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September 17, 2018

VIA U.S. AND ELECTRONIC MAIL

WaterFix Comments 2018
P.O. Box 1919
Sacramento, CA 95812

**Re: North Delta Water Agency Cooperating Agency Comments on July 2018
Supplemental Environmental Impact Report - California WaterFix**

To secure the current contractual and individual water rights of Agency landowners to adequate water supply and quality, and consistent with its role as a Cooperating Agency in the project, the North Delta Water Agency (NDWA or Agency) submits these comments on the Supplemental Environmental Impact Report/Environmental Impact Statement (Draft SEIR) for the Bay Delta Conservation Plan/California WaterFix project (WaterFix Project or CWF). The Agency appreciates this opportunity to comment on that document.

The Agency has a clear statutory mandate under its Agency Act to assure that the lands within the North Delta have a dependable supply of water of suitable quality sufficient to meet present and future needs in accordance with the 1981 Contract. For this reason, NDWA has repeatedly asserted during the WaterFix Project planning process that the Project must: 1) be based on the best available science; 2) be consistent with the contractual obligations of the State under the 1981 Contract; and 3) be undertaken in compliance with all applicable state and federal law. It is with this background that the Agency submits these comments on the Draft SEIR.¹

DWR's conclusions and findings regarding the impacts of the revised Project are not supported by substantial evidence. For the reasons described herein, the Draft SEIR is fatally flawed.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1973, the Agency was formed by a special act of the Legislature to represent northern Delta interests in negotiating a contract with both the United States Bureau of Reclamation (Reclamation) and California Department of Water Resources (DWR) in order to mitigate the

¹ NDWA's past comment letters are incorporated by reference here, and listed in Exhibit A. Testimony submitted by NDWA and others in the related SWRCB Hearings are likewise incorporated by reference, and listed in Exhibit B. This testimony is directly probative of the changes to the Project since DWR's certification of the Final EIR/EIS, and provides direct evidence of the potential increases in 1981 Contract exceedances (and direct impacts upon NDWA and its landowners) that will be brought about under DWR's anticipated operations regime.

water rights impacts of the Central Valley Project and the State Water Project (SWP).² Representing nearly one-half of the legal Delta, the Agency's boundaries encompass approximately 300,000 acres. This includes all of that portion of the Sacramento-San Joaquin Delta, as defined in Water Code Section 12220, situated within Sacramento, Yolo and Solano Counties, including New Hope Tract, Canal Ranch and Staten Island in northeastern San Joaquin County.

A. The North Delta Water Agency Contract.

In 1981, the NDWA and DWR executed the *Contract for the Assurance of a Dependable Water Supply of Suitable Quality* (1981 Contract). The crux of the 1981 Contract, which remains in full force and effect, is a guarantee by the State of California that, on an ongoing basis, DWR will ensure through the operation of the SWP that suitable water will be available to satisfy all agricultural and other reasonable and beneficial uses in all channels within NDWA's boundaries. Specifically, the State is obligated to furnish "such water as may be required within the Agency to the extent not otherwise available under the water rights of water users." If the State is not able to comply with the requirements of the 1981 Contract, it must cease operation of the SWP, including the export of water from Delta channels.

Unfortunately, it has become apparent through the evolution of the Project that DWR has not adequately considered or analyzed its ability to comply with the provisions of the 1981 Contract. Under the express terms of the 1981 Contract, NDWA consents to the export of water *so long as the State remains in compliance with the Contract*. DWR has offered no evidence that it is capable of complying with those terms. Instead, DWR's own statements and ample evidence in parallel processes demonstrate that: (1) the WaterFix Project DWR intends to carry out is quite different from the one described in its prior environmental documents; and (2) that those changes will result in significant increases in future violations to the 1981 Contract.

B. Evolution of the WaterFix Project

On August 25, 2015, the DWR and Reclamation jointly submitted a Petition for Change to the California State Water Resources Control Board (SWRCB), describing these changes as necessary for a project "that will be part of the SWP and operated in coordination with Reclamation and its operation of the CVP."³ The new points of diversion were to be jointly owned by Reclamation and DWR.⁴ NDWA, together with other parties, filed protests challenging that Petition, and the SWRCB convened an evidentiary hearing to consider the proposed change (SWRCB Hearing).

In early stages of the SWRCB Hearing, DWR witnesses confirmed that DWR had performed no independent analysis in its modeling to determine whether the WaterFix Project operations would comply with the water quality criteria identified in the 1981 Contract. Instead, in the then-current modeling, DWR relied upon compliance with SWRCB Decision 1641 as an

² North Delta Water Agency Act, Chapter 283, Special Statutes of 1973.

³ Cover Letter to Aug. 25, 2015 Petition for Change, p. 1.

⁴ Petition for Change, p. 2.

analogue for 1981 Contract compliance.⁵ That reliance is inappropriate for the reasons previously described in NDWA’s comments on the FEIR/EIS, and explained in detail there.

On October 7, 2016, DWR submitted an incidental take permit application for WaterFix (ITP Application) to the California Department of Fish and Wildlife (CDFW), pursuant to California Fish and Game Code section 2081. The ITP Application described a project jointly operated by DWR and Reclamation, in which the current operations of the SWP and CVP would be altered to include “modified spring Delta outflow to ensure no adverse effects to longfin smelt.”⁶ The targeted flows of DWR’s proposed spring outflow criteria were:

*... intended to be provided by appropriate beneficiaries through the 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 CVP/SWP to the extent an obligation is imposed on either the SWP or CVP under federal or applicable state law.*⁷

Two months later, DWR and Reclamation incorporated those spring outflow assumptions into the Final EIR/EIS on December 22, 2016.⁸ Reclamation has taken no further action related to the December 2016 Final EIR/EIS.

DWR, however, forged ahead. On Friday, July 21, 2017, DWR issued a document titled Developments after Publication of the Proposed Final Environmental Impact Report (Developments), and certified the Final EIR/EIS for the California WaterFix Project under CEQA. The Developments document represented that DWR considered it, together with the December 2016 EIR/EIS, to be “the full EIR for purposes of CEQA...Reclamation will separately address issues with the Final EIS.” The modeling upon which DWR’s analysis was based did not account for compliance with the 1981 Contract. When the 1981 Contract objectives were applied against the modeling data used in the EIR/EIS analysis, a significant and measurable increase in contract exceedances was apparent.⁹

One week later, CDFW issued an incidental take permit under Section 2081(b) for the WaterFix Project (WaterFix ITP).¹⁰ The WaterFix ITP set operating parameters and conditions, including revised spring outflow criteria that differed from those described in DWR’s ITP Application and those in the Final EIR/EIS. Modeling performed in connection with the federal fisheries agencies’ Biological Opinions and the WaterFix ITP spring outflow criteria was provided in response to a subpoena on March 2, 2018, and was the subject of considerable cross-examination in the SWRCB Hearing. The new spring outflow criteria contained in the WaterFix ITP were not, however, analyzed in any environmental document under CEQA. Later, on October 18,

⁵ See SWRCB Hearing Transcript (HT), Part 1, Vol.14; p. 29:15-20 (Aug. 24, 2016); see also id. at 21:1 through 29:23; See generally Final EIR/EIS, Appendix 5A.

