



June 29, 2023

Karla Nemeth, Director, California Department of Water Resources California  
Department of Water Resources

[deltaconveyance@water.ca.gov](mailto:deltaconveyance@water.ca.gov) via Email

**Re: Supplemental Comments on the Draft EIR for the Delta Conveyance Project**

Dear Director Karla Nemeth and Department of Water Resources:

By this letter, our public interest organizations submit supplemental comments on the Department of Water Resources' (DWR) Draft Environmental Impact Report (EIR) for the Delta Conveyance Project. These comments follow up the comments our public interest organizations submitted on December 15, 2022.

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These supplemental comments provide significant new information regarding environmental impacts of the proposed project that became available after DWR made the subject Draft EIR available for public review on July 27, 2022. The public interest organizations joining in this supplemental comment letter are Sierra Club California, AquAlliance, California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity, Environmental Water Caucus, Friends of the River, Planning and Conservation League, and Restore the Delta.

## **INTRODUCTION**

*First*, significant new information has become available since the Draft EIR was published last year including that the Project could lead to greater impairment or extinction of subject endangered and threatened fish species, and the Project could worsen harmful algal blooms, adversely impact public health, and contribute to exceedances of water quality standards..

*Second*, the significant new information is consistent with the conclusions reached by expert State agencies: the California Department of Fish and Wildlife, the State Water Resources Control Board, and the Delta Independent Science Board.

*Third*, the new information adds to the circumstances requiring revision of the Draft EIR and recirculation for public review and comment that our organizations said was required in our December 15, 2022, comments.

## **COMMENTS**

### **A. SIGNIFICANT NEW INFORMATION HAS BECOME AVAILABLE THAT WAS NOT INCLUDED IN THE DRAFT EIR**

#### **1. Significant New Information has Become Available that Subject Endangered and Threatened Fish Species are Even More Imperiled than Appeared to be the case when the Draft EIR was published in July 2022**

**Exhibit 1**, attached, is a copy of the Notice published in the Federal Register at 87 Fed. Reg. 60957-60975 by the U.S. Fish and Wildlife Service on October 7, 2022, of its proposed listing of the Bay-Delta longfin smelt distinct population segment (DPS) as an endangered species under the Endangered Species Act of 1973.

The U.S. Fish and Wildlife Service Federal Register Notice said:

The operation of the State Water Project [SWP] and Central Valley Project [CVP] and the many large reservoirs that store and supply water to agricultural and municipal beneficial uses modify the flow regime and affect the volume and timing of Delta freshwater inflow and outflow. (87 Fed.Reg. 60963.)

The Notice added:

*We consider reduced and altered freshwater flows resulting from human activities and impacts associated from current climate change conditions (increased magnitude and duration of drought and associated increased temperatures) as the main threat facing the Bay-Delta longfin smelt due to the importance of freshwater flows to maintaining the life-history functions and species needs of the DPS.* However, because the Bay-Delta longfin smelt is an aquatic species and the needs of the species are closely tied to freshwater input into the estuary, the impact of many of the other threats identified above are influenced by the amount of freshwater inflow into the system (*i.e.*, reduced freshwater inflows reduce food availability, increase water temperatures, and increase entrainment potential). (*Id.*)(Emphasis added.)

The Notice also said, under the heading “Threats Influencing the Bay-Delta Longfin Smelt” and subheading “Reduced and Altered Freshwater Flows”:

It is estimated that the State and Federal water projects annually reduce an average of about 5 million acre-feet (MAF) of freshwater into the Delta, while other municipal or private reservoirs or diverters annually decrement an additional 8 MAF of potential freshwater into the Delta (Hutton et al. 2017, fig.4, p. 8). (*Id.*)

The threat section of the Notice concluded:

In the case of Bay-Delta longfin smelt, the amount of low-salinity habitat available for optimal growth and rearing conditions (food and water conditions (salinity, turbidity)), especially for early life stage fish, is directly linked to freshwater inflow. (87 Fed.Reg. 60963-60964.)

So, the endangered and threatened fish species including the-- in the process of being listed Bay-Delta longfin smelt-- need increased freshwater flows not reduced freshwater flows. The Delta Conveyance Tunnel Project would further reduce—not increase— freshwater flows. As our organizations said in our December 15, 2022, comments (at pp. 7-8),

The proposed Project is 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.*)<sup>1</sup> 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.)

This further worsening of the extinction crisis for the subject endangered and threatened fish species including Bay-Delta longfin smelt by further reducing freshwater flows by developing the Delta Conveyance Project is significant new information.

