March 14, 2023

Zachary Simmons, Project Manager
U.S. Army Corps of Engineers, Sacramento District
Via email to Zachary.M.Simmons@usace.army.mil and DLL-DCP-EIS@usace.army.mil

Re: Comments on Draft EIS for the Delta Conveyance Project

Dear U.S. Army Corps of Engineers and Project Manager Zachary M. Simmons:

By this letter, our public interest organizations comment pursuant to NEPA, on the U.S. Army Corps of Engineers Draft EIS for the California Department of Water Resources' (DWR) Delta Conveyance Project. Our organizations object to approval of the Project, to preparation of a Final EIS for the Project, and to issuance of a Record of Decision (ROD) for the reasons set forth in this letter. The Corps must prepare and publish a supplemental Draft EIS before proceeding any further to consider approval of the Project. The organizations joining in this 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, and Planning and Conservation League. Our Table of Contents begins on the next page.

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SUMMARY OF REASONS WHY THE CORPS MUST PREPARE A SUPPLEMENTAL DRAFT EIS COVERING THE EFFECTS OF PROJECT OPERATIONS

The U.S. Army Corps of Engineers Draft EIS on the Delta Conveyance Project *does not cover Project operations*. The Corps must prepare and publish a supplemental Draft EIS covering Project operations.

The Delta Conveyance Project facilities proposed by the California Department of Water Resources (DWR) include massive intakes and a 45-mile-long Tunnel to divert substantial quantities of freshwater flows from navigable waters of the United States--the Sacramento River --upstream from the already impaired San Francisco Bay-Delta Estuary. Instead of continuing to flow through the Delta--which according to expert state and federal agencies needs increased, not reduced, freshwater flows-- the diverted water would be diverted to the Tunnel prior to export from the south Delta. The Corps' Draft EIS admits, "The modeling results showed consistent decreases in long-term average flows for all months on the Sacramento River north of Courtland (i.e. downstream of the proposed north Delta intakes)." (**Draft EIS**, Ch. 3, 3.18.2.2, p. 3-18-2.)

This is yet another attempt by DWR to inflict the most controversial water project in California history on the San Francisco Bay-Delta Estuary. The then-named Peripheral Canal was rejected by California's voters by a 2 to 1 margin in a statewide referendum in June 1982.

The Corps' Draft EIS on the Project *does not cover Project operations*. The Draft EIS states it was prepared "for construction of the proposed action." (**Draft EIS**, ES.1, p. ES-1.) The effects of Project operations "are not covered by this EIS." (**Draft EIS**, Table ES-2, p. ES-32.) (The Draft EIS is EPA No. 20220183, 87 Fed. Reg. 77106.) Moreover, the impacts of the Project on surface water and water supply were not evaluated by DWR as impacts under the California Environmental Quality Act (CEQA.) (**Draft EIR,** Ch. 5, p. 5-1, Ch. 6, p. 6-1.)

The National Environmental Policy Act (NEPA) requires that federal agencies take a "hard look" at the environmental consequences of their actions. (*E.g.*, *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1990); *350 Montana v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022.) But instead of doing what NEPA requires, the Corps took no look at the environmental consequences of *operating* the Delta Conveyance Tunnel Project.

According to the Draft EIS, "The project is dependent on federal action and would require federal permits," (**Draft EIS**, Ch. 1, 1.7, p. 1.7.) Permits are required to alter a federal levee or channel under Clean Water Act (CWA) section 408, to discharges of dredged or fill material into waters of the United States under CWA section 404, for work or construction of a structure in or over any navigable water of the United States under section 10 of the Rivers and Harbors Act, and "activities affecting plant or animal species protected by the federal Endangered Species Act (ESA)…" (***Id.***)

When a project's viability is founded on the Corps' issuance of a section 404 permit, the entire project is within the Corps' purview. (*White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039-1042 (9th Cir. 2009.) The Corps *must* prepare a supplemental Draft EIS addressing Project *operations* because the *viability* of the Delta Conveyance Tunnel project is *founded* on the issuance of permits by the Corps.

There is more. The Corps is the federal lead agency for the Project. (**Draft EIS**, ES.1, p. ES-1.) Four other federal agencies are cooperating agencies in the EIS process. The cooperating federal agencies are the EPA, NMFS, USFWS, and Bureau of Reclamation. (**Draft EIS**, Ch. 1, 1.6.2, p. 1-6.) The Central Valley Project (CVP) is operated by Reclamation. According to DWR, its fundamental purpose in developing the "new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP [State Water Project] water deliveries *and, potentially, CVP water deliveries* south of the Delta,.." (**Draft EIR**, Ch. 2, p.2-2; **Draft EIS**, ES.1.1.2, p. ES-1)(Emphasis added.) *Moreover, SWP and CVP water are co-mingled in the San Luis reservoir and the Delta Mendota and San Luis canals*.

Reclamation has explained, "Both the CVP and SWP use the San Luis Reservoir, O'Neill Forebay, and more than 100 miles of the California Aqueduct and its related pumping and generating facilities." (Reclamation website, https://www.usbr.gov › cvp › about-cvp *About the CVP| California-Great Basin - Bureau of Reclamation* August 24, 2022.) The Draft EIS admits with respect to CVP deliveries, "*During dry and critical water years, most action alternatives could result in increases in deliveries*." (**Draft EIS**, Ch. 3, 3.22.2.1, p. 3.22-3.) (Emphasis added.)

In other words, if the Project is constructed and operates, some of the water ultimately delivered to Reclamation's CVP contractors will have been taken out of the Sacramento River by the proposed new intakes and transported through the proposed Water Tunnel.

The federal government through its agencies including the EPA, NMFS, USFWS, and Reclamation and its CVP will be involved in Project operations and pre-approval review of same. The *only* EIS the cooperating agencies will have is the EIS prepared by the Corps. It must cover, not exclude, the impacts of Project operations. Because it does not cover Project operations, the prepared Draft EIS is virtually useless for the cooperating agencies attempting to carry out their responsibilities ranging from determining the impacts of Project operations on water quality to determining the impacts of operations on endangered and threatened fish species and their designated critical habitat.

The previous Bay Delta Conservation Plan/California Water Fix Final EIS/EIR was prepared *jointly* by Reclamation and DWR. (**Letter** from Kathleen H. Johnson, Director, Enforcement Division, EPA Region IX to David Murillo, Regional Director, Bureau of Reclamation, Mid-Pacific Region, January 18, 2017.) EPA's letter said the purpose of Reclamation's proposed action included, " 'to improve movement of water entering the Delta from the Sacramento Valley watershed to existing Central Valley Project (CVP) and State Water Project (SWP) pumps in the south of the Delta'" and "'delivery of up to full contract amounts of CVP project water' when conditions are such that sufficient water is available. This purpose would be accomplished by adjusting the operations of the CVP, specific to the Delta, to accommodate new conveyance facility operations and flow requirements." (***Id.*** at pp. 1-2.) EPA's letter also stated "the FEIS continues to predict that water quality for municipal, agricultural, and aquatic life beneficial uses will be degraded and exceed standards as the western Delta becomes more saline. Significantly, the FEIS' conclusions regarding impacts to aquatic life remain unchanged from those in the SDEIS, predicting substantial declines in quantity and quality of aquatic habitat for 15 of 18 fishes evaluated under WaterFix preferred operations." (***Id.*** at p. 2.)

It is reasonable to conclude that the switch from a joint Reclamation/DWR EIS/EIR to an EIS by the Corps is an attempt to evade the NEPA requirement to evaluate the impacts of Project operations. An honest evaluation of Project operations would require disclosure that reducing freshwater flows through the Delta will have adverse impacts on water quality and on endangered and threatened fish species and their designated critical habitat. As the EPA said in a Technical Report, "Alteration of the natural flow regime can have cascading effects on the physical, chemical, and biological properties of riverine ecosystems." (**Final EPA-USGS Technical Report:** Protecting Aquatic Life from Effects of Hydrologic Alteration, EPA Report 822–R–16–007 USGS Scientific Investigations Report 2016–5164.)

The Corps published a notice on December 19, 2022, explaining under the heading "Environmental Setting" "The proposed project is within the Sacramento-San Joaquin Delta, a state-wide resource for recreation, water supply, cultural and historic resources, agriculture, and fish and wildlife habitat." (**Corps Public Notice** SPK-2019-00899.) The Corps' notice also said under the heading "ENDANGERED SPECIES" "The proposed activity may affect Federally listed endangered or threatened species and their critical habitat." (***Id.***)

The NEPA Regulations require the scope of an EIS to cover connected actions--meaning they are closely related. (40 C.F.R. § 1501.9(e)(1.) It would not be possible for actions to be more closely related than constructing the Project facilities followed by operating them to divert the water away from the Sacramento River and Delta Estuary. *The Project facilities are not a statue or a monument*. The *only* reason to *construct* the facilities is to *operate* the facilities. What the Corps has provided is unlawful segmentation of environmental review of construction impacts from operations impacts.

The scope of an EIS must include the combined environmental impacts of a construction project and the activities the project is designed to facilitate. Here, like the situation in *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985), "it would be irrational" to construct the Delta Conveyance Project facilities but then not operate them to divert and export the water. In *Baykeeper v. U.S. Army Corps of Engineers*, 2006 WL 2711547 *8 (E.D. Cal., No. CIV. S-06-1908, September 20, 2006), the court explained, "while it is the development's impact on jurisdictional waters that determines the scope of the Corps' permitting authority, it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility."

The NEPA statute requires a detailed EIS by the lead agency on several subjects including "the environmental *impact* of the proposed action," the adverse environmental *effects* which cannot be avoided should the proposed action be implemented," and "*any irreversible and irretrievable commitments of resources* which would be involved in the proposed action should it be implemented." (42 U.S.C. § 4332(2)(C) (i), (ii), and (v)(Emphasis added.)

The NEPA Regulations confirm the requirements of the statute in more detail. The definition of "*Effects or impacts* means changes to the human environment from the proposed action or alternatives that are *reasonably foreseeable* and include the following:.. (2) *Indirect effects*, which are caused by the action and are later in time or farther removed in distance but are still *reasonably foreseeable*. Indirect effects may include… related effects on air and water and other natural systems, including

ecosystems. (3) *Cumulative effects*, which are effects on the environment that result from the *reasonably foreseeable* actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. (4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems)… whether direct, indirect, or cumulative." (40 C.F.R. §1508.1(g)(Emphasis added.) Here, Project *operations* are "reasonably foreseeable." The project operation and implementation impacts must be analyzed and disclosed for public review. The courts enforce these requirements. (*See Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 870 (9th Cir. 2005) ("Because a 'reasonably close causal relationship' exists between the Corps' issuance of the permit [for a dock extension], the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills, the Corps had a duty to explore this relationship further in an EIS.")

Finally, the Corps' own regulations also make clear it must review the environmental impacts of the freshwater diversions during Project operations. *First*, the Tunnel is an "artificial waterway" that will be "connected to navigable waters of the United States"--the Sacramento River. It will "at some point in its construction or operation" result "in an effect" on the "condition, or capacity of navigable waters of the United States." The exercise of the Corps' regulatory authority includes "those activities which affect" the "condition, or capacity of the navigable waters of the United States." (33 C.F.R. § 322.5(g.) *Second*, according to the Corps, the Tunnel corridor includes "13 crossings of navigable waterways,..'' (85 Fed.Reg. 514211, August 20, 2020.) The Corps' own regulations state, "For purposes of a section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody." (33 C.F.R. § 322.3(a.)

In conclusion, the NEPA Regulations require, "If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion." (40 C.F.R. § 1502.9(b.) Because the Draft EIS does not cover the environmental effects of Project operations it is so inadequate as to preclude meaningful analysis. That is true for decision-makers in the Corps and the cooperating agencies as well as for the public. The Corps must prepare and publish a supplemental Draft EIS that analyzes the effects of Project operations on the environment.

1. THE CORPS MUST PREPARE A SUPPLEMENTAL DRAFT EIS TO ADDRESS THE IMPACTS OF PROJECT OPERATIONS ON THE ENVIRONMENT BECAUSE CONSTRUCTION OF THE PROJECT AND OPERATING IT ARE CLOSELY RELATED CONNECTED ACTIONS

A. Because the Project's Viability is Founded on the Corps' Issuance of Permits the Entire Project is within the Corps' Purview

When a project's viability is founded on the Corps' issuance of a section 404 permit, the entire project is within the Corps' purview. (*White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039-1042 (9th Cir. 2009)(scope of environmental assessment too restricted to support issuance of section 404 permit by the Corps and reversing summary judgment in favor of the Corps); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113. 1122 (9th Cir. 2005)("Although the Corps' permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project. Put another way, while it is the development's impact on jurisdictional waters that determines the scope of the Corps' permitting authority, it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility.")

The Draft EIS states, "The project is dependent on federal action and would require federal permits,.. "(Draft EIS, Ch. 1, 1.7, p. 1.7.) Everything that follows in this comment letter is cumulative. The Corps *must* prepare a supplemental Draft EIS addressing Project *operations* because the *viability* of the Delta Conveyance Tunnel Project *is founded on the issuance of permits* by the Corps.

B. It Would Not be Possible for an Action to be More Closely Related to Construction of the Delta Conveyance Project than Operating it When it has been Constructed

The Tunnel Project is a massive water project. It involves massive new intakes and a long tunnel to divert quantities of water from the Sacramento River that would decrease freshwater flows through the already impaired Delta, downstream from the new intakes. Despite that, the Draft EIS states it was prepared "for construction of the proposed action."(**Draft EIS**, Executive Summary, ES.1, p. ES-1.) The effects of Project operations "are not covered by this EIS." (**Draft EIS**, Executive Summary, Table ES-2, p. ES-32.)