⁶ October 5, 2016 Incidental Take Permit Application for California WaterFix (ITP Application), p. 1-4, attached hereto as Exhibit D.

⁷ ITP Application, p. 3-97.

⁸ Final EIR/EIS, Ch. 3, Project Description, Table 3-7, *New and Existing Water Operations Flow Criteria and relationship to Assumptions in CALSIM II Modeling*, p. 3-47.

⁹ MBK Engineers, Technical Comments on California WaterFix Modeling (August 31, 2016), attached hereto as Exhibit C.

¹⁰ July 2017 Final Incidental Take Permit for California WaterFix (ITP), attached hereto as Exhibit E

2017, Carl Wilcox of CDFW sent a letter to Karla Nemeth of DWR, purporting to clarify the intent behind spring outflow targets in the ITP (ITP Clarification Letter).¹¹ That letter did not alter the spring outflow criteria described in the Final ITP.

Meanwhile, in September of 2017, Reclamation notified CVP contractors that it “lacks the legal authority” to fund CWF construction: “Accordingly, at this time, Reclamation will not be participating in the construction of CWF, will not own any of the CWF facilities, and the CWF will not be a CVP facility.”¹² In response, the overwhelming majority of proposed CVP participants in the WaterFix Project voted not to participate, citing concerns that the “participation approach” promoted by Reclamation, in which 45% of the WaterFix Project facilities would be available to participating CVP contractors, was not financially viable.¹³ Simultaneously, Reclamation represented that any “additional water supply requirements that are tied solely to CWF permits and operations would not be met using increased releases of upstream CVP stored water. CWF-specific outflow requirements above the then-existing regulations would be met through CWF reductions and/or acquisition of water, by Participants, from willing sellers.”¹⁴

In response to lack of CVP contractor participation in the WaterFix Project, DWR proposed in early 2018 (and then quickly abandoned) a staged, SWP-forward approach to the WaterFix Project.¹⁵ Then, in April 2018 and with the urging of Governor Jerry Brown, the Metropolitan Water District (MWD) authorized its general manager to begin negotiating agreements that would allow MWD to finance not only of its own share of the SWP capacity, but also of the “unsubscribed” CVP share, up to a combined total of 64.6% the total project costs, thereby closing the gap between existing DWR commitments and the still-unfunded CVP share of the WaterFix Project’s construction costs.¹⁶ MWD and DWR contemplated that MWD would enter into a “Master Agreement” to purchase the unsubscribed CVP capacity in the WaterFix Project (now estimated to be roughly 33% of the WaterFix Project’s capacity), and then negotiate

¹¹ Oct. 18, 2017, Letter from Wilcox to Nemeth (ITP Clarification Letter), p. 2, attached hereto as Exhibit F.

¹² See e.g. Sept. 15, 2017 Letter to Norma Camacho (Santa Clara Valley Water District) from David Murillo (Reclamation), p. 1, attached hereto as Exhibit G.

¹³ See, e.g., *Westlands Water District Statement on California Waterfix*, Sept. 20, 2017 (available at: <https://wwd.ca.gov/wwd-statement-on-ca-waterfix/>).

¹⁴ Sept 2017 Murillo Letter, p. 3.

¹⁵ See Feb. 8, 2018 Letter to Tam Doduc and Felicia Marcus (SWRCB) from Karla Nemeth (DWR), attached hereto as Exhibit H.

¹⁶ MWD Resolution No. 9239, *Resolution of the Board of Directors of the Metropolitan Water District of Southern California Authorizing District’s Purchase of Capacity Interest in the California WaterFix, the Financing of Such Purchase, and Other Arrangements, and Authorizing the General Manager to Negotiate, Execute, and Deliver Various Agreements and Documents Related Thereto* (April 10, 2018), attached hereto as Exhibit I; MWD Resolution No. 9243, *Resolution of the Board of Directors of the Metropolitan Water District of Southern California Authorizing District’s Purchase of Capacity Interest in the California WaterFix, the Financing of Such Purchase, and Other Arrangements, and Authorizing the General Manager to Negotiate, Execute and Deliver Various Agreements and Documents Related Thereto* (July 10, 2018), attached hereto as Exhibit J; MWD Resolution No. 9244, *Resolution of the Board of Directors of the Metropolitan Water District of Southern California Authorizing District’s Financial Support of California WaterFix and Authorizing the General Manager to Negotiate, Execute and Deliver Various Financing Implementation Agreements and Related Documents* (July 10, 2018), attached hereto as Exhibit K; April 9, 2018 Letter to Board Members of the Metropolitan Water District from Governor Jerry Brown, attached hereto as Exhibit L.

Capacity Interest Purchase Agreements with interested water agencies, or hold that capacity for its own use.¹⁷

Testimony provided at the SWRCB Hearing in February 2018 again confirmed that DWR had not evaluated its ability to comply with the 1981 Contract until well after the FEIR was certified.¹⁸ DWR witnesses testified that this new analysis demonstrated 5% increase in violations of the water quality criteria of the 1981 Contract based on the CWF H3+ modeling that DWR presented after issuance of the FEIR/EIS. Independent modeling presented by MBK Engineers in the same proceeding, the H3+ modeled operations, under which CWF was now purported to operate, would result in an additional 203 days of violations (or, a 3.5 percent increase) over a 16-year simulation period.¹⁹

On June 12, 2018, DWR released the Administrative Draft Supplemental EIR/EIS, addressing only the impacts from changes to construction and engineering of a proposed new WaterFix Project footprint. New impacts to NDWA, revealed in the SWRCB Hearing, are not referenced, and the DWR's plan for compliance with the 1981 Contract is not discussed. One month later, DWR released its Draft SEIR/EIS. In the Draft SEIR, DWR takes the position that the WaterFix Project's operations, including water diversions and deliveries, "are not changing from those described" for the WaterFix Project approved by DWR on July 21, 2017, and that therefore DWR has no new impacts to disclose or analyze.²⁰ This statement is demonstrably false.