**Exhibit 2**, copy attached, is a copy of the California Department of Fish and Wildlife (CDFW) Memorandum of December 29, 2022, reporting the 2022 Fall Midwater Trawl annual fish abundance and distribution summary. Delta Smelt had been declared threatened in 1993 and their critical habitat had been designated in 1994. The Department's Memorandum said,

*The 2022 abundance index was zero and continues the trend of no catch in the FMWT (Fall Midwater Trawl Survey) since 2017. (Fig. 2). No Delta Smelt were collected from any stations during our survey months of September-December. An absence of Delta Smelt catch in the FMWT is consistent among other surveys in the estuary. The Enhanced Delta Smelt Monitoring (EDSM) survey of the U.S. Fish and Wildlife Service (USFWS) caught 3 Delta Smelt among 61 sampling days (between 9/6 and 12/15) comprised of 1,997 tows (U.S. Fish and Wildlife Service 2022)... While FMWT did not catch any Delta Smelt, it does not mean there were no smelt present, but the numbers are very low and below the effective detection threshold by most sampling methods. (Memorandum at p. 2) (Emphasis added.)*

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<sup>1</sup> 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-30. In critical years, flows are below 10,000

cfs from April through November with the exception of June at 10,214 cfs.

Thirty years after Delta Smelt were determined to be a threatened species; extensive CDFW searches for them are not finding any; and extensive U.S. Fish and Wildlife searches for them found only three during 61 sampling days. That is significant new information about the severity of the environmental impacts of water diversions on the subject endangered and threatened fish species.

**Exhibit 3**, copy attached, consists of a copy of 2 pages of the U.S. Army Corps of Engineers Draft EIS (EIS No. 20220183) issued on the Delta Conveyance Project December 16, 2022, availability publicly noticed by the Army Corps on December 19, 2022. (**Exhibit 3**, Draft EIS, Ch. 3, 3.4.1, pp. 3.4-1, and -2.) The subject of the two pages from the Draft EIS is fisheries and aquatic habitat and includes the status of federal and state endangered and threatened species and species of management concern potentially affected by the Project. According to the Army Corps Draft EIS,

USACE is coordinating with the NMFS [National Marine Fisheries Service] and the applicant is coordinating with the California Department of Fish and Wildlife (CDFW) to provide accurate information for compliance with the Endangered Species Act (ESA) and the California Endangered Species Act (CESA), respectively. USACE will initiate Section 7 formal consultation *when the information is available and appropriate for the process*. All information will be updated for the Final EIS. (**Exhibit 3**, Draft EIS p. 3.4-2.) (Emphasis added.)

So, more than four months *after* DWR issued the Draft EIR on the Project, there was so little information as to Project impacts on endangered and threatened fish species and their designated critical habitat that the Army Corps could not begin to initiate formal consultation under the Endangered Species Act. The absence of required information for evaluation of the impacts of Project operations on the subject fish species is significant new information that the Draft EIR could not have meaningfully evaluated those impacts.

**Exhibit 4**, copy attached, is a copy of the U.S. Environmental Protection Agency (EPA) comment letter of March 16, 2023, on the Army Corps Draft EIS on the Delta Conveyance Project. (The EPA transmitted its comment letter to Kristina Reese of DWR.) The Army Corps Draft EIS did not cover Project operations. The Draft EIS stated 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 EPA's letter made clear the EIS must cover the impacts of project operations. "The Draft EIS assesses the effects of project operations qualitatively and refers readers to the Draft EIR for a quantitative analysis of project operations. *While project operations have not yet been fully defined, even in the EIR, assessment of their potential impacts is required.*" (**Exhibit 4**, EPA

Letter, p. 2) (Emphasis added.) And “While project operations have not yet been fully defined, assessment of potential operational impacts is required by 40 CFR 230.” (**Exhibit 4**, EPA letter, first page EPA’s attached detailed comments.) The EPA said, “While the project has been significantly scaled-back since its inception, EPA continues to believe that the operation of the proposed project has the potential to cause or contribute to long-term exceedances of regulatory water quality standards.” (**Exhibit 4**, EPA Letter, p. 2)

The EPA explained,

EPA’s review of the proposed project, as evaluated in the Draft EIS, indicates potential secondary effects include, but are not limited to: (1) changes in the salinity gradient and the location and volume of the low salinity zone in all seasons (40 CFR 230.25); (2) adverse effects on water quality including the amplification of water quality impairments; (3) disruption of migratory corridors for salmonids and sturgeon (40 CFR 230.30, 40 CFR 230.51); (4) decreases in the reproduction and survival of fishes (40 CFR 230.31); (5) degradation of aquatic life beneficial uses; (6) disruption and loss of ecosystem processes; (7) reductions in cold water supply for migratory fishes in the upper watershed; and (8) changes to wetland or river hydrology (40 CFR 230.23). (**Exhibit 4**, EPA letter, first page EPA’s attached detailed comments.)

The EPA also pointed out,

As described in further detail below, the Delta is already experiencing degraded conditions due to insufficient inflow, increased surface water temperatures, invasive animal and plant species, harmful algal blooms, and sea level rise. As described in the Draft EIS and Draft EIR, the proposed project will not ameliorate any of these stressors and is likely to exacerbate many of them. In particular, secondary effects of the discharge on flow conditions downstream of the proposed diversions are likely to result from decreased Sacramento River flows, with multiple potential effects including reduced primary production (Draft EIR p. 12- 171-174), reduced through-Delta survival of migratory fish (e.g., Draft EIR p. 12- 121, 12-152), and degraded habitat conditions in receiving waters due to decreased turbidity and increased salinity. (**Exhibit 4**, EPA letter, pp. 2-3 EPA’s attached detailed comments.)

