

COMMENTS OF SAVE THE CALIFORNIA DELTA ALLIANCE ON THE BAY DELTA
CONSERVATION PLAN / CALIFORNIA WATERFIX 2015 RECIRCULATED DRAFT
ENVIRONMENTAL IMPACT REPORT / ENVIRONMENTAL IMPACT STATEMENT

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The following comments are submitted on behalf of Save the California Delta Alliance. We wish to thank the Lead Agencies for this opportunity to submit comments and for considering our views.

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I. These Comments Focus Directly On The RDEIR/S; References To The 2013 Draft EIR/S Are Required By The Way The Lead Agencies Have Structured These Documents And Substantive Responses To Comments Herein Reliant On The 2013 Draft EIR/S Are Required By NEPA and CEQA.

These comments focus directly on the analysis in the RDEIR/S and must necessarily address the 2013 Draft EIR/S because the 2015 RDEIR/S^β fails to include a reasonable range of alternatives that stems directly from and relies upon the 2013 Draft EIR/S. In order to understand and respond to new alternatives 4A, 2D, and 5A, and assess whether these new alternatives fill out a “reasonable range of alternatives,” it is necessary to understand the screening and development of alternatives presented in the 2013 Draft EIR/S. Where that process was flawed or incomprehensible, references to it and requests for corrections are appropriate at this point. Portions of these comments that describe and analyze portions of the 2013 Draft EIR/S are necessary, and must be allowed, in order to make meaningful comments on the RDEIR/S. Further, the public must be able to *understand* the 2013 Draft EIR/S in order to understand the RDEIR/S. Comments directed to failure of the 2013 Draft EIR/S as an informational document are indispensable to a lawful CEQA/NEPA process.

Many commenters called for changes in the 2013 Draft EIR/S and for repairs to its informational presentation. The 2015 DEIR should have responded to these calls, but largely did not. These failures of the 2015 DEIR can only be meaningfully addressed by references to the 2013 Draft EIR/S.

Further, the 2015 RDEIR/S re-issues, revises, and incorporates the 2013 Draft EIR/S in 2015 Appendix A. The 2013 Draft EIR/S is an integral, current, component of the 2015 RDEIR/S. References to the original pagination/section numbering in the 2013 Draft EIR/S, rather than the same information as it is re-presented in Appendix A, are necessary to a clear and comprehensible presentation and to allow a meaningful response to these comments. This is particularly so in light of the condition of informational chaos present in BDCP/Fix environmental review documents.

Failure to respond to any of the criticisms presented in these comments on grounds that the comment period on the 2013 Draft EIR/S has closed would violate the duty of the Lead Agencies to respond to comments as required by NEPA and CEQA.

II. The 2013 Draft EIR/S And 2015 RDEIR/S Fail As Informational Documents.

A. The EIR/S-RDEIR/S Fails To Meet Minimal Requirements For Fostering Informed Agency Decision-Making And Informed Public Participation.

“[T]he touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation. *State of Cal. v. Block*, 690 F.2d 753, 766-67 (9th Cir. 1982). The BDCP/Fix EIR/S does not. “The Current Draft lacks key information, analyses, 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.” 2015 ISB DEIR Review 4 (Attachment 21).

“Judicial review of the range of alternatives considered by an agency is governed by a ‘rule of reason’ that requires an agency to set forth only those alternatives necessary to permit a ‘reasoned choice.’” *State of Cal. v. Block*, 690 F.2d at 767. “These reasonable expectations go largely unmet in the Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement Draft. We do not attempt to determine whether this report fulfills the letter of the law. But we find the Current Draft sufficiently incomplete and opaque to deter its evaluation and use by decision-makers, resource managers, scientists, and the broader public.” 2015 ISB DEIR Review 1.

It is perhaps unnecessary to add to the ISB’s comments to make the point that the EIR/S-RDEIR/S fails as an informational document within the meaning of 42 U.S.C. § 4332, the large body of case law requiring that environmental impact statements be informative and comprehensible, and applicable Council on Environmental Quality implementing regulations. If a panel of eminent scientists, charged by the California Legislature with being the preeminent science advisors to Delta decision-makers, and who have followed and participated in the BDCP/Fix process from the beginning, find the documents “incomplete and opaque,” it would seem a tautology to argue that less specialized participants, such as lawyers representing stakeholders, let alone members of the public, could not be reasonably informed by the documents.