II. EVIDENCE PRESENTED IN THE SWRCB HEARING DEMONSTRATES THAT OPERATION OF THE WATERFIX PROJECT WILL RESULT IN INCREASED VIOLATIONS OF THE 1981 CONTRACT

The NDWA's 1981 Contract contains numerous provisions that protect water users and channels in the North Delta from harm caused by changes in SWP water conveyance infrastructure and operations, specifies year-round water quality criteria,²¹ and also contains provisions pertaining to physical hydrologic changes.²² The 1981 Contract provides specific remedies for non-compliance, including limitations on the operations of the SWP.²³ In return for the benefits received, NDWA makes an annual payment to DWR.²⁴ NDWA further expressly consents to the

¹⁷ See MWD Board Letter 8-6, attached hereto as Exhibit M, p. 6 (observing that the estimated 33% of Unsubscribed Capacity in the Project is "is based on the expectation that 6,000 cfs, or 67% of the capacity, would be for the benefit of the SWP PWAs, and that the remaining 3,000 cfs, or 33% of the capacity, would ultimately be acquired by CVP PWAs for their benefit. In the event that not all of the 3,000 cfs capacity is used by CVP contractors, and, instead that capacity is used for the benefit of the SWP, following appropriate additional environmental analysis and permitting, then full implementation of California WaterFix is expected to result in approximately 150,000 acre-feet per year of additional SWP supply."); compare Sept. 15, 2017 Letter from David Murillo ("DWR will hold title to CWF facilities and may split the capacity of the CWF between the SWP and the CVP at 55-percent and 45-percent, respectively. If so, CVP South of Delta Contractor(s) would acquire from DWR up to the entire 45-percent of the capacity of the CWF for conveyance of CVP water.").

¹⁸ HT Part 2, Vol. 5, February 26, 2018, pp. 107:6-110:9.

¹⁹ SWRCB Hearing Exhibit NDWA-502 (hereafter, NDWA-502), p. 8.

²⁰ Draft SEIR, p. 3-2, referring readers to Chapter 3 of DWR's Final EIR for a "detailed discussion of...the operation of the approved project".

²¹ 1981 Contract, Art. 2

²² *Id.* at Art. 6

²³ *Id.* at Art. 12

²⁴ *Id.* at Art. 10.

export of water from the Delta “so long as this contract remains in full force and effect and the State is in compliance herewith.”²⁵ Conversely, the Agency no longer consents to the export of water from the Delta during times when DWR is in violation of any provisions in the 1981 Contract.

DWR’s vague assurances that it will comply with the 1981 Contract in operating the WaterFix Project are not supported and are in fact contradicted by the evidence. Because these impacts were not disclosed until well after the Final EIR was certified, NDWA and the public were deprived of an opportunity to provide comment on the potentially significant impacts of this Project. Indeed, DWR itself failed to consider how the Project’s operations might increase 1981 Contract violations until well after it had certified the Final EIR.²⁶ DWR likewise failed to consider any plan to reduce those violations, and thereby maintain compliance with the 1981 Contract.²⁷

Testimony in the SWRCB Hearing presented by both DWR and NDWA witnesses reveals that (1) DWR has not analyzed its ability to comply with the 1981 Contract in any meaningful way, despite NDWA’s repeated requests that it perform that analysis; and (2) if the WaterFix Project operates in the fashion that DWR describes, DWR will not be in compliance with the 1981 Contract.²⁸ This latter revelation is, by definition “New information, which was not known and could not have been known at the time the environmental impact report was certified as complete.”²⁹ DWR paradoxically suggests that there is no new information to discuss related to compliance with the 1981 Contract: yet, that information was unavailable precisely because DWR declined to perform the required analysis.³⁰ Having been repeatedly warned that these increases in exceedances under the 1981 Contract might present significant impact, DWR cannot now evade CEQA’s requirement that it grapple with the new information presented to it in the SWRCB Hearings, confirming that suspicion.

DWR must resolve the issues raised here before proceeding with the Project. CEQA does not allow significant environmental issues to be “swept under the rug”: DWR must grapple with the issues raised, rather than turn a blind eye.³¹ It is in that context, and in light of its role as a Cooperating Agency in the WaterFix Project, that NDWA now urges DWR to correct its environmental documentation, commit to fully and complete compliance with the 1981 Contract, and appropriately plan for its future compliance with that obligation.

²⁵ *Id.* at Art. 8(e)

²⁶ HT Part 2, Vol. 5, February 26, 2018, pp. 107:6-110:9 (Testimony of Tara Smith, confirming that analysis of 1981 Contract violations had been done “a week ago.”)

²⁷ See HT, Part 2, Vol. 5, February 26, 2018, pp. 113:25-115:5 (“MS. NIKKEL: So did you conduct any analysis to consider whether any real-time operations that the Department might engaged in to reduce that 5 percent increase in noncompliance down to zero or something close to it, what the effect of that would be? WITNESS SMITH: No, I have not done any analysis on that.”)

²⁸ See NDWA-502 (203 additional days of violations, predominantly in September and December); HT, Part 2, Vol. 5, February 26, 2018, pp. 113:25-115:5

²⁹ Pub. Res. Code § 21166.

³⁰ HT, Part 1, Vol. 14, Aug. 24, 2016; p. 29:15-20; *see also id.* at 21:1 through 29:23.

³¹ See *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 553.

III. THE WATERFIX PROJECT AND ITS IMPACTS HAVE SUBSTANTIALLY CHANGED, AND DWR MUST EVALUATE THOSE CHANGES

DWR's failure to analyze or disclose impacts related to its compliance (or lack thereof) with the 1981 Contract is fundamentally tied to the ever-changing nature of the WaterFix Project, and its amorphous project description and operations plan. Physically, institutionally, and practically, the Project proposed by DWR has fundamentally changed from the one described in the Final EIR, and DWR admits in the parallel SWRCB Hearing that this Project has not yet been fully analyzed.³² Nonetheless, DWR contends it has no obligation to consider new information relating to operational and water supply impacts because it elected to proceed with a Draft SEIR that addressed only one facet of the many changes brought about in the WaterFix Project since its July 21, 2017 approval by DWR. DWR's position is not supported by the evidence. These changes to the WaterFix Project and its impacts are so fundamental and substantial as to render DWR's prior environmental documentation "irrelevant to the decision-making process." *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 951. Before the Project may proceed, these changes must be disclosed and analyzed.

A. The SEIR Fails to Disclose or Analyze New Operational and Water Supply Impacts Due to Changes in Spring Outflow Criteria.

As a result of the July 27, 2017 issuance of the WaterFix ITP, the operational parameters of the WaterFix Project have changed, but the impact of those changes has not yet been adequately analyzed. The WaterFix Project described in the Final EIR/EIS included spring outflow requirements that are objectively different than those later imposed in the WaterFix ITP, and the Draft SEIR fails to fully disclose, analyze, and mitigate the potentially significant water supply and operational impacts of those changes.

1. The spring outflow criteria proposed in the Final EIR/EIS are not the criteria under which the WaterFix Project is authorized to operate.