Under the heading “Project Operations, the EPA said,

The operation of the Proposed Project has potential to increase the extent of ecological impacts already impacting the Delta and Sacramento River, including salinity, temperature, nutrients, and chemical contaminants. Pelagic and migratory fish species in the Delta and Central Valley rivers and streams have undergone

dramatic declines over the past 50 years and are now at perilous levels. The declines are due in large part to freshwater diversion from the Sacramento River as part of state and federal water conveyance projects. According to the Draft EIS and EIR in the descriptions of the No Action Alternative and Existing Conditions, water reduction in the Sacramento River has led to increased Delta salinity, increased temperature in the Sacramento River and the Delta, altered circulation patterns within the Delta, which interferes with fish migration and leads to entrainment of fish and other aquatic organisms, and less water available in the Sacramento River for dilution of chemical contaminants. Moderate to high freshwater flows in Central Valley rivers and tributaries provide significant health benefits to residential and migratory fish and are correlated to increased abundance and productivity. Conversely, current flow levels in the Sacramento Rivers are correlated with declines in species abundance and productivity. *Given that the status of many Delta fish species is threatened, endangered, or other description of imperilment, further diversion of Sacramento River water under the Project could very well lead to greater impairment or extinction.* (**Exhibit 4**, EPA letter, p.5 EPA's attached detailed comments)(Emphasis added.)

There is more. According to the EPA,

The operational scenario evaluated in the Draft EIR (referenced to in the EIS) does not take into account significant recent and upcoming activities that affect the amount of available water for the Project. In particular, the Draft EIR's evaluation of operation impacts does not consider the impacts of future storage projects that would require Sacramento River water or recent and upcoming updates to the Bay Delta Water Quality Control Plan (WQCP). Overestimation of available water will lead to underestimating ecological impacts or water available for water users. (**Exhibit 4**, EPA letter, p.6 EPA's attached detailed comments.)

The EPA concluded, "we are concerned that the proposed project would make future compliance with water quality standards more difficult, thereby increasing the chances of exceeding water quality standards and failing to protect multiple beneficial uses." (**Exhibit 4**, EPA letter, p. 6 EPA's attached detailed comments.)

The EPA letter contains significant new information regarding adverse impacts of Project operations on worsening the harmful algal bloom impacts on water quality and public health in the San Francisco Bay-Delta Estuary under the heading "Water Quality" and subheading "Harmful Algal Blooms,"

The Draft EIS states that cyanobacteria harmful algal blooms (CHABs) already occur in the Delta so there would not be a significant increase in the frequency and magnitude of CHABs from construction of any of the Action alternatives (p. 3.17- 40). There is limited analysis of the frequency or severity of current HABs and

cyanotoxins, or the anticipated increases due to climate change, so the Draft EIS analysis assumes HABs are there and will be there, instead of any in-depth assessment of CHAB species occurrence (changes in species presence), variations, or the duration, severity or aerial extent of CHAB occurrence. Numerous CHAB species are known to occur in the Delta as well as other cyanotoxins (e.g., anatoxins), with quite varied public health effects. Operations of the project could affect HABs, but this is not included in the Draft EIS.

The analysis in the Draft EIS inappropriately focuses on CHABs from *Microcystis* (and thus microcystin concentrations) (p. 3.17-52). 'Compensatory mitigation would not result in markedly higher electrical conductivity (EC) levels in the Delta, Suisun Marsh, Suisun Bay, San Francisco Bay, or the SWP/CVP export service areas. Therefore, this impact does not appear to be significant' (p. 3.21-7). Operation of the project will change flows in the Delta and thus Delta assimilative capacity for EC. Higher EC is linked to the occurrence of another type of Harmful alga called *Prymnesium parvum* (also called Golden Algae) that causes fish kills and is present in Californian lakes. The Draft EIS acknowledges that 'while these discussions estimate recreational effects on the statutory Delta as a whole, it is possible that recreational opportunities and quality in specific areas within the Delta would be affected by activities of the action alternatives more than the Delta as a whole' (p. 3.17-13).

The Draft EIS states that CHABs are not problematic in Cache Slough or Yolo Bypass based on visual observations of *Microcystis* collected by the applicant and the California Department of Fish and Wildlife. Visual observation of microcystis in Cache Slough is not a sufficient measure for the presence of CHABs. While visual observations may identify microcystis, there are other forms of CHABs where this is insufficient. Furthermore, the visual observations may be useful for identifying pervasive, high levels of microcystis but it does not effectively assess the presence, trends, and therefore risks of microcystis in a waterbody (p. 3.21- 17). In addition, the Draft EIS misrepresents the impacts and mitigation measures of HABs when it says, 'the presence of vegetation would generally decrease the potential for CHAB formation because plants would likely outcompete cyanobacteria for nutrients and sunlight.' In actuality, Cyanobacteria tends to out compete native vegetation. Therefore, relying on the vegetation in the tidal habitat is not an adequate means of mitigating CHAB concerns.

