



October 30, 2015

Ms. Karla Nemeth
Natural Resources Agency
1416 9th Street, Suite 1311
Sacramento, CA 95814

Re: California Water Fix – The Importance of Regional Sustainability in the North State

Dear Ms. Nemeth:

The North State Water Alliance (*Alliance*) provides comments today on the California Water Fix and the related environmental documents, including detailed supporting technical analyses.

The *Alliance*, which came together to promote responsible statewide water solutions that protect the economy, environment and quality of life for the north state and for all Californians, remains committed to help the Administration implement a comprehensive California Water Action Plan (Action Plan). In fact, we are undertaking various efforts in the north state to meet the Action Plan’s “three broad objectives: more reliable water supplies, the restoration of important species and habitat, and a more resilient, sustainably managed water resources system (water supply, water quality, flood protection, and environment) that can better withstand inevitable and unforeseen pressures in the coming decades.” The *Alliance* partners are working with state and federal agencies to advance local and regional water management to support many beneficial purposes, including cities and communities, farms and forests, fish, birds and recreation.

Today, as part of our ongoing efforts to advance our region’s sustainability, we are providing detailed technical comments expressing our concerns with the draft California Water Fix and the way in which it would impact regional sustainability in the north state. In sum, we remain concerned that Alternative 4(a) has not addressed our earlier comments (see July 28, 2014 letter and comments) regarding how the proposed project would redirect impacts--both water supply and financial--to the north state. In our view, the Administration should not advance the interests of one part of the state to the detriment of other parts of the state—in this case by redirecting impacts from the Bay-Delta to upstream areas and impeding upstream efforts to maintain or promote regional water sustainability. To avoid this conflict, the *Alliance* is committed to work with you and the Administration to develop a coordinated approach to managing the Delta as called for in the Action Plan.

More specifically,

- The California Water Fix appears to be designed to require additional flows into the Delta that would directly reduce available water supplies, both surface and groundwater, for the north state’s economy and environment. Unfortunately, the California Water Fix and its environmental document do not identify or sufficiently address these impacts. This is particularly a problem with the pending change petition process before the SWRCB, where the petitioners must demonstrate that “the change will not operate to the injury of any legal user of water” and fish and wildlife will not be affected.
- The operations, although not adequately described in the documents, seem to pose a threat to our ability to serve water for various north state beneficial purposes—both now and into the future.
- California Water Fix does not demonstrate that it can meet the biological needs of covered salmonid and pelagic fish species and is more likely to harm these species than contribute to their recovery.

The Cal Water Fix Project is a “Covered Action” under the Delta Plan and must demonstrate consistency with the Delta Plan. For the reasons described in our comments, the Project, including the RDEIR/SDEIS, is inconsistent with the Delta Reform Act’s co-equal goals for the Delta and numerous key Delta Plan policies because it fails to use the best available science; fails to properly define adaptive management; and will increase adverse effects to aquatic life. Thus a finding of consistency cannot be made.

As the *Alliance* has consistently stated, California needs to improve its water supplies, not just improve water conveyance across regions. The *Alliance* believes that the California Water Fix, as currently described, does not solve the state’s water supply reliability problem, does not further the co-equal goals, and has the potential to cause significant impacts to the north state.

The technical supplements with our detailed comments are available at www.northstatewater.org.

The *Alliance* looks forward to engaging with you, the Administration, the project proponents, and various other parties to craft strategies that improve water sustainability statewide.

Sincerely,



David Guy
President
Northern California Water Association



Mike McKeever
Chief Executive Officer
Sacramento Area Council of Governments



John Woodling
Executive Director
Regional Water Authority



John Kingsbury
Executive Director
Mountain County Water Resources Association



Peter Tateishi
President and CEO
Sacramento Metro Chamber

Cc: State and Federal Officials
NSWA Participants

**North State Water Alliance (NSWA) Comments on
Cal WaterFix and RDEIR/SDEIS
October 30, 2015**

These comments on the Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) for the Cal WaterFix Project (Project) are submitted on behalf of the North State Water Alliance (NSWA) and the parties listed on Exhibit A attached hereto.

