

PLANNING AND CONSERVATION LEAGUE

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VIA EMAIL CalWaterFix@water.ca.gov & bwhite@usbr.gov

Re: Supplemental Comments and Additional Areas of Noncompliance of Final BDCP/California Water Fix EIR/EIS with NEPA, CEQA, the Delta Reform Act and other Laws

Dear CalWaterFix@water.ca.gov and Ms. Brooke White, California Water Fix Program Manager, U.S. Bureau of Reclamation:

By this supplemental comment letter, PCL and the undersigned signatory public interest organizations oppose approval of the Bay Delta Conservation Plan/California Water Fix (BDCP/CWF) and its Final Environmental Impact Report/Final Environmental Impact Statement (EIR/EIS) of December 22, 2016, including preferred alternative 4A, all other variants of the Delta Water Tunnels, and any new upstream conveyance for exporting water south. We set forth in this letter additional documentation of noncompliance with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). For the reasons stated below, a new environmental analysis—one that complies with state and federal laws—is needed to achieve the objective of CEQA and NEPA for informed decision making based on accurate information about the purpose of the project, alternatives, and its full impacts.

In these supplemental comments, we focus on two broad and interactive areas of noncompliance with CEQA and NEPA: (1) the lack of an accurate, stable, and consistent project definition; and (2) the granting of preferential influence to select state and federal water contractors who would benefit most from the proposed project. Both of these shortcomings are critical and illegal flaws that disqualify the project and the EIR/EIS.

Lack of an accurate, stable, and consistent project definition

An accurate, stable, and consistent project definition is a fundamental requirement of an acceptable and legal EIR/EIS. From the outset, however, the public has been provided a misleading and

changing project description and purpose.¹ The project was initiated in 2008 by USFWS and NMFS as a conservation habitat plan with the purpose of restoring the San Francisco Bay Sacramento-San Joaquin Estuary. After years of difficult-to-follow flux in the project purpose and definition, in 2015 the lead agencies were changed to just USBR and DWR, dropping USFWS and NOAA, and the project purpose focused solely on the construction of two massive tunnels, 150 deep and some 30 miles long, with three intakes to take water from the Sacramento River at new diversion points and export it south of the Delta estuary to the project proponents (select state and federal water contractors). The Habitat Conservation Plan [HCP] & Natural Community and Conservation Plan [NCCP] purposes were largely dropped from the project², such that now the proposed water export project will exist primarily to withdraw freshwater inflows to the San Francisco Bay-Delta Estuary for use by agricultural and urban water contractors, thereby diverting freshwater inflows critical to endangered species habitat and water quality essential to drinking water, recreation, along with water dependent business activities and farming.

"An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 CA3d 185, 193. Additionally, the entire project being proposed must be described in the EIR, and the project description must not minimize project impacts. *City of Santee v. County of San Diego* (1989) 214 CA3d 1438, 1450. Without an accurate description of the project and its environmental setting, an EIR-EIS cannot achieve the foremost objective of CEQA & NEPA, that is, the disclosure and analysis of project related impacts on the environment.

The Chronology (see Exhibit A attached) of federal register public notices and related actions shows that various elements of the project and, specifically the lack of public notification for the virtually invisible Delta Habitat Conservation and Conveyance Program (DHCCP) agreements and funding (MOAs), have resulted in a hidden shift in project definition and purpose, and have provided select water contractors³ inappropriate preferential influence on project definition, purpose, and the selected

¹ See Exhibit A, listing the Chronology of Federal Register Notices of Intent [NOI] and project purpose statements 2008- 2015.

² The Bay Delta Habitat Conservation Plan (BDCP) is referred to as Project Alternative 4, however, it is no longer considered as a preferred alternative. "*California WaterFix (Alternative 4A) reflects an alternative regulatory strategyto meet the project purpose and need and includes the new Delta water delivery infrastructure for the SWP.... without a habitat conservation plan.*" http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/California_WaterFix_RDEIR-SDEIS_FAQ_Aug-15.sflb.ashx

³ Signatories to the DHCCP MOA 2009 and 2011 agreements and undisclosed funding agreements are: Metropolitan Water District of Southern California (MWDSC), Westlands Water District (WWD), San Luis Delta Mendota Water Authority (SLDMWA), Kern County Water Agency (KCWA), Santa Clara Valley Water District, State and Federal Contractor Water Authority (created in 2009), State Water Project Contractors Authority Inc., DWR and USBR. *Memorandum Of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for The Delta Habitat Conservation And Conveyance Program In Connection With The Development Of The Bay Delta Conservation Plan* (March 2009) and the December 2011, First Amendment to the BDCP-DHCCP MOA. <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/DHCCP-Original-MOA-WWD-SLDWA-et-al-with-DWR-2009.pdf> &

alternative. These non-public agreements have been used to fund and influence the environmental review of the more quasi-public Bay Delta Conservation Plan (BDCP) and now the Cal WaterFix water tunnels export program, thereby embedding the biases of project proponents in the environmental analysis, lack of a reasonable range of alternatives considered and jeopardizing an accurate disclosure and analysis of the environmental impacts.⁴