The WaterFix Project described in the Final EIR/EIS and approved by DWR in July 2017 included specific operational criteria, imported from DWR's ITP application, that were intended to maintain March-May average delta outflow and fully mitigate the Project's incidental take of the state-listed longfin smelt.³³ Those operational criteria included an additional flow requirement for March that calculated outflow targets based on a linear interpolation of a lookup

³² See, e.g., HT Part 2, Vol. 3, p. 59, ln. 6-15 ("MR. BEZERRA: [Y]ou are not stating that terms of the Incidental Take Permit have been included in CWF H3+; correct? WITNESS BUCHHOLZ: What we're saying is that they weren't included in the Final EIR, which is defined as CWF H3+, due to timing and also the fact that DWR was fully committed to meeting the requirements of California Department of Fish and Wildlife.") See also *id.* at p. 121: 15-23 ("MR. ALADJEM: [W]ould it be fair to say that Spring Delta Outflow was an attempt to deal -- or to address the regulatory requirements in the Biological Opinion but not the Incidental Take Permit which was issued afterwards? WITNESS BUCHHOLZ: Right.").

³³ See Final EIR/EIS, Ch. 3, Table 3-7, New and Existing Water Operations Flow Criteria and Relationship to Assumptions in CALSIM II Modeling, p. 3-47.

table, utilizing the 90% exceedance forecast of the Eight River Index.³⁴ To meet that March target, in the Final EIR/EIS, DWR proposed reducing south-of-Delta exports down to the health and safety minimum of 1,500 cfs.³⁵ For April and May, the Final EIR/EIS's operational criteria would rely upon the San Joaquin River inflow-export ratio, set forth in the National Marine Fisheries Service's 2009 Biological Opinion (BiOp) (action IV.2.1), to constrain Delta exports and thereby achieve outflows similar to the Final EIR/EIS's No Action Alternative, after accounting for future climate change.³⁶

The Final EIR/EIS's spring outflow criteria do not reflect the operational requirements that CDFW ultimately imposed in the final WaterFix ITP. On July 28, 2017, one week after DWR's certification of the WaterFix Final EIR/EIS, CDFW rejected the San Joaquin River inflow-export approach identified in the Final EIR/EIS and proposed in DWR's ITP Application. Instead, the WaterFix ITP—which governs the WaterFix Project's ultimate operations—imposed new, specific outflow targets based on the Eight River Index for all three spring months, as shown in Condition of Approval 9.9.4.3:

*Condition 9.9.4.3 Spring Outflow: Abiotic Habitat for Longfin Smelt: [...] "Permittee shall maintain Delta outflows that are protective of LFS every year from March 1 – May 31. [...] Protective outflows from March 1 – May 31 every year shall be determined by the use of a lookup table derived from a linear relationship between the 50% exceedance forecast for the current month's 8RI and recent historic Delta outflow (1980-2016), as shown in Sub Table B."*³⁷

The WaterFix ITP's Sub Table B is based on the 50% exceedance forecast for each current month's Eight River Index prediction, accounting for early long-term climate change.³⁶ The, rather than the 90% exceedance forecast that was proposed for just March in the ITP Application.³⁸ The WaterFix ITP also specifies that spring outflow targets are to be met "through the acquisition of water from willing sellers and through operations of the CVP/SWP."³⁹ Unlike the Final EIR/EIS criteria contained in the Final EIR/EIS, which set no specific outflow volumes for April or May, the WaterFix ITP sets specific outflow volumes for each of the three months, suggesting the San Joaquin River inflow-export ratio was insufficient to adequately guard against take of longfin smelt.⁴⁰

DWR appears to have gambled on a different result from CDFW. Earlier in the consultation process, in December of 2015 and January of 2016, CDFW notified DWR that DWR's analysis used an incorrect baseline as a basis of comparison; the comparative approach between WaterFix and the No Action Alternative under climate change conditions "does not describe in clear terms the effects of the [project] as a whole;" and that modeling should be re-run using explicit outflow

³⁴ Incidental Take Permit Application, Section 5.3.2.3.2 *Effects of Spring Outflow*, p. 5-28. The Eight River Index is a cumulative total of unimpaired runoff at eight different locations on the major rivers in the Delta. *Id.* at p. 5-28, fn. 4.

³⁵ *Id.* at p. 5-28.

³⁶ *Ibid.*

³⁷ 2081(b) Incidental Take Permit for California WaterFix, p. 188.

³⁸ *Id.* at pp. 185-186.

³⁹ *Id.* at p. 189.

⁴⁰ *Id.*

targets.⁴¹ As late as February of 2016, DWR was aware that CDFW apparently disagreed with DWR as to the efficacy of its proposed measures.⁴² In response, DWR's consultants ran new modeling with specific targets set forth for the months of April and May and shared those results with CDFW.⁴³ According to DWR, the new modeling showed a relative increase in outflows by 65 TAF, with most of the additional flows met by an average release of 64 TAF from Oroville above export reductions.⁴⁴

Nevertheless, CDFW rejected DWR's proposed spring outflow criteria in its ITP Application to approve what DWR characterized as a "more implementable and assessable criteria."⁴⁵ The final spring outflow criteria contained in the WaterFix ITP require DWR to implement individual delta outflow targets for March, April and May that are more particular more stringent than the proposed San Joaquin River inflow-export ratio.⁴⁶ Only a week prior, DWR asserted that "CDFW's spring outflow criteria are expected to result in similar outflow conditions as the 2081(b) application criteria, given that the two sets of criteria are targeting a similar level of Delta outflow during March through May, and export curtailments would be the primary mechanism to achieve outflow targets."⁴⁷ However, the final spring outflow criteria contained in the WaterFix ITP require DWR to implement individual Delta outflow requirements for March, April and May that are distinct from and more particular than the proposed San Joaquin River inflow-export ratio identified in the Final EIR/EIS and in the ITP Application, which has no fixed thresholds.⁴⁸ Rather than export curtailments, as contemplated in the Final EIR/EIS, the WaterFix ITP directs that the spring outflow requirements are to be met "through the acquisition of water from willing sellers and through operations of the CVP/SWP."⁴⁹

DWR's ITP Application explains that, without proper mitigation, the overall potential for WaterFix to result in take of longfin smelt is "high."⁵⁰ The adoption of adequate spring outflow criteria is intended to be the primary mechanism by which DWR mitigates and minimizes the effect of that expected take.⁵¹ To that end, DWR has taken the position in the SWRCB proceedings that because both the Final EIR/EIS criteria and the final WaterFix ITP criteria share a common intended purpose (to produce outflow similar to existing conditions for spring

⁴¹ Feb. 4, 2016 Issue Paper, prepared by DWR for CDFW, attached hereto as Exhibit N.