I. The RDEIR/SDEIS Fails to Address NSWA's July 2014 Comments on the Effects of the Proposed North Delta Diversion

NSWA provided extensive comments on the Draft EIR/Draft EIS (DEIR/DEIS) for the BDCP, including detailed technical critiques by experts in the areas of hydrologic modeling and water supply impact assessment, and pelagic and anadromous fish. (See July 29, 2014 NSWA Comments on BDCP, Implementing Agreement and DEIR/DEIS.) The concerns raised in NSWA's 2014 comments were not addressed in the supplemental or revised analyses included in the RDEIR/SDEIS, including the new evaluation of Alternatives 4A, 2D and 5A. For example, NSWA's hydrologic experts, MBK Engineers, provided evidence and analysis that demonstrated that the BDCP hydrologic model, which was the foundation of the DEIR/DEIS impact analysis, was seriously flawed and had inaccurate and incomplete data and coding problems, reliance on an outdated version of CALSIM, and substantially underestimating Delta exports and overestimating Delta outflow, which resulted in a misleading and incomplete impact analysis. NSWA also commented that the failure to include a defined operational plan for the proposed new North Delta Diversion made it impossible to understand the proposed project or its effects on flows, water quality and water supply. These comments remain unaddressed in the RDEIR/SDEIS. The RDEIR/SDEIS continues to rely on the same flawed hydrologic model to analyze the new alternatives and no operations plan has been provided in or for the new Project or RDEIR/SDEIS. More unaddressed comments are described later in these comments.

Because no changes were made to the Project or RDEIR/SDEIS that would address the vast majority of NSWA's concerns, to the extent new alternatives, including Alternative 4A, are similar to the previously proposed BDCP CM1, and to the extent the RDEIR/SDEIS relies on the modeling conducted for the BDCP, NSWA's prior comments apply to the Cal WaterFix Project and RDEIR/SDEIS, and NSWA reasserts its prior comments here and incorporates them by reference as comments on the RDEIR/SDEIS and Cal WaterFix Project alternatives.

II. The RDEIR/SDEIS Is So Badly Organized that It Does Not Enable the Public to Understand the Proposed Project, Let Alone the Project's Impacts on the Environment

The RDEIR/SDEIS is poorly organized, requiring a reviewer to toggle back and forth among at least three different extremely lengthy portions of the combined environmental document (the RDEIR/SDEIS, Appendix A, and various charts and figures) in order to review it. This failure to provide a cohesive analysis so impedes public review and comment of the RDEIR/SDEIS that it violates CEQA and NEPA informational and readability requirements. When information is scattered throughout the document in a haphazard way, as here, the true impacts of the project are obscured, and it is impossible for the Lead Agency (here, DWR) to fulfill the requirement for a good faith analysis. "Information scattered here and there in EIR appendices, or a report buried in an appendix, is not a substitute for a good faith reasoned analysis." (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239; see also *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 723-24 (report on SWP water availability, which was "buried in an appendix" to the EIR, could not overcome challenge that EIR failed to properly analyze impact of SWP water availability on project).) Likewise, NEPA requires that an EIS be "organized and written so as to be readily understandable by governmental decision makers and by interested non-professional laypersons likely to be affected by actions taken under the EIS." (*Oregon Env'tl. Council v. Kuzman* (9th Cir. 1987) 817 F.2d 484, 494.) While technical material included in an appendix may be exempted from the "readability requirement," an agency may not avoid its obligation to provide a clear assessment of a project's environmental impacts simply by placing complicated information or analyses in an appendix. (*Id.* at p. 494.)

Although the original BDCP DEIR/DEIS contained significant flaws (including many still unaddressed in the RDEIR/SDEIS), the RDEIR/SDEIS suffers an even more fundamental problem: it is poorly organized, difficult to navigate, and relies almost entirely on lengthy appendices and internal cross-references to support its analysis. This violates CEQA's requirement that data "be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.)

A representative example of the problems with the RDEIR/SDEIS's analysis is the following discussion related to water quality impacts: The RDEIR/SDEIS states, at Appendix B, p. 83, that modeling results "indicate that the incremental changes for Alt 4A (H3) and Alt 4A (H4) when compared to the No Action Alternative are trending similar to A4 (H3) and A4 (H4), at both the ELT [Early Long Term timeframe] and LLT [Late Long Term timeframe]." This discussion reflects the RDEIR/SDEIS's Band-Aid

approach to impact analysis and resulting failure to appropriately model the effects of the actual Project now being proposed, relying instead on inferences gleaned from a sensitivity analysis. The number of dizzying cross references to various operating scenarios and baselines, combined with the wholly unclear phrase “trending similar,” is a prime example of the RDEIR/SDEIS’s failure to present information in a manner calculated to adequately inform the public and decision makers. The RDEIR/SDEIS’s failure to present information in a manner that actually informs the public requires DWR to withdraw the document and start over with an entirely new and self-contained draft EIR that can be understood by decision makers and members of the public.