The proposed Project is DWR Alternative 5. The Project would be a massive new diversion including two intakes with a conveyance capacity of 6000 cfs. (**Draft EIR**, Ch.

3, Description of the Proposed Project and Alternatives, p. 3-14.) That capacity is almost 1/3 of the annual average Sacramento River flow of 21,464 cfs north of Courtland, the location of the proposed intakes. (**Draft EIR**, Ch. 5, Surface Water, Table 5, p. 5-3.) That capacity is almost 1/2 of the annual dry/critical Sacramento River flow of 12, 484 cfs at that location. (***Id.***)[1] The Tunnel would be 45 miles long. (**Draft EIR**, Ch. 3, p. 3-16, Table 3-2.) The Tunnel would have an inside diameter of 36 feet. (*Id.*)

The Project would increase deliveries, meaning diversions, by 543,000 acre-feet per year from 2,429,000 acre-feet per year on average, and by 316,000 acre-feet per year from 1,317,000 acre-feet per year in dry and critical water years. (**Draft EIR**, Executive Summary, p. ES-51, table ES-4.) That represents increases in diversions of about 18% in the face of diminishing available water due to climate change. California's *Water Resilience Portfolio* issued July 28, 2020, states rising winter temperatures will reduce mountain snowpack in the Sierra Nevada and Cascade ranges by 65% on average by the end of the century. (***Water Resilience Portfolio*** p. 14.)

The Draft EIS admits, "The modeling results showed consistent decreases in long-term average flows for all months on the Sacramento River north of Courtland (i.e. downstream of the proposed north Delta intakes)." (**Draft EIS**, Ch. 3, 3.18.2.2, p. 3-18-2.)[2]

In addition to the downstream impacts of diversions for the Project omitted from NEPA analysis, *there will also be upstream impacts* likewise omitted. "[O]peration of the proposed north Delta intakes (as part of a dynamic system) could result in changes in river flows and reservoir storage levels." (**Draft EIS**, Ch.3, 3.18.2.1, p. 3.18-1.) "Modeling tools were used to identify potential changes to flows in the Trinity, Sacramento, Feather, and American Rivers and SWP or CVP reservoir storage levels resulting from implementation of the action alternatives." (***Id.***)

The Draft EIS admits, "The following areas of controversy include concerns raised during the scoping process for both the Draft EIS and the Delta Conveyance Project Draft EIR." (**Draft EI**S, Executive Summary, ES.1.3, p. ES-3.) The Areas of Controversy section in the Executive Summary of the Draft EIS shows the Corps was alerted by concerns raised during the scoping process that the Draft EIS should cover operation of the project. Under the Executive Summary heading "Purpose and objectives" the Draft

[1] Mean monthly flows at Freeport, upstream of the proposed new diversion are shown in the Draft EIR in Appendix 5 C, Table 5C.3.5.1 at p. 5C-50. In critical years, flows are below 10,000 cfs from April through November with the exception of June at 10,214 cfs.

[2] 3.18.2.2 is the section number in the Draft EIS.

EIS admits "Some commenters requested that USACE expand its evaluation to cover operation of the project." (***Id.***)

The Draft EIS says,

> **Water supply and surface water resources.** Water supply and surface water resources—key drivers for development of the proposed action and its action alternatives—are controversial issues for many interested parties (e.g., agricultural interests, hunting and fishing interests, water agencies, local jurisdictions) because of the potential changes in Delta hydrodynamic conditions attributable to changes in the SWP points of diversion in the Delta. The applicant will seek to obtain authorization from the State Water Resources Control Board (State Water Board) for new SWP points of diversion. Such changes would not include changes in water rights; however, there are concerns that the project could result in the potential for increased exports and further reliance on water that moves through the Delta. Water supply and surface water effects on the Trinity and Klamath Rivers were of interest. There was also a focus on future effects both related and unrelated to the project operations (e.g., sea level rise, flooding, degradation of adjacent levees). These issues are addressed in Chapter 3, *Affected Environment and Environmental Consequences*, Section 3.18, *Surface Water*, and Section 3.22, *Water Supply*. (**Draft EIS**, Executive Summary, ES.1.3, p. ES-3.)

That last sentence-- "These issues are addressed in Chapter 3, *Affected Environment and Environmental Consequences*, Section 3.18, *Surface Water*, and Section 3.22, *Water Supply*"— is false. Section 4 of these comments shows that the effects of Project operations on surface water and water supply were *not* analyzed in the Draft EIS under NEPA and were *not* analyzed in the Draft EIR under CEQA.

NEPA Regulation § 1501.9(e) requires,

> Determination of scope. As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:
> (1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
> (i) Automatically trigger other actions that may require environmental impact statements;
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

An action could not be more closely related to the construction of the Delta Conveyance Project than the actual operations of the Project once constructed. *The Project is not a statue or a monument*. Its sole purpose is to operate by diverting water from the Sacramento River and Delta for export. Construction automatically triggers other actions that require an EIS to address operations of the project. The Project cannot operate unless applicant DWR obtains the subject permits from the Corps. Operations and construction are connected under NEPA Regulation 1501.9(e)(1)(i.) Construction of the project cannot proceed unless operations of the Project receive the required State and Federal approvals. Operations and construction are thus connected under NEPA Regulation 1501.9(e)(1)(ii.) Construction of the Project is an interdependent part of a larger action meaning construction of the Project depends on Project operations for its justification. Therefore, construction of the Project and Project operations are also connected under NEPA Regulation 1501.9(e)(1)(iii.)

The Corps must prepare a supplemental Draft EIS to cover Project operations because operations are closely related to construction of the project.

C. The Federal Government through its Agencies including the Bureau of Reclamation and its CVP will be Involved in Project Operations and Review of Same

The Draft EIS states,

The project is dependent on federal action and would require federal permits for one or more of the following activities: (1) permission to alter a federal levee or channel under Section 408, (2) discharges of dredged or fill material into waters of the United States (Section 404 of the CWA), (3) work or construction of a structure in or over any navigable water of the United States (Section 10 of the RHA), (4) activities within the federal navigation channel near the City of Stockton, (5) *activities affecting plant or animal species protected by the federal Endangered Species Act (ESA) (16 USC § 1531 et seq.*), and (6) activities affecting cultural resources that are listed or are eligible for listing in the National Register of Historic Places for compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 USC § 470). (**Draft EIS**, Ch. 1, 1.7, p.1.7)(Emphasis added.)

The Corps is the federal lead agency for the Project. (**Draft EIS**, Executive Summary, ES .1, p. lES-1.) "Under NEPA, a cooperating agency is any federal agency other than the federal lead agency that has jurisdiction by law or special expertise with respect to any environmental effect involved in an action requiring an EIS. Under NEPA, cooperating agencies are encouraged to actively participate in the NEPA process of the federal lead agency, review the NEPA documents of the federal lead agency, and use the documents when necessary if making decisions on the project. The National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), U.S. Environmental Protection Agency (USEPA), and Bureau of Reclamation (Reclamation) are NEPA cooperating agencies for this EIS." (**Draft EIS**, Ch. 1, 1.6.2, p.1-6.) So, four other federal agencies are involved with respect to the environmental effects of the Project.

DWR states,

> DWR's fundamental purpose in proposing to develop new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP water deliveries *and, potentially, CVP water deliveries* south of the Delta, consistent with the State's Water Resilience Portfolio in a cost-effective manner. (**Draft EIR**, Ch. 2, Purpose and Project Objectives, p. 2-2) (Emphasis added.)

The Corps' Draft EIS states the Project needs and objectives include,

- To minimize the potential for public health and safety effects from reduced quantity and quality of SWP water deliveries, *and potentially Central Valley Project (CVP) water deliveries*, south of the Delta as a result of a major earthquake that could cause breaching of Delta levees and the inundation of brackish water into the areas where existing SWP and CVP pumping plants operate in the southern Delta.
- To protect the ability of the SWP, *and potentially CVP, to deliver water* when hydrologic conditions result in the availability of sufficient amounts, consistent with the requirements of state and federal law, including the California and federal Endangered Species Acts and the Delta Reform Act, as well as the terms and conditions of water delivery contracts and other existing applicable agreements. (**Draft EIS**, ES.1.1.2, p. ES-1) (Emphasis added.)

The Bureau of Reclamation operates the Central Valley Project (CVP.) The ability of Reclamation's CVP to deliver water is included as part of the very purpose of the proposed Delta Conveyance Project. The federal government through its agencies including Reclamation and its CVP will be involved in Project operations should the Project be approved and constructed. "The CVP is operated jointly with the State Water

Project (SWP), which provides much of its water to municipal users in Southern California." (**Congressional Research Service**, *Central Valley Project Issues and Legislation*, Summary, October 15, 2018.)

The Bureau of Reclamation explains,

> Some CVP facilities (i.e., the San Luis Unit) were developed in coordination with the California State Water Project (SWP). Both the CVP and the SWP use the San Luis Reservoir, O`Neill Forebay, and more than 100 miles of the California Aqueduct and its related pumping and generating facilities. These operations are closely coordinated at a Joint Operations Center in Sacramento and join with other agencies such as the National Weather Service and the U.S. Army Corps of Engineers for joint action during flood emergencies. (Reclamation website, https://www.usbr.gov › cvp › about-cvp *About the CVP| California-Great Basin - Bureau of Reclamation* August 24, 2022.**)**

Reclamation has described the Coordinated Operation Agreement pursuant to which it and DWR operate the CVP and SWP,

> ES.2.3 Coordinated Operation of the CVP and SWP *The CVP and SWP are operated in a coordinated manner* in accordance with Public Law 99-546 (October 27, 1986), directing the Secretary to execute the Coordinated Operation Agreement (COA)... The CVP and SWP are permitted by SWRCB to store water, divert water and redivert CVP and SWP water that has been stored in upstream reservoirs…The COA is an agreement between the Federal government and the State of California for the coordinated operation of the CVP and SWP. Implementation of the COA has evolved continually since 1986 as CVP and SWP facilities, operational criteria, and physical and regulatory environment have changed. For example, adoption of the CVPIA in 1992 changed the purposes and operations of the CVP, and ESA responsibilities have affected operation of the CVP and SWP. DWR and Reclamation have operational arrangements to accommodate new facilities, water quality objectives, the CVPIA, other SWRCB criteria, and the ESA, but the COA has not been formally modified to address these newer operating conditions. (**Bureau of Reclamation, Final EIS**, Coordinated Long-Term Operation of the Central Valley Project and State Water Project, ES 2.3, p. ES-3, November 2015.)

Reclamation and DWR operate the CVP and SWP together through the Coordinated Operation Agreement. *SWP and CVP water are co-mingled in the San Luis reservoir and the Delta Mendota and San Luis canals*. If the project is developed and

operates, some of the water diverted into the Tunnel will be exported by the Bureau of Reclamation to CVP contractors.

The Draft EIS admits with respect to CVP deliveries,

> **Central Valley Project Deliveries**
>
> The long-term average annual total CVP deliveries for all the action alternatives is expected to remain essentially the same. *During dry and critical water years, most action alternatives could result in increases in deliveries."* (**Draft EIS**, 3.22.2.1, p. 3.22.3)(Emphasis added.)

In reality, regardless of who pays for it, the Delta Conveyance Project is a joint federal state project in which Reclamation will divert and export water for CVP contractors and DWR will do the same for SWP contractors using the Project's new intakes and Tunnel.

What would make sense in this situation would be for the Corps and Reclamation to prepare a joint supplemental Draft EIS to cover both Project construction and Project operations.

The federal government through its agencies including the EPA, NMFS, USFWS, and Reclamation and its CVP will be involved in Project operations and pre-approval review of same. The *only* EIS the cooperating agencies will have is the EIS prepared by the Corps. It must cover, not exclude, the impacts of Project operations.

There is more. Due to the impacts of Project operations on endangered and threatened species and their critical habitats, NMFS and USFWS will be preparing biological opinions required by the Endangered Species Act (ESA.) The biological opinions they prepare will have to consider the whole of the actual Project meaning operations, not just construction, of the project. (*See Connor v. Burford*, 848 F.2d 1441, 1457-1458 (9th Cir. 1988.) The Corps must prepare a supplemental Draft EIS covering Project operations because an EIS is required for preparation of a biological opinion. (*See San Luis & Delta Mendota Water Authority v. Jewell*, 747 F.3d 581, 645-655 (9th Cir. 2014.)

The Corps' regulations provide that when review is extended to the entire project, "the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute." (33 C.F.R. Pt. 325, App B, 7(b)(3)Examples.) Also, "When the Corps is lead agency, it will be responsible for managing the EIS process, including those portions which come under the jurisdiction of other Federal agencies." (33 C.F.R. Pt. 325, App B, 8 b. Corps as Lead Agency.)

A supplemental Draft EIS must be prepared by the federal lead agency— the Corps— to cover Project operations coming under the jurisdiction of the EPA, NMFS, USFWS, and the Bureau of Reclamation.

D. It would be Irrational to Construct the Project But Not Operate It

The Ninth Circuit held in *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985)(EIS required that would analyze combined environmental impacts of the road and timber sales that the road was designed to facilitate)(abrogated on other grounds), "It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales."