The Draft EIS further states 'the design of the tidal habitats is such that there would be daily hydrologic exchange that would ensure that there would not be substantially increased residence time compared to adjacent habitats.... Based on the above findings, under all action alternatives the effects on CHABs resulting from compensatory mitigation does not appear to be significant.' (p. 3.21-17 & 18). The HAB event in San Francisco Bay this summer as well as regular blooms

in the Delta demonstrate that mixing gradients and residence time do not prevent substantial cyanobacteria production.

The Draft EIS acknowledges that the project proposes to create waterbodies - the construction of one or two north Delta intake facilities between River Mile (RM) 42 (south of Freeport) and RM 37 (north of the town of Courtland), the Twin Cities Complex, other tunnel launch, reception, and maintenance sites, and the Southern Complex or Bethany Complex. Additionally, 'certain tidal habitats could create new 8 'seed' areas for CHABs. This could result in long-term increases in the frequency and size of CHABs within the Delta in the vicinity of new tidal habitats, relative to the No Action Alternative and, therefore, could potentially increase health risks to people recreating in the vicinity.' (p. 3.17-41). 'Mitigation Measure WQ-14: Develop and Implement a CHAB Management and Monitoring Plan would be implemented with the goal to mitigate the potential for increases in CHAB formation and, thus, human exposure to cyanotoxins, within compensatory mitigation sites' (p. 3.17-53). However, the analysis incorrectly says 'types of compensatory mitigation (i.e., valley/foothill riparian, freshwater emergent perennial wetland, seasonal wetland, lake/pond)...would not be hydrodynamically connected with Delta channels... As such, these other types of new habitats would not affect CHAB formation within the Delta, relative to the No Action Alternative.' (p. 3.17-41). Hydraulic connection is not necessary for these areas to form CHABs and cyanotoxins that could impact public health e.g., thru direct contact, aerosol transport and other mechanisms of release of the CHABs or cyanotoxins, and the likelihood of CHABs should be addressed in the analysis. (**Exhibit 4**, EPA letter, pp.7-8 EPA's attached detailed comments.)

Finally, the EPA called for modification of the project, meaning additional alternatives, to avoid causing or contributing to exceedances of water quality standards. The EPA said, "Our enclosed detailed comments identify opportunities to improve the analysis and modify the project to ensure these impacts are avoided as part of the preferred alternative in the Final EIS." (**Exhibit 4**, EPA letter, p. 2.) The EPA also said, "The Guidelines require USACE to conduct an alternatives analysis that clearly demonstrates that the proposed discharges represent the Least Environmentally Damaging Practicable Alternative (LEDPA) that achieves the overall project purpose (40 CFR 230.10(a))." (**Exhibit 4**, EPA letter, p.2 EPA's attached detailed comments.)

The EPA's March 16, 2023, comment letter contains significant new information on the adverse impacts of Project operations on endangered and threatened fish species, on worsening the impacts of harmful algal blooms on water quality and public health and the need for the Least Environmentally Damaging Practicable Alternative (LEDPA.)

## **B. THE SIGNIFICANT NEW INFORMATION IS CONSISTENT WITH CONCLUSIONS REACHED BY EXPERT STATE AGENCIES**

The significant new information is consistent with conclusions reached by expert State agencies in their written comments submitted on DWR's Draft EIR. The California Department of Fish and Wildlife (CDFW) comments of December 16, 2022, were submitted by letter from Brooke Jacobs, CDFW Water Branch Chief, to Marcus Yee, Environmental Compliance Manager, Delta Conveyance Office, DWR. The State Water Resources Control Board (SWRCB) comments of December 16, 2022, were submitted by email from Diane Riddle, SWRCB Assistant Deputy Director, Division of Water Rights, to, Department of Water Resources (DWR), Attention: Delta Conveyance Office. The Delta Independent Science Board comments of December 16, 2022, were submitted by email from Lisa Wainger, Chair, DISB to California Department of Water Resources, Attn: Delta Conveyance Office.

These comment letters are not attached to these supplemental comments as DWR already received them on or about December 16, 2022.

### **1. The Significant New Information Pertaining to Endangered and Threatened Fish Species is Consistent with the Comments by Expert State Agencies**

The significant new information about listed fish species is consistent with the comments of expert State agencies. According to CDFW, "CESA-and ESA- listed aquatic species in the Delta are at record low abundance following years of sharp population declines with uncertainty regarding the resiliency and recovery is prolonged drought exacerbates conditions Delta." (**CDFW comment letter** p. 16.) Moreover,

The NMFS Viability Assessment (NMFS) 2022) identifies winter-run and spring-run (except Butte Creek population) Chinook Salmon as having a high risk of extinction due to factors related to redundancy, resiliency, current population size and recent declines, and hatchery influence. Under 2040 conditions the Proposed Project operations are likely to affect the ongoing resiliency and ability fish species to recover from periods of low abundance or stress induced by drought conditions, which may lead to a destabilizing effect on fish populations. (**CDFW comment letter** p. 17.)

