

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
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PROTEST– PETITION

PROTEST TO PETITION

REQUESTING CHANGES IN WATER RIGHTS OF THE DEPARTMENT OF
WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE
CALIFORNIA WATERFIX PROJECT

California Department of Water Resources Permit Nos. 16478, 16479, 16481, 16482,
(App. Nos. 5630, 14443, 14445A, 17512.)

United States Bureau of Reclamation Permit Nos. 12721, 12722, 12723, 11315, 11316,
11967, 11968, 11969, 11971, 11973, 12364, (App. Nos. 5626, 9363, 9364, 13370, 13371,
5628, 15374, 15375, 16767, 17374, 17376.)

We, Save the California Delta Alliance (“Delta Alliance”), P.O. Box 1760, Discovery Bay, CA 94505; Janet McCleery and Michael McCleery, 5672 Drakes Drive, Discovery Bay, CA 94505; Frank Morgan, 1700 Riverlake Rd., Discovery Bay, CA 94505; and Captain Morgan’s Delta Adventures, LLC, 1700 Riverlake Rd., Discovery Bay, CA 94505, have carefully read Notice Of Petition Requesting Changes In Water Rights Of The Department Of Water Resources And U.S. Bureau Of Reclamation For The California Waterfix Project dated October 30, 2015 (“Notice”), Petition For Change dated August 25, 2015, and addendum and errata to Petition For Change, dated September 11, 2015.

Protest Based On Public Interest Considerations:

The proposed changes in the point of diversion / re-diversion will:

- Not best serve the public interest or conserve public trust uses,
- Be contrary to law, and
- Have an adverse environmental impact.

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I. Statement Of Facts.

A. Protestants To The Petition.

1. Save the California Delta Alliance. Delta Alliance was formed in 2010 and is a membership organization headquartered in Discovery Bay, California. We regularly turn out several hundred enthusiastic members at our town-hall style meetings that are held several times a year in Discovery Bay.

Several hundred Delta Alliance members own waterfront homes with attached docks in Discovery Bay. Our members possess riparian rights to Delta waters abutting their properties, including Kellogg Creek, Indian Slough, and the bays of Discovery Bay that are fed by the waters of Kellogg Creek and Indian Slough.

The waterfront lots of Discovery Bay, including those of our members, extend beyond the low tide line and embrace navigable waters of the United States. The navigable waters over the submerged lands owned by our members are subject to recreational use by the general public pursuant to the public trust doctrine. However, our members possess distinct riparian rights to recreation in the waters over and adjacent to their lands.

Our members recreate intensely in the waters of Kellogg Creek, Indian Slough, and the bays of Discovery Bay fed by Kellogg Creek and Indian Slough. Recreational activities include swimming, fishing, paddle boarding, and many other forms of recreation that include frequent and prolonged human contact with the waters of the Delta by children and adults.

In addition to representing the rights of waterfront homeowners in these proceedings, Delta Alliance members swim, fish, and engage in watersports throughout the Delta. Delta Alliance members also include water-related Delta businesses. Among Delta Alliance's organizational purposes is preservation and restoration of the Delta ecosystem. Delta Alliance members regularly boat throughout the Delta, San Francisco Bay, and the coastal waters of Northern California. Our members view and monitor the Delta ecosystem and will suffer injury as the result of harm to the Delta ecosystem.

Our members retain their riparian legal rights to put Delta waters to beneficial use by individually diverting small quantities of water for irrigation of gardens and other domestic uses.¹

However, this Protest is based on public interest considerations.

2. Janet McCleery, Michael McCleery, And Frank Morgan. Janet and Michael McCleery own and reside at 5672 Drakes Drive, Discovery Bay, CA 94505, which is a waterfront parcel with an attached dock abutting Marlin Bay. Marlin Bay is fed by the waters of Indian Slough.

The McCleerys exercise their riparian recreational rights by swimming and engaging in water sports in the waters overlying their submerged lands and abutting their riparian lands. The McCleerys also dock their boat at their attached dock and exercise the navigational rights attendant upon riparian ownership.

¹ Pursuant to their riparian rights, our members have a right to oppose a change in the point of diversion pursuant to Water Code section 1702:

Accordingly, we must conclude that section 16 of the Water Commission Act allowed anyone who had a legal right to use water to oppose a change in the point of diversion of an appropriation on the ground the change would interfere with his or her legal right to use the water involved.

State Water Res. Control Bd. Cases, 136 Cal. App. 4th 674, 803, 804 (2006) (emphasis on *all* original).

The McClearys also boat and recreate throughout the Delta, including regularly swimming, fishing, and engaging in watersports in Delta waters.

Frank Morgan owns and resides at 1700 Riverlake Rd., Discovery Bay, CA 94505, which is a waterfront parcel with an attached dock abutting Sand Bay. Sand Bay is fed by the waters of Kellogg Creek.

Mr. Morgan exercises his riparian recreational rights by swimming and engaging in water sports in the waters overlying his submerged lands and abutting his riparian lands. Mr. Morgan also docks his boat at his attached dock and exercise the navigational rights attendant upon riparian ownership.

Mr. Morgan also boats and recreates throughout the Delta, including regularly swimming, fishing, and engaging in watersports in Delta waters.

The McCleary's and Mr. Morgan members retain their riparian legal rights to put Delta waters to beneficial use by individually diverting small quantities of water for irrigation of gardens and other domestic uses.

However, this Protest is based on public interest considerations.

3. Captain Morgan's Delta Adventures, LLC, Captain Morgan's Delta Adventures' business address is 1700 Riverlake Rd, Discovery Bay, CA 94505. Captain Morgan's Delta Adventures operates the 55' charter vessel Rosemarie, which is berthed in Discovery Bay. Rosemarie's cruises allow local and out-of-town guests to enjoy the beauty of the California Delta and to recreate in Delta waters. In 2015, Rosemarie made 136 cruises traveling as far upstream as Sacramento, as far west as Antioch, and as far east as the Port of Stockton. In December 2015 alone, Rosemarie cruised over 1,000 guests in and around Discovery Bay to view the annual holiday light displays.

B. The California WaterFix Project.

Begun in 2006, the Bay Delta Conservation Plan ("BDCP") was initially proposed with two basic components. The first was to build twin water diversion tunnels, each 40 feet in diameter, with a combined capacity large enough to divert 15,000 cfs from new points of diversion on the Sacramento River a few miles downstream of Sacramento. The second component was to restore or create up to 150,000 acres of wetland and other habitat in the Delta.

The foundation of the project was that operation of the tunnels, in conjunction with vast new areas of Delta habitat, would meet the "gold standard" of a habitat conservation plan ("HCP") pursuant to section 10 of the federal Endangered Species Act and a natural communities conservation plan ("NCCP") pursuant to the California Endangered Species Act. The high-capacity tunnels and new point of diversion would allow a "big gulp"/"little sip" approach to water diversion. Water for export would be diverted for storage at times of abundance and drawn from storage and used, as needed, at times of scarcity (big gulp). Diversions could thereby be minimized or eliminated at times of scarcity (little sip) and more freshwater would flow through the Delta. Creation of vast areas of habitat would remake the Delta into an ecosystem that would thrive under the new big gulp/little sip flow regime made possible by the tunnels.