⁴² See *id.* (detailing a point of disagreement between DWR and CDFW as "[w]hether or not DWR needs to meet specific Mar-May outflow targets, to be determined, or can commit to operating to a SJR i-e ratio which achieves those target goals.").

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Developments document, at p. 130, fn. 4.

⁴⁶ 2081(b) Incidental Take Permit for California WaterFix, p. 188.

⁴⁷ See Developments document, at p. 130, fn. 4.

⁴⁸ ITP, p. 188.

⁴⁹ ITP Application, p. 3-97.

⁵⁰ *Id.*, Section 4.2.7.2.1, *Level of Take*, p. 4-296.

⁵¹ See Final Mitigation Monitoring and Reporting Program for the California WaterFix, December 2016, § 2.13, p. 2-20 ("DWR will consult with DFW as part of the 2081 incidental take process to include spring outflow criteria as necessary to fully mitigate any impacts of operation-related take of longfin smelt attributable to the project, with adjustments through Adaptive Management as appropriate."); see also Incidental Take Permit Application, Ch. 5, Take Minimization and Mitigation Measures, Section 5.3.2.3.2 *Effects of Spring Outflow*, p. 5-28 ("The effectiveness of the proposed longfin smelt spring outflow criteria and the mechanisms underlying the importance of outflow will be a key component of a proposed scientific research program for longfin smelt, to be funded by and, as appropriate, participated in by DWR.").

months), the resulting impacts of these two sets of spring outflow criteria are likewise similar.⁵² However, this assumption has never been tested or modeled by DWR at any stage of DWR's review of potential impacts.⁵³ In fact, by DWR's own assessment, the annual volume of additional water needed to meet the March Delta outflow criteria required by the ITP, above simulated Delta outflow in DWR/USBR CWF H3+, ranges from 24,000 acre-feet to 1,115,000 acre-feet with an annual average of 38,000 acre-feet.

None of DWR's environmental review to date has addressed this change from the operational criteria described in the Final EIR/EIS, and at no point has DWR analyzed the impacts of achieving that compliance

2. DWR is required to comply with the ITP's Spring Outflow Criteria, and must analyze the impacts of that compliance.

In a memorandum dated October 17, 2018, CDFW employee Carl Wilcox provided a "clarification" of the final ITP Spring Outflow Criteria, explaining that the parameters identified in Condition 9.9.4.3 "are properly interpreted as requiring [DWR] to utilize the linear relationships described in Sub Table B as targets to be met to the extent export cuts down to a minimum of 1,500 cfs can achieve them."⁵⁴ The Clarification Letter, to the extent that it is binding on Project operations at all, does not authorize DWR to operate to the San Joaquin River inflow-export ratio (as identified in the Final EIR/EIS), rather than the Eight River Index lookup table specified by the final WaterFix ITP.

Mr. Wilcox's Clarification Memorandum does not amend the WaterFix ITP to modify the spring outflow. Mr. Wilcox's statement that "reducing exports from the south and north Delta facilities in an attempt to meet a monthly average target *can* attain outflows consistent with recent conditions" does not mean that it necessarily will, or that DWR's obligation to evaluate the impact of those changes has been met. DWR has taken the position that it is *only* required to reduce exports to 1,500 in attempt to meet the monthly targets of Sub Table B, and not take any other action like the acquisition of water from willing sellers and other operational tools at its disposal.⁵⁵ This position is entirely unsupported by both the Clarification Memorandum and the plain language of the WaterFix ITP itself.

The spring outflow criteria for March, April, and May under the WaterFix ITP are irrefutably different than those analyzed in the proponents' CWF H3+ modeling, thus they represent a

⁵² See, e.g., HT, Part 2, Vol. 6, p. 177: 21-24 ("WITNESS MILLER: And both methods get to the same -- are a way to get to the same objective, maintaining the three-month average outflow to the existing conditions in March, April, May.").

⁵³ See *id.* at p. 297: 2-15 ("MS. NIKKEL: And remind me: Was the [ITP] application for April and May, was it based on the Eight-River Index or the San Joaquin IE? WITNESS MILLER: So the -- the application was the San Joaquin IE in April and May. MS. NIKKEL: And did you compare those results with a -- a modeling scenario that included spring outflow based on the Eight River Index? WITNESS MILLER: I did not make a comparison of that, no.").

⁵⁴ ITP Clarification Letter, p. 2.

⁵⁵ See, e.g., HT, Part 2, Vol.6, p. 181: 11-14 ("WITNESS MILLER: My -- My understanding based on the clarification memo is that the outflow targets will be met through reducing exports down to 1500 cfs in an attempt to meet those targets."). This position is entirely unsupported by both the Clarification Letter and the plain language of the ITP itself.

substantial change to the Project that is neither described, nor considered in the Final EIR/EIS.⁵⁶ Indeed, testimony in the SWRCB Hearing revealed the following substantial differences in the outflow criteria set forth in the WaterFix ITP and those analyzed in the CWF H3+ modeling of spring outflow.

- March Delta outflow criteria under the ITP are approximately 1,000 to 4,000 cfs, approximately 61,000 to 246,000 acre-feet, higher than DWR/USBR CWF H3+.⁵⁷
- March Delta outflow criteria under the ITP are not met in roughly 13 percent of the 82 years simulated.⁵⁸
- The ITP outflow criteria in April and May are not met in 62 percent and 73 percent of the simulated period.⁵⁹

To date, DWR has not analyzed the impacts of operation under these new criteria.⁶⁰ For the impacts of the WaterFix Project to be fully understood and disclosed, DWR must accurately describe the actual expected operations, and evaluate the impacts of those operations in an environmental document.

B. The SEIR’s Assumptions Regarding CVP Participation in the Project Are Outdated, Inaccurate, and Fail to Disclose Substantial Changes to the Impacts and Operations of the Project

DWR’s CEQA analysis is premised on a jointly operated Project, in which Reclamation and DWR Central Valley Project contractors and the Bureau of Reclamation in the Project’s operations. However, the Project has evolved since DWR certified its Final EIR/EIS in July 2017, and its assumptions regarding CVP participation in the Project are outdated and inaccurate. Changes in that participation—including the very real possibility that *no* CVP contractors will participate in the Project—undermine the fundamental assumptions upon which the Final EIR/EIS’s impacts analysis was based, and drastically undercut the informational value of that document and the Draft SEIR that relies upon it.

This assumption underlies each of the alternatives considered by DWR in its purported “range of Project operations.” A project that is predominantly comprised of SWP participants or one in which Reclamation’s role is reduced or eliminated, is simply outside the bounds of anything described in the Final EIR/EIS or the Draft SEIR. So, for example, the CWF H3+ modeling

⁵⁶ SWRCB Hearing Exhibit SVWU-400 at ¶ 8; SWRCB Hearing Exhibit SVWU-402, at p. 13.