The comments of the Delta ISB reflect the frustration of almost all stakeholders with the obdurate obduracy¹ of those responsible for preparing BDCP/Fix documents in refusing to heed repeated and longstanding calls for documents that meet the basic requirements of informed decision-making:

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. Appallingly, such summaries and comparisons remain absent in the current draft.

2015 ISB DEIR Review 9 (footnotes omitted).

For example, a reviewer attempting to understand alternative 9A would be confronted with the following tortured journey through project documents.

¹ For a discussion of obduracy in a legal context, see *Fink v. Gomez*, 293 F.3d 989, 992 (9th Cir. 2001).

Alternative 9A (discussed substantively in section III.E.) was apparently intended to comply with the requirement of the California Legislature that the Lead Agencies consider a scientific report issued by the California State Water Resources Control Board explicitly for the use of the Lead Agencies in developing the BDCP. “For the purposes of informing planning decisions for the Delta Plan and the Bay Development and Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources.” Cal. Water Code § 85086(c)(1) (“Flow Criteria Report”).

The SWRCB issued the Flow Criteria Report on August 3, 2010. It calls, in brief, for restoration of Delta flows to 75% of unimpaired flow. The report stresses that it takes account only of “the flows that would be needed in the Delta ecosystem if fishery protection was the sole purpose for which its waters were put to beneficial use.” Flow Criteria Report cover page. It does not (and was not commissioned to) perform the extensive detailed analysis needed to balance fishery protection with other beneficial uses, including water supply, nor does it examine how to implement a restoration of 75% of unimpaired flow. It does conclude that restoration of 75% of unimpaired flow is necessary to protect public trust resources in the Delta at certain times of the year and that other standards for Delta outflow also are necessary to protect public trust resources. Flow Criteria Report 98.

It was incumbent upon the Lead Agencies to consider alternatives that examined the flow criteria goal in the context of meeting water supply and other beneficial use needs. However, the EIR/S-RDEIR/S’s treatment of Alternative 9A is frustratingly obscure, opaque, and contradictory and it is nowhere apparent that appropriate consideration to the relevant factors was given.

First, Alternative 9A is treated within 2013 Draft EIR/S Chapter 3 (in the body of the EIR/S) and subsequently in Appendix 3A. Chapter 3 is titled “Description of Alternatives” and is 212 pages long. Chapter 3 repeatedly refers the reader to Appendix 3A for an explanation of the screening process and those alternatives that were summarily dismissed without detailed examination. The reader is advised to refer to Appendix 3A “for description of alternatives that were eliminated.” 2013 Draft EIR/S 3-7. Appendix 3A contains ninety-four pages of text and an additional sixty-three pages of tables. Although pdf bookmarks appear *after* downloading Appendix 3A, there is no table of contents for Appendix 3A, tables or text. No bookmarks at all appear for the sixty-three pages of tables. The main table of contents for the entire EIR/S lists Appendix 3A only as “Identification of Water Conveyance Alternatives, Conservation Measure CM1.” 2013 Draft EIR/S lxxiv. Many of the crucial tables in Appendix 3A are printed in text that appears to be five or six-point. *See, e.g.*, 3A-146 (left hand column) (Attachment 1). Appendix 3A also has seven attachments, consuming 104.47 megabytes of disk space. The table of contents does not list the titles of the attachments and there are no bookmarks for the separate attachments.²

It is within this informational setting, then, that the interested reader must pursue Alternative 9A—the only alternatives response to the express call of the California

² It occurred to the present reviewer that the omission of tables of contents for the critical documents could not have passed unnoticed. However, no erratum providing the tables of contents was found. There is a link at the bottom of the 2013 Public Review Draft BDCP EIR/EIS document page entitled “Errata to the Draft EIR/EIS.” None of the omitted tables of contents were found at this link.

Legislature and subject of a scientific report issued at the direction of the California Legislature expressly for the use of the Lead Agencies in formulating the BDCP/Fix project. 2013 Draft EIR/S section 3.2.2 states that screening alternatives (including 9A) “were evaluated to narrow them to a more manageable field by eliminating similar or duplicative features (i.e., based on conveyance facilities or operations), or because the alternative would fail to meet the purpose and need for the BDCP or would likely violate federal and state statutes or regulations.”

Accordingly, “the following conveyance alternatives were dismissed from further evaluation as detailed in Appendix 3A.” 2013 Draft EIR/S 3-12. Six screening alternatives, including screening Alternative 9A, are then listed as being dismissed. *Id.* No reference to page numbers in Appendix 3A is provided as to where the reader will find details on what these alternatives contained or why they were dismissed. No explanation or notation as to which of the proffered reasons (duplicative features, fail to meet purpose and need, or violate statutes or regulations) applies to which alternative.