After the BDCP planning process was well along in its commitment to restoring the Delta ecosystem, including the restoration of freshwater flows through the Delta, the Sacramento-San Joaquin Delta Reform Act of 2009, Water Code §§ 85000–85350 ("Delta Reform Act") recognized the potential benefits of the BDCP as an HCP and NCCP and placed certain restrictions and requirements on the Board and other state agencies with respect to the BDCP, with the understanding that the BDCP would be considered for various state approvals and state funding as an HCP and NCCP.

As an HCP, the BDCP would be a fifty-year plan for progressively and fundamentally restoring the Delta and conversely would benefit water system reliability by entitling the State Water Project ("SWP") and Central Valley Project ("CVP")

(collectively “projects”) to fifty-year “no surprises” permits for Delta operations. The BDCP would therefore implement the Delta Reform Act’s coequal goals of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” Water Code § 85054.

The legislature had high expectations when it declared the goal of restoring the Delta as state policy, embracing the full potential of the largest and ecologically most important estuary on the west coast of the Americas. Restoration, in the context of the Delta and the BDCP, means returning the Delta “to a condition in which its biological and structural components achieve a close approximation to its natural potential” Water Code § 85066. The legislative expectation for a restored Delta was commensurate with the BDCP’s promise to create vast new areas of habitat and return freshwater flows to an ecosystem that had been deprived of adequate seaward flows since inception of the projects.

However, in 2015, the California Department of Water Resources (“DWR”) and its partners abruptly abandoned the habitat component and broke the foundational commitment to meeting the “gold standard” of an HCP and NCCP. What is left is a tunnels-only mega-diversion project, a resurrected underground version of the scientifically failed and voter-rejected 1982 Peripheral Canal. This is precisely what the legislature intended the BDCP would not be:

This bill does NOT authorize ‘the Peripheral Canal’ Instead, it specifies certain requirements for BDCP in considering options for changing Delta water conveyance for the State Water Project (SWP) and federal Central Valley Project (CVP). First, BDCP must analyze certain factors in the CEQA process. Second, BDCP must meet ‘the gold standard’ of achieving approval as an NCCP, if it wants state funding . . . [including] adaptive management of BDCP projects and programs, which may include new Delta conveyance.

California Committee Report No. RN0925373 Senate Bill No. 1, November 4, 2009, California 2009–2010 Seventh Extraordinary Session (describing legislative intent in the Delta Reform Act) (“SBI Committee Report”) (Attachment One).

DWR has revised the project objectives section of the *2015 Public Draft Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (“2015 RDEIR/S”)* (SWRCB-3) to delete the habitat component and the HCP and NCCP permit objectives. Compare the *2013 Public Draft Environmental Impact Report/Environmental Impact Statement Bay Delta Conservation Plan 2-3 (“2013 Draft EIR/S”)* (SWRCB-4) with *2015 RDEIR/S 1-8*. Re-branding the project as California WaterFix does not change its legal character or diminish the requirements of the Delta Reform Act applicable to the project. Nor does DWR’s promotional re-branding effort change the underlying reality that the project has failed in its promise to restore Delta flows. “[T]he WaterFix project does not propose additional flows in the Delta” and alternatives that “could provide substantially more water for resident and migratory fish and provide benefits to aquatic life . . . were not evaluated as alternatives in the SDEIS.” *Letter from Jared Blumenfeld, Regional Director USEPA Region 9 to David Murillo, Regional Director Bureau of Reclamation Mid-Pacific Region, October 30, 2015, 3 (“October 30, 2015, EPA Letter”)* (Attachment Two). Rather than provide more flexibility for water system operations, as DWR claims for California WaterFix, “the flexibility that Reclamation and DWR have to operate the system to ensure that water quality criteria are met will be seriously diminished, and the two agencies will have little room for error in operating the system to protect beneficial uses and achieve the coequal goals.” *October 30, 2015, EPA Letter 3*.

In casual shorthand, the Board refers to California WaterFix as a “portion of the former BDCP.” Notice 3. However, California WaterFix is Alternative 4A of the BDCP.

See 2015 RDEIR/S. DWR and its federal partner, the United States Bureau of Reclamation (“Reclamation”), are still proceeding under the BDCP *Notice of Intent to Prepare Environmental Impact Statement/Environmental Impact Report* (“*NOI*”), dated February 13, 2009, and *Revised Notice of Preparation of Environmental Impact Report and Environmental Impact Statement* (“*NOP*”), also dated February 13, 2009. The *NOI* announces “preparation of a joint EIS/EIR for the Bay Delta Conservation Plan (BDCP).” 74 Fed. Reg. 7257. The *NOP* is issued “For The Bay Delta Conservation Plan.” *NOP*, State Clearinghouse No. 2008032062, February 13, 2009. (Attachments Three and Four).

It is still the BDCP, albeit in tunnels-only guise that does not meet the requirements of the Delta Reform Act. California WaterFix comes to the Board as a legislatively disfavored project. State funds may not be expended to build California WaterFix/BDCP Alternative 4A. See Water Code § 85320(b) (“The BDCP shall not be incorporated into the Delta Plan *and* the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following [including meeting the requirements of an NCCP]”) (emphasis added). It is unclear how, if at all, the project could be financed and operated consistent with the Delta Reform Act.

The tunnels-only change in point of diversion provides no additional flows for the Delta. Failure of the habitat component removes the second flow-related justification for the project: that proponents could export more water with less harm because the Delta ecosystem would flourish even with diminished flows because the habitat-reformulated Delta would be an ecosystem that required less freshwater flow. The project failed in July of 2015 when that speculative and counterintuitive hypothesis proved false. They should have seen it coming: “One cannot substitute for the other; both flow improvements and habitat restoration are essential to protecting the public trust resources.” *2010 SWRCB Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem 7* (“*Flow Criteria Report*”) (SWRCB-25). What is left is a mega-diversion project with no habitat restoration, no HCP, no capacity to restore Delta flows, and the capacity to further damage an already jeopardized ecosystem while decreasing water system flexibility and reliability.

C. Additional Facts Are Stated Within Each Section Below And Incorporated Into This Statement Of Facts In Support Of This Protest.

Pursuant to the Notice, Protestants have stated facts to support the grounds for this Protest. Additional facts are stated below in each section as needed to meet the requirements of supporting each ground for Protest.

II. The Proposed Changes In The Point Of Diversion/Re-Diversion Will Not Best Serve The Public Interest.

The proposed change will adversely affect the public because it will make California’s water system more unreliable and will impede restoration of the Delta, including impeding restoration of freshwater flows through the Delta. The proposed changes will further damage the Delta ecosystem, including diminishing freshwater flows through the Delta and limiting operational flexibility of the projects to meet environmental and water supply needs.