⁵⁷ Exhibit SVWU-402, at p. 12.

⁵⁸ Exhibit SVWU-400, at ¶ 7.

⁵⁹ Exhibit SVWU-402, Tables 3-4.

⁶⁰ Exhibit SVWU-400 at ¶ 8; (The “[e]ffects of Delta outflow criteria contained in the CWF ITP on CVP and SWP operations with CWF have not been analyzed, and therefore the effects are unknown.”); HT, Part 2, Vol. 5, pp. 101:9-102:12:

WITNESS MILLER: I don’t think there’s any criteria that limits our upstream operations.” ...

MS. NIKKEL: Thank you. Are you aware of any analysis done by DWR or anybody else of what the effect would be if DWR were to release additional water from upstream storage in order to meet the Incidental Take Permit? ...

WITNESS MILLER: Yeah, I’m not aware of any..

upon which the Draft SEIR and DWR's Final EIR/EIS impacts analyses are based assumes that 51% of the total capacity of the WaterFix Project would be dedicated to CVP water deliveries, and the analysis in each of these documents flows from that fundamental assumption.⁶¹

More than a year after DWR's certification of the Final EIR/EIS and more than 18 months after the close of the federal comment period on the Draft EIR/EIS, the Bureau of Reclamation has yet to issue a record of decision for the proposed project, and remains ominously silent on the WaterFix Project's future.⁶² Importantly, while the Santa Clara Valley Water District Board of Directors directed its staff to begin negotiating these agreements to allow its participation in the MWD-financed project in May of 2018, no CVP contractor has, as of the date of this comment letter, executed an agreement with Reclamation or MWD for the delivery of water through the Project.⁶³ Reclamation's silence is significant, as the Project's projected impacts and planned mitigation measures are all premised on participation by Reclamation and the CVP contractors.

Federal participation is essential to mitigating the Project's impacts and ensuring appropriate operations:

*Reclamation's action in relation to the BDCP/California WaterFix would be to adjust CVP operations specific to the Delta to accommodate new conveyance facility operations and/or flow requirements, in coordination with SWP operations.*⁶⁴

The entirety of DWR's prior analysis is premised on this participation. So, for example, the Final EIR/EIS assumes total CVP deliveries of approximately 4.5 million acre-feet per year under the Project's operations, of which 2.2 million would be delivered to South of Delta CVP contractors.⁶⁵ Within the Final EIR/EIS, and as incorporated by reference in the Draft SEIR, "allocations between contractors in each hydrologic region were assumed to be the same as the existing water delivery allocations for each region. In a similar way, because most of the changes in CVP deliveries for each of the alternatives were for south of Delta contractors, the changes in CVP deliveries are reflected in the south of Delta water deliveries. The allocation of CVP deliveries for each hydrologic region were assumed to be the same as the existing water delivery allocations for each region."⁶⁶

The assertion in the Draft SEIR that changes to "modeling assumptions regarding SWP and CVP water delivered through California WaterFix" does not warrant any additional analysis⁶⁷ is

⁶¹ See Written Testimony of Richard Denton, CCC-SC-51, page 3:22-24; 6:17-8:5.

⁶² See, e.g. Developments, p. 3 (representing that the Developments document, together with the December 2016 Final EIR, "is considered the full EIR for purposes of CEQA...this document has been prepared by [DWR], the CEQA lead agency, as a CEQA-only document. Reclamation will separately address issues with the Final EIS."); see also Draft SEIR, Executive Summary, Note to Readers, ES-1 ("Due to timing constraints, publication and release for public review of this Draft Supplemental EIR/EIS is being done by DWR as lead agency in compliance with the requirements of CEQA only. Separate publication and release for public review of this document by the U.S. Bureau of Reclamation (Reclamation) as the lead agency in compliance with NEPA will be done at a later date.

⁶³ See SCVWD Resolution 18-0384, Authorizing Participation in California Waterfix (May 2, 2018).

⁶⁴ Final EIR/EIS, p. 3-6.

⁶⁵ *Id.* at Table 30-19; see Draft SEIR p. 30-1 (opining that "operation of the proposed project would be identical to operation of the approved project.").

⁶⁶ Final EIR/EIS, p. 30-57.

⁶⁷ Draft SEIR/EIS, Appendix 3A, page 3A-6.

wrong. Federal participation is essential to mitigating the Project's impacts and ensuring appropriate operations:

Reclamation's action in relation to the BDCP/California WaterFix would be to adjust CVP operations specific to the Delta to accommodate new conveyance facility operations and/or flow requirements, in coordination with SWP operations.⁶⁸

A reduction in the CVP share of capacity in the Project, however, will result in corresponding reductions to those South of Delta CVP deliveries, and renders these assumptions invalid at best, and misleading at worst.⁶⁹ The uncertainty surrounding Reclamation's role in this project is particularly troubling to NDWA in light of the 1981 Contract: DWR has provided no evidence that its joint operations with Reclamation (to the extent they do exist) are capable of complying with the protections of that agreement.⁷⁰

DWR has suggested in the parallel SWRCB Change Petition hearings that allocations of capacity between DWR and Reclamation are merely a question of accounting between those two agencies, and not a meaningful change to implementation of the Project or the potential impacts of the Project. This is incorrect. Changes in the amount of water delivered to a location constitute physical changes to the environment, and those physical changes have not been analyzed to date.⁷¹ A reduction in CVP South of Delta deliveries, by DWR's own acknowledgment, will cause environmental impacts that have not been evaluated.⁷²

The Project's mitigation measures and impacts analysis are premised on commitments from Reclamation and DWR as joint operators.⁷³ This interrelationship cuts to the heart of the CWF's operations: the Final EIR/EIS's impacts analysis assumes that the CVP and SWP will continue to operate under the parameters of the 1986 Coordinated Operations Agreement (COA) between DWR and Reclamation. Under COA-defined "balanced conditions", when water must be withdrawn from storage to meet Sacramento Valley and Delta requirements, 75 percent of the responsibility to withdraw from storage is borne by the CVP and 25 percent by the SWP. Likewise, COA also provides that during balanced conditions when unstored water is available for export, 55 percent of the sum of stored water and the unstored export water is allocated to the

⁶⁸ Final EIR/EIS, p. 3-6.

⁶⁹ See Declaration of Walter Bourez in Support of Sacramento County et al's Response to Department of Water Resources Opposition to Stay (February 13, 2018) ("February 2018 Bourez Declaration") (noting under a 5,000 cfs/1,000 cfs division of SWP and CVP capacity, CVP south of Delta deliveries decrease by annual average of 120,000 acre feet when compared to the No Action Alternative).