III. Fundamental Flaws in the Technical Analyses Supporting the RDEIR/SDEIS Undermine Its Conclusions

NSWA and others, including the Delta Independent Science Board (ISB), commented previously on the numerous errors and omissions in the BDCP and DEIR/DEIS’s modeling of Bay Delta hydrology. The RDEIR/SDEIS fails to correct these problems. NSWA also commented on the DEIR/DEIS’s failure to adequately analyze impacts to endangered and threatened Sacramento River fish from the North Delta Diversion. Expert reports evaluating the RDEIR/SDEIS demonstrate that the same questions and concerns about the impacts of the previously preferred project apply to the new alternatives, including Alternative 4A.

CEQA requires that an EIR analysis and impact determinations be based on substantial evidence. CEQA “[c]ase law defines “substantial evidence” supporting an agency’s decision as ‘ “relevant evidence that a reasonable mind might accept as adequate support for a conclusion” ’ [citation] or ‘evidence of ‘ “ponderable legal significance . . . reasonable in nature, credible, and of solid value” ‘ “ [citation].’” (*Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 261, fn. 10.) For the reasons discussed in this letter, the technical analyses supporting the RDEIR/SDEIS do not meet this standard; their flaws are so substantial that they invalidate the RDEIR/SDEIS analyses and impact determinations based on these technical analyses.

A. Faulty Assumptions, Errors and Outdated Tools Used in the Modeling of Bay Delta Hydrology Preclude Accurate or Meaningful Evaluation of Project Impacts

The NSWA retained MBK Engineers, one of the most respected engineering firms in California and one with extensive experience in analyzing the operations of the Central Valley Project (CVP) and the State Water Project (SWP), to evaluate the hydrologic modeling that serves as the foundation for the environmental analysis in the RDEIR/SDEIS. MBK also reviewed and prepared technical comments on the prior BDCP

project and DEIR/DEIS. As described in the technical memorandum included as Exhibit B to these comments, MBK found that the modeling used for the RDEIR/SDEIS is fundamentally flawed, in two major ways. (Ex. B, MBK Engineers, *Technical Comments on the Bay Delta Conservation Plan/California Water Fix Partially Recirculated Draft EIR/Supplemental Draft EIS*, October 28, 2015 (Supplemental MBK Report).)

First, the modeling that was done does not accurately reflect the project now being proposed. Instead, the modeling that was used is the same modeling that was used for the BDCP DEIR/DEIS that was released for public review in December 2013. That modeling suffered from a number of flaws, none of which has been corrected. Further, the Cal WaterFix Project is substantially different from the previous Bay-Delta Conservation Plan project, so even if the BDCP modeling had been performed correctly, that modeling would not apply to the current project. For example, the BDCP anticipated that there would be 25,000 acres of tidal marsh created by 2025, which would substantially ameliorate salinity in the Delta. The Cal WaterFix Project, which relies on the BDCP modeling, only includes 59 acres of tidal marsh.

Second, the Cal WaterFix Project does not include any type of definite proposed project operations. The RDEIR/SDEIS does not specify how much water would be diverted at the North Delta Diversion, under which conditions, during which seasons, etc. Nor does the Project specify where the large quantities of water needed for spring outflow would be obtained, or even how much water would be acquired in specific years. All such detail is dismissed under the rubric of “adaptive management” without providing any guidance on how the adaptive management is to proceed, who will participate in that management, or even a description of the goals of adaptive management. These omissions make it impossible to draw any conclusions about what the effects of the Project might be on the environment or on legal users of water in the Sacramento Valley, the northern Delta or elsewhere.

B. The RDEIR/SDEIS Fails to Adequately Analyze Project Impacts to Sacramento River Basin Anadromous Salmonids

Fisheries biologist Dave Vogel, who previously reviewed the BDCP and accompanying DEIR/DEIS, continues to conclude that the Project’s potential adverse impacts to anadromous salmonids could be catastrophic. (Ex. C, Vogel, D., *Comments on the Bay-Delta Conservation Plan/California WaterFix Public Review Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS)* (October 20, 2015).) Mr. Vogel’s detailed review of the RDEIR/SDEIS primarily focused on the potential effects of the Project Alternative 4A on Sacramento River basin anadromous salmonids. Mr. Vogel concludes that the RDEIR/SDEIS contains a deeply flawed analysis of the potential effects and impacts of

Alternative 4A on anadromous fisheries including, but not limited to, the following key deficiencies:

- Many major specific design features and critical operational criteria for Alternative 4A have not been determined. That information is critically necessary to adequately analyze environment impacts of the Project. The RDEIR/SEIS is severely deficient in this regard.
- The confusing organization and poor readability of the RDEIR/SDEIS make it exceedingly difficult to review the document and provide constructive comments. Mr. Vogel notes that the Delta ISB also found this RDEIR/SDEIS deficiency to be highly problematic.
- The RDEIR/SDEIS continues to overstate potential benefits to fish, and no credible supporting evidence is provided.
- The RDEIR/SDEIS: (1) has not corrected serious deficiencies and errors in the fish models used to evaluate Project alternatives, (2) continues to propagate flawed assumptions and oversimplification of juvenile salmonid behavior and adverse impacts caused by the three north Delta intakes, (3) lacks the necessary technical information on fish screen design and operational criteria, (4) has not addressed the anticipated high salmon mortality at the north Delta intakes and in areas downstream from the intakes, and (5) overstates purported benefits of proposed predator control and nonphysical fish barriers without supporting details and scientific justification.
- Misuse or lack of use of the best available science.
- Improper reliance on “adaptive management” without describing how future problems may be resolved through such management.
- The best available scientific information indicates that Alternative 4A would contribute considerably to significant cumulative adverse impacts to salmon.

These fundamental errors identified by Mr. Vogel must be corrected before the RDEIR/SDEIS can be used to accurately characterize the Project’s effects on anadromous salmonids.

C. The RDEIR/SDEIS Fails to Adequately Analyze Project Impacts to Pelagic Fish

Robert Latour, a Professor of Marine Science at the Virginia Institute of Marine Science, of the College of William & Mary, previously prepared comments on the BDCP and the DEIR/DEIS, which were included with the July 29, 2014 NSWA's comments on the BDCP and the DEIR/DEIS. Professor Latour has reviewed the pertinent sections of the RDEIR/SDEIS and prepared comments concerning the potential impacts of the new proposed Project on delta smelt and longfin smelt. A copy of these comments is enclosed with this letter. (Ex. D, Latour, R. PhD., *Technical review of portions of the revised draft Environmental Impact Report and supplemental draft Environmental Impact Statement (RDEIR/SDEIS) for the Bay-Delta Conservation Plan (BDCP)*, October 28, 2015.)

As discussed in Professor Latour's new comments, the RDEIR/SDEIS does not address his prior comments, and the deficiencies in the BDCP and the Draft EIR that were described in his prior comments now apply to the proposed Cal WaterFix Project. Professor Latour's new comments also describe several deficiencies in the RDEIR/SDEIS's analyses of the impacts of this proposed project on delta smelt and longfin smelt.

IV. The RDEIR/DEIS Fails to Summarize or Resolve Disagreements Among Experts Regarding its Underlying Data and Methodologies

The CEQA Guidelines provide that when experts disagree about an EIR's data or methodology, the EIR should summarize the main points of disagreement. (CEQA Guidelines, §15151.) When the EIR's discussion and analysis is not modified to incorporate the suggestions made in comments on the draft document, the EIR must acknowledge the conflict in opinions and explain why they have been rejected, supporting its statements with relevant data. (*Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367, 1371.) An EIR that fails to explain major discrepancies in critical data or fails to resolve the conflict with substantial evidence is legally inadequate. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260.)

Here, qualified experts (including the Delta ISB, MBK Engineers, Dave Vogel and Robert Latour) provided detailed comments constituting substantial evidence that show why and how the DEIR/DEIS's hydrologic modeling and fisheries analyses were flawed and inadequate to support the DEIR/DEIS's analyses and impact determinations, and thus to support adequate public participation and agency decision making. These expert comments raised issues of such significance regarding the foundational assumptions, data and methodology used in the DEIR/DEIS as to merit discussion in a

revised and recirculated Draft EIR/EIS. The RDEIR/SDEIS does not address these expert criticisms of the DEIR/DEIS.

By deferring any discussion of these issues to the Final EIR/EIS, the lead agencies have effectively precluded informed public participation on some of the most important aspects of the environmental review documents. Given the magnitude of the criticisms levied at the DEIR/DEIS data and methodologies, and the fact that the same errors appear to have been repeated in the RDEIR/SDEIS (see Exhibit B), it would be an abuse of discretion for the lead agencies to fail to directly address the key expert criticisms in the RDEIR/SDEIS so the public and decision makers could understand and weigh the agencies' views and supporting evidence in their evaluation of the RDEIR/SDEIS.

V. The RDEIR/SDEIS Fails to Adequately Define the "Project" Being Analyzed

A finite project description is the "*sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) In contrast, a "curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*County of Inyo*, 71 Cal.App.3d at 197-98.) The RDEIR/SDEIS's project description lacks the information necessary for members of the public or the agency to evaluate Project impacts. This deficiency is significant, as "only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives." (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454.)