The public has an interest in a reliable water system and restoring the Delta ecosystem as established by state policy in the Delta Reform Act. The proposed changes will therefore adversely affect the public interest.

A. California WaterFix Does Not Best Serve The Public Interest Because It Does Not Provide A More Reliable Water Supply And Does Not Restore The Delta Ecosystem.

The purpose and need for changes in operation of the SWP and CVP, as originally conceived by the BDCP and proffered on behalf of California WaterFix, were aptly described by the USEPA:

As stated in the SDEIS, the purpose and need for the WaterFix project, as was the case for the BDCP, is to advance the co-equal goals set forth in the Delta Reform Act of 2009. Those are (1) to provide a more reliable water supply for California, and (2) to protect, restore, and enhance the Delta ecosystem.

October 30, 2015, EPA Letter 2. See Also Cal. Water Code § 85054 (“‘Coequal goals’ means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.”).

DWR and Reclamation have repeatedly justified and described the project’s broad overall purpose and public interest benefits in the same expansive terms summarized by the USEPA. “The overarching goals of the BDCP are to advance the restoration of the ecological functions and productivity in the Delta and restore and protect water supplies provided by the SWP and CVP” *2013 Public Draft Bay Delta Conservation Plan 1-5 (“Draft BDCP”)(SWRCB-5)*. Successful completion of the BDCP is intended to “afford regulatory stability with respect to the operation of the primary water delivery systems for the State of California.” *Draft BDCP 1-26*. The BDCP “is intended to result in long-term regulatory stability for the state and federal water projects, while furthering the goals of the BDCP to restore and protect ecosystem health, water supply, and water quality.” *Draft BDCP 1-6. See also Draft Implementing Agreement for the Bay Delta Conservation Plan § 2.1.8* (“The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework.”) (Attachment Five).

However, failure to address ecosystem needs in a systemic fashion, as was promised, portends more of the same instability for water system operations. The BDCP’s ability to achieve regulatory stability for water system operations was premised on meeting the standards for an HCP and NCCP and concomitant ability to significantly restore freshwater flows through the Delta. In large measure, the reliability of CVP and SWP water deliveries are uncertain due to the projects’ jeopardizing listed species (due to lack of freshwater flows) and resulting exposure to ESA curtailments of water deliveries and re-direction of stored project water to environmental flows. Failure to achieve the “gold standard” of an HCP removes an important pillar from the project’s foundation: certainty and stability with regard to ESA demands on project operations over the next 50 years. WaterFix’s failure to restore freshwater flows through the Delta diminishes, rather than enhances, the system’s flexibility to simultaneously meet export and environmental needs.

The Board has recognized that current water quality objectives, including flow-dependent objectives, as implemented through the *SWRCB Revised Water Right Decision 1641*, March 15, 2000 (“*D-1641*”) (SWRCB-21), are inadequate to protect public trust resources. *See generally Flow Criteria Report*. Existing standards are inadequate, in part, because there is a mismatch between export demands on the Delta and the system’s ability to meet those demands in an ecologically responsible manner that protects public trust resources. The Board’s duty to balance consumptive needs against the imperative to protect public trust resources in an oversubscribed watershed has led to a Delta ecosystem in crisis *and* an unreliable water supply. Even when current standards are being met, neither fish nor farmers are satisfied. However, the Board is repeatedly called upon, through temporary urgency change petitions (“TUCPs”), to allow the projects to

violate even the minimal protections offered by these standards. The current lack of system flexibility and mismatch between water supply demands on the Delta and the Delta's capacity to sustainably supply water for beneficial use make the Hobson's choice between maintaining minimal ecological standards and meeting the health and safety needs of underserved Central Valley communities a regular feature of the Board's deliberations.

The BDCP promised to address this systemic failure by providing critical infrastructure that would provide stability to the system, allowing reliable public trust environmental flows and reasonably certain export operations. However, it has failed to do so and changing the name of the project to California WaterFix does not excuse the failure.

B. California WaterFix Fails To Restore Delta Flows.

Restoring Delta flows is an irrefragable and inherent sub-goal of the legislative imperative to restore the Delta ecosystem. *See* Cal. Water Code § 85302(e)(4). Restoring Delta flows means allowing *substantially more freshwater to flow through the Delta*. The California Legislature directed the applicant to consider the *Flow Criteria Report*, which was legislatively commissioned. California Water Code § 85086(c)(1) provides that:

For the purposes of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board [SWRCB] shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources ["flow criteria report"].

The *Flow Criteria Report* concluded that restoring "75% of 14-day average unimpaired flow for January through June" was necessary to "halt the population decline and increase populations of native species as well as species of commercial and recreational importance." *Flow Criteria Report* 98. This flow criteria is "necessary to protect public trust resources ... [because] flow modification is an action that can be implemented in a relatively short time in order to improve the survival of desirable species and protect the public trust resources" *Flow Criteria Report* 7.

The *Flow Criteria Report* repeatedly cautions the reader that it takes account only of environmental needs and cannot be directly translated into regulatory flow objectives because the needs of beneficial users, including export needs, have not been considered in formulating the flow criteria. *See Flow Criteria Report* cover sheet and *passim*. It is also possible that a metric of unimpaired flow may not be the best standard for environmental restoration when beneficial use needs and infrastructure constraints are taken into account, as they must be.

However, what the *Flow Criteria Report* confirms is that restoring Delta flows means allowing *substantially more freshwater to flow through the Delta*. *See also Letter from Jared Blumenfeld, Regional Administrator, Region 9 United States Environmental Protection Agency to Will Stelle, Regional Administrator, West Coast Region National Marine Fisheries Service* 1, August 26, 2014, 3 ("*August 26, 2014, EPA Letter*") (Attachment Six) ("We are concerned over the sole reliance on habitat restoration for ecosystem recovery, recognizing that existing freshwater diversions and significantly diminished seaward flows have played a significant role in precluding recovery of the Bay Delta ecosystem processes and declining fish populations.")

Restoring Delta flows, within the meaning of the *Flow Criteria Report*, was an overarching concern of the Delta Reform Act and is paramount in the Board's consideration of whether California WaterFix serves the public interest:

One key "early action" is the SWRCB developing "flow criteria," which is

a new legal concept This bill's "flow criteria" reflect a landmark concept of the state exercising its public trust authority to ask—FIRST—what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan.

SBI Committee Report 9. What the Delta needs, subject to the Board's sound deliberations on exact metrics, is more freshwater flowing through the Delta.

The *Flow Criteria Report* identified the public interest "need for the BDCP to develop an integrated set of solutions, to address ecosystem flow needs, including flow and non-flow measures." *Flow Criteria Report 7.* California WaterFix does neither and does not serve flow restoration needs.

C. The Project Potentially Provides Only One Benefit, Avoiding Smelt Entrainment, That Is Outweighed By The Project's Adverse Effect On Delta Flows And Resulting Degradation Of The Aquatic Ecosystem.