CDFW concluded,

Based on the information provided, CDFW currently does not see sufficient

substantiation for the DEIR's determination of the following Project impacts to be less than significant with mitigation: AQUA-1: Effects of Construction of Water Conveyance Facilities on Fish and Aquatic Species, Aqua-2: Effects of Operation and Maintenance of Water Conveyance Facilities on Sacramento River Winter- Run Chinook Salmon, Aqua-3: Effects of Operations and Maintenance of Water Conveyance Facilities on Central Valley Spring-Run Chinook Salmon, Aqua-6: Effects of Operations and Maintenance of Water Conveyance Facilities on Delta Smelt, and Aqua-7: Effects of Operations and Maintenance of Water Conveyance Facilities on Longfin Smelt. **(CDFW comment letter p. 23.)**

After noting the Draft EIR concluded "that the effects of the Project on Delta smelt and longfin smelt would be 'less than significant' with mitigation measures" the SWRCB said, "However, the Draft EIR does not provide evidence as to how the proposed habitat restoration will reduce significant operational impacts to less than significant." **(SWCB comment letter p. 13.)**

The DISB said, "The effect of flow variability on aquatic habitat or persistence of species of concern under existing or future climate were not addressed in the Surface Water (Chapter 5) nor in Appendix 3C (Defining Existing Conditions, No Project Alternative, and Cumulative impact Conditions)." **(DISB comment letter p. 25.)**

## **2. The Significant New Information Pertaining to Harmful Algal Blooms and Water Quality is Consistent with the Comments by Expert State Agencies**

The significant new information about harmful algal blooms and water quality is consistent with the comments of expert State agencies. The DISB said,

Water quality impacts are almost entirely addressed from a drinking water perspective, rather than recognizing that biota are also affected by water quality changes. A prominent example is that changes in nutrient concentrations are largely ignored in the water quality analysis, despite their potential to lower dissolved oxygen levels or exacerbate harmful algal bloom (HAB) frequency or intensity, with potentially severe consequences for fish. HAB issues were mentioned in impacts under the "no-project" alternative, but only assessed for drinking water quality impacts, rather than being recognized for potentially broad effects on ecosystems, wild and domestic animals, human health, and recreational activities. **(DISB comments p. 23.)**

The DISB added,

Similarly, uncertainties of changing conditions on harmful algal blooms (HABs), with and without the project were not well characterized. HABs are becoming increasingly common in the Delta, and warmer temperatures, reduced flow, high residence time, and more concentrated nutrients are likely to exacerbate the problem. (**DISB comments** p. 25.)

The SWRCB also addressed water quality and harmful algal blooms. The SWRCB noted the Draft EIR stated with respect to water quality,

that for whichever water quality constituent is being analyzed, project alternatives would not cause more frequent exceedances of the Bay-Delta Plan objectives for the constituent because project facilities will be operated to objectives has implemented through D-1641 [adopted in 1999, revised March 15, 2000]. However, since D-1641 was implemented, water quality and Delta outflow objectives have not been achieved during drought conditions and DWR and Reclamation have requested temporary urgency changes to water right requirements to relax those requirements. The EIR should demonstrate how the Project (TUCPs) and future violations of water quality and flow requirements. Additionally, D-1641 does not account for all possible water quality concerns in the Bay-Delta, such as harmful aquatic blooms. (**SWRCB comments** pp. 9-10.)

The SWRCB also said, "Without assessing potential for increasing cyanobacterial harmful algal blooms (CHABs) across the entire Delta, it is difficult to determine impacts of the proposed Project operations. (**SWRCB comments** p.10.)

### **3. The Significant New Information Pertaining to the Requirement for a Range of Reasonable Alternatives is Consistent with the Comments by Expert State Agencies**

The significant new information about the requirement for additional alternatives is consistent with the comments of expert State agencies. "CDFW recommends including additional CEQA alternatives in the EIR that depict and evaluate different operational scenarios." (**CDFW comment letter** p. 6.)

The SWRCB said,

Water Board staff recommend the EIR evaluate a reasonable range of operational alternatives in order to provide the Water Boards and other responsible agencies with analyses to inform their decision-making processes. This is particularly important given that pursuant to the Delta Reform Act, the State Water Board will need to include appropriate Delta flow criteria for the

Project in any approval of a water right change petition needed for the project. These alternatives should include an evaluation of flow criteria for the Project that would improve conditions for native fish species, which are currently in poor condition given the current cumulative impacts to native fish and wildlife species resulting from existing flow modifications and other activities explained in the State Water Board's 2017 Scientific Basis Report in support of potential updates to the Bay-Delta Plan. Flow criteria that would improve Delta outflows, reduce fish entrainment and impingement at SWP (and possibly CVP) diversions, and improve cold water management without redirected impacts to native fish species should be evaluated.