⁷⁰ Compare Mitigation Measure WQ7-e, *CCWD Settlement Agreement* ("DWR, as the project applicant, has committed to implementing these mitigation measures and DWR and Reclamation are including these measures (and analysis of potential environmental impacts of these measures) in the Final EIR/EIS.").

⁷¹ See also Pub. Resources Code § 21060.5 ("Environment" means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water").

⁷² See Final EIR/EIS, p. 30-58 (No Action Alternative would cause greater differences between regional water demands and the available water supplies, and would "likely cause greater indirect environmental effects associated with replacement water supplies for the reduced CVP and SWP in the six hydrologic regions").

⁷³ See, e.g. Mitigation Measure WQ-11e ("DWR and Reclamation will be responsible for adaptive management of the North and South Delta intakes."), MMRP p. 2-13; Mitigation Measure AQUA-22d ("Implementation of any necessary spring outflow criteria will occur through coordinated operations of the CVP and SWP... Fulfillment of compliance monitoring and reporting requirements is solely the responsibility of Reclamation, DWR, and their contractors."), MMRP pp. 2-20, 2-21; See also Environmental Commitments 3, 6, 7, 8, 9, 10, 11, 12, 15, 16.

CVP, and 45 percent is allocated to the SWP.⁷⁴ On August 17, 2018, however, Reclamation formally initiated re-negotiation under COA, citing to the parties' inability to "mutually agree on revisions" that would maintain conformity with the objectives and principles identified in COA.⁷⁵

The public's understanding of the WaterFix Project is based upon the description in the Final EIR/EIS. If Reclamation withdraws, or the terms of COA are altered, not only are additional impacts likely, but the disclosures contained in that document are inaccurate and misleading. DWR and Reclamation have not planned for or disclosed the impacts of a CWF Project under this scenario, and changes of this nature require appropriate environmental documentation, disclosure, and mitigation.

IV. IN PROCEEDING WITH THIS NARROW SEIR, DWR FELL FAR SHORT OF CEQA'S MANDATE FOR DISCLOSURE.

The changes described above compound prior failings in DWR's environmental review of the WaterFix Project.⁷⁶ The Draft SEIR, tiered off of an already flawed Final EIR/EIS, is so lacking in detail, and inconsistent in its analysis that it fails as an informational document.⁷⁷ Moreover, the WaterFix Project and its impacts have changed in significant ways, and the Draft SEIR fails to discuss or disclose those changes. In light of these failings, the Draft SEIR fails to adequately disclose effects of the proposed project and inform the public, in violation of CEQA.⁷⁸

A. DWR's Decision to Proceed with a Supplemental, Rather than Subsequent, EIR is not Supported by Substantial Evidence.

CEQA's subsequent review provisions are "designed to ensure that an agency that proposes changes to a previously approved project 'explore[s] environmental impacts not considered in the original environmental document.'"⁷⁹ Accordingly, major revisions to a CEQA review document will be required when the project under consideration "involve[s] ... new significant environmental effects or a substantial increase in the severity of previously identified significant effects" or the "new information" shows the same.⁸⁰ Fundamentally, the question before the

⁷⁴ See Final EIR/EIS, *Ch. 5: Water Supply*, pp. 5-6; 5-20; 5-33-34 (COA "sets forth procedures for coordination of operations, identifies formulas for sharing joint responsibilities for meeting Delta standards, as the standards existed in State Water Board Decision 1485, and other legal uses of water, identifies how unstored flow will be shared, sets up a framework for exchange of water and services between the projects."); *Appendix 1a*, pp. 1a-22, 1a-23.

⁷⁵ Aug. 17, 2018 Letter from Murillo (Reclamation) to Nemeth (DWR), attached hereto as Exhibit O; see also Aug. 17, 2018 Memorandum from Zinke (Reclamation), attached hereto as Exhibit P.

⁷⁶ For example, DWR's ever-shifting Project Description remains inadequate for the reasons outlined in prior comment letters submitted by NDWA. As these flaws persist, and infect the validity of the Draft SEIR, each of these letters are again incorporated by reference here.

⁷⁷ See Pub. Resources Code, § 21168.5; CEQA Guidelines, § 15124; see *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (A project description that omits integral components of the project results in an EIR that fails to disclose the actual impacts of the project).

⁷⁸ Pub. Resources Code, §§ 21000; 21002.1(a); 21061; CEQA Guidelines § 15002(a)(4); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1106.

⁷⁹ *San Mateo*, 1 Cal.5th at 937, citing *Save Our Neighborhood*, 140 Cal.App.4th at 1296.

⁸⁰ Cal. Code Regs., tit. 14. § 15162(a); see Pub. Res. Code § 21166.

agency in light of such changed circumstances is whether the existing CEQA document encapsulates all of the environmentally significant impacts of the project.”⁸¹ In contrast, the agency *may* prepare a supplement to an EIR where “only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.”⁸²

The changes brought about by the issuance of the WaterFix ITP, and by the lack in participation by CVP contractors, are not merely “disagreements.” Instead, these changes are precisely the kind of substantial changes to a project and its impacts that section 21166 of CEQA is intended to capture. The public has not been afforded an adequate opportunity to review and comment on this new information, and DWR has yet to provide any analysis of how that information might change the operation and impact of the Project.⁸³ Indeed, these are precisely the kind of circumstances under which “the commencement of a project...is more misleading than if the agency had prepared no EIR, since the public might justifiably but erroneously assume that the project being built is the one discussed in the EIR.”

All the available evidence suggests, however, that these changes are significant, and minor changes to the Final EIR/EIS would not remedy the problem. DWR abused its discretion in failing to prepare a subsequent EIR to address these substantial changes in the Project.⁸⁴

B. At Minimum, the Draft SEIR Must be Revised and Recirculated to Address The Changes to the Project and Its Impacts Since Certification.

Not only did DWR err when it failed to evaluate changes to the Project in a subsequent EIR, but even in its supplemental EIR, DWR fails to acknowledge the significant changes to the Project that have occurred since the DWR’s Final EIR/EIS was certified.

A supplement to an EIR is appropriate in lieu of a subsequent EIR if “[a]ny of the conditions described in Section 15162 would require the preparation of a subsequent EIR” and “only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.”⁸⁵

Rather than taking any substantive steps to evaluate these changes, DWR neglected to discuss water supply, operational impacts, or its obligations under the 1981 Contract entirely in the Draft SEIR.⁸⁶ This omission is particularly curious because as recently as February 2018, DWR

⁸¹ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.

⁸² CEQA Guidelines, § 15163(a); *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1800.

⁸³ See CEQA Guidelines, § 15088.5.

⁸⁴ See *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 938 (“Indeed, the commencement of a project in these circumstances is more misleading than if the agency had prepared no EIR, since the public might justifiably but erroneously assume that the project being built is the one discussed in the EIR”).