The project has only one reasonably predictable benefit: that it could allow for a reduction in entrainment of the delta smelt. Currently, the south Delta points of diversion create reverse flows in Old and Middle River ("OMR reverse flows") that entrain smelt. If diversion could be shifted to the north Delta points of diversion when smelt are present in the south Delta, this entrainment could be avoided. This could allow exports to continue when they would otherwise be halted by federal Endangered Species Act requirements that pumping discontinue when smelt are jeopardized.

The applicant's originally proffered ability of north Delta points of diversion to help restore Delta flows has been proven false by the applicant's own modeling. The words "restore Delta flows" have taken on a new meaning for the applicant and now denote only a reduction in OMR reverse flows. *See, e.g., 2015 RDEIR/S ES-1-2* (describing project benefits as avoiding reverse flows, smelt entrainment, and concomitant restrictions on exports). However, "because significant volumes of freshwater flows are diverted at the intakes resulting in less water that is also of lower quality downstream of the intakes," *October 30, 2015, EPA Letter 3*, California WaterFix actually impedes, rather than advances, restoration of Delta flows within the Meaning of the Delta Reform Act and the Board's broad factual findings in the *Flow Criteria Report*.

III. The Proposed Changes In The Point Of Diversion/Re-Diversion Will Have An Adverse Environmental Impact; The Proposed Changes In Points Of Diversion Will Alter Water Flows In A Manner That Unreasonably Affects Fish, Wildlife, And Recreational Uses Of Water.

Less water of lower quality downstream of the intakes will cause significant adverse environmental impacts and unreasonably affect fish, wildlife, and recreational users of water. Adverse effects include "loss of valuable aquatic habitat for many fish species in the Delta . . . [including] delta smelt, winter-run Chinook salmon, green and white sturgeon, striped bass, and American shad," *October 30, 2015, EPA Letter 3*, "exceedances of chloride criteria near municipal water supply intakes . . . exceedances of salinity standard[s]" and other impacts. *Id.* These impacts might theoretically be mitigated or reduced by reducing diversions at the new intakes and "by appropriately timed increased flows." *Id.* However, the analysis that might support the Petitioner's reliance on altering tunnel operations has not yet been done and cannot be supported in the absence of an adaptive management plan. These impacts must therefore be considered to unreasonably affect fish, wildlife, and recreational users of water

Less water of lower quality downstream will increase the concentration of pollutants, aggravate water quality problems caused by invasive weeds, decrease hydraulic residence time, and increase algal blooms. All of these factors unreasonably

affect recreational uses of water, including recreational boating, swimming and other water contact sports.

Impacts on fish species will have an unreasonable affect on recreational fishing and an unreasonable affect on recovery of fish species in the Delta.

In addition, impacts GW-8, GW-9, AQUA-22, and AQUA-201 are admitted by the applicant to be adverse and unavoidable. Mitigation of impacts WQ-11 and AQUA-78 depend on an adaptive management plan that is impermissibly deferred and therefore must be considered to unreasonably affect fish, wildlife, and recreational uses. Mitigation of impacts WQ-7 and WQ-32 are unsupported and must be considered to unreasonably affect fish, wildlife, and recreational uses.

Merely avoiding or minimizing net adverse impacts (assuming, *arguendo*, that California WaterFix could avoid or minimize impacts) fails to meet the requirements of the public trust doctrine. The BDCP represents the joint, nearly decade-long effort of the combined resources of the state and federal governments, who operate and control the projects, in league with the state and federal water contractors, who collectively control most of the local and regional water supply systems in the state. Tremendous resources and capacity are available to the BDCP proponents. Portfolio alternative components, including integrated water management, integrated surface and groundwater storage, conjunctive use, and conservation were all readily available to BDCP planners. Yet, proponents rejected all of these alternatives and have painted themselves into the corner of a single-focus conveyance project that creates no new water and decreases system flexibility.² They promised better, the legislature expected better, and the public trust demands better.

Under these circumstances, the stewards of the public trust have an obligation to ensure that the resource is left in better condition for future generations. If the aim is only to prevent further harm, rather than promote restoration, then, as experience has shown, continued degradation over time will be the inevitable result.

A. Unmitigated Significant Adverse Impact/Effect GW-8: Statewide Long-Term Depletion Of Groundwater Supplies And Interference With Groundwater Recharge/Recharge Opportunities.

Under Alternative 4A surface water deliveries “may decrease by approximately 179 TAF per year depending on the range of spring Delta outflow requirements compared to Existing Conditions. A decrease in surface water deliveries could result in an increase in groundwater pumping and a decrease in groundwater levels, depending on the total water portfolio of the site-specific areas. Therefore, decreases in surface water deliveries would result in significant impacts on groundwater resources under Alternative 4A.” *2015 RDEIR/S* 4.3.3-8. The “overall impact for Alternative 4A [on groundwater supplies and recharge is] considered significant and unavoidable.” *Id.* 4.3.3-8.

B. Significant Unmitigated Adverse Impact/Effect GW-9 Degradation Of Statewide Groundwater Quality.

“If groundwater pumping is increased, there could be resulting changes in regional patterns of groundwater flow and a change in groundwater quality. Due to the uncertainty associated with these effects, this effect is considered adverse. For the same reasons discussed earlier in connection with the possibility of increased groundwater

² See *Comments of Save the California Delta Alliance SPK-2008-00861*, dated November 9, 2015, addressed to the Army Corps of Engineers 5–9 for a discussion of DWR’s rejection of reasonable and feasible alternatives to California WaterFix (Attachment Seven hereto).

pumping in Southern California, there is no feasible mitigation available to mitigate any changes in regional groundwater quality.” *2015 RDEIR/S* 4.3.3-8. Implementation “of Alternative 4A at ELT and LLT could degrade groundwater quality in portions of the Southern California SWP Export Service Areas; this impact is considered significant due to the possibility of increased groundwater pumping and the resulting effects on regional groundwater flow patterns. As discussed above, there is no feasible mitigation to address this significant impact. The impact would be considered significant and unavoidable in these areas.” *Id.* 4.3.3-8–9. The “overall impact for Impact Gw-9 Alternative 4A is considered significant and unavoidable.” *Id.* 4.3.3-9.

C. Significant Adverse Impact/Effect WQ 11: Increased EC.

“The increase in EC in the Sacramento River at Emmaton, particularly during summer months of dry and critical water years, and the additional exceedances of water quality objectives in the San Joaquin River at Prisoners Point constitute an adverse effect on Water Quality. Mitigation Measure WQ-11 would be available to reduce these effects.” *2015 RDEIR/S* 4.3.4-28.

“Based on these findings, this impact in the Plan Area is considered to be significant. Implementation of Mitigation Measure WQ-11 would be expected to reduce these effects to a less-than-significant level.” *Id.* 4.3.4-30.