Turning to Appendix 3A, the alternatives are inconsistently and incrementally described. *Compare* 3A-11 and 3A-43–50, and renumbered, *see* 3A-53, and renumbered again, *see* 3A-72–73, and renumbered again, *see* 3A-79 (“the conveyance alternatives have been renumbered to be consistent with information presented in the BDCP process”). There is no concordance table or straightforward, comprehensible explanation or chart showing the progress of alternatives identification and transformation.

Alternative 9A first appears in Appendix 3A with a one-sentence description at 3A-72. Alternative 9A next appears at table 3A-12 with a one-sentence description in what appears to be five- or six-point font. 2013 Draft EIR/S 3A-145, and again at table 3A-13 with the same one-sentence description, and again at table 3A-14 with an additional one-sentence description indicating that it would likely require “reducing deliveries to upstream water rights holders.” 2013 Draft EIR/S 3A-148.

Alternative 9A is apparently eliminated from consideration in the EIR/S by table 3A-17, which answers the question as to whether the range of alternatives would result in the impairment of “existing senior water rights” as follows: “No for the range of conveyance alternatives that have been consistent with the three levels of screening criteria” although some alternatives may require a “change in legal ownership due to sale of property.” 2013 Draft EIR/S 3A-150. Alternative 9A was included in the chart applying third-level screening criteria and is a second-screening alternative. The table text continues, in what appears to be eight-point font, “However, the answer would be likely for Second Screening Dual Conveyance Alternative 8A, which includes operations alternatives based on Scenario 7a, and Second Screening Dual Conveyance Alternative 9A, which includes the State Water Resources Control Board 2010 flow recommendations for Delta Ecosystem.” However, Alternative 9A was carried forward to Table 3A-21, the last of the Appendix 3A tables, and the closest thing (along with preceding Table 3A-20) to a coherent summary of alternatives. This table reports that Alternative 9A was eliminated because it “probably would violate federal or state statutes or regulations.” 2013 App. A 3A-157. This must be a reference to Table 3A-14 Column 6, which indicates that Alternative 9A would likely violate statutes or regulations because “Delta outflow criteria could not be accomplished even with reducing deliveries to upstream water rights holders.” 2013 App. A 3A-148.

Section 3A.9.3 is entitled, “State Water Resources Control Board Enhanced Spring Delta Outflow Alternative.” 2013 Draft EIR/S 3A-62. This alternative is discussed in the context of the SWRCB Flow Criteria Report. The “alternative includes a requirement of 55% of unimpaired flow, as estimated for the Sacramento River at Freeport, to become Delta outflow.” 2013 Draft EIR/S 3A-64. Section 3A.9.3 does not disclose under which numbered alternative, if any, this alternative is analyzed as in the EIR/S. A separate perusal of Appendix 3A reveals, as best as can be determined, that it wound up as Alternative 8. Section 3A.9.3 appears to be the closest approximation, untitled and unreferenced as such, that analyzes or explains why the 2010 Flow Criteria Report recommendation of 75% of unimpaired flow was not carried forward as an alternative in the EIR/S or what became of it.

This garble of information for Alternative 9A is repeated for the 15 conveyance alternatives identified in scoping (*see* Appendix 3A at 3A-11), the 21 alternatives listed at section 3.2.1.5 (*see* 2013 Draft EIR/S 3-10), and various other “proposals” that were never given a number and are treated at section 3A.11 (which repeatedly refers the reader back to numerous components of other alternatives treated elsewhere) of Appendix 3A. *See* 2013 Draft EIR/S Appendix 3A 3A-80–94.

To follow the disposition of Alternative 9A, the doggedly determined reader is left to print out a dozen sub-sections of the EIR/S, lay them on a table, shuttle back and forth between them, and create his or her own concordance table and table of contents, and ultimately construct his or her own comparison.

It is unreasonable to expect members of the public and even specialized commenters—let alone decision-makers—to follow that same procedure for all of the alternatives (importantly including those eliminated in scoping and those referred to as “proposals”), much less construct his or her own comparison of all these alternatives:

According to guidance for project proponents, “Environmental impact statements shall be written in plain language and may use appropriate graphics so that decision-makers and the public can readily understand them” (Code of Federal Regulations, 40 CFR 1502.8). Far-reaching decisions should not hinge on environmental documents that few can grasp.