Specifically, the EIR should evaluate a scenario that is consistent with the State Water Board's efforts to update and implement the Bay-Delta Plan to improve protections for native fish species. (**SWRCB comment letter** p. 4.)

The DISB also called for an additional alternative—a no-tunnel alternative-- in its comments on the Delta Conveyance Project Draft EIR. "A thorough analysis would also include impacts due to changes in inflows to the San Francisco Bay estuary and any gains in environmental resiliency for moving water through existing channels, rather than diverting it into a tunnel." (**DISB comments** p. 23.)

#### **A. THE SIGNIFICANT NEW INFORMATION REQUIRES REVISION OF THE DRAFT EIR AND RECIRCULATION FOR PUBLIC REVIEW AND COMMENT**

The Exhibits described above constitute significant new information that must be added to DWR's EIR. Consequently, DWR must revise the Draft EIR and recirculate the revised Draft EIR for public review and comment. CEQA requires,

When significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 and consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report. (Pub. Res. Code § 21092.1.)

The CEQA Guidelines 14 Cal. Code Regs § 15000 et seq.) provide additional detail regarding the requirement to revise and recirculate for public review a Draft EIR when significant new information is added. CEQA Guidelines section 15088.5(a) states

in pertinent part, "As used in this section, the term 'information' can include changes in the project or environmental setting as well as additional data or other information." Section 15088.5(a) states, "' Significant new information' requiring recirculation include, for example, a disclosure showing that:"

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
- (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
- (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043).

The new information set forth in the attached Exhibits shows that new significant environmental impacts would result from the Project and there would be a substantial increase in the severity of environmental impacts resulting from the Project. The new information must be added to the EIR. That requires revision and recirculation of the Draft EIR. (Pub. Res. Code § 21092.1; CEQA Guidelines § 15088.5(a); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 447-449 ("potentially significant impact of reduced river flows on the aquatic species, including migrating salmon"); *We Advocate Through Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5<sup>th</sup> 683, 695-696 (revision in project greenhouse gas emissions); *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4<sup>th</sup> 99, 130-134 (feasibility of mitigation for increased pumping of water.)

### **1. The Significant New Information Pertaining to Endangered and Threatened Fish Species and their Critical Habitat Adds to the Circumstances Requiring Revision of the Draft EIR and Recirculation**

CEQA's Additional Legislative Intent section 21001 declares "it is the policy of the state to:

- (a) Develop and maintain a high-quality environment now and in the future, *and take all action necessary* to protect, *rehabilitate, and enhance* the environmental quality of the state.
- (b) 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.
- (c) *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.
- (d) Ensure that the *long-term protection of the environment*, consistent with the provisions of a decent home and living environment for every Californian, *shall be the guiding criterion in public decisions.*
- [e) and (f) omitted]
- (g) *Require governmental agencies at all levels to consider qualitative factors* as well as economic and technical factors *and long-term benefits and costs*, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment. (Pub. Res. Code § 21001) (Emphasis added.)

“On June 4, 2009, NMFS [National Marine Fisheries Service] issued, and Reclamation accepted, a BiOp [Biological Opinion] that concluded that ‘the long-term operations of the CVP and SWP are likely to jeopardize the continued existence’ of various listed species, including winter-run and spring-run [salmon], and ‘destroy or adversely modify’ those species’ critical habitats.” (*Pacific Coast Federation of Fishermen’s Assn’s v. Ross* (E.D. Cal. 2020) 468 F.Supp.3d 1266, 1271, denying preliminary injunction; see also *California Natural Resources Agency v. Ross* (E.D. Cal., May 11, 2020, No.1:20-CV-00426) 2020 WL 2404853\*6, granting preliminary injunction in part.) “In the end, the greater the existing environmental problems are the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.” (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120, disapproved of on other grounds by *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109n.3.)

The California Supreme Court has explained, “As the CalFED PEIS/R itself recognizes, Bay-Delta ecosystem restoration to protect endangered species is mandated by both state and federal endangered species laws, and for this reason water exports from the Bay-Delta ultimately must be subordinated to environmental considerations.” (*In re*

*Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168.)<sup>2</sup>

CEQA Guidelines section 15065 sets forth “Mandatory Findings of Significance.” Guideline section 15065(a)(1) sets forth the first mandatory finding of significance,

The project has the potential to substantially degrade the quality of the environment; *substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species*; or eliminate important examples of the major periods of California history or prehistory. (Emphasis added.)

Pursuant to this Guideline section, “potential substantial impact on endangered, rare or threatened species is per se significant.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449.)