Mitigation measure WQ-11, however, would not be applied when it is needed most: in critical water years. “These actions [comprising WQ-11] would not be required in critical water years, when the objective does not apply.” *2015 RDEIR/S*. This constitutes a significant unmitigated negative impact/adverse effect because it exacerbates an already critical salinity problem when it is at its worst. The “objectives” that do not apply in critical years are SWRCB water quality objectives for salinity. However, regardless of the suspension of these regulatory requirements in critical years because current infrastructure cannot meet both these environmental needs and minimal export needs for the protection of human health and safety, the project *does* have a significant unmitigated effect on the environment. It increases salinity at Prisoners Point, Jersey Point, and Emmaton where it has adverse impacts on striped bass and other species.

Further, Mitigation Measure WQ-11 impermissibly defers formulation of the content of the mitigation measure to some future date. “Generally CEQA requires mitigation measures to be formulated in an EIR and not deferred to the development of future plans or measures” that are promised to mitigate impacts. *Center for Biological Diversity v. Dept. of Fish and Wildlife*, 183 Cal. Rptr. 3d 736, 754 (2015). The only exception is where the deferred mitigation measure provides a performance standard that will be met *and demonstrates that the impact can be mitigated in the manner described*. *Id.* (emphasis added). The deferred measures must “satisfy specific performance criteria articulated at the time of project approval.” *Sacramento Old City Ass’n v. City Council*, 229 Cal. App. 3d 1011, 1028–29 (1991) (emphasis added). WQ-11 relies on commitments to “Adaptively Manage Diversions at the North and South Delta Intakes to Reduce or Eliminate Water Quality Degradation in Western Delta” as well as adaptively managing the head of Old River barrier and north and south Delta intakes to eliminate exceedances at Prisoners Point. *2015 RDEIR/S* 4.3.4-30. These measures depend on an impermissibly deferred adaptive management plan. The project proponents have steadfastly refused to articulate how the adaptive management plan will work and have not demonstrated it can be effective. *See, e.g. Review by the Delta Independent Science Board of the Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement 5 (“2015 ISB DEIR Review”)* (Attachment Eight) (project proponents “have been unable to develop a substantive idea how adaptive management would work for the project.” *See also* § V.B. below.

Increased EC will unreasonably affect fish, wildlife, and recreational uses of water.

D. Significant Adverse Impact/Effect WQ 7: Chloride Concentrations.

“All of the Alternative 4H1-H4 Scenarios would result in increased water quality degradation ... and could contribute measurable water quality degradation relative to the 303[d] impairment in Suisun Marsh” *2015 RDEIR/S* 8-226. “Substantial long-term degradation may occur at Antioch under all of the H1-H4 Scenarios” *Id.* 8-227.

However, the NEPA Effects and CEQA Conclusion sections at *2015 RDEIR/S* 4.3.4-18 conclude that there would be no adverse effect or significant adverse impact. These conclusions appear to be based on re-visiting the results of the original modeling and making additional assumptions, providing explanations, and re-visiting metrics.

It appears that after spending tens of millions of dollars on modeling of various BDCP scenarios, none of which could show any benefit to the Delta ecosystem, DWR did not bother to run *any* modeling on Alternative 4A that is now before the Board.

Questionable conclusions that cannot support Petitioners claim that the project will not unreasonably affect fish, wildlife, and recreational uses include the following:

1) The increase in long-term average chloride concentration at Staten Island would be 25%. *2015 RDEIR/S* 4.3.4-13. But this is dismissed as insignificant because it is “extremely small in absolute terms” relative to “applicable water quality objectives.” *Id.* However, existing applicable water quality objectives (*D-1641*) are recognized by the Board as inadequate to protect public trust resources. Water quality for fish, municipal, and industrial uses suffers harm from excessive chloride concentrations under existing conditions. A 25% increase over existing conditions is an adverse effect and significant impact under these circumstances.

2) “In the Sacramento River at Emmaton, there would be an increase in chloride objective exceedance during the drought period modeled, from 55% to 57% under operations scenario H3, although these changes are within the uncertainty of the modeling approach; there would be no increase in objective exceedances under operations scenario H4.” *2015 RDEIR/S* 4.3.4-14.

3) Changing assumptions about operations of the Montezuma Slough Salinity Gates. Original modeling assumed the gates would not be operated and showed adverse effects of Alternative 4A on chloride concentrations. When the model was changed to include operation of the gates, the adverse effect was diminished. However, operation of these Gates has its own negative effects and the wisdom of operating the gates at all has been questioned. The gates “did have a negative effect on salmon passage” and attempts at modifying the gates “did not improve salmon passage at the SMSCG.” *Suisun Marsh Salinity Control Gates Salmon Passage Evaluation Report 1* (“*Suisun Marsh Salmon Passage Report*”) (Attachment Nine). Because of the opaque nature of the environmental documents, it is unknown if the gates were not included in original modeling in anticipation that they would not be operated because of their negative impact on salmon populations in view of recent crashes in salmon abundance. In any event, reliance on gate operation to find no adverse effect was an unreasonable assumption. There is a fair argument that locking gate operation in place to avoid salinity impacts of Alternative 4A itself may have a negative impact on salmon populations that must be analyzed.

Overall, the finding that there is no adverse effect/significant impact of WQ-11 is not supported.

E. Significant Adverse Effect/Impact WQ32: Microcystis.

The NEPA and CEQA conclusions that Alternative 4A would not have adverse effects is unsupported. “Modeling that adequately accounted for the effects of water conveyance facilities operations and maintenance and the hydrodynamic impacts of the environmental commitments on long-term average residence times in the six Delta sub-

areas was not available for Alternative 4A, so the hydrodynamic effects of this alternative on *Microcystis* were determined qualitatively.” This amounts to unjustified speculation driven by a rush to push Alternative 4A to approval.

This impact will unreasonably affect fish, wildlife, and recreational uses by harming fish species and making water contact sports harmful to recreational users.

F. Significant Adverse Effect/Impact AQUA-22: Longfin Smelt.

Project operations of Alternative 4A will have an adverse effect on spawning, egg incubation, and rearing habitat for longfin smelt. *2015 RDEIR/S* ES-50. The proposed mitigation measure is “adjustment via adaptive management, which is intended to allow for further evaluation of spring outflow.” This is an unlawful deferral of mitigation based on non-existent adaptive management as described above and at section VI. Below. The impacts on longfin smelt, therefore, must be considered adverse and significant.

This impact will unreasonably affect fish.

G. Significant Adverse Effect/Impact AQUA-78: Chinook Salmon Migration.

This impact is significant. *2015 RDEIR/S* ES-54. The proposed mitigation measure, AGUA-78D, states that “Whenever possible during real-time operations, project proponents will slightly adjust Shasta, Folsom and/or Oroville Reservoir operations to ensure that instream flows are sufficient to minimize or avoid migration-related effects to fall-run Chinook salmon.” *2015 RDEIR/S* 4.3.7-193. This is an unlawful deferred mitigation. There is no “real-time operations” monitoring or adaptive management mechanism, and all indications are that project proponents either cannot or will not develop one. The preface of “[w]herever possible” is not quantified or analyzed as to when and under what conditions it will be possible.

The impacts on Chinook salmon migration, therefore, must be considered adverse and significant.