⁸⁵ CEQA Guidelines, § 15163(a); *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1800, 16 Cal.Rptr.2d 358.

⁸⁶ See July 2018 Draft Supplemental EIR/EIS, Appendix 3A, page 3A-5, ln. 6-12 (DWR prepared a supplement to the approved project’s Final EIR (certified July 21, 2017 and as updated with the January 23, 2018 Addendum) because of the relatively minor changes and additions proposed to the California WaterFix facilities.”); *id.* at ln. 2-5 (“The lead agencies are utilizing a supplemental EIR/EIS and have appropriately focused their review on the

planned to prepare a supplemental EIR to “fully evaluate the potential environmental impacts of” a staged, SWP-focused implementation of the Project.⁸⁷ That additional information, required by CEQA, was to be “used to supplement the Endangered Species Act, Section 7 and California Endangered Species Act, Section 2081 record.”⁸⁸ By DWR’s own admission, then, changes to how the project will be operated by DWR and Reclamation require additional environmental review, and yet the Draft SEIR fails to conduct that additional review for the recent changes to how the project will be funded and implemented.

The Draft SEIR fails to analyze the substantial changes in the WaterFix Project since July of 2017. Instead, DWR holds out an outdated and inaccurate project description from the Final EIR/EIS as its representation of the WaterFix Project that DWR intends to carry out. That description misleads the public, and is inadequate as a matter of law for the reasons outlined in prior comments. These flaws are further exacerbated by DWR’s unwillingness to address changes to WaterFix Project operations in its environmental documents: as noted above, the range of CWF operations has changed in ways not contemplated by DWR’s Final EIR/EIS, and result of the shift to a project funded only by State Water Project contractors, and pursuant to the operational requirements of the ITP, and the Draft SEIR’s description of the Project is fatally flawed for the reasons outlined in prior comments.⁸⁹

This significant new information regarding impacts and Project operations requires the revision and recirculation of the environmental documents.⁹⁰ Recirculation is required because “significant new information” related to the Project’s operation and impacts has been revealed, but never analyzed by DWR in a publically available document—this deprives the public of a meaningful opportunity to comment.⁹¹ Public and agency review is a “fundamental requirement” of both CEQA and NEPA, and failure to provide adequate review of the significant new information revealed in these parallel regulatory processes would “eviscerate... the strongest assurance of the adequacy of the EIR.”⁹² And where, as it does here, “the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process,” that error is prejudicial.⁹³

C. DWR Cannot Limit the Public’s Right to Comment on the Draft SEIR.

CEQA does not place limits on the subject matter of public comments on a supplemental EIR, and DWR’s efforts to do so are misplaced. DWR attempts to inappropriately narrow the field of

proposed modifications to the California WaterFix and they are not required to include unrelated issues that have occurred subsequent to the certification of the California WaterFix Final EIR.”).

⁸⁷ February 7, 2018 Letter from Karla Nemeth to Public Water Agencies Participating in WaterFix, p. 2 (emphasis added); see *ibid.* (“DWR does not expect substantial change to the Biological Opinions or Section 2081 Incidental Take Permit issued in 2017.”).

⁸⁸ *Ibid.*

⁸⁹ See also *Concerned Citizens of Costa Mesa*, 42 Cal.3d at 938; 40 C.F.R. § 1501.2(b); *Sierra Club v. Babbitt* (1999) 69 F.Supp.2d 1202, 1217-1218.

⁹⁰ Pub. Resources Code § 21092.1; CEQA Guidelines, § 15088.5.

⁹¹ CEQA Guidelines, § 15088.5(a).

⁹² *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813; see also *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. at p. 172.

⁹³ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 403-405; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

public review on the Draft SEIR, effectively denying the public the opportunity to address the legal adequacy of its analysis in comments to the Draft SEIR.⁹⁴ But, because these substantial changes have never been publically analyzed, CEQA's goal of public participation in the environmental review process has been fundamentally undermined.⁹⁵ DWR's failure to prepare an adequate supplement or a subsequent EIR addressing these changes effectively deprived the public of any meaningful assessment of the actual project chosen by the agency.⁹⁶

Where, as here, a comment raises a significant environmental issue, the lead agency must address the comment in detail, giving reasons why the comment was not accepted. There must be good faith, reasoned analysis in response: conclusory statements unsupported by factual information will not suffice.⁹⁷ The revised Project requires additional environmental review, and that review must be completed before the impacts of the Project can be fully understood and disclosed. Indeed, the decision to proceed forward without reviewing the impacts of these changes is precisely the type of abuse of discretion that CEQA is designed to protect against.⁹⁸

V. CONCLUSION

CEQA mandates that DWR analyze the Project that it actually intends to carry out. That requires "thoughtful consideration of public interests transcending such necessary elements as always have been present... The impact report provides evidence that the decision-making has in fact been made and it allows those who are removed from the initial process to evaluate and balance the reported factors in their own judgment." *Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, (1972) 27 Cal.App.3d 695, 704-705.

This mandate is particularly crucial to NDWA: because of the ever-changing operational parameters for the WaterFix Project, it is nearly impossible for NDWA to assure its landowners that their rights to water of adequate quantity and quality under the 1981 Contract will not be violated. Given the operational changes brought about by the post-certification issuance of the ITP and the serious factual questions raised as to whether the Project will ever include Federal participation, the Project now contemplated by DWR is both physically and institutionally different than the one analyzed in its Final EIR, or in the Supplemental EIR. We ask, therefore, that DWR complete appropriate environmental analysis, including a full and robust analysis of the Project's impacts on 1981 Contract compliance, before proceeding with its approval of the WaterFix Project.

⁹⁴ See Draft SEIR, Appendix 3A, page 3A-5, ln. 2-5. ("The lead agencies are utilizing a supplemental EIR/EIS and have appropriately focused their review on the proposed modifications to the California WaterFix and they are not required to include unrelated issues that have occurred subsequent to the certification of the California WaterFix Final EIR.").

⁹⁵ DWR cites *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 531 for the proposition that objections must be specific and on-time in order to satisfy the exhaustion doctrine, but that is not analogous to the present situation. At issue here are the newly applicable operational criteria and project implementation that DWR has never analyzed as part of the WaterFix EIR.

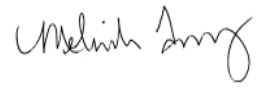
⁹⁶ *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 365.

⁹⁷ See CEQA Guidelines, § 15088(c); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124.

⁹⁸ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426 (an abuse of discretion under Public Resources Code section 21168.5 occurs when either "the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.").

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink that reads "Melinda Terry". The signature is written in a cursive, flowing style.

Melinda Terry,
Manager