A. The RDEIR/SDEIS Fails to Adequately Define Proposed Project Operations

One of the most significant problems with the RDEIR/SDEIS is its failure to define proposed Project operations, especially the amounts of spring outflow and the quantity and timing of water diverted at the North Delta Diversion, as well as how the CVP and SWP would be operated if the Project were to be approved. Each of these operational aspects is critical to understanding the Project's environmental effects.

One of the key elements of Alternative 4A is additional spring outflow in order to meet the needs of threatened and endangered fish species. However, the RDEIR/SDEIS does not describe the quantity, the timing or the source of water for this additional outflow. MBK Engineers aptly characterized the problem with regard to the RDEIR/SDEIS's information about spring outflow:

This description [on page 4.1-13 of the RDEIR/SDEIS] implies that the spring outflow will be bounded between zero when meeting existing

outflow requirements contained in D-1641, and between 9,200 and 44,500 cubic feet per second (cfs) as defined in Table 3-24 of the BDCP Draft EIR/EIS. While the existing outflow requirements in D-1641 are well defined and understood in terms of source, quantity, and timing, the upper bound on this additional required spring outflow is not. (Supplemental MBK Report at pp. 2-3.)

It is impossible to understand the Project's operations because spring outflows (one of the most important parameters of Project operations) could vary between zero and 44,500 cfs. The RDEIR/SDEIS states only,

the proposed project includes spring outflow criteria, which are intended to be provided through acquisition of water from willing sellers. If sufficient water cannot be acquired for this purpose, the spring outflow criteria will be accomplished through operations of the SWP and CVP to the extent an obligation is imposed on either the SWP or CVP under federal or applicable state law. (RDEIR/SDEIS, Section 4.1.2.2, p. 4.1-6.)

Essentially, this statement says DWR will – from some source or sources yet to be determined – acquire a quantity of water to be determined, which will be used in some manner to be determined, with effects that will surely be beneficial to the environment. This does not represent the good faith analysis required by CEQA. In particular, because both the CVP and the SWP have contractors – including many members of the NSWA – who would not benefit from the implementation of Cal WaterFix, it is impossible to tell how the increase spring outflow criteria would affect those contractors when all the RDEIR/SDEIS says is that those criteria would be met "through operations of the SWP and CVP." This omission precludes NSWA members from having any reliable understanding of what California WaterFix's water-supply impacts would be.

Second, one of the key changes from the current conditions is the proposed construction of the North Delta Diversion near Hood and the use of that diversion to avoid adverse impacts to fisheries in the Delta. The addition of a second point of diversion means that the CVP and SWP operators must determine when water will be diverted from which point of diversion and in what quantities. The RDEIR/SDEIS, however, states only that the proposed Project operations "include a preference for south Delta pumping in July through September to provide limited flushing for improving general water quality conditions and reduced residence times." (RDEIR/SDEIS p. 4.1-6.) As with the discussion of spring outflow criteria, this general statement begs the questions needed for a good faith environmental analysis: to what extent will the preference be exercised, how much of a preference is there, in which year types, how much flushing and measured at what points in the Delta, for which water quality

objectives and what degree of reduction in residence times. Without answers to these (and other) questions, there is insufficient information about the Project to allow for the environmental analysis required by CEQA and NEPA.

B. The Adaptive Management Process Is Vague and Uncertain

The RDEIR/SDEIS properly recognizes that the Delta environment is likely to change over time and so proposes an adaptive management program to address those changes. However, as MBK Engineers described, “[p]roviding no description of the likely range of changes in the other criteria that may occur under the Adaptive Management Process is another area wherein the project description lacks sufficient detail for analysis of potential environmental effects.” (Supplemental MBK Report at p. 4.)

Key omissions in the RDEIR/SDEIS regarding the Project’s adaptive management program are: (i) the lack of any description of how the iterative planning process will occur, and (ii) the key criteria for changing Project operations: how often Project operations will be modified (e.g., hourly, daily, weekly, monthly, annually, or on an “as needed” basis); whether the criteria for modifying Project operations will include water quality at diversions located in the Delta or be limited to the needs of fish species; and many other important questions. Despite the lack of information about these critical aspects of Project operations, the RDEIR/SDEIS states that it is *assumed* that the adaptive management process “would not, by itself, create or contribute to any new significant effects.” (RDEIR/SDEIS, p. 4.1-18.) CEQA requires that an EIR be based on substantial evidence. Substantial evidence is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion . . .” (CEQA Guidelines, § 15384(a).) Substantial evidence must include “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (CEQA Guidelines, §, 15384(b).) The lack of facts about the adaptive management process results in a lack of substantial evidence to support the RDEIR/SDEIS’s determination that the Project’s adaptive management program would not create or contribute to any significant effects.