This impact will unreasonably affect fish. This impact violates the legislative imperative to double salmon populations and consequently violates the public trust doctrine.

H. Significant Unmitigated Impact/Adverse Effect AQUA-201: Striped Bass And American Shad.

This impact is significant and unmitigated for CEQA purposes. ES-59. Entrainment at the new north Delta intakes of early life stage striped bass and American shad would be significant under CEQA and entrainment of early life stage American shad would be adverse under NEPA. *2015 RDEIR/S* 4.4.7-213–214.

This impact will unreasonably affect fish and unreasonably affect recreational bass fishing.

I. Significant Impacts/Effects On Aesthetics, Delta-As-Place, Navigation, And Historic Resources.

Construction and operation of the north Delta intakes and associated infrastructure would existentially transform one of the most scenic and iconic sections of the Delta as viewed from both land and water. The industrial character of the facilities and restrictions on boating and land access are incompatible with the Delta Reform Act’s requirements to preserve Delta-as-place and respect existing land uses. Under these circumstances these impacts are significant and adverse for purposes of NEPA and CEQA.

There are significant multi-year (permanent) impacts to recreational boating due

to construction activities at the intakes. The *2015 RDEIR/S* describes construction-related cofferdams sticking out 60 feet into the Sacramento River at three locations over about four miles on the east bank of the River between Elk Slough and Snodgrass Slough. The *2015 RDEIR/S* states that “warning signs and buoys would be posted upstream, downstream of, and at the construction sites” for the intakes. It also describes barge traffic servicing the intake construction sites. It is reasonably foreseeable that multiple barges with construction equipment and supplies will be anchored throughout this stretch of the river. Safety concerns will likely result in a five mile per hour zone along this entire stretch of river. Prudent boaters will feel compelled to slow to five miles per hour or avoid the area in any event.

This massive construction activity turns a four-mile stretch of the Sacramento River into a multi-year five mile per hour summer-season construction zone. The *2015 RDEIR/S* states that in-water construction activity will be limited to the period between June 1 and October 31 each season in order to minimize impacts to fish species. However, that limitation concentrates construction activities in the prime summer boating season, which is when recreational boat traffic is intense and impacts on boating are the greatest.

If the three large intakes proposed in Alternative 4A are to be constructed, this effect is adverse and unavoidable. The only way to avoid this impact is to consider alternatives that do not involve three large intakes at this location. For example, an alternative with one 3,000 cfs intake would lessen the impact.

The *2015 RDEIR/S* describes the cofferdams being replaced by permanent rock embankments when construction is completed. The drawings and description are very vague as to how far from the existing levees the permanent rock embankments will stick out and whether the rock embankments are underwater or rise to and above the surface. It is unknown whether promised “state of the art fish screens” will necessitate a five mile per hour zone. There is not enough information for the applicant to show that permanent impacts to recreational boating will not be adverse; its claims to the contrary are unsupported.

The intakes and associated industrial facilities, including gantry cranes looming over the river, scenic Highway 160, and the entire landscape, and forebays that look like sewage treatment plants (despite the applicant’s best efforts to render them in a flattering light), alter a historic vernacular landscape by placing multiple large industrial facilities on an extensive stretch of peaceful boating and farming landscape. *See Design Construction Enterprise, Intake Design Review (Attachment Ten) (gantry cranes at page MWD004398).*

The intakes and associated industrial facilities are also in close proximity to the town of Locke and the Locke Historic District, which preserves the cultural and aesthetic history of Chinese immigrants to the Delta. The Locke Historic District is “the largest, most complete example of a rural, agricultural Chinese American community in the United States.” National Park Service, *Locke Historic District*, available at http://www.nps.gov/nr/travel/Asian_American_and_Pacific_Islander_Heritage/Locke-Historic-District.htm, last visited November 7, 2015. The historic district exists in the context of the largely unaltered late nineteenth century landscape surrounding it. It is now, for the most part, as it was when the immigrants first settled here. The industrial forebay shown on sheet 6 of the figures attached to the Notice, as well as the dumping sites shown on sheet 6, are in very close proximity to the town of Locke. There are historic homes on the banks of the Sacramento River close to the intakes. Perhaps the only remaining example of a levee-side historic farmhouse is near one of the intakes. The nearby town of Hood is an iconic example of the Delta-as-place. The intake facilities change the character of the entire area and present an unavoidable adverse effect on the historic values of the area. The intake structures are existentially incompatible with maintaining the historical sense of the area.

Within Alternative 4A, this is an adverse unavoidable aesthetic impact to boaters,

users of scenic Highway 160, and the entire historic vernacular landscape that emanates from the Locke Historic District and the historically preserved character of the area.

J. Adverse Impacts Of Alteration Of Water Flows That Unreasonably Affect Recreational And Other Uses In Discovery Bay.

The bays of Discovery Bay are fed by Kellogg Creek and Indian Slough. The circulation of water in the bays of Discovery Bay is gravity fed and circulation is increased with increased currents in Indian Slough and Kellogg Creek. OMR reverse flows have adverse impacts on the Delta smelt. However, significant decreases in OMR reverse flows will also decrease flows in Kellogg Creek and Indian Slough, which are significantly affected by operation of the nearby Jones and Banks pumping stations. Decreased OMR flows will decrease circulation in the bays, increase hydraulic residence time, decrease dissolved oxygen, increase algal blooms, and increase concentrations of pollutants.

The bays of Discovery Bay are intensely used for water contact recreation by thousands of children and adults who live in Discovery Bay.

The unmitigated recreational and human health impacts of reductions in the circulation in the bays of Discovery Bay due to the proposed change in the point of diversion unreasonably affects Discovery Bay uses.

Adverse impacts on water quality and circulation in the bays of Discovery Bay also impairs the riparian rights of Protestants to put the waters over and abutting their lands to beneficial domestic use.

IV. Navigable Waters And Public Trust Values Affected By The Proposed Changes.

Navigable waters affected by the proposed change include all waters of the Delta downstream from the proposed point of diversion, including the central, south, and west Delta. Navigation, including recreational navigation, is a paramount public trust value. As described herein, recreational navigation will be adversely impacted at the new intakes during construction and during long-term operations. Recreational navigation will also be adversely impacted by construction of the new permanent gate at the head of Old River. The bays of Discovery Bay are navigable waters used for moorage of thousands of boats. The navigability of the bays of Discovery Bay is already impacted by the presence of invasive weeds, including Water Hyacinth, *Egeria densa*, and Curly-Leaf Pondweed. These plants become so dense at times that navigation is severely hindered. Reduction in freshwater flows downstream from the new points of diversion, changes in operation of the existing Jones and Banks pumping plants, and reductions in OMR reverse flows will all restrict circulation in the bays of Discovery Bay, which will make the bays more hospitable to invasive weeds and make portions of the bays un-navigable.

Decreased freshwater flows downstream of the intakes will also increase the presence of invasive weeds throughout the Delta. The presence of invasive weeds hinders navigation.