The Court said in *Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir. 1988),

> In *Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir.1974), we stated that an EIS must cover subsequent phases of development when '[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.' *Id.* at 1285, *quoted in Thomas,* 753 F.2d at 759. 'The dependency of the road on the timber sales meets this standard; *it would be built to provide access*.' *Thomas v. Peterson,* 753 F.2d at 759. (Emphasis added

It is clear that Project operations cannot proceed without constructing the Delta Conveyance facilities and the facilities "would not be built but for" the contemplated Project operations. Moreover, it would be irrational to construct the conveyance facilities and then not operate the intakes and Tunnel to divert the water the facilities were built to divert.

The Corps has been found to have violated NEPA by avoiding review of connected actions. (*See Choate v. U.S. Army Corps of Engineers*, 2008 WL 4833113 *9 (E.D. Ark., No. 4:07-CV-01170, November 5, 2008) ("When 'it would be irrational, or at least unwise to undertake one action without subsequent actions, the actions are connected.'"); *Baykeeper v. U.S. Army Corps of Engineers*, 2006 WL 2711547 *9, E.D. Cal., No. CIV. S-06-1908, September 20, 2006) ("Where it would be 'irrational, or at least unwise' to undertake one action without subsequent actions, the actions are connected."); *Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 401 F.Supp.2d 1298, 401 F.Supp.2d 1298, 1323" (S.D. Fla. 2005)("Not unlike the impropriety of segmentation to avoid significance, manipulation of a project designed to

conform to a concept of independent utility, particularly with the intention that a permit be expedited, undermines the underlying purposes of NEPA.")

This is a stronger case than any of the cases cited in these comments. The Corps and its Draft EIS have understandably *not* contended that the 45-mile-long Tunnel and massive intakes have any independent utility.

Finally, the Ninth Circuit said in *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219, 1226 (9th Cir. 2015), "The crux of the test is whether '*each of two projects* would have taken place *with or without the other* and thus had independent utility.'" Here, neither construction of the facilities nor operations of the facilities would take place without the other. So, a supplemental Draft EIS must be prepared to analyze the effects of Project operations.

E. The Failure to Cover the Impacts of Project Operations in the Draft EIS is Unlawful Segmentation

In *Sierra Club v. Marsh*, 769 F.2d 868, 881-882 (1st Cir. 1985)("illegal 'piecemealing' or 'segmentation' allows agency to avoid requirements of the Act"), the Court held the Corps had to prepare an EIS because of the secondary effects of the project. The Court said in *Baykeeper v. U.S. Army Corps of Engineers*, 2006 WL 2711547 *7 (E.D. Cal., No. CIV. S-06-1908, September 20, 2006), "Agencies may not improperly 'segment' projects in order to avoid preparing an EIS; instead, they must consider related actions in a single EIS."

Here, the Corps has unlawfully segmented the impacts of operating the Project from the impacts of constructing the Project. So, a supplemental Draft EIS is required to analyze the environmental impacts of Project operations.

2. THE CORPS MUST PREPARE A SUPPLEMENTAL DRAFT EIS TO ADDRESS THE IMPACTS OF PROJECT OPERATIONS ON THE ENVIRONMENT UNDER THE PLAIN LANGUAGE OF NEPA

NEPA mandates in section 102(2)(C) requiring preparation of an EIS that "(2) *all* agencies of the Federal Government *shall*--…(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, *a detailed statement* by the responsible official on

(i) *the environmental impact of the proposed action*,
(ii) *the adverse environmental effects which cannot be avoided should the proposal be implemented*,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity, and
(v) *any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemente*d. (42 U.S.C. § 4332(2)(C) (Emphasis added.)

Again, the Project to be constructed is not a statue or a monument. The sole reason for constructing it would be to operate the Project thereby diverting substantial freshwater flows from the Sacramento River and Delta for export. Operating the Project will have environmental impacts; will result in adverse environmental effects; and will result in the irreversible and irretrievable commitment of water resources. The statute requires that those impacts, effects, and commitments of resources be addressed in detail in the EIS.

The NEPA Regulations confirm the requirements of the statute in more detail. The definition in NEPA Regulation § 1508.1(g) states,

> *Effects or impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:
> (1) Direct effects, which are caused by the action and occur at the same time and place.
> (2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and *related effects on air and water and other natural systems, including ecosystems.*
> (3) Cumulative effects, which are effects on the environment that result from the *reasonably foreseeable actions regardless of what agency (Federal or non–Federal) or person undertakes such other actions*. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.
> (4) *Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems*), aesthetic, historic, cultural, economic, social, or health, w*hether direct, indirect, or cumulative.* Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial. (Emphasis added.)

The impacts and effects of operating the Project are direct, indirect but reasonably foreseeable, and cumulative effects of constructing the Project.[3] NEPA cases have upheld the NEPA requirement that an EIS address reasonably foreseeable indirect and cumulative effects caused by the action. (*See Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737-738 (9th Cir. 2020)("An EIS that does not adequately consider the indirect effects of a proposed action violates NEPA," "emissions resulting from the foreign consumption of oil are surely a 'reasonably foreseeable indirect effect of drilling at Liberty," EIS did not comply with NEPA); *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357, 1374-1375 (D.C. Cir. 2017)(Federal Energy Regulatory Commission EIS for a natural gas pipeline project unlawfully failed to quantify the indirect greenhouse gas emissions that would result from the burning of the natural gas transported by the pipelines); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 870 (9th Cir. 2005)("Because a 'reasonably close causal relationship' exists between the Corps' issuance of the permit [for a dock extension], the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills, the Corps had a duty to explore this relationship further in an EIS.")

The impacts and effects of *operating* the Delta Conveyance Project were required by NEPA to be included in the Draft EIS. Since they were not included, the Corps must prepare a supplemental draft EIS including the impacts of operating the Project.

3. A SUPPLEMENTAL DRAFT EIS IS REQUIRED TO COMPLY WITH THE CLEAN WATER ACT AND THE RIVERS AND HARBORS ACT RESPONSIBILITIES OF THE CORPS

The Corps' own regulations also make clear it must review the environmental impacts of the freshwater diversions during Project operations. The Corps' Regulations state, "For purposes of a section 10 permit, *a tunnel* or other structure or work under or over any navigable water of the United States is considered to have an impact on the navigable capacity of the water body." (33 C.F.R. §322.3(a) (Emphasis added.) According to the Corps, the Tunnel corridor includes "13 crossings of navigable waterways,.." (85 Fed.Reg. 514211, August 20, 2020.)

So, the Tunnel crossings have an impact on the navigable capacity of the subject water body. A supplemental Draft EIS is required to analyze the impacts.

[3] The NEPA Regulations include the definition, "*Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." (§ 1508.1(aa.)

Another regulation under section 10 of the Rivers and Harbors Act states in pertinent part,

> (g) Canals and other artificial waterways connected to navigable waters of the United States. A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this part, if it constitutes a navigable water of the United States, *or if it is connected to navigable waters* of the United States *in a manner which affects* their course, location, *condition, or capacity*, or if at some point in its construction *or operation it results in an effect on the course, location, condition, or capacity of navigable waters* of the United States. In all cases the connection to navigable waters of the United States requires a permit. (33 C.F.R. § 322.5(g) (Emphasis added.)

The Delta Conveyance Tunnel would be "connected to navigable waters [the Sacramento River] of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States." A supplemental Draft EIS is required to address the effect of Tunnel operations on the condition of the Sacramento River and the Delta.

A provision of Clean Water Act § 404 also requires the Corps to review impacts of project operations. The so-called "recapture" provision requires,

> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. (33 U.S.C. § 1344(f)(2.)

Under the first part of the section an area of the navigable waters will be brought into a use to which was not previously subject. Instead of continuing to flow through the Sacramento River and the Delta the water will instead be diverted into a long tunnel for export. Under the second part of the section the flow and circulation of the navigable waters of the Sacramento River and the Delta will be impaired by being substantially reduced in quantity.

The recapture provision requires a permit for comparatively minor farming, maintenance, or construction discharge of dredged or fill material activities that would otherwise be exempt from the permit requirement under 323 U.S.C. § 1344(f)(1), if the activity to which it is incidental meets the exception set forth in § 1344(f)(2.) The only purpose of requiring a permit in these instances would be to require the permit decision to include review of the change in use of the area of navigable waters, and the impairment

of the flow or circulation of the navigable waters. It is an EIS that provides the basis for such review. The Ninth Circuit affirmed civil penalties for Clean Water Act violations under the recapture provision in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), aff'd 537 U.S. 99 (2002)("Thus, even normal plowing can be regulated under the Clean Water Act if it falls under this so-called 'recapture' provision" and "activities that require 'substantial hydrological alterations' require a permit.")On January 10, 2023, EPA clarified that pollution from hydrologic alteration of rivers, streams, lakes, and estuaries affects water quality. (EPA website.) The first publication EPA referenced was the *Final EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration* which explained,

> *The natural flow regime of a water body, defined as its characteristic pattern of flow magnitude, timing, duration, frequency, and rate of change, plays a critical role in supporting the chemical, physical, and biological integrity of streams and regime can degrade a stream's physical and chemical properties, leading to loss of aquatic life and reduced aquatic biodiversity*. Protecting aquatic life from the effects of flow alteration involves maintaining multiple components of the flow regime within their typical range of variation…Human activities that alter the natural flow regime also occur at both the catchment and reach scales and include impoundments, channelization*, diversions*, groundwater pumping, wastewater discharges, urban development, thermoelectric power generation, and agricultural practices. Many of these activities alter hydrologic processes like infiltration, groundwater recharge, channel storage, or routing and lead to flow conditions outside the natural range of variation. *Others directly add or remove water from a stream such that flows are uncommonly high or low over long periods of time.* Occurring in conjunction with these activities is climate change. Climate trends observed in recent decades and future projections (for example, rising ambient air temperatures, increasing frequency of heavy precipitation events, reductions in the thickness of snow pack and ice) may magnify the effects of other anthropogenic processes on the natural flow regime. *Alteration of the natural flow regime can have cascading effects on the physical, chemical, and biological properties of riverine ecosystems.* Effects on physical properties include altered channel geomorphology (channel incision, widening, bed armoring, etc.), reduced (or augmented) riparian and flood-plain connectivity, and reduced (or augmented) longitudinal (upstream-downstream) and vertical (surface water/groundwater) connectivity. *Effects on water quality can also result from altered flow magnitudes.* For example, salinity, sedimentation, and water temperature can increase with amplified flow volumes. *These changes to a stream can in turn lead to the degradation of aquatic life as a result of the loss and disconnection of high-quality habitat.* Furthermore, altered flows can fail to provide the cues needed for aquatic species to complete their life cycles and can encourage the invasion and establishment of non-native aquatic species. The ability of a water body to support

aquatic life is tied to the maintenance of key flow-regime components. (**Final EPA-USGS Technical Report:** Protecting Aquatic Life from Effects of Hydrologic Alteration, EPA Report 822–R–16–007 USGS Scientific Investigations Report 2016–5164.)

Diverting substantial quantities of freshwater flows out of the Sacramento River and the Delta would have "cascading effects on the physical, chemical, and biological properties of [the Sacramento River and Delta] riverine ecosystems" including "degradation of aquatic life as a result of the loss and disconnection of high-quality habitat." The adverse environmental impacts of Delta Conveyance Project operations cry out for comprehensive and detailed analysis in a Draft EIS.

The Corps' Clean Water Act regulations call for review of Project operations as well as construction of the facilities. The Corps must conduct a public interest review of permits. (33 C.F.R. § 320.1(a)(1.) Activities reviewed include "Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (part 322);.." (33 C.F.R. § 320.1(a)(b)(3.) Also reviewed are "Discharges of dredged or fill material into waters of the United States (part 323);.." (33 C.F.R. § 320.1(a)(b)(5.)

The public interest review includes evaluation of probable impact "including cumulative impacts, of the proposed activity and its intended use on the public interest." (33 C.R.R. § 320.4(a)(1.) "All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish, and wildlife values,.. navigation,.. recreation, water supply and conservation, water quality,.. and in general, the needs and welfare of the people." (*Id.*)

The regulation also requires,

> (2) The following general criteria will be considered in the evaluation of every application:
> (i) The relative extent of the public and private need for the proposed structure or work:
> (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
> (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited. (33 C.F.R. § 320.4(a)(2.)

The objective of the construction of the Delta Conveyance Project facilities is to divert substantial quantities of freshwater flows from the Sacramento River and the Delta for export. The relative extent of the need of the proposed project is a subject for analysis in an EIS. The unresolved conflicts as to use of the freshwater resource is likewise a subject for analysis in an EIS.

The public interest review section expressly requires, "Water quality. Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction *and subsequent operation of the proposed activity*." (33 C.F.R. § 320.4(d.) Since the Corps must evaluate subsequent operation of the proposed activity; that evaluation must be included within the EIS.

Subsection (e) of the public interest review section addresses "Historic, cultural, scenic, and recreational values." The last sentence of the subsection states "Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established." (33 C.F.R. § 320.4(e.) The Project is not consistent with the Delta Reform Act and other California laws set forth in section 6C of these comments. Also, permits should only be issued if applicable statutes have been considered and followed including NEPA, the Endangered Species Act, and the Clean Water Act. (33 C.F.R. § 320.4(j)(4.)

Subsection (m) of the public interest review section addresses "Water supply and conservation." The subsection provides in pertinent part "Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements." (33 C.F.R. § 320.4(m.) The EIS must cover Project operations to consider the efficient use of water resources as an alternative to the Tunnel.