The lack of information about the adaptive management program also means that the public cannot determine who will be involved in the adaptive management program (e.g., could any water user in California be involved, could the Delta Counties be involved, or will the key stakeholders be limited to hearing about the results of a closed-door meeting between the Lead Agencies?). These all are fundamental questions about how adaptive management will function and its ability to address adverse environmental effects if and when they occur. Due to the omission of this information, the REIR/SDEIS fails in its fundamental purpose to “demonstrate to an apprehensive citizenry that the agency has . . . analyzed and considered the ecological implications of its action.” (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

VI. The RDEIR/SDEIS Does Not Analyze the Proposed Project

To the extent that the RDEIR/SDEIS attempts to define a project for analysis, it does not analyze the project being proposed for adoption. An EIR that describes one project but analyzes another does not meet CEQA's basic objectives of promoting informed decision-making. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d at 197 (EIR's "incessant shifts among different project descriptions...vitiates the city's EIR process as a vehicle for intelligent public participation."); accord, *Western Placer Citizens for an Agriculture & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 898 (the project analyzed must be consistent with the project description, "[t]he defined project and not some different project must be the EIR's bona fide subject."))

There are several areas where the mismatch between the project as analyzed and the project proposed is so substantial as to call into question the entire impact analysis. Three changes between the project described in the DEIR/DEIS and the new Cal WaterFix are of particular importance: (i) tidal wetlands, (ii) the salinity control point (Emmaton vs. Three Mile Slough), and (iii) the Head of Old River barrier. First, the modeling runs used for the RDEIR/SDEIS (which are the same model runs as were used for the BDCP DEIR/DEIS) assumed that there would be at least 25,000 acres of tidal marsh by 2025 and 65,000 acres of tidal marsh by 2060. By contrast, the actual project currently being proposed only includes 59 acres of tidal marsh. This difference is quite important; tidal marsh habitat has a beneficial effect on salinity in the Delta. Thus, MBK concluded that it would be "inappropriate to assume that ALT 4A in the RDEIR/SDEIS would have the same effects on Delta water quality, tidal energy, and CVP/SWP operations as a project that includes nearly 25,000 acres more tidal wetlands restoration." (Supplemental MBK Report at p. 5.)

Second, the modeling runs used by the RDEIR/SDEIS, which were prepared for the BDCP DEIR/DEIS, calculate compliance with salinity water quality objectives mandated by D-1641 at Three Mile Slough. By contrast, the revised Project and RDEIR/SDEIS now contemplates compliance with the same salinity requirement at Emmaton, which is located substantially downstream from Three Mile Slough. Compliance at Three Mile Slough requires less outflow than compliance with the same salinity requirement at Emmaton. Given that RDEIR/SDEIS analysis assumed compliance would occur at Three Mile Slough but the revised Project now contemplates compliance with the salinity standards at Emmaton, all of the assumptions of outflow needed to meet salinity standards that underlay the DEIR/DEIS modeling are underestimated. Given the importance of those salinity standards, this change makes it difficult, if not impossible, for any party to understand the true effects of the proposed Project on salinity.

Third, the Head of Old River barrier (“HORB”) is an important facility that determines, in significant part, salinity in the central and southern Delta. As described in the Supplemental MBK Report at page 4, the Project assumes that the HORB would be adjusted as part of the adaptive management plan, but “[t]hese potential adjustments and environmental effects are not analyzed in the RDEIR/SDEIS.”

VII. The RDEIR/SDEIS Uses an Incorrect Baseline

The RDEIR/SDEIS used a baseline condition that does not include the Fall X₂ flows currently mandated by the Biological Opinions that govern the operation of the CVP and the SWP. The effect of that choice is to make the baseline condition appear to be more saline than it actually is, so that the potential impacts of the Project appear to be significantly smaller than they would be with an appropriate baseline. See *RDEIR/SDEIS*, p. 4.1-42.

VIII. The RDEIR/SDEIS Fails to Adequately Analyze Project Impacts on Sacramento Valley Waterfowl and the Pacific Flyway

Many avian species use the Sacramento Valley’s irrigated croplands and managed wetlands as winter and breeding habitat. The croplands, especially small grains, along with publically and privately managed wetlands, provide crucial habitat in the Pacific Flyway, particularly in areas such as the Central Valley where only a fraction of historic wetlands remain. The habitat values created by these lands are described in detail in the Central Valley Joint Venture 2006 Implementation Plan (www.centralvalleyjointventure.org/science). In its comments on the DEIR/DEIS, NSWA expressed concerns about the potential for the North Delta Diversion to adversely affect the Sacramento Valley’s water supplies, and the potential for adverse effects to Sacramento Valley waterfowl and the Pacific Flyway from the reduction in diversions of water that support avian habitat values on both irrigated cropland and wetlands. This includes both direct diversions of water to support these values, as well as tailwater from other agricultural uses and managed wetlands. Mark Petrie with Ducks Unlimited describes these impacts in detail in his comments for the November 14, 2012 State Water Resources Control Board (SWRCB) workshop on the Bay-Delta Plan (http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docsc omments111312/mark_petrie.pdf.) These comments and concerns remain unaddressed in the RDEIR/SDEIS.