These non-public agreements were made available only after months of tedious Public Record Act requests and Freedom of Information Requests by PCL et.al. . The federal assistance agreements (FAA) between DWR and USBR required the delivery of a "DHCCP EIR-EIS, a federal feasibility report, an implementation agreement, and other deliverables."⁵ Some contractually required work products such as a federal feasibility report that requires a cost benefit analysis were not delivered.⁶ The agreements and work products were not submitted for public review and analysis, or were cloaked in another name—the DHCCP—and slipped into the Bay Delta Conservation Plan NEPA and CEQA documents without public disclosure. These virtually invisible funding agreements, decision making agreements contained in the MOAs, and where the DHCCP environmental analysis documents were used to develop an entirely new design of a conveyance system of tunnels, diversions and water exports in which federal and state water contractors were formally provided elevated status as “cooperating agencies” (federal) or “responsible agencies” (state), thus enabling their promotion of additional water exports from the Bay-Delta estuary as the primary alternative considered. The additional water exports would violate the Delta Reform Act of 2009.⁷ Additionally, the DHCCP MOAs provide the water export contractors with inside and outsized access to information and hidden opportunities to influence the BDCP planning process, the EIS/EIR development, and the science to support both. Comments regarding this potential prejudicial decision making body were ignored and not addressed in the FEIR-EIS for the Cal Fix water export

http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/First_Amendment_BDCP_MOA_Redline_Edits_12-16-11.sflb.ashx

⁴ See SLDMWA minutes documents September 2008 where "embedded" employees of the proponents are on "loan" to DWR and the planning effort in key roles and where the DHCCP Executive Committee [made up of the select water export contractors] has review and virtual control of the planning contract effort and document generation. <http://www.deltatunnelsboondoggle.com/water-exporters-embedded-dwr/> and the September 2008 SLDMWA Board and WRC documents: <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/hidden-water-exporter-plan.pdf>

⁵ See Federal Assistance Grants and Cooperative Agreements with the California Department of Water Resources: 09FC200011, R10AC20897 (Completion date March 2013 extended to March 2014) for \$51,841,000. Agreement # R10AC20897 (Signed July 30, 2015 with a completion date December 31, 2016) for \$17,941,727.00. And the American Resource and Recovery Act (ARRA) Agreement # R10AC20R23 for \$3,950,372.00 signed on December 31, 2009 with extensions to be completed March 30, 2011 and then extended to March 30, 2014.

⁶ Dr. Jeffrey Michaels reports even with the artificially low discount rates used the project is not economically justified delivering just 23 cents for every dollar spent. Further using the low discount rate the project does not meet federal feasibility rules where the required discount rate is more than double the one used. Thus, further inflating the meager value of the project. See his report at <http://www.pacific.edu/Documents/schoolbusiness/BFC/WaterFix%20benefit%20cost.pdf>

⁷ See http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001_0050/sbx7_1_bill_20091112_chaptered.html

tunnels.⁸ This level of influence by project beneficiaries on a public project, as will be detailed further below, is inappropriate and illegal.

The failure to provide a stable definition and purpose of the project began early. The February 13, 2009, Notice of Intent to prepare an Environmental Impact Statement, 74 Fed. Reg. 7257, (“NOI”) states that the proposed federal actions are issuance of ESA permits and implementation of one or more components of the BDCP. However, this is not an accurate description of what came to be. In particular, the new project purpose of delivery of "up to full contract amounts" for specific water contractors also was added. Full contract amounts have never been delivered historically and actual feasible amounts are poorly defined in the FEIR/EIS, such that this metric is an inappropriate project purpose.

As can be seen by the June 15, 2015, Notice of Intent To Prepare a “Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement to the Draft Environmental Impact Statement on the Bay Delta Habitat Conservation Plan and Natural Community Conservation Plan for the Sacramento-San Joaquin Delta, California”, 80 Fed. Reg. 34170, the latest purpose is dramatically different from where it began. The purpose is now a new water export delivery project with tunnels and new diversion points that would dewater critical habitat upstream, reduce estuary flows some 20%, degrading critical habitat within the San Francisco Bay-Delta estuary, degrade water quality within the region, and does not include a habitat conservation plan component in the preferred alternative. Perhaps the changes made in the 2009 NOI predicted the shift from a conservation plan to a water export project with the addition of the language of the project to deliver "up to full contract amounts" for Kern County Water Agency and specific federal contractors. This change in purpose was criticized by EPA in which they noted there is not unlimited discretion in adopting a project purpose and the fact that 'up to full contract amounts' is not defined and as a metric has never occurred.⁹ These changes and the undue water exporter access and influence also limited the range of alternatives considered.