The Corps has extensive authority to mitigate adverse impacts by project modifications including reductions in scope and size. (33 C.F.R. § 320.4(r.) Section 404 permits may be denied. (33 C.F.R. § 323.6.) Permits may also be conditioned to satisfy legal requirements or the public interest requirement. (33 C.F.R. § 325,4.)

A district engineer must refer an application to the division engineer "When there is substantial doubt as to authority, law, regulations, or policies applicable to the

proposed activity,.." (33 C.F.R. §325.8(b)(3.) And, the division engineer must refer an application to the Chief of Engineers "When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity,.." (33 C.F.R. §325.8(c)(2.) There is, at the very least, substantial doubt as to whether not covering Project operations in the Draft EIS complies with NEPA.

The duties and responsibilities of the Corps under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act embrace the effects of Project operations on the condition of the Sacramento River and the Delta. Consequently, a supplemental Draft EIS is required to cover Project operations--not just construction.

4. THE IMPACTS OF THE MASSIVE WATER PROJECT ON SURFACE WATER AND WATER SUPPLY HAVE NOT BEEN EVALUATED UNDER EITHER NEPA IN THE DRAFT EIS OR CEQA IN THE DRAFT EIR

Despite the worsening of conditions in the already impaired Delta by reducing freshwater flows through the Delta, the Corps' Draft EIS does *not* address the effects of operations of the Tunnel Project on surface water. The Draft EIS states,

> Effects that result from operation of the action alternatives are not within USACE's authority and are not covered by this EIS. Brief descriptions of the effects of operations are included in Chapter 3, where appropriate; however they will not be included here. For more information on the effects of operations as a result of operation of the action alternatives, see the Delta Conveyance Project Draft EIR (California Department of Water Resources 2022). (**Draft EIS**, Executive Summary, Table ES-2, p. ES-32.)

Again, the effects of Project operations "are not covered by this EIS." (**Draft EIS**, Executive Summary, Table ES-2, p. ES-32.)

The Draft EIS in Chapter 3, section 3.18 on Surface Water, claims project operations are outside the Corps' authority under sections 408, 404, and 10. (**Draft EIS**, Ch. 3, 3.18, p. 3.18-1.) The Draft EIS goes on to claim, falsely, "Therefore, while the effects of operations of the action alternatives [on surface water] are discussed briefly and qualitatively in this Draft EIS, a more in-depth analysis of operations and associated effects on the environment is provided in the Delta Conveyance Project Draft EIR Chapter 5, *Surface Water* (California Department of Water Resources 2022). This Draft EIS focuses only on those actions under USACE authority." (*Id.*)

In fact, Chapter 5 of DWR's Draft EIR opens with these 2 sentences, "This chapter describes potential changes to surface water resources that could result from implementation of the Delta Conveyance Project (project) alternatives. Changes to surface water resources by themselves, *are not considered an impact* of the project alternatives under... (CEQA), and thus, *are not evaluated as impacts* in this chapter." (**Draft EIR**, Ch. 5, p. 5-1) (Emphasis added.) That omission is repeated more than once in the Draft EIR. "Changes to surface water resources, by themselves, are not considered an impact of the project under CEQA and thus are not evaluated as impacts in this chapter." (**Draft EIR**, Executive Summary, p. ES-48; Ch. 5, p. 5-2.)

So, the impacts of the Tunnel Project on surface water, including the reductions in surface water flows downstream of the proposed new intakes, have *not* been evaluated under NEPA in the Draft EIS and have *not* been evaluated under CEQA in the Draft EIR.

The impacts of the Tunnel Project on water supply have likewise been excluded from analysis under NEPA in the Draft EIS and from analysis under CEQA in the Draft EIR. (**Draft EIS**, Executive Summary p. ES-36, Ch. 3, 3.22, p. 3-22-1; **Draft EIR**, Ch. 6, pp. 6-1, 6-2, 6-34.) The Corps' Draft EIS says "Water supply effects are not evaluated under NEPA; therefore, an analysis of the No Action Alternative is not included in this Draft EIS." (**Draft EIS**, Ch. 3, 3.22.2.1, p. 3.22-1.) DWR's Draft EIR says, "Changes to water supply, by themselves, are not considered an impact under CEQA and are not evaluated as impacts in this chapter." (**Draft EIR**, Ch. 6 p. 6-1.)

The impacts of the Tunnel Project on water supply have *not* been evaluated under NEPA in the Draft EIS and they have *not* been evaluated under CEQA in the Draft EIR. That is so even though the Draft EIS admits that DWR's Preferred Alternative could lead to increases in annual SWP deliveries during dry and critical water years of 13% and increases in annual SWP Table A deliveries during dry and critical water years of 23%. (**Draft EIS** Ch. 3 p. 3.22-2.) The increases in deliveries mean decreases in freshwater flows which includes among the adverse impacts worsening critical habitat for endangered and threatened fish species. An "irreversible and irretrievable commitment of the availability of [water] resources" is a major federal action requiring an EIS. (*Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 852(9th Cir. 1979.)

The omission of analysis of Project impacts on water supply and surface water is astonishing given that DWR in its Notice of Preparation (NOP) of the Draft EIR had listed as the first two of twenty-four probable effects of the Project on the environment as,

-Water Supply: changes in water deliveries.
-Surface Water: changes in river flows in the Delta. (**DWR NOP** at p. 9, January 15, 2020.)

The Corps' own Regulations provide the authority for obtaining information about the impacts of Project operations on surface water and water supply. "The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an Environmental Assessment (EA) or Environmental Impact statement (EIS)." (33 C.F.R. Pt 325. 3
App. B, NEPA Implementation Procedures for the Regulatory Program

NEPA section 102, 42 U.S.C. 4332(C) is quoted in section 2 of these comments. The statute requires a detailed EIS on several subjects including "the environmental *impact* of the proposed action"(subsection (i), "the adverse environmental *effects* which cannot be avoided should the proposal be implemented" (subsection (ii), and "*any* irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented" (subsection (v.) (Emphasis added.)NEPA Regulation § 1502.16(a)(4) requires the environmental consequences section of an EIS to include "*Any* irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented." (Emphasis added.)

The diversions for the Tunnel Project will have adverse environmental impacts including the reduction of freshwater flows through the already impaired Delta. Those reductions in freshwater flows cannot be avoided if the Tunnel Project is constructed and operated. Diversion of the freshwater flows from the Sacramento River and the Delta would be an irreversible and irretrievable commitment of those water resources which would take place if the Tunnel Project is operated. The omission of the impacts of Project operations on surface water and water supply from the Draft EIS violates the plain language of NEPA, 42 U.S.C. § 4332(2)(C.) Moreover, the impacts of Project operations on surface water and water supply have also not been evaluated under CEQA.

5. THE TUNNEL PROJECT AND ITS DRAFT EIR ARE IN CONFLICT WITH CALIFORNIA LAW

The Tunnel Project involves conflicts and inconsistencies with California law including CEQA as well as other statutes. As shown later in these comments in sections 7 and 8, the Corps will have to prepare and publish a supplemental draft of the surface water and water supply portions of the Draft EIS. The Corps will also have to include

discussion of the conflicts and inconsistencies of the Tunnel Project and DWR's Draft EIR with California law in the supplemental draft.

DWR's Draft EIR fails to comply with CEQA. CEQA declares the policy of the state includes, "Take all action necessary to provide the people of this state with clean air and *water*, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Res. Code § 21001(b).)

The effect on "*Water*" is expressly included by CEQA as one of the physical conditions in the environment that must, if affected by a substantial, or potentially substantial adverse change from a project, be the subject in the EIR of detailed information about the effect.

CEQA defines "environment" as, "'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, *water*," (Pub. Res. Code § 21060.5.) (See also CEQA Guidelines §15360) (Emphasis added.)

CEQA Guidelines § 15382 includes the definition, ""Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, *water*," (Emphasis added.)[4] (*See also* Pub. Res. Code § 21068.)

CEQA includes in the definition of an EIR, "The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the *environment*; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Res. Code § 21061) (Emphasis added.)

CEQA requires that an EIR "*shall* include a detailed statement setting forth all of the following: (1) *All* significant effects *on the environment* of the proposed project…" (Pub. Res. Code § 21100(b)(1) (Emphasis added.)

So, DWR decided to *not evaluate the* impacts under CEQA that the massive, proposed water project and new water diversion would have on surface water or water supply. That failure is a clear violation of CEQA given the CEQA definitions of "environment," "significant effect on the environment," "environmental impact report,"

[4] The CEQA Guidelines are codified at 14 Cal. Code Regs. § 15000 et seq.

and the required contents of an EIR. The violation of CEQA by DWR is clear. Were it not, the California Supreme Court has consistently held for almost a half century, "[t]he foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*E.g., Sierra Club v. County of Fresno*, 6 Cal.5th 502, 511(2018)) (internal quotation marks deleted.)

The proposed project is a massive *water* project. *The Draft EIR for this water project does not evaluate its impacts on water.* In addition to the CEQA statute itself, there is also the case law under CEQA. What is involved here is a proposed massive water project the purpose of which is to divert enormous quantities of freshwater from the Sacramento River which would significantly reduce freshwater flows through the already impaired San Francisco Bay-Delta estuary. The Supreme Court dealt with a land use project involving far lower quantities of water under CEQA in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412 (2007). The court held,

> But the future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis. An EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, *the impacts of providing water to the entire proposed project.* (40 Cal.4th at 431) (Emphasis added.)

The court emphasized,

> The ultimate question under CEQA, moreover, is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project. (40 Cal.4th at 434)(Emphasis in original.)[5]

The court held the County failed to proceed in the manner required by CEQA because the EIR did "not discuss *the impacts of new surface water diversions*, enforceable measures to mitigate those impacts, or the remaining unmitigated impacts." (40 Cal.4th 412, 444) (Emphasis added.)

[5] In *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App. 4th 182, 206, the court held the EIR for a development project "does require recognition that water must be supplied, that it will come from a specific source or one of several possible sources, of what the *impact* will be if supplied from a particular source or possible sources and if that *impact* is adverse how it will be addressed." (Emphasis added)

In *King & Gardiner Farms, LLC v. County of Kern*, 45 Cal.App.4th 814, 844-845(2022), the court held a decrease in water supply of only 2982 acre-feet caused by a project is an adverse environmental impact under CEQA.

In *AquAlliance v. U.S. Bureau of Reclamation*, 287 F.Supp.3d 969, 1036 (E.D. Cal. 2018), the court noted "the present condition of the Delta is already precarious, due in part to reduced Delta outflows." The court held a FEIS/R did not pass muster under CEQA because the analysis of cumulative impacts to Delta outflow did not consider existing conditions in the Delta. (287 F.Supp.3d at 1037.)

DWR claims in the Draft EIR that Chapter 7, Flood Protection describes flood risks, Chapter 9, Water Quality, describes surface water quality impacts, Chapter 8, Groundwater, discusses groundwater impacts, Chapter 12, Fish and Aquatic Resources, and Chapter 13, Terrestrial Biological Resources, discuss riparian corridor biological resources. (**Draft EIR**, Ch. 5, p. 5-1.) DWR, however, lacks the power to amend or weaken CEQA or the CEQA Guidelines. As shown above, CEQA expressly includes "*water*" in its definition of "environment." (Pub. Res. Code § 21060.5) (Emphasis added.) CEQA requires that an EIR be a detailed statement setting forth "*All* significant effects on the *environment* of the proposed project…" (Pub. Res. Code § 21100(b)(1) (Emphasis added.) CEQA Guidelines § 15382 defines "Significant effect on the environment" as expressly including any "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including…*water*..."

Diverting water from a river for specific uses constitutes a removal for consumptive use of the water so diverted from any other use including maintaining in-stream and Delta flows and water quality as well as alternative consumptive uses. That is a physical change in the environment that under CEQA must be the subject of detailed analysis in the EIR. The Legislature did not limit the meaning of the term "water" by including any qualification such as adding the word "quality" after "water." The CEQA statute, CEQA Guidelines, and CEQA case law all make it clear that DWR's failure to address the impacts of diversions for the water Project on surface water and on water supply in the Draft EIR, violates CEQA. DWR unlawfully evaded the single most important subjects an EIR on a massive water project could have-- the impacts of the project on surface water including volume, quantity, and temperature, and water supply.

The CEQA Guidelines require recirculation of a revised Draft EIR for public review when "A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented." (Guidelines §

15088.5(a)(1.) That is the situation here since the Draft EIR did not evaluate the impacts of the water project on water. Moreover, that omission made the Draft EIR "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (See Guidelines § 15088.5(a)(4.) A revised Draft EIR *evaluating the impacts of the water project on surface water and water supply* under CEQA will have to be prepared and recirculated for public review and comment pursuant to CEQA Guidelines § 15088.5(a)(1) and (4.)

Neither the Corps' Draft EIS nor DWR's Draft EIR evaluate the impacts of the diversions for the massive water project on surface water—volume, flows, temperature—under NEPA or CEQA. Consequently, the Draft EIS is so inadequate as to preclude meaningful analysis. The Corps must prepare and publish a supplemental draft of the portions purportedly addressing surface water and water supply—Chapter 3, sections 3.18 and 3.22. The supplemental Draft EIS must also include discussion of the conflicts and inconsistencies of the Tunnel Project and DWR's Draft EIR with California law as shown in section 8 of these comments.

6. THE REQUIRED RANGE OF REASONABLE ALTERNATIVES TO THE PROPOSED ACTION HAS NOT BEEN INCLUDED IN EITHER THE DRAFT EIS OR THE DRAFT EIR

A. The Draft EIS Fails to Include the Required Range of Reasonable Alternatives Required by NEPA

The required range of reasonable alternatives to the proposed action has not been included in the Corps' Draft EIS and has not been included in DWR's Draft EIR.