IX. The Changes to the Proposed Project are So Fundamental as to Render the Entire Combined DEIR/DEIS/RDEIR/SDEIS Inadequate and to Trigger the Need for A New Alternatives Analysis under CEQA

The project proponents have fundamentally altered the nature of the proposed project from the BDCP described in the DEIR/DEIS (preferred Alternative 4) to the Cal WaterFix Project described in the RDEIR/SDEIS (new preferred Alternative 4A). The new proposed project is a significant departure from the original Draft BDCP. The prior proposed project was a Habitat Conservation Plan under the federal Endangered Species Act. The Cal WaterFix significantly departs from the BDCP, eliminating the habitat conservation portion of the project, and the objective of restoration the Delta ecosystem, and retaining just the proposed North Delta diversion and conveyance project. These changes are so significant that the Project no longer qualifies for inclusion into California's Delta Plan. (Cal. Water Code, §85320.) These fundamental changes alter both the purpose and impacts of the Project to such a significant degree that the combined DEIR/DEIS – the BDCP DEIR/DEIS plus the Cal Water Fix RDEIS/SDEIS – is not adequate, and the lead agencies must analyze a reasonable range of alternatives to the new Project as part of the revised analyses necessary to satisfy CEQA and NEPA.

The new “project” involves the following major changes from the original proposal evaluated in the DEIR/DEIS:

- (i) Elimination of 25,000 acres of habitat restoration;
- (ii) Change in method of diversion from pumping to gravity, including change from above-ground pumping structures; and
- (iii) Major modifications of disclosed operating conditions, including potentially substantial increases in spring Delta outflows.

Because of these major changes, the combined DEIR/DEIS – the BDCP DEIR/DEIS plus the California Water Fix RDEIS/SDEIS – would violate the fundamental CEQA rule that a project description must be “accurate, stable and finite.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App. 4th 645, 655.) In essence, the RDEIR/SDEIS analyzes a different project than the BDCP DEIR/DEIS, a project that contains a much smaller amount of the restoration that was intended to offset the environmental impacts of the only project that Cal Water Fix now proposes. As a result, the combined DEIR/DEIS and RDEIR/SDEIS is internally inconsistent in describing the actual project and what it will do. This sort of internally inconsistent project description results in an EIR failing in its purpose of allowing interested parties to understand and weigh a project's environmental consequences, thus violating CEQA. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App. 4th 645, 654-657.) The

combined DEIR/DEIS and RDEIR/SDEIS cannot be sufficient because it effectively analyzes two very different projects.

Not only do these major changes to the Project fundamentally alter its purpose, but they also represent wholesale changes in the assumptions underlying the DEIR/DEIS modeling and mitigation. Due to the scope of the changes, and change in essential premise from the previously proposed BDCP project, the Cal WaterFix – considered in isolation -- constitutes an entirely new proposed project. The RDEIR/SDEIS evaluates only two alternatives to that project – Alternatives 2D and 5A. Of these alternatives, Alternative 5A is plainly infeasible because it proposes diversion of up to 15,000 cfs, an almost 75 percent increase over historic deliveries that could never occur under existing and reasonably foreseeable environmental regulations and that most certainly would not avoid or substantially lessen any of the significant effects of the preferred alternative 4A. (CEQA Guidelines, § 15126.6, (a), (f).) Other than the required No Action Alternative, that leaves only one alternative, Alternative 2D, which proposes diversion of up to just 3,000 cfs. The Project proponents would almost certainly deem Alternative 2A to be infeasible due to the low return on the massive investment associated with such small increase in water supply reliability. NEPA guidance explains that the range of alternatives “include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.” (Council on Environmental Quality, *Memorandum For Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process* (March 16, 1991), ¶ 2a.)

Because the only two alternatives to the new preferred project included in the RDEIR/SDEIS would not avoid or substantially lessen any of the proposed Project’s significant impacts, or are not practical or feasible from the technical and economic standpoint and using common sense, the RDEIR/SDEIS does not satisfy CEQA and NEPA requirements that an EIR/EIS analyze a reasonable range of alternatives. The RDEIR/SDEIS must be revised to evaluate realistic alternatives capable of avoiding or substantially lessening the significant impacts of the massive proposed North Delta Diversion that now constitutes the Cal WaterFix Project, including defined and viable reduced diversion alternatives. (*See Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 (invalidating EIR for project to increase Russian River diversions on grounds that EIR should have considered alternatives that would reduce dependence on diversions with significant environmental impacts).