This guidance applies all the more to an EIR/S of the scope, complexity, and importance of the Current Draft. It demands excellent comparative descriptions of alternatives that are supported by readable tables and high-quality graphics, enumeration of major points, well-organized appendices, and integration of main figures with text. For policy deliberations, the presentation of alternatives should include explicit comparisons of water supply deliveries and reliabilities as well as economic performance. For decision-makers, scientists, and the public, summaries of impacts should state underlying assumptions clearly and highlight major uncertainties. The current draft is inadequate in these regards.

2015 ISB DEIR Review 9.

Promises that these deficiencies will be corrected in the final project documents do not fulfill the purposes of NEPA and CEQA, which are to provide decision-makers with comprehensible information upon which to base their decisions early in the process, when changes of course are practicable. Depriving the public of comprehensible information until after final decisions have been made further frustrates informed public participation and constitutes actionable informational injury as well as depriving decision-makers of informed comments to guide their deliberations.

B. The 2015 RDEIR/S Compounds The Informational Injury Inflicted By BDCP/Fix Environmental Review Documents Because It Adds Further Confusion And Is Misleading.

The 2015 RDEIR contains several features that may have been intended to address the informational chaos created by the 2015 Draft EIRS. For example, the 2015 RDEIR/S provides an Appendix A, which is a redline version of the 2013 Draft EIR/S. This could be a useful feature. However, the Lead Agencies have chosen to renumber all the sections, without providing a concordance table or a table of contents.³ Some new text is indicated in redline insertion text. Some new text is not so indicated. The pagination has been radically altered. For example, 2013 page 8-420 has become 2015 Appendix A page 8-217. These pages describe significant unmitigated impacts on water quality. They are crucial. The section under which this critical text appears has yet again been renumbered, from 8.4.3.9 to 8.3.3.9. *Compare* 2015 RDEIR/S Appendix A 8-204 *with* 2013 Draft EIR/S 8-407. The numbering change does not appear in strikeout or underline. Absent a concordance table and/or table of contents/concordance of table of headings (new and original), Appendix A is a source of frustration that will drive away informed comments. The present reviewer can imagine no rational basis for the failure to use well-established techniques, such as keeping all original heading numbering the same and inserting new headings as .0001, .0002, etc.

As it stands, the most expedient way to find out what changes were made to a specific passage from the 2013 Draft EIR/S is to select unique phrases from the 2013 text of interest and run a word search in Acrobat on the 2015 Appendix A in hopes of landing at the correct text.

A line has to be drawn somewhere as to how confusing, poorly organized, and poorly presented NEPA/CEQA documents may be. Here, the line has been crossed and the only remedy is to re-draft the 2015 RDEIR/S and reopen the comment period, if for no other reason than to address the basic requirement of informing the public as to what is being proposed and evaluated, and to allow for informed public comment at stages early enough to allow their meaningful use by decision-makers.

More troubling yet is the misleading presentation of several critical portions of the 2015 RDEIR/S. For example, table ES-9 purports to summarize the impacts of the three new alternatives (2D, 4A, and 5A) (Attachment 2). However, it lacks a key feature: a further column that would direct the reader to the text of the DEIR that supports the table's conclusory presentations. This leads to a misstatement of impacts.

Two of the significant unmitigated adverse impacts/effects of preferred Alternative 4A disclosed by the 2013 Draft EIR/S were GW-8 and GW-9, which are statewide impacts to groundwater. Table ES-9 lists GW-8 and GW-9 as having no impact for new alternatives 2D, 4A, and 5A. 2015 RDEIR ES-43. However, a tiny footnote cue, appearing only on the

³ Like 2013 Appendix 3A, there are only pdf bookmarks available after download.

column “Impact Conclusion Before Mitigation,” directs the reader to footnotes stating that the preferred alternative, Alternative 4A, “could have” significant/adverse unmitigated impacts on groundwater. The right-hand column, “Impact After Mitigation,” lists Alternative 4A as LTS and B (less than significant or beneficial). This is false. The actual finding purporting to be summarized is that the “overall impact for Alternative 4A [on groundwater supplies and recharge is] considered significant and unavoidable.” REDIER/S 4.3.3-8. Most readers of this table will skim the right-hand columns, which list as “S” or “SU” or “A” those impacts that are significant and unmitigated. On this method, Alternative 4A appears benign, which it is not. An executive summary table constructed with the aim of *alerting* readers to significant impacts that are worthy of further perusal in the body of the document would not have presented information in this manner.