The Draft EIS included five so-called action "alternatives," in addition to the required no-project alternative, to be analyzed in the Draft EIS. (**Draft EIS**, Executive Summary p. ES-7.) The so-called "alternatives" are all Tunnels simply following different alignments, ranging in number of intakes from 1 to 2 and ranging in capacity from 3000 cfs to 6000 cfs. These so-called "alternatives" are simply the same Tunnel Project dressed up in different outfits.

DWR's Draft EIR claims to include nine alternatives. DWR's nine "alternatives" are all Tunnels ranging in capacity from 3000 cfs to 7500 cfs. (**Draft EIR**, Executive Summary, pp. ES-13, -14.) DWR's so-called "alternatives," like the so-called "alternatives" in the Draft EIS, are simply the same Tunnel Project dressed up in different outfits.

NEPA requires an EIS to include "*alternatives to the proposed action*,.." (42 U.S.C. § 4332(2)(C)(iii) (Emphasis added.) The NEPA Regulations require an EIS to "Evaluate reasonable alternatives to the proposed action,.." (§ 1502.14.) The agency preparing the EIS must "study, develop, and describe appropriate *alternatives* to recommended courses of action *in any proposal which involves unresolved conflicts concerning alternative uses of available resources*;.." (42 U.S.C. § 4332(2)(E) (Emphasis added.) NEPA Regulation § 1502.16(a)(6) requires the environmental consequences section of an EIS to include "Energy requirements *and conservation potential of various alternatives* and mitigation measures." (Emphasis added.)

DWR's Tunnel Project involves unresolved conflicts concerning alternative uses of the available water resource. Freshwater flows diverted for the Tunnel and export away from the Sacramento River and Delta would be unavailable for alternative uses including maintaining freshwater flows through the River and Delta, protecting public health by not worsening harmful algal blooms, and maintaining critical habitat for endangered and threatened fish species.

In determining the range of reasonable alternatives that must be included in an EIS, "'The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.' *Calif. v. Block,* 690 F.2d 753, 767 (9th Cir.1982)." (*Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004.) Limiting the alternatives to variations of the Tunnel project failed to inform decision-making and public participation.

The Corps' NEPA regulations require, "(c) The EIS should discuss geographic alternatives, e.g., changes in location and other site-specific variables, *and functional alternatives, e.g., project substitutes* and design modifications ." (33 C.F.R. Pt. 325, App. B, 9(5)(c) (Emphasis added.)

In *California. v. Block,* 690 F.2d 753, 765-769 (9th Cir.1982), the project at issue involved allocating to wilderness, non-wilderness or future planning, remaining roadless areas in national forests throughout the United States. Like the situation here where a trade-off is involved between a Tunnel for water exports and Delta restoration, the Forest Service program involved "a trade-off between wilderness use and development. This trade-off, however, cannot be intelligently made without examining whether it can be softened or eliminated by increasing resource extraction and use from already developed areas." 690 F.2d at 767. The court held the EIS inadequate because it failed to include

required reasonable alternatives. (*Id*.) Here, likewise, trade-offs cannot be intelligently analyzed without examining whether the impacts of a no-Tunnel alternative reducing exports can be softened or eliminated by increasing water conservation and recycling and retiring drainage-impaired agricultural lands in the areas of the exporters from production. (*See also, Western Watersheds Project v. Abbey*, 719 F.3 1035, 1053-1054 (9th Cir. 2013) (EA failed to include an alternative reducing grazing lands); *Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1122-1124 (9th Cir. 2010) (uncritical alternatives analysis in EIS privileging one form of use over another violated NEPA.)

In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9th Cir. 1999)(per curiam) an EIS violated NEPA because the two action alternatives were virtually identical. Here, also, the so-called action alternatives are virtually identical. They are simply different varieties of a Tunnel Project.

The Ninth Circuit reversed a district court decision denying environmental plaintiffs summary judgment because the challenged environmental document issued by the Bureau of Reclamation under the National Environmental Policy Act (NEPA) "did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities. (*Pacific Coast Federation of Fishermen's Assn's v. U.S. Dept. of the Interior* (9th Cir. No. 14-15514, July 25, 2016) 655 Fed.Appx. 595 (not selected for publication.) The court noted Reclamation's "reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts." (*Id*.)

Alternatives to the Tunnel Project include conservation, agriculture water use efficiency, urban water use efficiency, recycled municipal water, storm water capture, groundwater storage, and other modern innovations greatly reducing the need for exporting water from the northern and central California watershed. The failure to include any alternatives whatsoever to the Tunnel Project in the Draft EIS is a failure to proceed in the manner required by NEPA.

B. DWR's Draft EIR Failed to Include the Reasonable Range of Alternatives required by CEQA

This subsection and the next subsection address some of DWR's CEQA violations. These violations require the Corps to prepare a supplemental Draft EIS

addressing the inconsistencies and conflicts with state laws and policies as shown in section 8 of these comments.

As shown above, DWR's Draft EIR's nine so-called "alternatives" were simply the same Tunnel Project dressed up in different outfits. So, there were no "alternatives to proposed actions affecting the environment" required by CEQA. (Pub. Res. Code § 21001(g.)

The California Supreme Court explained in *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918, 936-937 (2017),

> An EIR must 'describe a range of reasonable alternatives to the project,' or to its location, that would 'feasibly attain' most of its basic objectives but will 'avoid or substantially lessen' its significant effects. (Guidelines, § 15126.6, subd. (a).) Among the factors relevant to the feasibility analysis are 'other plans or regulatory limitations, [and] jurisdictional boundaries (projects with a regionally significant impact should consider the regional context).' (*Id*. subd. (f)(1).)

CEQA sets forth the purpose of an EIR. "The purpose of an environmental impact report is to identify the significant effects on the environment of a project, *to identify alternatives to the project*, and indicate the manner in which those significant effects can be mitigated or avoided." (Pub. Res. Code § 21002.1(a) (Emphasis added.) "The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; *and to indicate alternatives to such a project*." (Pub. Res. Code §21061) (Emphasis added.) The EIR "shall include a detailed statement setting forth all of the following:.. Alternatives *to* the proposed project." (Pub. Res. Code § 21100(b)(3)(4) (Emphasis added.)

Again, the Draft EIR includes no alternatives *to* the Tunnel Project. Consequently, the Draft EIR is useless because of its failure to foster informed decision-making about the pros and cons of going forward with the proposed Tunnel Project. That is contrary to the requirements of CEQA pursuant to which "Decision makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 431 (2007.)

DWR has facilitated its omission of alternatives to the Project by setting forth artificially narrow project objectives. According to the Draft EIR, "DWR's fundamental purpose in proposing to develop new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP water deliveries and, potentially, CVP water deliveries south of the Delta, consistent with the State's Water Resilience Portfolio in a cost-effective manner." (**Draft EIR**, Ch. 2, Purpose and Project Objectives, p. 2-2; **Draft EIR**, Appendix 3A, Identification of Water Conveyance Alternatives, p. 3A-1 (restated in almost identical language.)

The Draft EIR then set forth DWR's objectives,

> The above stated purpose, in turn, gives rise to several related objectives of the Delta Conveyance Project, as follows.
>
> - To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events.
> - To minimize the potential for public health and safety impacts from reduced quantity and quality of SWP water deliveries, and potentially CVP water deliveries, south of the Delta as a result of a major earthquake that could cause breaching of Delta levees and the inundation of brackish water into the areas where existing SWP and CVP pumping plants operate in the southern Delta.
> - To protect the ability of the SWP, and potentially the CVP, to deliver water when hydrologic conditions result in the availability of sufficient amounts of water, consistent with the requirements of state and federal law, including the California and federal Endangered Species Acts and Delta Reform Act, as well as the terms and conditions of water delivery contracts and other existing applicable agreements
> - To provide operational flexibility to improve aquatic conditions in the Delta and better manage risks of further regulatory constraints on project operations. (**Draft EIR**, Ch. 2, pp. 2-2,-3.)

Those objectives are artificially narrow. As shown below in section 6D, that has contributed to the unlawful omission of alternatives in the Draft EIR. By not describing a range of reasonable alternatives to the Project, DWR failed to proceed in the manner required by CEQA.

C. DWR's Draft EIR Failed to Include Alternatives Required by Related Regulatory Regimes

The California Supreme Court held in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936-937,

> The Guidelines [§ 15126.6(f)(1)] specifically call for consideration of related regulatory regimes, like the Coastal Act, when discussing project alternatives…Thus, the regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR's analysis of feasible alternatives.

Contrary to the requirements of CEQA as confirmed by the *Banning Ranch Conservancy* decision, regulatory limitations imposed by the Delta Reform Act and other related regulatory regimes should have been, but were not, central to the Draft EIR's analysis of feasible alternatives.

There is more. *One* regulatory limitation had been ignored by the public agency in determining what alternatives were feasible in the *Banning Ranch Conservancy* case. Here, DWR ignored *multiple* regulatory limitations including the Delta Reform Act, the Climate Change Legislation, CESA, and the public trust doctrine when it confined the Draft EIR's "alternatives" to variations of tunnels. DWR failed to proceed in the manner required by CEQA.

1. The Draft EIR Failed to Include a Delta Reform Act Focused Alternative

The foundational alternatives in addition to tunnel alternatives, had to include other, no-tunnel and through-Delta alternatives to protect the Delta. The policy of the State of California is set forth in the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), Water Code § 85000 et seq. Pursuant to the Delta Reform Act, the established State policy is "*to reduce reliance on the Delta* in meeting California's future water supply needs through a statewide strategy of investing in improved water supplies, conservation, and water use efficiency." (Water Code § 85021) (Emphasis added.). Another policy established by the Act is to, "Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem." (Water Code § 85020(c.) "'Coequal goals' means the two goals of providing a more reliable water supply for California *and protecting, restoring, and enhancing the Delta ecosystem.* The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (Water Code § 85054) (Emphasis added.)

The Act *expressly requires* that a new conveyance project, previously called the Bay Delta Conservation Plan (BDCP), evaluate "[a] reasonable range of Delta conveyance alternatives, including through-Delta," as well as dual or isolated conveyance alternatives. (Water Code § 85320(b)(2)(B).) "Through-Delta" means no-tunnel

alternatives continuing to use the Sacramento River and Delta as the pathway for water to be exported from the south Delta.

The Delta Reform Act also mandates, "The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." (Water Code § 85023.)

Delta Reform Act focused alternatives restoring the Delta, "should have been central to the" "analysis of feasible alternatives" to the Delta Conveyance Project. (*Banning Ranch Conservancy*, 2 Cal.5th 918, 936-937.) Instead of complying with CEQA, DWR developed nine faux "alternatives" that are simply the same Delta Conveyance Project dressed up in different outfits. DWR also ignored the Delta Reform Act's mandate to evaluate "through- Delta" alternatives. The Project would do the opposite of reducing reliance on the Delta. The Project would instead spend billions of dollars to increase reliance on the Delta in meeting future water supply needs.

2. The Draft EIR Failed to Include a Climate Change Legislation Focused Alternative

The first objective stated by DWR for the project is, "To help address anticipated rising sea levels and other reasonably foreseeable consequences of *climate change* and extreme weather events." (**Draft EIR**, Ch.2. p. 2-2) (Emphasis added.)

Effective January 1, 2016, Assembly Bill 1482 (Stats. 2015, c. 603) added part 3. 7, Climate Change and Climate Adaptation, to Division 34, Environmental Protection, of the Public Resources Code. That climate change part includes Public Resources Code § 71154(c)(2) which states,

> When developing infrastructure to address adaptation [to climate change], where feasible, *a project alternative should be developed* that utilizes existing natural features and ecosystem processes or the restoration of natural features and ecosystem processes to meet the project's goals. (Emphasis added.)

DWR is part of the California Natural Resources Agency. The Resources Agency is the agency responsible (Pub. Res. Code § 71150(a) for updating every three years "the state's climate adaptation strategy, known as the plan." (Pub. Res. Code § 71153.) The Resources Agency has published the 2021 update of the climate adaptation strategy required by the legislation at: https://resources.ca.gov/Initiatives/Building-Climate-Resilience/2021-State-Adaptation-Strategy-Update.

The 2021 update under "PRIORITY: Bolster Public Health and Safety to Protect Against Increasing Climate Risks" establishes "GOAL A: Reduce urgent public health and safety risks posed by climate change." Action 2 under that goal is "Conserve water." (2021 Update at p. 6.) Under "PRIORITY" the text of the update states, "Nature-based climate solutions are actions that work with and enhance nature to build climate resilience and/or contribute to carbon neutrality." (2021 Update at p. 12.) GOAL A under that priority is, "Increase the pace and scale of nature-based climate solutions." Action 12 under that goal is, "In the Sacramento-San Joaquin Delta watershed, build climate resilience through restoration." (2021 Update at p. 13.) GOAL C under that priority is, "Integrate nature-based climate solutions to relevant infrastructure and investments." Action 3 under that goal is, "Prioritize the use of natural infrastructure in efforts to protect and restore watersheds, coast, marine waters, and ecosystems." (2021 Update at p. 14.)

The Draft EIR had to but did not include a project alternative focused on conserving water and that utilizes existing natural features and ecosystem processes or the restoration of natural features and ecosystem processes to meet the project's goals. DWR's failure to include such an alternative violated CEQA.