Aquatic recreation, including water contact sports, is a public trust value that will be adversely impacted by the change in the point of diversion by increasing the concentration of pollutants and adversely affecting water quality in the bays of Discovery Bay and throughout the Delta.

Protection of the Delta ecosystem is a public trust value. The proposed change in the point of diversion will harm the Delta ecosystem by adversely affecting native and valued species, adversely affecting aquatic habitat for native and valued species, decreasing freshwater flow through the Delta, and degrading water quality.

The Delta Reform Act declares restoration of the Delta ecosystem, including the restoration of freshwater flows through the Delta, and the doubling of Salmon

populations, as public trust values to be protected and advanced. As described herein, the change in the point of diversion will negatively affect these public trust values. The Board made a factual determination in the *Flow Criteria Report* that a substantial increase in the amount of freshwater flowing through the Delta is required to protect public trust resources, including the many species of threatened and endangered fishes dependent on Delta flows. California WaterFix fails to allow for adequate flows through the Delta to protect public trust resources commensurate with the findings of the *Flow Criteria Report*. In fact, the proposed changes in the points of diversion will foreclose restoration of adequate flows through the Delta in the foreseeable future and therefore violate the public trust doctrine.

V. The Proposed Changes In The Point Of Diversion/Re-Diversion Will Be Contrary To Law.

A. The Petition Should Be Rejected Because The Petition Fails To Comply With Water Code § 1701.1(d) & (e) And Approving The Petition Absent Recirculation Of A Second Revised Draft Environmental Impact Report Would Violate CEQA.

The Petition should be rejected and returned to the Petitioner because the Petition fails to “include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.” Water Code § 1701.1(d). The Petition also fails to contain “other appropriate information” required to make a determination on the environmental effects of the proposed change. Water Code § 1701.1 (e).

It is beyond reasonable dispute that the current environmental documents for California WaterFix are inadequate to meet the requirements of CEQA and NEPA. They cannot demonstrate that the project will not injure legal users of water and will not have adverse environmental impacts. Recirculation of a second Draft EIR/ second Supplemental EIS is required before the Board can lawfully consider the Petition. Beginning the Board’s consideration of the Petition on the basis of an inadequate draft EIR/S and then concluding the process on the basis of a final, yet to be produced, EIR/S, without allowing for intervening recirculation of second draft would fail to meet the requirements of CEQA—and make any approval of the Petition contrary to law.

The current *2015 RDEIR/S* fails as an informational document and, in particular, fails with regard to treatment of alternatives. The *2015 RDEIR/S* suffers from:

overall incompleteness through deferral of content to the Final EIR/EIS (herein, “the Final Report”); specific incompleteness in treatment of adaptive management, habitat restoration, levees, and long-term effects; and inadequacies in presentation.

The Current Draft lacks key information, analysis, summaries, and comparisons. The missing content is needed for evaluation of the science that underpins the proposed project. Accordingly, the Current Draft fails to adequately inform weighty decisions about public policy.

ISB SDEIS Review 4. Despite sustained outcry from the public and peer reviewers, the *2015 RDEIR/S* still fails to comprehensibly compare the expected results of various courses of action:

For over three years, the Delta ISB has been specifically requesting

summaries and comparisons: first in June 2012, then in June 2013, and again in a review of the Previous Draft in May 2014 (footnote 1, p.1). Appallingly, such summaries and comparisons remain absent in the Current Draft. ... Three years is more than enough time to have developed them.

Id. at 9.

With respect to the 2015 *RDEIR/S*'s omission of a comprehensible alternatives analysis, which is essential to the Boards' duty to determine if the project best serves the public interest:

The Previous Draft contained few examples of concise text and supporting graphics that compare alternatives and evaluate critical underlying assumptions. Rudimentary comparisons of alternatives were almost entirely absent. The Current Draft retains this fundamental inadequacy.

Id. at 4. No peer reviewer has found the environmental documents to be adequate. The missing content is "critical to comprehending what is being proposed and its potential impacts." *Id.* at 10.

Awaiting preparation of the Final EIR/S is not a lawful option because "[t]hat will be far too late in the EIR/EIS process for content so critical to comprehending what is being proposed and its potential impacts." *ISB SDEIS Review* 10.

B. Approval Of The Petition Would Be Contrary To Law Because California WaterFix Fails To Include An Adaptive Management Plan And Real-Time Operational Decisionmaking Process As Required By The Delta Reform Act.

The Delta Reform Act provides that:

Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section. The flow criteria shall be subject to modification over time based on a science-based adaptive management program that integrates scientific and monitoring results, including the contribution of habitat and other conservation measures, into ongoing Delta water management.

Water Code § 85086(c)(1). The Act further provides that:

The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.

Water Code § 85321.

Practice in the scientific community (which develops and implements adaptive management programs) has been to interpret the Delta Reform Act's adaptive management requirements to require "science-based adaptive management of all ecosystem and water management programs in the Delta." Saracino & Mount, LLC, *Panel review of the Draft Bay Delta Conservation Plan* 99 ("*Mount Report*") (citing Cal. Water Code § 85308(f)) (Attached to Comments of Save The California Delta Alliance on 2013 *RDEIR/S*) (SWRCB-4).

The applicant acknowledges the central role of adaptive management in defining

California WaterFix operations. However, the applicant has not begun to develop an adaptive management plan for the operations of the tunnels and appears unequipped to undertake this complex task. Despite sustained outcry from the scientific community and the public about the Lead Agencies' chimerical treatment of adaptive management, the documents remain an exercise in specious deflection of calls for a real adaptive management program. As the Delta Independent Science Board put it, "We are not looking here for a primer on adaptive management." *2015 ISB SDEIS Review* 5. The project's "missing content includes: 1. Details about the adaptive-management process, collaborative science, monitoring, and the resources that these efforts will require." *Id.* 1
Further:

The lack of a substantive treatment of adaptive management in the Current Draft indicates that it is not considered a high priority or the proposers have been unable to develop a substantive idea of how adaptive management would work for the project.

Id. 5.

The current state of vacuity in adaptive management is the progression of a process that sought to *frustrate* the ability of adaptive management to throttle back exports through the high-capacity tunnels no matter how dire or immediate the harm to the Delta ecosystem. From the outset, the regulated entities, including the water contractors whose self-interest is to derive as much water as possible from the Delta, have been given an illegitimate role in adaptive management. *See, e.g., Mount Report* 100 (commenting on 2013 Administrative Draft) (noting that the adaptive management structure "confuses the roles of regulators and regulated entities" and will likely result in "rendering the concept of adaptive management moot"); *see also id.* at 83 (noting that adaptive management "is undermined by provisions in the draft Plan that grant the Authorized Entity Group [water contractors]—rather than regulatory agencies—veto authority over changes to the conservation measures [including CM1, operation of the tunnels themselves], biological objectives, and adaptive management strategies, as well as over amendments to the BDCP itself").

California WaterFix must develop an adaptive management and real-time operations plan that demonstrates that the project can be operated, controlled, and modified to meet all requirements of applicable law *before* any change in the point of diversion can be approved.