In addition to noncompliance with CEQA and NEPA, and relevant federal government contracting requirements, it may further be argued that the deterrent effect of these documents is so great as to deprive the public of its right to petition the government for a redress of grievances within the meaning of the First Amendment to The United States Constitution. Physical exclusion of dissenting citizens from a hearing room would have no more pernicious effect than the organization of these documents, especially if deceptive intent is found.

III. The 2015 RDEIR/S Fails To Consider A Reasonable Range Of Alternatives.

The current range of Alternatives (including new Alternatives 2D and 5A) and the preferred project (Alternative 4A) do not represent a reasonable range of alternatives as required by CEQA and NEPA. For the following reasons, a second revised RDEIR/S should be issued for public comment that includes some or all of the alternatives discussed below.

A. The Extent Of The Lead Agencies’ Duty To Rigorously Explore And Objectively Evaluate All Reasonable Alternatives Is At Its Zenith In This Matter.

An agency must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative use of available resources.” 42 U.S.C.A. § 4332(2)(E). “Judicial review of the range of alternatives considered by an agency is governed by a ‘rule of reason’ that requires an agency to set forth only those alternatives necessary to permit a ‘reasoned choice.’” *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). The “touchstone for our inquiry is whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.” *Id.*

As acknowledged in the RDEIR/S, federal agencies are required to take a “hard look” at the environmental consequences of their actions, including a hard look at potential alternatives to recommended courses of action that might lessen environmental impacts. *See* RDEIR/S 4.1-3. “The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a ‘hard look’ by the agency, and thereby permit informed public comment on proposed actions and any choices or alternatives that might be pursued with less environmental harm.” *Te-Moak Tribe of Western Shoshone of*

Nevada v. United States Dep't of the Interior, 608 F.3d 592, 601 (9th Cir. 2010) (citation omitted). “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Id.* (citation omitted).

It would be hard to overstate the conflicts surrounding alternative competing uses of Delta water resources, including but not limited to the conflicts between environmental needs and water supply needs; and the conflicts between in-basin consumptive users, upstream diverters, and export consumptive users. It would also be hard to overstate the cost of a wrong decision. The ecosystem of the largest and most important estuary on the west coast of North and South America is on the brink of collapse. The wrong decision could push numerous species to extinction and take a horrific toll on communities and the economies that rely on Delta water. Indeed, near final drafts of the BDCP, as operated in and in conjunction with expected climate-changed conditions, and vetted by the Lead Action Agencies, would have driven important fish species, including winter-run and spring-run Chinook salmon, to extinction. *See NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document 1* (“Red Flag Comments”) (Attachment 22).

The responsibility of the Lead Agencies in this matter to “describe appropriate alternatives,” 42 U.S.C. § 4332(2)(E), that are “necessary to permit a ‘reasoned choice,’” *California v. Block*, 690 F.2d at 767, after a “hard look” at environmental consequences in the context of lessening them by considering alternative courses of action, *Te-Moak*, 608 F.3d at 601, is commensurate with the gravity and far-reaching consequences of the ultimate decision in this matter. In short, the Lead Agencies’ public duty to “rigorously explore and objectively evaluate all reasonable alternatives,” 40 C.F.R. § 1502.14(a), is here at its zenith. The federal Lead Agencies would perhaps not dispute this characterization of their duty. What we ask, upon review of these and all other comments on the RDEIR, is for the Federal Lead Agencies to earnestly re-examine whether they have lived up to it.

B. The BDCP/Fix Statements Of Purpose And Need May Not Be Drawn Or Interpreted In Terms So Narrow As To Unreasonably Limit The Range Of Alternatives Considered.

On February 13, 2009, the Lead Agencies issued a Notice of Intent to Prepare an Environmental Impact Statement/Environmental Impact Report and Notice of Public Scoping Meetings pursuant to NEPA, 74 FR 7257 (“2009 NOI”), and a Revised Notice of Preparation OF Environmental Impact Report and Environmental Impact Statement for the Bay Delta Conservation Plan, State Clearinghouse Number 2008032062, pursuant to CEQA (“2009 NOP”). These statements remained in effect until they were revised on July 10, 2015, as part of the RDEIR/S.

These documents contain the statement of purpose and need and the statements of objectives and fundamental underlying purpose pursuant to NEPA and CEQA respectively. Because the framing and interpretation of these statements are closely related to the duty to discuss alternatives, they are being increasingly used by lead agencies to limit the range of alternatives they wish to consider. As explained by leading practice guides on NEPA and CEQA:

[An EIS] must briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action The courts have recognized these requirements are closely related to the duty to discuss alternatives, because the purpose of an action determines the universe of alternatives an agency must consider.