The major federal action—in the latest definition of the project—is operation of the SWP and CVP at increased rates of export through one of three alternative tunnel conveyance options. It is the continued operation of the CVP and SWP at increased export levels through a set of tunnels taking water under the estuary that creates the jeopardy to the smelt, salmon and other listed species (and the take) by diverting critical water and essential flows from the delta and estuary and bay. The Habitat Conservation Plan (“HCP”) and the ESA Section 10 permits are discarded in the preferred alternative. The NOI’s

⁸ Contra Costa Water District raised objections to the DHCCP MOA stating, " *...we are concerned that the proposed MOA will hinder DWR in exercising its independent judgment, which is a requirement to certify that the Environmental Impact Report (EIR) is complete and accurate.*" See <http://www.ccwater.com/DocumentCenter/Home/View/1981> See also http://deltacouncil.ca.gov/sites/default/files/documents/files/EDF_111611.pdf and http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/STCDA%20et%20al/scda_51.pdf

⁹ See <https://www.epa.gov/sites/production/files/documents/epar9commentsbdcppurpstmt6-10-2010.pdf> & PCL et. al. ACE comment letter <http://www.restorethedelta.org/wp-content/uploads/2015/11/BDCP-CWF-Army-Corps-Cmts-PCL-et-al-10-30-15.pdf>

misstatement of the major federal action and definition of the project has been carried through the eight year process and resulted in widespread public perception that the BDCP is a 15.5 billion dollar peripheral canal or tunnel project designed to be a habitat conservation project, rather than its true purpose as a water development project to increase exports of freshwater to water contractors. The suggestion in the project purpose statements that this new project is merely a "remodel" of the existing State Water Project and the Central Valley Project, has been legally challenged as factually incorrect.¹⁰

Furthermore, the virtually hidden and undisclosed DHCCP MOA and other non-public DHCCP agreements and funding documents, described above, confuse the public and decision makers when they characterize the water export tunnels as a "conservation measure." Federal and state endangered species laws define conserve and conservation to mean "methods and procedures which are necessary to bringing any endangered species or threatened species to the point at which the measure provided pursuant to this chapter are not longer necessary." The proposed tunnels are a water export project that increases threats to endangered and threatened species and does nothing to help conserve these species. The project purpose and intent is to divert large amounts of water out of the ecosystem for purposes of export for consumptive use. Such a facility cannot be reasonably considered a "conservation measure."

This misleading information about the project over time and the lack of public disclosure of key underlying documents, especially the DHCCP MOA's and funding agreements, have kept the public and decision makers in the dark, obfuscated impacts, and created a FEIR-FEIS where the alternatives are various versions of same tunnels export project rather than a reasonable range of alternatives. The result has been public injury due to the denial of accurate information and a confusing ever-changing project definition across almost a decade long period.

Select State and Federal Water Contractors Given Preferential Treatment and Undue Influence

Undisclosed 'Delta Habitat Conservation and Conveyance Program' agreements and funding mechanisms elevated the status of water contractors, giving them inappropriate access to information and opportunities for undue influence on the BDCP-Cal Waterfix planning process and FEIR-FEIS process. As discussed, the Federal Register Notices of Intent in 2008 and 2009 describe a project purpose for the Bay Delta Conservation Plan (BDCP) as a 'recovery plan for endangered species' (Section 10 permit) and stated a general purpose as follows: "...allow for projects that restore and protect water supply, water quality, ecosystem, and ecosystem health to proceed within a stable regulatory framework". The Delta Habitat Conservation and Conveyance Program MOA signed March 12, 2009¹¹, however, is not publicly disclosed, despite being a major federal and public agency action designed with a purpose, according to

¹⁰ Tunnels or references to tunnels or conveyance of water through tunnels is not contained in the State Water Project authorization or description <http://www.water.ca.gov/swp/> nor in the Federal Central Valley Project Delta Division authorizations <https://www.usbr.gov/mp/accomp-rpt/2010-accomp-rpt.pdf> and the San Luis Division exports to the Westside and the 'DHCCP federal contractors' are limited to 500,000 acre feet in three counties. (PUBLIC LAW 86-488-JUNE 3, 1960. [74 ST AT. Public Law 86-488. June 3, 1960.]) See also <http://www.restorethedelta.org/wp-content/uploads/2016/08/Tim-Stroshane-Testimony-SIGNED.pdf>