As shown above, in proposing to list Bay-Delta longfin smelt as an endangered species on October 7, 2022, the U.S. Fish and Wildlife Service determined that the “main threat facing the Bay-Delta longfin smelt” is reduced and altered freshwater flows resulting from human activities such as operation of the State Water Project and impacts associated from current climate change conditions. (**Exhibit 1**, 87 Fed. Reg. 60957 at 60963.) The EPA comments on March 16, 2023, on the Army Corps’ EIS for the Project included, “Given that the status of many Delta fish species is threatened, endangered, or other description of imperilment, further diversion of Sacramento River water under the Project could very well lead to greater impairment or extinction.” (**Exhibit 4**, EPA letter, p.5 EPA’s attached detailed comments.) CDFW’s annual trawl surveys have collected no threatened Delta Smelt since 2017. (**Exhibit 2**, CDFW Memorandum at p. 2.) The Army Corps’ Draft EIS admitted there was so little information as to Project impacts on endangered and threatened fish species it could not even begin to initiate formal consultation under the Endangered Species Act. (**Exhibit 3**, Draft EIS p. 3.4-2.) That admission came almost five months *after* DWR published the Draft EIR.

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Our organizations pointed out in our December 15, 2022, comment letter (pp. 7- 11) that the Draft EIR must be revised and recirculated for public review and comment

<sup>2</sup> The decision held that under the CALFED Program at the time a reduced exports alternative was not required. (43 Cal.4th at 1169.) The decision was handed down June 5, 2008. The Delta Reform Act including state policy to reduce reliance on the Delta, Water Code section 85021, became effective February 3, 2010.

because it did not evaluate the impacts of the diversions for the massive water Project on surface water—volume, flows, temperature—under CEQA. Those are key parts of the critical habitat for listed fish species.

The first section of these supplemental comments addressing Exhibit 1 showed the 6000 cfs capacity of the intakes for the Project is almost 1/3 of the annual average summer River flow at that location, and almost 1/2 of the annual dry/critical flow there. The Draft EIR admits the impacts of project operations before mitigation will be significant on Fish and Aquatic Species. (**Draft EIR**, Executive Summary, p. ES-33, Impact AQUA-1.) It makes specific admissions that project operations will be significant on Delta Smelt, Longfin Smelt, Central Valley Steelhead, (**Draft EIR**, Executive Summary, p. ES-34, Impacts AQUA-5, -6, -7), and on Sacramento River Winter-Run Chinook Salmon (**Draft EIR**, Executive Summary, p. ES-33, Impact AQUA-2).

The Draft EIR concluded, however, that the impacts after mitigation on Delta Smelt, Longfin Smelt, Sacramento River Winter-Run Chinook Salmon, and Central Valley Steelhead, would be less than significant. (**Draft EIR**, Executive Summary, pp. ES-33, -34.) That conclusion is simply argument, speculation, or opinion; not substantial evidence as defined by CEQA Guideline section 15384. Our organizations had pointed out that the Draft EIR's claims the significant impacts on certain endangered and threatened fish species would not be significant after mitigation defy common sense and are not supported by substantial evidence. (Sierra Club California et al. December 15, 2022, comment letter p. 48.) (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1117 ("Although Respondents contend that we should defer to the Board's finding that the mitigation measures are effective, we decline to do so where the Board's findings are not supported by substantial evidence *or defy common sense*. Law is not required to abandon common sense. Here, our common sense informs us that the mitigation measures will not effectively replace the water that could be lost by the neighboring landowners.")(Emphasis added.)

As shown above in section B1 of these supplemental comments, "CDFW currently does not see sufficient substantiation for the DEIR's determination" of the Project operations and maintenance "impacts to be less than significant with mitigation" on Sacramento River Winter-Run Chinook Salmon, Central Valley Spring-Run Chinook Salmon, Delta Smelt, and Longfin Smelt. (**CDFW comment letter** p. 23.)

“In the end, the greater the existing environmental problems are the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.” (*Communities for a Better Environment*, 103 Cal.App.4th 98, 120.)

The purpose of the project is to divert freshwater flows for export for agricultural, commercial, and residential use elsewhere. It is not possible to mitigate the impacts on endangered and threatened fish species of further reduction in the freshwater flows in which they live. A revised and recirculated Draft EIR is required to honestly disclose that significant adverse impacts of the Project on the endangered and threatened fish species including Delta Smelt and Bay-Delta longfin smelt cannot be mitigated below the level of significance. The revised Draft EIR must include detailed evaluation of those impacts.

## **2. The Significant New Information Pertaining to Harmful Algal Blooms Adds to the Circumstances Requiring Revision of the Draft EIR and Recirculation**

With the exception of vector-borne diseases the Draft EIR claims project operations would have no significant adverse environmental impacts on public health. (**Draft EIR**, Executive Summary, p. ES-45, Impacts PH 2-4.) That includes PH-5, “Impact Public Health Due to an Increase in Microcystis Bloom Formation.” (*Id.*)

According to the EPA, however, “Numerous CHAB species are known to occur in the Delta as well as other cyanotoxins (e.g., anatoxins), with quite varied public health effects. Operations of the project could affect HABs, but this is not included in the Draft EIS.” (**Exhibit 4**, EPA letter, p. 7 EPA’s detailed comments.) And the SWRCB said, “Without assessing potential for increasing cyanobacterial harmful algal blooms ( CHABs) across the entire Delta, it is difficult to determine impacts of the proposed Project operations.” (**SWRCB comment letter** p. 10.)