Daniel R. Mandelker, *NEPA Law and Litigation* § 9:23 (Thomson Reuters 2015) (citations and quotation marks omitted) (“*NEPA Law and Litigation*”).

Lead agencies have considerable discretion to select the project objectives they wish to achieve. Although a lead agency may not give a project’s purpose an artificially narrow definition, a lead agency may structure its EIR alternatives analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal.

Stephen I. Kostka and Michael H. Zischke, *Practice Under the California Environmental Quality Act* (CEB 2d ed. 2015) (“*Practice Under CEQA*”).

However, courts are increasingly recognizing that lead agencies may abuse the statement of purpose and need to evade the requirement to earnestly evaluate a reasonable range of alternatives. *See, e.g., National Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009) (summarizing 9th Circuit precedent to “forbid the [lead agency] to define its objectives in unreasonably narrow terms”) (striking down lead agency’s EIS because “[a]s a result of this unreasonably narrow purpose and need statement, the [lead agency] necessarily considered an unreasonably narrow range of alternatives”); *see also id.* at 1071 (stating that the court will “determine whether the [lead agency’s] purpose and need statement properly states the [lead agency’s] purpose and need . . . in a manner broad enough to allow consideration of a reasonable range of alternatives”).

Courts also scrutinize unreasonably narrow interpretations of purpose and need statements by lead agencies where the statement of purpose and need, fairly read, would allow for consideration of alternatives that the lead agency rejected as outside the project’s purpose and need statement. *See, e.g., Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1219 (9th Cir. 2008) (holding that “[w]e also disagree with [the lead agency] that Petitioners’ suggested alternatives would not be reasonably related to the project’s purpose”).

C. The Project’s Range Of Alternatives Described In The 2015 DEIR Is Unreasonably Limited By Excluding All Storage, Groundwater, Integrated Water Management, And Conservation Elements From Consideration And Failing To Give Meaningful Consideration To Conveyance Options.

1. At The Very Outset Of The Process, The Lead Agencies Unreasonably Eliminated Any Portfolio Approach By Drafting And/Or Interpreting The 2009 Statement Of Purpose And Need In Unreasonably Narrow Terms And Drafted The Revised 2015 Statement In Unreasonably Narrow Terms.

Virtually all stakeholders agree a “portfolio” approach is required if we are to make meaningful progress in solving California’s water problems. A portfolio approach simply combines elements of conveyance with one or more elements of storage, groundwater management/recharge, and conservation. However, the Lead Agencies unreasonably eliminated any possibility of a portfolio approach at the outset of the process.

“Scoping” is the process undertaken at the outset of environmental review to determine the scope of issues that the EIS will include. As part of the scoping process the lead agency shall “[d]etermine the scope and the significant issues to be analyzed in depth in the environmental impact statement.” 40 C.F.R. § 1501.7(a)(2).

The 2009 NOI, which contained the statement of purpose and need, also announced the commencement of 10 public scoping meetings. However, through their drafting/interpretation of the statement of purpose and need announced in the 2009 NOI, the Lead Agencies had already effectively eliminated from meaningful consideration any water infrastructure other than conveyance within the statutory Delta:

The 2009 NOP and NOI stated that the new points of diversion could be located along the Sacramento River between South Sacramento and Walnut Grove. The new conveyance facility could extend from the new points of diversion to the existing SWP and CVP pumping facilities in the South Delta and be located either to the west or east of the Sacramento River.

2013 Draft EIR/S, App. 3A 3A-11.

The Lead Agencies’ interpretation of the 2009 NOI/NOP had also absolutely eliminated from consideration any conservation element; had eliminated from consideration any groundwater component; and had eliminated from consideration any storage component. The 2015 revised statement of purpose in need is narrowed and also excludes storage. This is a failure to respond to changed circumstances because the need for storage has become all the more acute as recognition of the severe diminishment of the snowpack as a storage element has become much better understood and more pronounced in the last six years. It was out of bounds from this point forward for the Lead Agencies to meaningfully consider any portfolio approach or any surface storage, groundwater recharge and storage, or demand reduction/management measures.

The 2015 Revision to the statement of purpose and need only further unreasonably narrows the purpose and need.