C. California WaterFix Fails To Comply With The Delta Reform Act.

As detailed above, California WaterFix does not comply with numerous aspects of the Delta Reform Act and must be disapproved unless and until it is modified to comply with the Act.

VI. Conditions Under Which This Protest May Be Dismissed.

Meeting the following conditions may allow for dismissal of the Protest:

A. Meeting The Original Promise Of The BDCP.

Meeting the original promise of the BDCP, the intent of the Delta Reform Act, and the requirements of the public trust doctrine to accomplish long-term restoration of the Delta, including freshwater flows through the Delta, would provide the prerequisite for conditions under which this petition could be dismissed. Meeting the promise of restoring the Delta would also involve providing a more reliable water supply for California, as one cannot be accomplished without the other.

Any order approving a change in the point of diversion should include flow criteria informed by the *Flow Criteria Report* such that substantially more freshwater flows through the Delta than under current conditions or as is currently proposed by California WaterFix operating scenarios. Restoring Delta flows within the meaning of the Delta Reform Act means providing more freshwater flow throughout the Delta. Addressing OMR reverse flows and smelt entrainment is inadequate to justify the project.

For example, restoring Delta flows to a substantially undiminished state could be accomplished over time with the implementation of a combination new surface and groundwater storage, integrated water management, and reduced reliance on the Delta through development of “regional supplies, conservation, and water use efficiency,” as required by Water Code section 85021.

B. Substantial Reduction In Reliance On The Delta For Exports.

Any order approving a change in the point of diversion should be conditioned upon substantial reductions in reliance on the Delta for export needs on a firm schedule. Appropriate Delta flow criteria should not be based on the limitations of existing infrastructure to meet beneficial use needs. Rather, appropriate flow criteria should look to what is possible with an aggressive portfolio approach and should serve as an infrastructure and conservation forcing standard.

C. Full Mitigation For Impacts Of Reduced OMR Flows On Discovery Bay.

Full mitigations for any impacts of reductions in OMR reverse flows on the circulation of water in the bays of Discovery Bay, and water quality impacts on Discovery Bay, should be included in any order approving a change in the point of diversion.

D. Changes To The Project To Eliminate Or Minimize Impacts To Recreation And The Delta-As-Place.

All of the impacts on recreation and the Delta-as-place, from construction and operation of the tunnels, should be addressed in a way that minimizes or eliminates the impacts. For example, reduction from three 3,000 cfs intakes to one 3,000 cfs intake may adequately reduce impacts to an acceptable level.

E. Development Of An Adaptive Management Plan And Management Structure That Protects The Delta Environment And Delta Interests.

As outlined in section V.B. above, inclusion of an adaptive management and real-time operations plan is required before any change in the point of diversion can be approved.

F. The Board Should Update The 2006 WQCP Before Considering The WaterFix Change Petition.

In light of the incomplete nature of the WaterFix project and change petition, the serious flaws in the WaterFix environmental review process and environmental documents, and the existential nature of the changes proposed by the WaterFix project, we believe that the Board should first update the 2006 WQCP before considering any WaterFix application. Upon updating the 2006 WQCP, the Board will be in a better position to determine appropriate flow criteria to be included in any order approving a change in the point of diversion.

During the process of updating the 2006 WQCP, DWR and Reclamation would have time to develop a viable project. As discussed above, the BDCP failed when project proponents abruptly dropped the habitat component and abandoned the commitment to meet the standards of an HCP and NCCP.

Rather than devote the needed time and effort to developing a replacement strategy for restoring the Delta and obtaining regulatory stability for water system operations, proponents forged ahead with a tunnels-only proposal that accomplishes none of the goals of the BDCP.

Likely, project proponents need to pursue a portfolio approach, including some elements of storage, in order to make the project workable in the absence of the habitat component. Perhaps including the Sites Reservoir, or other North of Delta Offline Storage component, would allow a change in the point of diversion to avoid harming the public interest and work to the benefit of the Delta ecosystem and water system reliability. Water stored offline and upstream during times of peak flow could be released back into the Sacramento River at times of lower flow. A portion of this “new water” could be diverted by the tunnels (unhindered by smelt entrainment issues) and a portion could remain in-stream, benefitting the Delta ecosystem. This is only one of many possibilities that the Petitioner should consider in developing a viable project.

Promises to add such portfolio elements at some time in the future are not acceptable. The BDCP/California WaterFix must come to the Board as a complete project that meets the requirements of law without relying on unenforceable promises of future modifications to the water system.

Appropriate scoping, design, and modeling of a replacement for the failed BDCP should commence without further delay. Allowing a failed project to proceed through regulatory approvals is not in the public interest.

The Board has the authority to rescind acceptance of the Petition because the Petition admittedly does not comply with Water Code sections 1701(d) & (e). The environmental documents are grossly inadequate. *See October 30, 2015 EPA Letter* (rating of 3 “inadequate”); *ISB SDEIS Review* (environmental documents fail to inform weighty decisions of public policy). In light of the failure of the Petitioner to provide a complete description of the project and its impacts, the Board has elected to await preparation of a final EIS before making any decisions on the project because current documents are inadequate. Rather than proceeding before a complete project is presented, the Petition should be returned and a parallel process of updating the 2006 WQCP and reformulating the BDCP should be undertaken.

Pursuant to the Board’s instructions on page 15 of the Notice, Protestants will submit a more detailed request for changes in the Board’s procedures for considering California WaterFix. As per instructions in the Notice, the request will be submitted after the filing of Protestant’s notice of intent to appear and before the pre-hearing conference so that the request can be discussed, as needed, at the pre-hearing conference and ruled upon by the hearing officers at the appropriate time.

VII. Reservation Of Rights To Amend Protest And Request For Board To Allow For Consideration Of Amendments To Protest At The Appropriate Time.

Because the description of the project is incomplete and environmental documents are inadequate, it is impossible for Protestants to know the full nature, scope, or extent of the effects of the project. However, failure to file this protest by the due date would forfeit important rights to protest. Therefore, Protestants have done the best they could, under the circumstances, to provide a complete and accurate protest.


The date for Phase II hearings, at which Protestants will present evidence, has not yet been set pending the Petitioners submission of complete environmental documents and a complete project description. Protestants have filed a notice of intent to appear at phase II today as required. However, the Board has required that the notice of intent to

appear at phase II be re-submitted at such time as the hearings are actually scheduled.

Under these circumstances, Protestants believe it is reasonable to allow amendment, supplementation, and revision of this Protest in response to fuller information about the project when such information becomes available. Protestants reserve the right to do so and will request that the Board consider a procedure for allowing amendment to Protests for discussion at the pre-hearing conference.

Respectfully submitted,

Dated: January 5, 2016

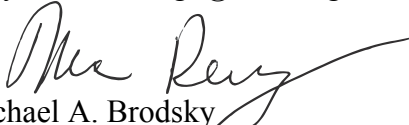

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By: 
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Executed at Capitola, CA on January 5, 2016