The 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.)

The Draft EIR claims, however, the project's "individual contributions to the significant cumulative condition for CHABs in the Delta would not be cumulatively considerable and, thus, would not be significant." (*Id.*) That is both conclusory and preposterous. The claim is simply argument, speculation, or opinion; not substantial evidence as defined by CEQA Guideline section 15384. In addition, "[W]hen a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users." (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 377-378.) Moreover, "In the end, the greater the existing environmental problems are the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Communities for a Better Environment*, 103 Cal.App.4th 98, 120.)

The first section of these supplemental comments addressing Exhibit 1 showed the 6000 cfs capacity of the intakes for the Project is almost 1/3 of the annual average summer River flow at that location, and almost 1/2 of the annual dry/critical flow there. DWR defies common sense by claiming the flow reductions from Project operations would not be at the very least cumulatively considerable for CHABs in the Delta. A revised and recirculated Draft EIR is required to honestly disclose impacts of the Project on CHAB's in the Delta will be significant. The revised Draft EIR must include a detailed analysis of those impacts.

### **3. The Significant New Information Pertaining to Water Quality Adds to the Circumstances Requiring Revision of the Draft EIR and Recirculation**

The Draft EIR made the preposterous claim the massive water project and its enormous new diversions upstream from the already impaired Delta would have no significant environmental impacts on water quality so that mitigation is not necessary. (**Draft EIR**, Executive Summary, pp. 32-33.) That conclusion is simply argument, speculation, or opinion; not substantial evidence as defined by CEQA Guideline section 15384.

The preceding section of these supplemental comments showed that the new information in the EPA's comment letter on the Army Corps' Draft EIS establishes that

Project operations would worsen CHABs in the Delta. That is an adverse impact on water quality. The EPA concluded Project secondary effects include, “adverse effects on water quality including the amplification of water quality impairments;” (**Exhibit 4**, EPA letter, first page EPA’s attached detailed comments.) The EPA also concluded, “we are concerned that the proposed project would make future compliance with water quality standards more difficult, thereby increasing the chances of exceeding water quality standards and failing to protect multiple beneficial uses.” (**Exhibit 4**, EPA letter, p. 6 EPA’s attached detailed comments.)

A revised and recirculated Draft EIR is required to honestly disclose that the Project will have significant adverse impacts on water quality in the Delta and in the watershed. The revised Draft EIR must include detailed evaluation of the Project’s impacts on water quality.

#### **4. The Significant New Information that Additional Alternatives are Required Adds to the Circumstances Requiring Revision of the Draft EIR and Recirculation**

The EPA has explained the “Least Environmentally Damaging Practicable Alternative (LEDPA)” is required. (**Exhibit 4**, EPA letter, p. 2 EPA’s attached detailed comments.) Also, “An alternatives analysis includes estimates of direct, secondary, and cumulative impacts on the aquatic ecosystem from each alternative considered. Secondary effects from the project alternatives, including the diversion of freshwater from Sacramento-San Joaquin Delta, present a potentially significant effect on the aquatic ecosystem and must be included in LEDPA identification.” (*Id.*) As shown above in section B3 of these supplemental comments, the SWRCB and DISB have also called for additional alternatives.

Our organizations’ comments of December 15, 2022, pointed out that the Draft EIR failed to include the CEQA required range of reasonable alternatives. (Sierra Club California et al. comment letter pp. 17-31, December 15, 2022.)

The EPA is an expert Federal agency and the SWRCB and DISB are expert State agencies. Their calls for additional alternatives cannot be ignored. The types of alternatives they call for would clearly lessen the significant environmental impacts of the project. The types of alternatives they call for must be included in the EIR. Consequently, revision and recirculation of the Draft EIR are required to include the additional alternatives requested. (CEQA Guidelines § 15088.5(a)(3) (“ A feasible project

alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.")

### CONCLUSION

New significant information requires revision of the Draft EIR and recirculation for public review and comment. In addition to the grounds set forth above, revision and recirculation are also required because the "draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines § 15088.5(a)(4).) The contact for this supplemental comment letter is E. Robert Wright, Counsel, Sierra Club California (916) 557-1104 or [bwrightatty@gmail.com](mailto:bwrightatty@gmail.com) . We will do our best to answer any questions you may have.

Sincerely,



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**Exhibits sent separately due to volume:**

1. USFWS Federal Register Notice October 7, 2022, 87 Fed. Reg. 60967-60975
2. CDFW December 29, 2022, Memorandum
3. USACE DCP DEIS December 16, 2022, pp. 3.4-1, and -2
4. U.S. EPA March 16, 2023 Comment Letter on USACE DCP DEIS