The now six-year-old environmental review process, while producing tens of thousands of pages of reports, convening dozens of public meetings, drawing thousands of comment letters, and proclaiming itself one of the most thorough ever undertaken, had eliminated the most promising alternatives at the outset. The 2015 RDEIR/S revision to the statement of purpose and need should have corrected course by including a reasonable range of alternatives, but it did not. All of the hundreds of thousands of hours of study and hundreds of millions of dollars in consultant's fees were focused on assessing a badly defined project with a self-imposed constraint that forbids or refuses consideration of better alternatives.

As explained to the public:

While water storage is a critically important tool for managing California's water resources, developing new water supplies and including new storage is not part of the BDCP purpose and need.

2013-4 Your Questions Answered, *available at* <http://baydeltaconservationplan.com/Library/BDCPLibrary/YourQuestionsAnswered.aspx> (last visited October 23, 2015) (Attachment 3).

"New water supplies" or "new water" as used in the BDCP/Fix documents, and in California water discussions generally, includes storage and conservation measures. Increasing storage capacity makes "new water" because it allows the capture and storage of water supplies that would not otherwise be available; it increases the total amount of water available for management. Likewise, conservation measures are considered to provide "new water" because "using water more efficiently reduces demand, which has the same effect as adding water to the system." Delta Plan 91, n.1.

The Lead Agencies, therefore, dismissed the basic reaction to initial scoping by concerned stakeholders whose comments "described methods to reduce reliance upon Delta water supplies, including water conservation, recycling, and use of other water supplies such as conjunctive use programs to ensure adequate groundwater recharge operations." 2013 Draft EIR/S App A 3A-11.

Where this process has ended up, stand-alone (single-focus) new conveyance infrastructure, is one of the few choices that were available to the Lead Agencies that *does not* increase water supplies:

The benefits of new Delta conveyance infrastructure should be maximized by integrating with new and expanded storage projects, implementing projects that increase water-use efficiency and conservation, improving groundwater management, and restoring the structure and function of some key Delta ecosystems. New Delta conveyance infrastructure by itself does not create any new supplies of water.

Delta Stewardship Council, *18 Principles for Water Conveyance in the Delta, Storage Systems, and for the Operation of Both to Achieve the Coequal Goals* ¶ 4, *available at*

<http://www.deltacouncil.ca.gov/docs/delta-stewardship-council-october-22-23-2015-meeting-agenda-item-10-attachment-1-draft> (Attachment 20).

The Lead Agencies' narrow drafting/and or narrow interpretation of the purpose and need of the project as excluding "developing new water supplies" also excludes groundwater storage from meaningful consideration. Groundwater storage is considered a source of "new water" and has the potential to provide up to two million acre-feet of new water annually. *See, e.g.* Delta Plan 92 (Attachment 4).⁴ But because it is considered a source of "new water" it has been excluded by the Lead Agencies, through use of the purpose and need statement, from meaningful consideration.

The 2009 NOI stated that "improvements to the conveyance system are needed" and that the project would include "three major elements," one of which was "potential capital improvements to the water conveyance system." 74 FR 7259. However, the description of potential alternatives in the 2009 NOI stated that:

Three general alternatives are being considered as they relate to the potential changes in the water conveyance system and CVP/SWP operations. These include (1) A through-Delta alternative; (2) a dual conveyance alternative; and (3) an isolated facility alternative.

Each of these alternatives was limited to conveying water from a point on the Sacramento River between South Sacramento and Walnut Grove to the existing CVP and SWP pumping plants near Tracy, about forty miles away. 2013 Draft EIR/S App. 3A 3A-11.⁵

The elimination of serious consideration of *any* portfolio alternatives was unreasonable on its face. *See, e.g., National Highway Traffic Safety Administration*, 538 F.3d 1172, 1219 (9th Cir. 2008) (striking down impact statement and rejecting lead agency's argument that "Petitioners' suggested alternatives would not be reasonably related to the project's purpose").

Groundwater recharge, surface storage, and conservation are all reasonably related to the project's purpose. Project documents repeatedly state that the underlying goal of the project is to improve deliveries of water to consumptive users while at the same time improving ecological conditions in the Delta:

"As described in Chapter 1, *Introduction*, the BDCP is intended to provide for the ecological needs of a number of at-risk species adversely affected by a range of human activities while also ensuring adequate and reliable water supplies from the Sacramento-San Joaquin River Delta (Delta) and its stream tributaries, for people, communities, agriculture, and industry." Draft EIR/S App. 3G-2 (2013). "As stated in Section 1, *Introduction*, the RDEIR/SDEIS considers additional sub-alternatives that meet the goals of restoring the ecological functions of the Delta and improving water supply reliability."

