (RDEIR 2-26).

That statement is both false and constitutes erroneous interpretation of CEQA. The project was defined during the summer by both the DWR Deputy Director and the Governor as consisting of two 33 foot diameter tunnels 35 miles long with the capacity to convey 15,000cfs (cubic feet per second) under the Delta to the pumping plants at the south end of the Delta. The upstream diversion location would be near Clarksburg on the Sacramento River. Initially there would be three intakes with a capacity to divert 9000cfs though additional intakes could be added later to take the whole 15,000cfs. That is an enormous quantity of water, equivalent to the typical entire summer flow of the Sacramento River at that location. There is a difference between filling a water bottle in the River and diverting 15,000cfs.

As explained by the California Supreme Court more than 30 years ago, CEQA establishes a mandate "that environmental considerations do not become submerged by chopping a large project into many little ones-each with a minimal potential impact on the environment-which cumulatively may have disastrous consequences." *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-4. What the Council's CEQA process has done is to segment, or piecemeal, the decision whether to establish new conveyance for the exporters, upstream from the Delta, from the analysis of the actual impacts of the actual diversions and conveyance of all that fresh water before it even reaches the Delta. "Doing so [segmenting environmental analysis] 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, Inc. v. City of Sonora* (2007) 155Cal.App.4th 1214, 1230. The CEQA Guidelines provide that where individual projects or a phased project is to be undertaken the lead agency shall prepare a single program EIR for the ultimate project. And, "Where an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effects, an EIR must address itself to the scope of the larger project." Guideline § 15165. Section 15165 prescribes that the program EIR shall be prepared as described in Guideline § 15168, which explains how the program EIR can allow more exhaustive consideration of effects and alternatives and do so at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.

ROR010-13

The CEQA process followed by the Council has, instead of following the CEQA decisions and governing Guideline sections, unlawfully segmented the General Plan type fundamental decision to create new conveyance from analysis of the environmental consequences of diverting the enormous quantities of water upstream from the Delta in the course of operations of the conveyance facilities—Delta Tunnels— that are the centerpiece of the BDCP. "[P]ostponing environmental analysis can permit 'bureaucratic and financial momentum' to build irresistibly behind a proposed project,' thus providing a strong incentive to ignore environmental concerns.'" *Save Tara v. City of West Hollywood* (2008) 45

No comments

- n/a -

Cal.4th 116, 135. "' The full consideration of environmental effects CEQA mandates must not be reduced to a process whose result will be largely to generate paper, to produce an EIR that describes a journey whose destination is already predetermined.'" *Save Tara*, 45 Cal.4th 116, 135-6. ROR010-13

"CEQA's informational purpose 'is not satisfied by simply stating information will be provided in the future.'" *Vineyard Area Citizens*, 40 Cal.4th 412, 441. Either the call for new conveyance, optimizing diversions in the wet years, and so forth must be dropped from the Delta Plan and the Proposed Regulations, or a new Draft EIR comprehensively addressing and analyzing water availability, water supply, and the environmental consequences of providing the quantity of water to be taken must be prepared and recirculated so that the decision-makers and the public have adequate information to evaluate the proposed project and to consider reasonable alternatives.

Finally, this confirms the items that I entered into the Record by supplying them to Angela D'Ambrosio, special assistant to the Executive Officer after concluding my oral comments at the public hearing on January 11, 2013. These items were as follows:

Friends of the River comment letter dated January 11, 2013, seven pages long, including submission of New Alternatives 2A and 2B.

Friends of the River letter dated January 11, 2013, and the three exhibits furnished therewith including *Release and Report in Brief*, National Academy of Sciences; *Eberhardt School of Business Forecasting Center*, Benefit-Cost Analysis of Delta Water Conveyance Tunnels; and *California Natural Resources Agency* "The elements of a preferred proposal include the construction of water intake facilities with a total capacity of 9000 cubic feet per second . . ." ROR010-14

I also entered into the Record the lengthy document and appendices entitled Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay, with a cover page reflecting Delta Flow Criteria Informational Proceeding, before the State Water Resources Control Board, Technical Memorandum WR10-001, Contra Costa Water District (February 2010).

Please call if any of the above six items have been misplaced or are not found in your Administrative Record, and I will be happy to furnish a duplicate.

CONCLUSION

The Council's CEQA process has placed the cart before the horse by calling for new conveyance of significant quantities of freshwater upstream from the Delta prior to the Council or any other public agency completing the CEQA process including preparation of a sufficient EIR identifying, disclosing, and analyzing the environmental consequences of doing so. That action violates CEQA. This placing the cart before the horse including being prior to the State Water Resources Control Board determining how much if any water is actually available for such diversions, and conducting cost-benefit analysis and performing its analytical responsibilities pursuant to the public trust doctrine to ensure protection of the Delta and the Delta watershed, also violates California's public trust doctrine as set forth by the California Supreme Court in the Mono Lake case, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. ROR010-15

Response to comment ROR010-14

Comment noted.

Response to comment ROR010-15

Comment noted.

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

Senior Counsel

No comments

- n/a -