3. The Draft EIR Failed to Include a California Endangered Species Act (CESA) Focused Alternative

The California Supreme Court said in *Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 125, "For example, CESA establishes a policy adding significant weight to the CEQA balancing scale on the side favoring protection of a listed species over projects that might jeopardize them or their habitats. (Fish & G. Code, § 2053.)" Fish and Game Code section 2053 states "Legislative findings and declarations; alternative state agency projects" as follows,

> (a) The Legislature further finds and declares that it is the policy of the state that public agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent *alternatives* available consistent with conserving the species or its habitat which would prevent jeopardy.
>
> (b) Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent *alternatives shall be developed* by the department, together with the project proponent and the state lead agency, consistent with conserving

the species, while at the same time maintaining the project purpose to the greatest extent possible. (Emphasis added.)

CEQA establishes the policy of the state to, "Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history." (Pub. Res. Code § 21001(c).)

The State Water Resources Control Board (SWRCB) comment letter (April 15, 2020) on the NOP for the Delta Conveyance Project declared,[6]

> The Bay-Delta ecosystem and freshwater ecosystems and tributary watersheds are in a state of prolonged decline. Fish species in the Bay-Delta have continued to experience precipitous declines in recent years. In the early 2000's, scientists noted a steep and lasting decline in population abundance of several native 2012-2016. Simultaneously, natural production of all runs of Central Valley Chinook salmon and steelhead remains near all-time low levels. (**SWRCB** Letter at pp. 5-6.)[7] (**Copy of SWRCB Letter is Exhibit 1 to this comment letter**.)

The SWRCB also pointed out,

> [T]he Project also has the potential to adversely affect aquatic resources by modifying the timing, volume, and duration of freshwater flows and tidal energy that influence the amount of aquatic habitat and water quality habitat conditions such as freshwater flow, salinity, dissolved oxygen, turbidity, and temperature. In particular, adding new water diversion facilities closer to the major migratory runs), has the potential to expose these species to greater risks and impacts as compared to current conditions. Sacramento River Chinook salmon, sturgeon, and diversion facilities of the proposed size and capacity of the new intakes, which may modify flow signals and impact habitat characteristics. (**SWRCB** Letter at p. 6.)

[6] Letter from Diane Riddle, Assistant Deputy Director, Division of Water Rights, SWRCB to Rene Rodriguez, DWR, April 15, 2020. (**The SWRCB Letter is an Exhibit to this comment letter.**)

[7] The SWRCB letter identified the following CESA and federal ESA endangered and threatened fish species as follows: CESA and ESA Endangered Sacramento River winter-run Chinook salmon, CESA and ESA Threatened Central Valley spring-run Chinook salmon, ESA Threatened Central Valley Distinct Population Segment (DSP) steelhead, ESA Threatened Green Sturgeon southern DPS, ESA Endangered Killer whale Southern Resident DSP, ESA Threatened Delta smelt, and CESA Threatened Longfin smelt. (**SWRCB** Letter p. 7.)

The Draft EIR failed to develop and include any CESA, and CEQA § 21001(c) policy, alternatives focused on conserving the endangered and threatened fish species and their critical habitat. That failure violated CEQA.

4. The Public Trust Doctrine was Not Central to the Draft EIR's Analysis of Feasible Alternatives

The Delta Reform Act mandates, "The longstanding constitutional principle of reasonable use *and the public trust doctrine* shall be the foundation of state water management policy and are particularly important and applicable to the Delta." (Water Code § 85023) (Emphasis added.)

The California Supreme Court made it clear in the Mono Lake case, *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446 (1983) that "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, *and to protect public trust uses whenever feasible.*" (Emphasis added.)

Moreover,

> Once the state has approved an appropriation, the public trust imposes a duty of *continuing supervision* over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, *the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.*
>
> *The state accordingly has the power to reconsider allocation decisions* even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses. (*National Audubon*, 33 Cal.3d 419, 447) (Emphasis added.)

Fish and Game Code § 5937 is also an expression of the public trust doctrine. The statute provides in pertinent part, "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

DWR ignored the public trust doctrine in setting forth the purpose of the project "to restore and protect the reliability of SWP water deliveries…" (**Draft EIR**, Ch. 2, p. 2-2.) A purpose or objective was required to effectuate DWR's duty to exercise continuing supervision over water diversions and deliveries "which may be incorrect in light of

current knowledge or inconsistent with current needs." As shown above, the SWRCB comment letter on the NOP noted the "precipitous declines in recent years" of fish species in the Bay-Delta. The SWRCB comment letter also noted, "Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane, [and *ten* other named items], and toxicity." (**SWRCB** Letter at p. 8) (Emphasis added.)

The failure to include an alternative focused on protecting the Bay-Delta watershed public trust resource violated CEQA.

5. The Principle of Reasonable Use was Ignored in the Draft EIR's Analysis of Feasible Alternatives

The Delta Reform Act mandates, "The longstanding *constitutional principle of reasonable use* and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." (Water Code § 85023) (Emphasis added.)

As just one example of applicable State law, Article X of the California Constitution states:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water… (Cal. Const. art. X, § 2.)

DWR has frozen water allocations to the existing contractual allocations for state water contractors. There should have been scrutiny of whether exports can be reduced as certain uses or methods of use have become unreasonable because of current and forecasted shortages of available water caused by climate change on the one hand, and technological improvements and innovations such as conservation, recycling, and drip irrigation on the other hand. The Draft EIR should have, but did not, include an alternative based on reducing exports based

on certain uses or methods of use having become unreasonable.

6. The Delta Not Meeting Water Quality Standards was Ignored in the Draft EIR's Analysis of Feasible Alternatives

The SWRCB comment letter on the NOP noted, "Portions of the Delta within the project area are currently on the Clean Water Act Section 303(d) List of Impaired Waters for not meeting water quality standards due to chlordane, [and *ten* other named items], and toxicity." (**SWRCB Letter** at p. 8) (Emphasis added.)

Agencies that have some form of regulatory authority or input on the proposed Project include the EPA, Corps of Engineers, SWRCB, and the San Francisco Regional Water Quality Control Board. (**Draft EIR,** Executive Summary, p. ES-11.) An alternative focused on meeting water quality standards should have been included in the Draft EIR as that will be a key issue for approving and responsible agencies.

D. The Corps' Artificially Narrow Statement of Purpose and Need Violated NEPA and DWR's Artificially Narrow Project Objectives Violated CEQA

The Draft EIS states the Project purpose as, "The purpose of the Delta Conveyance Project is to improve diversion and conveyance facilities in the Delta to ensure the reliability of State Water Project (SWP) water deliveries south of the Delta." (**Draft EIS**, ES.1.1.1 p. ES-1.) That is virtually identical to the Project purpose set forth in DWR's Draft EIR, "DWR's fundamental purpose in proposing to develop new diversion and conveyance facilities in the Delta is to restore and protect the reliability of SWP water deliveries and, potentially, CVP water deliveries south of the Delta, consistent with the State's Water Resilience Portfolio in a cost-effective manner." (**Draft EIR**, Ch. 2, Purpose and Project Objectives, p. 2-2.)

The Draft EIS states the Project needs and objectives as,

The needs and objectives of the Delta Conveyance Project are as follows.

- To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events.
- To minimize the potential for public health and safety effects from reduced quantity and quality of SWP water deliveries, and potentially Central Valley Project (CVP) water deliveries, south of the Delta as a result of a major earthquake that could cause breaching of Delta levees and the inundation of brackish water into the areas where existing SWP and CVP pumping plants operate in the southern Delta.

- To protect the ability of the SWP, and potentially CVP, to deliver water when hydrologic conditions result in the availability of sufficient amounts, consistent with the requirements of state and federal law, including the California and federal Endangered Species Acts and the Delta Reform Act, as well as the terms and conditions of water delivery contracts and other existing applicable agreements.
- To provide operational flexibility for improving aquatic conditions in the Delta and better manage risks of further regulatory constraints on project operations. (**Draft EIS**, ES.1.1.2 p. ES-1.)

The Project objectives set forth in the Draft EIS are identical to the objectives set forth in DWR's Draft EIR. (**Draft EIR**, Ch. 2, pp. 2-2, -3.)

In *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058, 1071-1072 (9th Cir. 2009), the Ninth Circuit explained the Court's precedent forbids an agency from defining its objectives in unreasonably narrow terms and held the EIS inadequate because the unreasonably narrow purpose and need statement resulted in the agency considering an unreasonably narrow range of alternatives. (*See also Center for Biological Diversity v. National Highway Traffic Safety Admin.,* 538F.3d 1172, 1219 (9th Cir. 2008) (Courts reject unreasonably narrow interpretations of purpose and need that exclude viable alternatives suggested by commenters.); *Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989) ("Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.")

The rule under CEQA is similar. In *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4h 647, 669, the court held an EIR improperly omitted alternatives by an "artificially narrow" definition of the program objective. The same is true here. Pursuant to the Delta Reform Act and other related regulatory regimes, project objectives needed to include reducing reliance on the Delta, restoring the Delta ecosystem and utilization of natural processes and other conservation objectives. With those objectives in mind, an alternative was required that would reduce reliance on the Delta and begin to restore the Delta ecosystem by reducing exports to increase freshwater flows through the Delta.[8] Likewise, an alternative was required utilizing existing natural resource processes. Instead, *all* DWR's "alternatives" do the opposite. They further degrade the already impaired Delta by adding a massive new diversion of freshwater flows from the

[8] In *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163-1167, the court held failure to examine an alternative reducing exports was not unlawful because that alternative would not achieve the program objective of water supply reliability. That decision was handed down on June 5, 2008. The Delta Reform Act became effective February 3, 2010. The court's holding as to objectives has been superseded by the Legislature's adoption of the Delta Reform Act setting forth California's water policies and objectives.

Sacramento River in the north Delta. DWR foreclosed alternatives required by CEQA, the Delta Reform Act, the climate change legislation, CESA and other related regulatory regimes.

The court explained in *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 546, "Examining alternatives begins with project objectives because it is these objectives that a proposed alternative must be designed to meet." In this case alternatives already foreclosed were required by the Delta Reform Act and other laws and policies. In the *Golden Door Properties* case there were objectives to reduce vehicle miles traveled, "VMT," to meet goals lowering greenhouse gas, "GHG," emissions. The court held,

> In light of this consistently clear mandate to reduce VMT to help achieve target GHG emission reductions, it is reasonable to expect at least one project alternative in the SEIR to have been focused primarily on significantly reducing VMT. [Citation omitted.] The SEIR's failure to do so is prejudicial because it precludes informed public participation and decisionmaking. (*Golden Door Properties*, 50 Cal.App. 5th 467, 548.)

Here, it is reasonable to expect at least one alternative to have been focused primarily on significantly reducing exports in order to increase instead of reduce freshwater flows through the Delta.

In *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1086-1090, the court held a city violated CEQA because the EIR failed to analyze a reduced development alternative. The city had argued that no discussion of an alternative was required if it would not meet a project objective. The court explained, 183 Cal.App.4th at 1087,

> This premise is mistaken. It is virtually a given that the alternatives to a project will not attain all of the project's objectives. [Citations omitted.] Nevertheless, an EIR is required to consider those alternatives that will 'attain most of the basic objectives' while avoiding or substantially reducing the environmental impacts of the project. (CEQA Guidelines, § 15126.6(a).)

The artificially narrow project objectives unlawfully facilitated the Draft EIS's and Draft EIR's omission of the required range of reasonable alternatives to the Project.

E. The Environmental Water Caucus and Sierra Club California Alternatives

Our public interest organizations submit an alternative to the Delta Conveyance Project. The *Environmental Water Caucus Alternative To The Delta Conveyance Project*, includes a no-tunnel alternative and reducing exports out of the Delta to 3 million acre-feet per year. (**Copy of Environmental Water Caucus Alternative is Exhibit 2 to this comment letter**.) Reasonable alternatives will include other variants on that quantity. This proposed alternative also includes abandoning infrastructure projects including the Delta Conveyance Tunnel Project and new reservoirs and instead of using bond funds and ratepayer dollars for these projects, developing and funding water conservation, water recycling, ecologically responsible farmland retirement including drainage-impaired lands, and other such modern measures. Also included in the alternative is reducing quantities in the CVP contracts and renegotiating Table A allocations in the SWP contracts to reflect safe yield water availability, climate change analysis, and allocation of public trust resources. These types of alternatives are required by the Delta Reform Act and other conservation legislation.

Our organizations also request consideration of the *Sierra Club California's Smart Water Alternatives: To The Bay Delta Conveyance Project* (December 2022.) That alternative is being submitted separately with a letter from Sierra Club California. The Sierra Club California alternative includes Potential Water Savings/Additional Supplies from a Portfolio of Resilient Strategies including agriculture water use efficiency, urban water use efficiency, recycled municipal water, stormwater capture and groundwater storage leading to a total savings of water supplies from 10.4 to 16.8 million acre-feet per year.

Alternatives such as the Environmental Water Caucus and Sierra Club California alternatives establish that there is no need to inflict the Delta Conveyance Project on the already impaired Delta. *The Supplemental Draft EIS and Final EIS must, pursuant to NEPA Regulation section 1502.17*, *include a summary identifying these submitted alternatives.*

F. Alternatives Conclusion

The failure to include any alternatives to the Tunnel Project rendered the Draft EIS so inadequate as to preclude meaningful analysis. The Corps must prepare and publish a supplemental draft of the portions purportedly addressing alternatives—including Executive Summary, ES2 pp. ES-5 through ES-36 and Appendix D, Alternatives Screening Process.