¹¹ <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/DHCCP-Original-MOA-WWD-SLDWA-et-al-with-DWR-2009.pdf>

the MOA, to fund and design a major water export project to export more water from the Bay-Delta Estuary and produce an Environmental Impact Statement, including a feasibility report for the then BDCP project. All of these activities are kept secret until 2011 when a "First Amendment to the DHCCP MOA" and a federal White Paper issued in response to concerns expressed by Congressman Miller, first disclosed this agreement and the elevated status of these select contractors in a request for comment on the BDCP Financing MOA.¹² It is at this time the public learns that select federal water export contractors are elevated to "Cooperating Agencies." This elevated status for these select project proponents and beneficiaries is automatically continued throughout the definition and purpose of the project through Federal Register Notices in 2015 and 2016.

Elevating these select state and federal Water Contractors to Cooperating Agency status through a federal White Paper¹³ that explains and defends the Amendment, when the term "Cooperating Agency" was not used with respect to these select Water Contractors prior to the White Paper (including in the DHCCP -BDCP MOA 2011 Amendment), is not consistent with NEPA implementing regulations and standard agency practice.

Rather, NEPA implementing regulations contemplate that Cooperating Agencies will be designated through a formal process and will be publicly announced prior to beginning the scoping process, usually in the NOI. *See* 40 C.F.R. § 1501.5 (c) ("lead agencies *shall* determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies") (emphasis added); 40 C.F.R. § 1501.6(b)(2) (requiring that "[e]ach cooperating agency *shall* . . . [p]articipate in the scoping process")(emphasis added); Memorandum for the Heads of Federal Agencies, Subject: Reporting Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Dec. 23, 2004) (requirement for all federal agencies for "reporting the designation of Federal and non-federal cooperating agencies"); Memorandum for the Heads of Federal Agencies From James Connaughton, Subject: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (instructing heads of agencies to "identify as early as practicable" Cooperating Agencies); Memorandum For The Heads of Federal Agencies From James L. Connaughton, Subject: Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (May 26, 2005) (noting Lead Agencies are "designating formal cooperating agencies when beginning their NEPA process").

In this case, Reclamation partially complied with the regulations and standard agency practice by formally announcing federal Cooperating Agencies in the NOI. However, the Cooperating Agencies designated did not include the select Water Contractors. Instead Reclamation designated only The Army Corps of Engineers ("ACE") and the United States Environmental Protection Agency ("USEPA") as the Cooperating Agencies. NOI, 74 Fed. Reg. at 7257. In contrast, the NOI designates the Water Contractors as "Potentially Regulated Entities or PREs." NOI, 74 Fed. Reg. at 7258. It is clear that at issuance of the NOI, which is the appropriate time to select Cooperating Agencies, the Water Contractors were not to be

¹²http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Letter_to_Congressman_Miller_regarding_MOA.sflb.ashx

¹³ **Ibid.**

designated as Cooperating Agencies because it is not appropriate for a *regulated* entity to serve as a Cooperating Agency.

Likewise, if select Water Contractors were to be Responsible Agencies under CEQA, the Notice of Preparation (“NOP”) filed by DWR did not follow required procedures for doing so. CEQA Guideline 3 section 15082(a) provides that “the lead agency shall send to the Office of Planning and Research and each responsible and trustee agency a notice of preparation stating that an environmental impact report will be prepared.” The distribution list attached to the NOP indicates that it was sent to twenty two public agencies. The list does not include the select state and federal Water Contractors. CEQA Guideline § 15096(b)(2) provides in pertinent part that “not longer than 30 days after receiving a Notice of Preparation from the Lead Agency, the Responsible Agency shall send a written reply by certified mail or any other method which provides the agency with a record showing that the notice was received. The reply shall specify the scope and content of the environmental information which would be germane to the Responsible Agency’s statutory responsibilities in connection with the proposed project.” The reply must also be sent to the State Clearinghouse. The State Clearinghouse website indicates that no reply was received from the Water Contractors. *See* SCH Number: 2008032062. That DWR did not follow required procedures for designating the Water Contractors as Responsible Agencies is not surprising because, like the NOI, the NOP identifies that Water Contractors not as Responsible Agencies but as “Potentially Regulated Entities.”(NOP at 2.) Public accountability is the cornerstone of CEQA. Whatever discussions or understandings the Water Contractors may have had with DWR regarding their roles at the time of preparation of the NOP are irrelevant. CEQA requires a specific *public* process to be followed in designating Responsible Agencies. In 2011, DWR discloses in a memorandum of agreement that these select project beneficiaries will be designated as ‘Responsible Agencies.’ This public process was not followed in the June 15, 2015, Federal Register Notice for the latest incarnation of this new water tunnels export project, which also declared the selected water export contractors to be Cooperating Agencies once again failing to follow the required public process.¹⁴