X. The EIR is Inadequate to Support Responsible Agency Decision Making

The numerous flaws in the DEIR/DEIS and RDEIR/SDEIS, including the lack of essential information about the Project’s effects on upstream and Delta water supplies and impacts to threatened and endangered fish species, render the document

inadequate to meet the needs of the state responsible agencies and federal agencies with permitting jurisdiction over the Project. The specific bases for this concern have been stated previously in the July 2014 comments of NSWA and many others, and additional evidence and analysis supporting this comment is included in Exhibits B through D.

For example, as a CEQA responsible agency, the SWRCB must rely on the Project EIR when considering the water rights changes necessary to implement the Project. The RDEIR/SDEIS cannot support the SWRCB's required findings for the Project's pending petitions to change water rights (including the finding under Water Code section 1702 that the changes "will not operate to the injury of any legal user of the water involved"), because Project effects on upstream hydrology, and the continued abilities of upstream water users to exercise their water rights, have not been adequately evaluated. For these reasons, the RDEIR/SDEIS does not support a finding that the Project-related water rights changes will not operate to the injury of any legal user of water. Similarly, because of substantial errors and omissions, the analysis of impacts to threatened and endangered fish species (detailed in Exhibits C and D) does not satisfy the legal requirement that water rights changes not adversely affect fish and wildlife. These same flaws render the RDEIR/SDEIS inadequate to support issuance of a Clean Water Act section 404 permit for the proposed diversion structures, or other required state and federal permits. The RDEIR/SDEIS thus is inadequate to support the subsequent approvals required to implement the Project.

XI. Conclusion

Like the DEIR/DEIS, the RDEIR/SDEIS fails to provide sufficient meaningful information about the proposed Project's adverse effects and omits consideration of many impacts of concern to residents of the Sacramento Valley. Rather, the RDEIR/SDEIS continues to provide an overly optimistic assessment of Project effects on water supply, water quality, fish and wildlife that is not based on the best available science. The RDEIR/SDEIS relies on flawed technical studies and incomplete data and omits essential information, violating CEQA and NEPA requirements that it actually inform the public and decision makers about the Cal WaterFix Project's potential environmental impacts. In fact, the Delta ISB found the RDEIR/SDEIS "sufficiently incomplete and opaque to deter its evaluation and use by decision-makers, resource managers, scientists and the broader public." (September 30, 2015 letter to R. Fiorini et al from Delta Independent Science Board Re. Review of environmental documents for BDCP/CA WaterFix at p. 1, accessed at <http://deltacouncil.ca.gov/docs/final-delta-isb-comments-partially-recirculated-draft-environmental-impact-reportsupplemental>.) The Delta ISB cited fundamental flaws in the RDEIR/SDEIS including, but not limited to, "overall incompleteness through deferral of content to the Final EIR/EIS . . . ; specific incompleteness in treatment of adaptive management, habitat restoration, levees and

long-term effects; and inadequacies in presentation.” (*Id.* at p. 4.) As a result of these overwhelming structural, organizational and content flaws, the Delta ISB concluded that the RDEIR/SDEIS “fails to adequately inform weighty decisions about public policy.” (*Id.*)

Due to the fundamental changes in the Project since publication of the DEIR/DEIS, the significant changes needed to the underlying technical studies and analyses, and the extensive comment and criticism of these documents, further edits and revisions or partial recirculation of the current DEIR/DEIS or RDEIR/SDEIS will not satisfy CEQA and NEPA informational mandates. The state and federal lead agencies must start over and prepare a new draft EIR/EIS that addresses the numerous concerns and criticisms raised in its comments on the DEIR/DEIS and RDEIR/SDEIS and identifies reasonable alternatives to the project that is now proposed.

Exhibits:

- Exhibit A: List of NSWA Commenting Parties.
- Exhibit B: MBK Engineers, *Technical Comments on the Bay Delta Conservation Plan/California Water Fix Partially Recirculated Draft EIR/Supplemental Draft EIS*, October 28, 2015.
- Exhibit C: Vogel, D. *Comments on the Bay Delta Conservation Plan/California WaterFix Public Review Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS)*, October 20, 2015.
- Exhibit D: Latour, R. PhD., *Technical review of portions of the revised draft Environmental Impact Report and supplemental draft Environmental Impact Statement (RDEIR/SDEIS) for the Bay-Delta Conservation Plan (BDCP)*, October 28, 2015.