7. A SUPPLEMENTAL DRAFT OF CRITICAL PORTIONS OF THE DRAFT EIS MUST BE PREPARED AND PUBLISHED BY THE CORPS OF ENGINEERS

The NEPA Regulations require in pertinent part, "To the fullest extent practicable, the draft statement must meet the requirements established for final statements in section 102(2)(C) of NEPA as interpreted in the regulations in this subchapter. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion." (§ 1502.9(b.) The Corps' NEPA Regulations say "A supplement to the draft or final EIS should be prepared whenever required as discussed in 40 CFR 1502.09(c.)" (33.C.F.R § 230.13(b.) "Supplements will be filed and circulated in the same manner as a draft and final EIS…" (***Id***.)

Sections 1 through 3 of these comments establish that the failure of the Draft EIS to cover Project operations violates NEPA. Sections 4 and 5 of these comments show neither the Draft EIS nor DWR's Draft EIR evaluated the impacts of the diversions for the proposed massive water project on surface water or water supply. Section 6 of these comments establish that neither the Draft EIS nor the Draft EIR included the required range of reasonable alternatives to the Tunnel Project required by NEPA and CEQA. Any of these omissions alone would render the Draft EIS so inadequate as to preclude meaningful analysis. Section 9 of these comments gives examples of adverse environmental effects of Project operations on water quality, public health, and fisheries and aquatic habitat omitted from the Draft EIS. Collectively these omissions are astonishing. So, instead of proceeding to prepare a Final EIS the Corps must instead prepare and publish for decision-maker review and public comment a supplemental draft EIS that covers Project operations.

In comments on DWR's Draft EIR, our public interest organizations notified DWR it would have to prepare a revised Draft EIR for decision-maker review and public comment pursuant to CEQA Guidelines § 15088.5(a.)

The Corps could have avoided issuing a Draft EIS so inadequate as to preclude meaningful analysis. The Corps published the Draft EIS on December 16, 2022--the same day DWR closed the period for public comment on its Draft EIR. Consequently, the Corps was oblivious to the comments on DWR's Draft EIR demonstrating that the Draft EIR failed to address the environmental impacts of the diversions for the Tunnel Project on surface water and water supply. The Corps evaded learning from the comments on the

Draft EIR that DWR had stated artificially narrow project objectives and failed to include required reasonable alternatives to the Tunnel Project.

8. THE DRAFT EIS FAILED TO INCLUDE THE REQUIRED DISCUSSION OF POSSIBLE CONFLICTS AND INCONSISTENCIES BETWEEN THE PROPOSED ACTION AND APPLICABLE STATE AND FEDERAL POLICIES AND LAW

NEPA Regulation section 1506.2(d) requires,

> To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies, NEPA does not require reconciliation.

NEPA Regulation § 1502.16(5) requires the environmental consequences section of the EIS to include discussion of,

> Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned. (§ 1506.2(d) of this chapter)

The Draft EIS fails to include any discussion of inconsistencies of the Tunnel Project, and the failure to include alternatives to the Tunnel Project, with California law including CEQA, the Delta Reform Act, Climate Change Legislation, California Endangered Species Act, California's public trust doctrine, and California's Constitutional reasonable use requirement. The Draft EIS likewise fails to include any discussion of conflicts between the Tunnel Project and California's policies and controls including the Delta Reform Act and other applicable laws.

California law including CEQA as well as the other laws cited above, require environmental analysis of the impacts of diversions for the Tunnel Project on surface water and water supply as shown in sections 4 and 5 of these comments. Those laws also require development of alternatives to the Tunnel Project as shown in section 6 of these comments. DWR has so far not produced a Draft EIR complying with California's laws and policies. So, the Corps must prepare and publish a supplemental Draft EIS including discussion of the conflicts and inconsistencies of the proposed action with the pertinent California laws and policies.

9. EXAMPLES OF ADVERSE ENVIRONMENTAL EFFECTS OF PROJECT OPERATIONS OMITTED FROM THE DRAFT EIS

A. The Draft EIS for the Massive Water Project Does Not Cover the Effects of Project Operations on Water Quality

Under the subheading "Facility Operations," the Draft EIS says,

> Based on existing conditions and factors affecting constituent concentrations, the cumulative conditions for constituents in the Delta, Suisun Marsh, Suisun Bay, San Francisco Bay and the SWP/CVP export service areas would have varying degrees of accumulation and effects dependent upon the location. (**Draft EIS**, Ch. 3, 3.21.2.3, p. 3.21-24.)

The Draft EIS admits, "Construction and operation of water supply-reliability projects have the potential to affect the water quality of surface waters within the four regions." (**Draft EIS**, Ch. 3, 3.21.2.1, p. 3.21-2.) Despite that, the Draft EIS does not cover the effects of Project operations on water quality.

It can be seen from reviewing the two pages in the Executive Summary Table summarizing water quality effects that the only effects listed are those resulting from "Construction" or from "Compensatory Mitigation." (**Draft EIS**, Executive Summary, Table ES-2, Summary of Effects, pp. ES-34, -35.) Admitting the Draft EIS does not cover water quality effects resulting from Project operations, the Draft EIS refers the reader to "Effects on the following [15 listed pollutants/constituents], resulting from facility operations, are discussed in Delta Conveyance Project Draft EIR Chapter 9,.." (**Draft EIS**, Ch. 3, 3.21.2.2, p. 3.21-4.) The 25 pages in the Draft EIS devoted to water quality only cover effects caused by construction or compensatory mitigation.

The Draft EIS is silent as to the effects on water quality caused by operations of the massive water project.

B. The Draft EIS Does Not Cover the Effects of Project Operations on Public Health in the Delta region which Percentage-wise has the Largest Environmental Justice Community in California

According to a Restore the Delta Report,

> Percentage-wise, the Delta region has the largest environmental justice community in California, with parts of Stockton hitting the 95th percentile for economic distress, and small Delta towns comprised of 52% of residents for whom English is not their first language. The economic distress of many Stockton environmental justice communities exceeds that of all other environmental justice communities of California.[9]

The Draft EIS says, "There are high proportions of minority residents in both urban and rural areas [in the Delta.]" (**Draft EIS**, Ch. 3, 3.17.1.3, p. 3.17-2.)

The previous comment section shows that the Draft EIS does not cover impacts of Project operations on water quality. That means that the public health impacts of pollutants/constituents on Delta region residents and users are omitted from the Draft EIS. This comment section focuses on just one of the 15 pollutants/constituents identified in the Draft EIS. The focus here as an example is on "Cyanobacteria Harmful Algal Blooms (CHABS.)" (**Draft EIS**, Ch. 3, 3.21.2.2, p. 3.21-4.) Even *without* the proposed Project,

> CHABs would be expected to occur with similar or greater frequency throughout the study area for the No Action Alternative, relative to existing conditions. With climate change associated with the No Action Alternative in 2040, there would be the potential for earlier Microcystis bloom initiation in Delta waters and also the potential for more frequent large blooms. This would be driven by climate change that would increase water temperatures in the Lower Sacramento River, San Joaquin River, and Delta. Higher water temperatures earlier in the year could enable Microcystis and other cyanobacteria blooms to begin occurring more often in the Delta in June rather than July as is typical under existing conditions. Cyanobacteria also have a competitive advantage over other algae at higher water temperatures, particularly those at or above 25°C (77°F). To the extent that future climate change *leads to lower inflows to the Delta* from the Sacramento and San Joaquin Rivers, *such effects would be expected to result in longer residence times for* various areas in the Delta, *which also would further favor larger cyanobacteria blooms in areas of the Delta* where residences times are longest (e.g., Discovery Bay, Franks Tract, Mildred Island, Stockton Deep Water Ship Channel). (**Draft EIS**, Ch. 3, 3.21.2.2, Impact-14, p. 3.21-16) (Emphasis added.)

Since lower inflows resulting from climate change would worsen CHABS blooms, the same result would follow from reducing flows by operating the Delta Conveyance

[9] *Climate Equity and Seismic Resilience for the San Francisco Bay-Delta Estuary,* p. 6, Restore the Delta (2019.)

Project. Moreover, the impacts of reductions in flows caused by climate change will be exacerbated by Project diversions further reducing flows. In terms of adverse public health impacts on Delta residents and users; operating the Delta Conveyance Project would be like pouring gasoline on a fire—taking a very bad situation and making it worse.

DWR's Draft EIR explained, "*Microcystis* is the most common and well-studied cyanobacteria in the Delta and typically comprises a large percentage of the Delta cyanobacteria community. *Microcystis* blooms are widespread throughout the Delta and have occurred at varying concentrations and frequency throughout the Delta since it was first detected in 1999 (Figure 9E-1; ESA 2022;5)." (**Draft EIR**, Appendix 9E, Cyanobacteria Harmful Algal Blooms, p. 9E-1.) According to the Draft EIR, the "five primary environmental factors that provide favorable conditions for *Microcystis* to outcompete other phytoplankton in the water column of Delta waters" are higher water temperatures, low channel velocities, long residence times, water column irradiance and sufficient nutrient availability. (**Draft EIR**, Appendix 9E, p. 9E-3.) "[H]igher flow rates (generally associated with higher channel velocities) make it difficult for *Microcystis* to form dense collections of colonies at the water surface." (**Draft EIR**, Appendix 9E, p. 9E-4.) "Areas with high flushing rates (i.e., short residence times) are characterized by relatively high velocities that result in turbulent, well-mixed channels where cyanobacteria generally cannot outcompete green algae or diatoms." (**Draft EIR**, Appendix 9E, p. 9E-5.) Microcystin concentrations continue to increase in extent and severity in the Delta. (**Draft EIR**, Appendix 9E, p. 9E-8.)

In other words, diversions for the Project reducing flows through the Delta will contribute to exacerbating harmful algal blooms in the Delta.

"It is expected that the frequency and intensity of CHABs will increase with the increased frequency and intensity of droughts with climate change [citations omitted]." (**Draft EIR**, Ch. 26, Public Health, p. 26-9.) "In addition to increased water temperatures, other variables associated with drought conditions such as water stratification, evaporation, hydraulic residence time, salinization, and duration of the summer season will likely favor the formation of algal blooms [citations omitted]." (**Draft EIR**, Ch. 26, Public Health, p. 26-10.)

The Draft EIR admits,

> Human exposure to cyanotoxins in freshwater has the potential to occur during recreational activities (e.g., swimming, boating) through direct contact, by inhaling aerosolized toxins near a contaminated water body, or through accidental ingestion

> of (or oral exposure to) contaminated water (U.S. Environmental Protection Agency 2019a). There are many reports of a variety of health effects in addition to liver damage (e.g., diarrhea, vomiting, blistering at the mouth, headache) following human exposure to cyanotoxins in drinking water or from swimming in water in which cyanotoxins are present. Such health effects can occur within minutes to days following exposure to cyanotoxins (U.S. Environmental Protection Agency 2019b:4). (**Draft EIR**, Ch. 26, p. 26-9.)

That is mild compared to what the EPA has to say. According to the EPA, Harmful algal blooms can:

- *Produce extremely dangerous toxins that can sicken or kill people* and animals
- Create dead zones in the water
- Raise treatment costs for drinking water
- Hurt industries that depend on clean water (U.S. EPA website https//www.epa.gov/nutrientpollution/harmful-algal-blooms February 7, 2022) (Emphasis added.)

On September 1, 2019, the Bay City News Service reported,

> A buildup of blue-green algae (cyanobacteria), commonly called an algae bloom, along the Sacramento-San Joaquin River Delta has prompted a safety warning from Contra Costa Environmental Health Services.
>
> The department is advising people out for holiday weekend recreation on the Delta that contact with blooms can make people and pets very sick. Cyanobacteria create a green, blue-green, white or brown coloring on the surface of slow-moving waterways.
>
> Advisory notices have been posted at the kayak launch and around the fishing dock at Big Break Regional Shoreline in Oakley after cyanobacteria was detected in the water.
>
> It warns users to stay out of the water, and do not touch algae scum in the water or on the shore, do not use the water for drinking, cleaning or cooking; do not let pets or livestock enter or drink the water; and do not eat fish or shellfish from the water.
>
> A caution advisory has also been posted near the boat ramp around the mouth of Mormon Slough by the California State Water Resources Control Board.

Stockton urban waterways are stagnant and thick with algal scum and toxins. Algae blooms are regularly found from Stockton to Discovery Bay with smaller ones becoming visible in sloughs between the cities. Adding enormous new diversions

upstream from the Delta combined with climate change will reduce freshwater flows and increase the buildup of these dangerous algal blooms.

Men and women, girls and boys, in economic distress do not have swimming pools and do not belong to clubs that have swimming pools. Many do not have air-conditioning at home. The Delta region is extremely hot in the summer. Residents in economic distress are the most likely to cool off in Delta waters. Some of these residents fish in Delta waters for part of their food supply. The Project's exacerbation of the existing CHABS public health crisis in the Delta will have a bad public health impact on all Delta residents and users. The bad impacts will be worst of all for the Delta's environmental justice community.

DWR's Draft EIR admits "Future climate change will result in reduced Delta inflows and increased average Delta water temperatures during the summer and early fall months, as discussed in Chapter 9, *Water Quality*. (**Draft EIR**, Ch. 26, p. 26-64.) In addition, "Because water temperatures, and possibly residence times in some portions of the Delta, are expected to increase in the future due primarily to sea level rise and climate change (which will favor CHABs), the future cumulative condition for *Microcystis* (and thus microcystin concentrations) as well as other cyanobacterial species, would be significant in the Delta." (*Id.*) The Draft EIR also admits, "Reduced Delta outflow may increase the potential for negative effects from flow -related stressors (e.g., *Microcystis.*) (**Draft EIR**, Ch. 26, p. 26-59.)