The water contractors neither own nor operate the CVP or SWP Projects (Projects). They do not have authority with regard to project operations, water rights, or obtaining a permit to change the point of diversion. These authorities are central to this new project water tunnels export project. The CVP and SWP are owned and operated by the U.S. government and the State of California, respectively, which is why the existing Biological Opinions that authorize take for the Projects operate against actions taken exclusively by the U.S. Bureau of Reclamation and the California Department of Water Resources. At issue in both of the Biological Opinions is the impact of coordinated Project operations on the biological resources of the Bay Delta Estuary. The issuance of any of the new incidental take authorizations at issue will inherently revolve around the coordinated Project operations that gave rise to the jeopardy opinions. While these select water export contractors are the ultimate beneficiaries of water deliveries from the Projects, it is the actions and decisions of the Bureau of Reclamation and the Department of Water

¹⁴http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/First_Amendment_BDCP_MOA_Redline_Edits_12-16-11.sflb.ashx See I page 8.

Resources that are at issue in the USFWS and NOAA determinations about whether or not incidental take may be authorized for the Projects' Delta operations.

Without following CEQA and NEPA regulations, allowing these select water contractors a front row seat in determining and analyzing and producing the environmental documents is prejudicial. The elevated status of the contractors is prejudicial to the general public, prejudicial to communities of color throughout the Bay-Delta region, and prejudicial to those like the Tribes along with fishing men and women whose livelihoods and culture rely on the water that will be taken to serve others under the water export tunnels project. And especially prejudicial to the Bay-Delta environmental justice communities which range from 19% to 50% of the population in Delta cities, towns, and rural regions. The Equal Protection Clause of the U.S. Constitution, demands that all citizens be afforded equal opportunity under the law without abridging, for example, the rights of the communities and people supported by the existing Delta Estuary waterways and fish and wildlife to access the process and receive information on an equal basis as those who would profit from taking the additional water.

The adoption of a secret agreement, and subsequent First Amendment to the DHCCP MOU, has significant environmental impacts and physical impacts that need to be disclosed, but were not in the BDCP Cal WaterFIX FEIR-EIS. By law, the export water contractors have no authority or role beyond that of the general public in developing project operational parameters, developing or employing adaptive management limits of project operations, developing annual operations plans, or any other activity that may present conflicts between water exports and protection of Delta ecosystems water quality. Granting water contractors this elevated status without following CEQA and NEPA public disclosure processes has significant impacts that need to be disclosed and have thus far remain hidden.

Creating a non-public process where the project beneficiaries are given prejudicial access also leads to outcome-driven results driven by these select water contractors, rather than an effective development of alternatives and an objective appraisal of the project's impacts. As the May 2011 National Academy of Sciences report concluded, the BDCP's foundational work--the draft Conservation Plan--was fundamentally flawed, because "scientific reasons for not considering alternative actions were not presented in the plan." (Report in Brief, p. 2, May 5, 2011).¹⁵

Outcome- and beneficiary-driven results and lack of consideration of viable alternatives are but one outcome of these non-public virtually invisible DHCCP water exporter agreements. Others include an inflated project baseline that masks the environmental impacts of the project, the failure to analyze the downstream effects of the alternatives on Suisun Bay, Carquinez Straight, San Pablo Bay, and San Francisco Bay, including modeling and measuring the effects of changing water export timing, volume, and rate on salinity, water quality, and aquatic and terrestrial biological resources throughout the entire Bay-Delta ecosystem. Also, virtually excluded from the impact analysis is the dewatering of upstream critical habitat for migrating anadromous fish, along with the lack of analysis of the magnitude of water transfers and other water exchanges that are likely during a drought and will occur more often if more pumping capacity under the BDCP/Cal WaterFix is adopted.¹⁶ Further the bias extends to the lack of

¹⁵ <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13148>

¹⁶ For example see comments by the SWRCB http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/exhibit3/r

seriously considering other alternatives and is displayed in the bias analysis of even the limited alternatives considered.¹⁷ Additional biased analysis is also exhibited in the environmental impacts of the land acquisition for the various alternatives, such as a Delta land acquisition plan that did not provide such information for all of the proposed even limited project alternatives.¹⁸ Furthermore, the bias has led to the segmentation of the project in that the impacts of SWP project proposed 50 year contracts extension, which are needed to pay for the project, are omitted entirely from the environmental analysis.¹⁹ These costs are substantial and fall particularly hard upon minority and low income communities who can least afford the potentially required land based charges or property taxes, especially when they receive no surface water from the existing or proposed project. For example, under the SWP, many communities are already paying for the BDCP-DHCCP-Cal WaterFix charges through property taxes even though they receive no water from the project. These communities include, but are not limited to, South Central Los Angeles, East Los Angeles, East Palo Alto, and Palo Alto, to name a few. Under the federal CVP, poor communities like El Porvenir and Cantua Creek are also paying for the Westlands' DHCCP land based charges for water they cannot use to drink or bath.²⁰

The FEIR-EIS at page 33, "*Table 1-1. Summary of Agencies and Review, Approval, or Other Responsibilities, in Addition to Those under CEQA and NEPA*" does little to meet legal obligations under CEQA and NEPA for meeting statutory and regulatory requirements. As the title indicates, the long list of various entities is '*in Addition to Those under CEQA and NEPA.*' This list fails to address why the

[deir_sdeis_comments/RECIRC_2582_SWRCB.pdf](#) or EPA 10-3-15 comments

<https://www.epa.gov/sites/production/files/2015-10/documents/waterfix-ltr-murillo-103015.pdf>

¹⁷ See SWRCB comments that raise this bias, "*As noted previously, only the preferred alternative for this project has been optimized to enhance the performance of the alternative for environmental and water supply purposes. The lack of optimization of the other alternatives should be noted and where possible addressed.*"

http://baydeltaconservationplan.com/RDEIRComments/RECIRC_2582_SWRCB.pdf The utter lack of a reasonable range of alternatives including more locally developed solutions with less reliance on Delta exports has been denied. See <http://www.restorethedelta.org/comment-letters-on-bdpcalifornia-waterfix/> & http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/Water_Use_Efficiency_and_Jobs_2011.pdf

¹⁸ <http://www.restorethedelta.org/wp-content/uploads/2015/08/DCE-Cm1-Property-Acquisition-Plan-1-Fr-MWD-PRA-2015.pdf> MWD, one of the select DHCCP signatories, voted to purchase the tunnel route lands needed for the chosen preferred alternative 4 (a) <http://www.scp.org/news/2015/11/10/55575/mwd-votes-to-buy-delta-islands-critics-see-water-g/>

¹⁹ See http://www.lloydgcarter.com/content/140130649_swp-water-supply-contract-extension and <https://mavensnotebook.com/wp-content/uploads/2014/04/March-4th-PCL-et-al-SWP-Water-Supply-Contract-Extension-Comment-2.pdf> See also <http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/SWP-contract-extension-PCL-DEIR-comments-10-17-16.pdf>

²⁰ Voting down exorbitant WWD land based charges that passed DHCCP land based charges through to the low income residents of El Porvenir and Cantua Creek see <http://www.fresnobee.com/news/local/water-and-drought/article19538838.html#storylink=cpy> Seeking to polish WWD's balance sheet with a "little Enron accounting" SEC fines WWD for among other items misstating DHCCP planning expenses. **California Water District to Pay Penalty for Misleading Investors** <https://www.sec.gov/news/pressrelease/2016-43.html> **California's largest water district, accused of misleading investors, settles with the SEC** <http://www.latimes.com/business/la-fi-westlands-sec-20160309-story.html>

above regulations for establishing "Responsible Parties under CEQA" and "Cooperating Agencies under NEPA" were not followed in designating these select water export contractors this elevated status. The public is even more confused by the listing in the FEIR-FEIS when these select water export contractors (except for the SFWCA which is listed as a Cooperating Agency) are listed as "potential CEQA responsible agencies" –with the footnote that "The term *potential* is used in this table generally. Whether particular entities are responsible agencies will be determined when a final BDCP is approved." ²¹ This shifting sand is not legally allowed, as noted in the previous discussions.

The fact that selected water export contractors with preferential status meet by contractual agreement in monthly meetings to decide the range of alternatives, respond to comments and provide engineering advice, and must be provided documents prior to public release, and yet were not properly designated 'Responsible Agencies' pursuant to the 1st MOA to the BDCP_DHCCP, does not meet the legal requirements. ²²

Conclusion

In these comments on the Bay Delta Conservation Plan/California Water Fix (BDCP/CWF) and its Final Environmental Impact Report/Final Environmental Impact Statement (EIR/EIS), we have documented and evaluated implications of two broad and interactive areas of noncompliance with CEQA and NEPA:

(1) The lack of an accurate, stable, and consistent project definition has made the project impossible for the public to evaluate as it shifted over time, led to inadequate environmental analysis, deceptively shifted the intent of the project from conservation to maximum water export, and resulted in poorly defined and incomplete formulation and evaluation of project impacts; and

(2) The granting of preferential influence to select state and federal water contractors who would benefit most from the proposed project was done by USBR and DWR without following required procedures and public disclosure, thus hiding this preferential influence from the public, and the preferential status of the contractors as Cooperating and Responsible Agencies has led to biased formulation and analysis of project alternatives and impacts because of their inside access to project analysis and decision making.