Despite all of the above, the Draft EIS does not cover the impacts of Project operations worsening public health risks, including exposure to CHABS.

C. The Draft EIS Does Not Cover the Effects of Project Operations on Fisheries and Aquatic Habitat

Among the species of "management concern" potentially affected by Project operations are one endangered and four threatened fish species. Winter-run Chinook salmon are endangered and Spring-run Chinook salmon, Steelhead, Delta smelt, and Green sturgeon are listed as threatened under the ESA. (**Draft EIS**, Ch. 3, 3.4.1, Table 3.4-1, p. 3.4-1.)

A subheading in the Draft EIS says it all, "Operations Effects on Fisheries and Aquatic Habitat not Covered in This Draft EIS." (**Draft EIS**, Ch. 3, 3.4.2.3, p. 3.4-16.) "No significance conclusions related to these [operations] effects are included in this Draft EIS." (**Draft EIS**, Ch. 3, 3.4.2.3, p. 3.4-16.) The Corps has so little information as to impacts on endangered and threatened fish species and their designated critical habitat

that " USACE will initiate Section 7 formal consultation when the information is available and appropriate for the process." (**Draft EIS**, Ch. 3, 3.4.1, p. 3.4-1.)

What is known is that reducing flows by diverting freshwater flows through the proposed intakes and Tunnel will worsen conditions for the already endangered and threatened fish species and their designated critical habitat.

The SWRCB April 15, 2020, comment letter on DWR's NOP said,

> The Bay-Delta ecosystem and freshwater ecosystems and tributary watersheds are in a state of prolonged decline. Fish species in the Bay-Delta have continued to experience precipitous declines in recent years. In the early 2000's, scientists noted a steep and lasting decline in population abundance of several native estuarine fish species, which continued and worsened during the sustained drought during 2012-2016. Simultaneously, natural production of all runs of Central Valley Chinook salmon and steelhead remains near all-time low levels. (**SWRCB** Letter pp. 5-6.)

And,

> [T]he Project also has the potential to adversely affect aquatic resources by modifying the timing, volume, and duration of freshwater flows and tidal energy that influence the amount of aquatic habitat and water quality habitat conditions such as freshwater flow, salinity, dissolved oxygen, turbidity, and temperature. In particular, adding new water diversion facilities closer to the major migratory routes of vulnerable fish populations, such as Sacramento River Chinook salmon (all runs), has the potential to expose these species to greater risks and impacts as compared to current conditions. Sacramento River Chinook salmon, sturgeon, and other species such as Sacramento splittail are not currently exposed at close proximity to diversion facilities of the proposed size and capacity of the new intakes, which may modify flow signals and impact habitat characteristics. (**SWRCB** Letter p. 6.)

The SWRCB also explained,

> Changes in land use due to agricultural practices, urbanization, and flood control combined with substantial and widespread water infrastructure development, including the construction and operation of the SWP and CVP, have been accompanied by significant declines in nearly all species of native fish. The SWP and CVP facilities are the largest contributors to hydromodification in the freshwater and estuarine ecosystems of the San Francisco Bay-Delta estuary and

> freshwater tributary watersheds. Modification to the volume, pattern, and timing of flows caused by the dams, water diversions, canals, and related operation of the CVP and SWP have contributed to declining fish populations, contraction of the freshwater and estuarine habitats and food webs, and persistently poor aquatic ecosystem conditions. (**SWRCB** Letter p. 6.)

The SWRCB issued a comment letter to the Bureau of Reclamation on September 25, 2019, on the Draft EIS on reinitiation of consultation on the coordinated long-term term operation of the CVP and SWP. (**Copy of SWRCB Letter is Exhibit 3 to this comment letter**.) The SWRCB explained,

> Available scientific knowledge indicates that decreasing freshwater flows in the Bay-Delta watershed and increasing exports and associated reverse flows in the interior Delta is expected to have a negative impact on the survival and abundance of native fish species, including threatened and endangered species that are the subject of the existing BiOps for the [CVP and SWP] Projects. *There is a body of scientific evidence that increased freshwater flows through the Delta and aquatic habitat restoration are needed to protect Bay-Delta ecosystem processes and native and migratory fish.* Accordingly, it is not clear how the proposed project will not further degrade conditions for fish and wildlife species that are already in poor condition, *some of which are on the verge of functional extinction or extirpation*…The scientific basis for updating flow objectives supports increasing spring, winter, and fall flows in tributaries to the Bay-Delta, *increasing Delta outflows,* and reducing cross Delta flows, in addition to numerous non-flow measures to provide reasonable protection for fish and wildlife beneficial uses. The science specifically supports *not reducing existing (baseline) spring, winter, and fall flows* as is proposed in the Preferred Alternative. (Emphasis added.)[10]

The absence of conclusions as to the significance of the effects of Project operations on fisheries and aquatic habitat is an example of the uselessness of the Draft EIS for the EPA, NMFS, USFWS, Reclamation and Corps to attempt to perform their responsibilities under federal law including the Clean Water Act, ESA, and NEPA. And the earlier subsections showing the omission of analyzing the effects of Project operations on water quality and public health cry out for a supplemental Draft EIS covering these effects and doing so in the detail required by NEPA.

[10] Comment Letter on Draft EIS for the Reinitiation of Consultation on the Coordinated Long-Term Operation of the CVP and SWP at p. 3, from Diane Riddle, Assistant Deputy Director, Division of Water Rights, SWRCB to David Mooney, Area Manager, Bay Delta Office, Bureau of Reclamation (September 25, 2019.)

D. The Draft EIS Does Not Cover the Effects of Project Operations Compounded by Climate Change

The Draft EIS admits "[A] variety of changes in climate changes will affect the study area, including changes in temperature, hydrology, and wildfire risk,.." (**Draft EIS**, Ch. 3, 3.6, p. 3.6-1.) "Increased water temperatures biologically, physically, and chemically affect aquatic organisms and habitats." (**Draft EIS**, Ch. 3, 3.6.3.2, p. 3.6-4.) "Based on these extensive analyses over more than a decade, climate change is expected to have significant effects on the overall SWP and CVP operations, upstream tributaries, and the Bay-Delta." (**Draft EIS**, Ch. 3, 3.6.3.3, p. 3.6-9.) "[F]or proposed new intakes in the north Delta, the climate change effects that need to be addressed include shift in timing and quantity of flows, increasingly variable hydrology, increased water levels, and potentially greater salinity intrusion, irrespective of the impacts on the overall SWP and CVP operations." (***Id***.)

Climate change would exacerbate mixing processes between saltwater and fresh water progressing as far upstream as Cache and Steamboat Slough 14 to 16 miles downstream from the new intakes locations. (**Draft EIS**, Ch. 3, 3.6.4.1, p. 3.6-12.) Increasing water temperature and seasonally reduced precipitation and drought "could result in decreased species populations and quality of species habitat in the study area." (***Id***.) "The action alternatives potentially would have negative effects on critical fish habitat and special-status species,.." (***Id***.) "Climate change also presents challenges to fish, fish habitat, and food availability, resulting in the action alternatives' potential for effects on species *to compound* with those given by climate change." (***Id***.) (Emphasis added.)

Since the Draft EIS does not cover Project operations; it does not cover in the detail required by NEPA compounding the effects of Project operations by the effects of climate change. That is true for fish. That is true also for the adverse effects of CHABS on the public health of Delta residents and users due to the effects of Project operations compounded by the effects of climate change.

10. THE SUPPLEMENTAL DRAFT EIS THE CORPS MUST PREPARE MUST PROVIDE QUANTIFIED AND DETAILED INFORMATION ABOUT THE ENVIRONMENTAL EFFECTS CAUSED BY PROJECT OPERATIONS

Since the Draft EIS does not cover Project operations; it goes without saying it does not include the quantified and detailed information about operations-caused

environmental effects required by NEPA. Project operations will result in cumulative impacts ranging from construction of the Project to effects caused by other related projects including the SWP and CVP as well as proposed projects such as the Sites Reservoir. When considering cumulative impacts, agencies must provide "some quantified or detailed information." "General statements about possible effects and some risk do not constitute a hard look absent justification regarding why more definitive information cannot be provided." (*Bark v. U.S. Forest Service*, 958 F.3d 865, 872 (9th Cir. 2020); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 868 (9th Cir. 2005.)

The Supplemental Draft EIS to be prepared by the Corps must provide quantified and detailed information about the environmental effects that will be caused by operating the Project.

11. NO BENEFIT COST ANALYSIS HAS BEEN PREPARED FOR THE PROPOSED PROJECT

A benefit cost analysis is required to allow informed comparison by the public of alternatives to the proposed project that must be available throughout the period for public and decision-maker review of a revised Draft EIR and Supplemental Draft EIS.

Unfortunately, DWR has been hiding the benefit cost ball. DWR's *Delta Conveyance Notice of Preparation and Public Scoping: Q&A* stated:

> There will be a cost estimate, as well as both a Benefit-Cost Analysis and a Financial Analysis, developed during the planning process. At this point, the NOP is a start of the environmental review, which focuses on the relative environmental impacts rather than economic issues. *Cost analyses will come later in the process, after a preferred alternative has been selected* (which may or may not be similar to the "proposed" project defined in the NOP). (Q & A No. 18 at p. 4, January 2020) (Emphasis added.)

To select the preferred alternative *before* doing benefit cost analyses intentionally stacks the deck in favor of the proposed project, and makes it impossible to fairly and adequately compare the proposed project with through Delta and no tunnel alternatives which are less environmentally degrading. The financial advantages of the through Delta and no tunnel alternatives are clear: through Delta conveyance already exists and studies show that investment in water conservation is generally less expensive than reliance on

importing water.[11] Conversely, the Tunnel Project would cost billions of dollars to construct over a 13-year period.

Accurate economic information is required by NEPA. In *Natural Resources Defense Council v. U.S. Forest Service*, the Ninth Circuit held that "[i]naccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." (421 F.3d 797, 811 (9th Cir. 2005.) Accurate economic analysis is required "to allow an informed comparison of the alternatives considered in the EIS." (421 F.3d at 813.) When an agency trumpets the benefits of a project, it must provide full disclosure of the costs. (*Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983)(Holding Corps of Engineers' EIS deficient under NEPA.)

Accurate economic analyses are good public policy as they are essential to informed decision-making. The billions of dollars spent on the proposed project would *not* be available for modern 21st century alternatives such as increased water efficiency and demand reduction programs, including urban and agricultural water conservation, recycling, and storm water recapture and reuse.

The Corps should require DWR to prepare and publish a benefit-cost analysis for decision makers and the public so it is available during the public review periods for a revised Draft EIR and supplemental Draft EIS.

12. THE ONLY PURPOSE SERVED BY THE INADEQUATE DRAFT EIS IS TO HIDE THE ADVERSE ENVIRONMENTAL IMPACTS OF PROJECT OPERATIONS FROM THE DECISION-MAKERS, THE COOPERATING AGENCIES, AND THE PUBLIC

NEPA prescribes procedures that must be followed by agencies when taking actions that have environmental consequences. The statute does not prescribe particular results. (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1990.) "NEPA merely prohibits uninformed—rather than unwise—agency action." (*Robertson*, 490 U.S. at 351.)

NEPA does not prevent the Corps from eventually issuing permits for the Delta Conveyance Project no matter how bad the environmental consequences might be for

[11]See https://pacinst.org/wp-content/uploads/2016/10/PI_TheCostofAlternativeWaterSupplyEfficiencyOptionsinCA.pdf

Delta residents and users. But NEPA does require that Delta residents and users along with decision-makers and the cooperating agencies be told the truth about the effects of Project operations on the environment.

NEPA requires full disclosure. *Sierra Club v. Sigler*, 695 F.2d 957, 970 (5th Cir. 1983.) The Corps' Draft EIS has done the opposite of providing full disclosure. It has provided no disclosure at all of the environmental effects of Project operations.

CONCLUSION

The Corps of Engineers is the federal lead agency for NEPA review of DWR's massive proposed water project. Four other federal agencies are NEPA cooperating agencies in the NEPA process. The *only* EIS to be prepared for this massive Project is the Corps' EIS. Because the Draft EIS does not cover Project operations it is so inadequate as to preclude meaningful analysis. The Corps must prepare and publish a supplemental Draft EIS covering Project operations.

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

Sincerely,

E. Robert Wright, Counsel
Sierra Club California

Brandon Dawson, Director
Sierra Club California

Howard Penn, Executive Director
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Conner Everts, Facilitator
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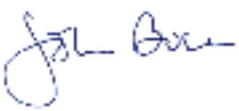

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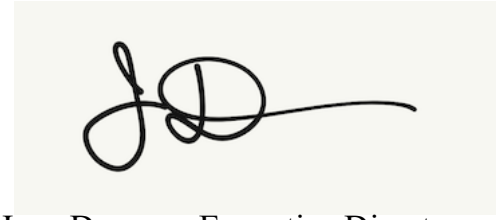

Jann Dorman, Executive Director
Friends of the River

Exhibits (transmitted separately due to volume):

Exhibit 1: SWRCB Letter, April 15, 2020

Exhibit 2: The *Environmental Water Caucus Alternative To The Delta Conveyance Project*

Exhibit 3: SWRCB Letter, September 25, 2019