²¹ See Table 1-1 in Volume I, 1-32 to 1-38. At 1-38, the document leaves the public with a murky impression that these select individual water contract contractors that are "potential" CEQA responsible agencies will have that role—among other things, it's "to be determined when financing agreements are identified." One of this group the SFWCA is listed as a (NEPA cooperating agency)@ pg 1-36. The document fails to reconcile the role and designation as CEQA responsible agencies in the 2011 BDCP_DHCCP MOA 1st Amendment agreement and cooperating agencies in the Federal White Paper 2011.

²² http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/First_Amendment_BDCP_MOA_Redline_Edits_12-16-11.sflb.ashx see also

These shortcomings are critical and illegal flaws that disqualify the project and the EIR/EIS.

We appreciate the opportunity to provide these supplemental comments and by reference we adopt by reference the Environmental Advocates' supplemental comments submitted to the Delta Stewardship Council dated February 2, 2012, with attachments that can be found on the DWC website. [http://deltacouncil.ca.gov/sites/default/files/documents/files/20120202_Env_Advocates.pdf] If question arise please contact Patricia Schifferle at pacificadvocates@hotmail.com, Conner Everts, Southern California Watershed Alliance (310) 804-6615 or connere@gmail.com, or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org.



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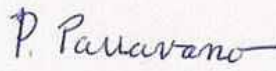
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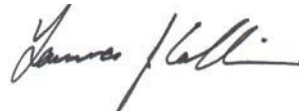
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EXHIBIT A: Chronology of Federal Register Notices of Intent (NOI), changing project purpose statements, and preferential status given to selected water contractors.

Date	Agency	Action Description	Comment
1-24-08	NMFS-USFWS	NOI-BDCP--Federal Register Notice of Intent (NOI) to Prepare EIS-EIR for Bay Delta Habitat Conservation Plan designed to provide a 'recovery plan for endangered species' (Section 10 permit) [73 FR 4178]	
4-15-08	NMFS_USFWS	NOI-BDCP---USBR is added as another Lead Agency for the NOI for the BDCP [73 FR 20326]	
2-13-09	NMFS_ USFWS_ USBR	NOI-BDCP--EPA and ACE are added as Cooperating agencies and a new project purpose is added to deliver "up to full water contract amounts" for Kern and specified San Luis Delta Mendota Water Contractors such as WWD. [74 FR 7257]	
3-12-09	USBR, DWR, WWD,SCVWA, SLDMWA, SWPC, SFCWA,KCWA	MOA between DWR, USBR and specific water contractors is signed, creating the Delta Habitat Conservation Conveyance Program (DHCCP) MOA to fund an EIS-EIR document covering " <i>analysis of appropriate habitat conservation and water supply measures, including Delta conveyance options that are developed in the Bay Delta Conservation Planning (BDCP) process.</i> " http://www.deltatunnelsboondoggle.com/wp-content/uploads/2017/01/DHCCP-Original-MOA-WWD-SLDWA-et-al-with-DWR-2009.pdf	No public notice or CEQA compliance No scoping, No NEPA notice-- Invisible DHCCP Funding MOA
3-13-09	DWR _USBR	Federal Assistance Agreement(FAA) between DWR and USBR is signed to fund EIR-EIS for DHCCP "planning activities" deliveries include EIS-EIR & Feasibility Document at \$ 51.841 million dollars --Cooperative Agreement - 09FC200011 http://www.deltatunnelsboondoggle.com/wp-content/uploads/2013/02/DHCCP-Original-Agreement-09FC200011-2.pdf	No NOI, No NEPA compliance
4-9-09	USBR_WWD	Agreement for Advance Payment of Operation and Maintenance charges (09-WC-20-3801) allowing a reimbursement credit back to federal water districts that pay for DHCCP EIS-EIR funding of EIS and making these costs taxpayer funded & non-reimbursable. http://www.deltatunnelsboondoggle.com/wp-content/uploads/2013/02/DHCCP-USBR-3-09-Agreement-09-wc-20-3801-Westlands.pdf	No NEPA, CEQA compliance, No scoping or NOI
10-31-11	Secretary of Interior Letter to Congressman George Miler	BDCP MOA changes & disclosure of DHCCP MOA 1st Amendment and Federal White Paper first public mention of contractors elevated role and access as Responsible Agencies (CEQA) and Cooperating Agencies (NEPA) http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Letter_to_Congressman_Miller_regarding_MOA.sflb.ashx	Non-compliance with CEQA §15096(b)(2) and NEPA regulations 40 C.F.R. §1501.5 (c) &§1501.6(b)(2)

EXHIBIT A: Chronology of Federal Register Notices of Intent (NOI), changing project purpose statements, and preferential status given to selected water contractors (continued).

12-16-11	USBR, DWR, WWD,SCVWA, SLDMWA, SWPC, SFCWA,KCWA	First Amendment DHCCP MOA & BDCP MOA --commits DWR and USBR to listing water export contractors-- WWD, SCVWD, SLDMWA, KCWA and SWPC--as Responsible Agencies and Cooperating Agencies, thus elevating their interests and influence above others in this massive public project, and also increases planning funding. http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/First_Amendment_MOA_September_2011.sflb.ashx	Non-compliance with CEQA §15096(b)(2) and NEPA regulations 40 C.F.R. §1501.5 (c) &§1501.6(b)(2)
12-13-13	USFWS,NMFS, USBR & DWR	Joint Federal and State draft EIS-EIR for a Bay-Delta conservation plan to support a 50 year permit for the SWP CVP projects, with 150,000 acres of mitigation proposed.	
06-15-15	USBR-DWR	Federal Register NOI for BDCP-Cal Water Fix Re-circulated EIR_Supplemental EIS . Reclamation and DWR are lead federal and state agencies. NMFS, USFWS, and the U.S. Army Corps of Engineers are now cooperating agencies for the RDEIS/SDEIR. Tunnels (only) strategy is the export project alternative added. Water export contractors are again identified as Cooperating Agencies through prior agreements and retain this elevated status for the RDEIR/SDEIS. [73 FR 4178]	No scoping for this new water export project--USBR claims an exemption.
7-9-15	USBR-DWR	Released partially Re-circulated Draft Environmental Impact Report (EIR)/Supplemental Draft Environmental Impact Statement (EIS) on the Bay Delta Conservation Plan/California WaterFix . Project has now been transformed to construction and operation of a new export and diversion tunnels project with greater CVP-SWP exports, taking more water from the Bay-Delta estuary and seeking an ESA Section 7 take permit as the State & Federal preferred project. Actions necessary to protect water quality and aquatic life are deferred to sometime in the future.	
7-30-15	USBR-DWR	Executed Financial Assistance Agreement (FAA) for the final EIS-EIR of the Delta Habitat and Conveyance Program (DHCCP) for \$17.941+ Million. Funding agreement between USBR and DWR for a FEIS-FEIR document for the DHCCP specified purpose which includes, " <i>implementation of the proposed Habitat Conservation Plan and California Natural Community Conservation Plan alternatives within the Final Bay Delta Conservation Plan (BDCP) Environmental Impact Statement/Environmental Impact Report (EIR/EIS) document...</i> " [Agreement # R15AC0052] https://mcnerney.house.gov/sites/mcnerney.house.gov/files/documents/Murillo%20Ltr%20Re%20DHCCP_BDCP_CWF%20Appropriations%202016-2.pdf	No public notice, NEPA, or CEQA compliance, No scoping or NOI for the funding agreement.

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12-16-15	President Signs Water Infrastructure Improvement Act	Statutory [S 612 Title III, Subtitle J], provides governing operations of the federal and state water projects under the Endangered Species Act for up to five years, regardless of drought conditions. It also alters federal water policy in the Sacramento–San Joaquin Delta requiring maximum exports under specified conditions. The amount of additional water the new law will make available to CVP and SWP contractors is uncertain—though it is likely to vary considerably with hydrologic conditions.	FEIR-EIS does not analyze the impact of this Act on the new water export, diversion and tunnels operations project.
12-30-16	USBR-DWR	Federal Register Notice FEIS-EIR, DWR identified Alternative 4A <i>i.e.</i> the new tunnels, with three intakes, new diversion and export project as their proposed project and Reclamation has selected Alternative 4A as the National Environmental Policy Act preferred alternative. Now called Cal WaterFix. Water export contractors are identified as Cooperating Agencies through prior agreements and retain this elevated status for the FEIS/FEIR, giving them front row seats to ensure contractor "certainty" for maximum exports.[81 FR 96485]	Elevated status for water contractors not addressed in the fog of information provided in FEIR-EIS Table 1-1 in Volume I, 1-32 to 1-38 continues murky standing when these agencies do not own nor operate the SWP or CVP and do not hold water right permits.