⁴ The 2013 Delta Plan has long been available to the lead agencies and was made a part of the administrative record in its entirety as a part of comments in July 2014. Several excerpts are attached here for the convenience of the reader.

⁵ Two conveyance components outside the statutory Delta, one conveying water from a point on the Sacramento River near the confluence of the Feather River, and the other from a point near Fremont Weir, were summarily eliminated without evaluation as project alternatives in the EIR/S.

RDEIR/S 4.1-1 (2015). “The current and projected future inability of the SWP and CVP to deliver water to meet the demands of certain south of Delta CVP and SWP water contractors is a very real concern. More specifically, there is an overall declining ability to meet defined water supply delivery volumes and water quality criteria to support water users’ needs for human consumption, manufacturing uses, recreation, and crop irrigation.” 2013 Draft EIR/S 2-6. *See also* our July 29, 2014, comments for further explication of the project purpose and need.

Federal regulators, who are not project proponents, also understand that the project has a broad fundamental purpose. “EPA fully supports the stated purpose of the BDCP effort: to produce a broad, long-term planning strategy that would meet the dual goals of water reliability and species recovery in this valuable ecosystem” 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 (“August 26, 2014, EPA Comments”) (Attachment 23). Federal regulators understand that portfolio approach alternatives are well within the BDCP/Fix project’s purpose and need. “Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta. Such alternatives would be consistent with the purpose and need for the project, as well as with the California Bay Delta Memorandum of Understanding among federal agencies and the Delta Reform Act of 2009.” *Id.* at 3.

Not only is a portfolio approach consistent with the Statement of Purpose and Need, the Lead Agencies’ own science advisors deem it indispensable. In 2014, the Action Lead Agencies commissioned four eminent Delta scientists to author a report addressing the challenges facing the Sacramento-San Joaquin Delta in the context of solving the vexing problems of water supply and ecological degradation. *See* Louma, et. al, *Challenges Facing the Sacramento-San Joaquin Delta* (Delta Science Program 2015) (“*Delta Challenges*”) (Attachment Five). *Delta Challenges* concludes that Delta problems are too complex to be addressed by single-focus solutions, such as lone conveyance projects. “Single-focus problem solving can create unanticipated outcomes.” *Delta Challenges* 9. Instead:

Simultaneous attention to a portfolio that includes actions like addressing overuse and mis-use of water, and improving ground water management and storage, *should accompany any necessary water infrastructure adjustments.*

Delta Challenges 4 (emphasis added).

The rejection of portfolio elements on purpose-and-need rationale was unreasonable.

2. A Portfolio Approach With Additional Conveyance Options Is Reasonable, Feasible, Proven, And Necessary And Should Have Been Included In The 2015 RDEIR/S.

The self-imposed limitation of considering conveyance options located only within the statutory Delta excludes many types of viable conveyance improvements. For example, the SWP and CVP canal system, along with interconnected regional canals, stretches from the Delta south to the Mexican border, west to the coastline at Santa Barbara, and east to Arizona. Many critically over-drafted groundwater basins lie adjacent to this extensive canal network, which forms the largest and most complex piece of water supply infrastructure in the United States (if not the world). Attachment 6 (Delta Plan 70) is a map of the canal network. Attachment 7 (Delta Plan 98) is a map showing the location of critically over-drafted ground water basins.

Smaller regional conveyance improvements, in the form of branch lines connecting to groundwater recharge facilities, or improvements to existing branch lines, along much of the route already traversed by existing canals could create new water by recharging badly over-drafted aquifers.

As discussed in our comments of July 29, 2014 (“Delta Alliance July 29, 2014 Comments”), Reclamation has found feasible and approved exactly these types of projects. *See* U.S. Dept. Of the Interior, *Record of Decision: Madera Irrigation District Water Supply Enhancement Project 1* (approving “Alternative B which includes the banking of MID CVP water outside MID’s service area in the proposed WSEP, modification of Reclamation’s 24.2 canal and potential federal funding”). *See also Measure J94 Goleta Water District* (local self-imposed ordinance requiring that portions of SWP water supply be devoted to groundwater recharge) (Attachment 8).

There is scientific consensus that recharge of depleted groundwater basins is *feasible* and *necessary* to California’s water future. A dozen or so scientific reports emphasizing this fact were attached to our July 29, 2014, comments. In addition to the reports, Lead Agency DWR’s California Water Plan, emphasizing the feasibility and necessity of groundwater recharge, was also attached.

The recently released *Delta Challenges* underscores that creating new water to take pressure off the Delta is essential to recovering the Delta ecosystem. “Water scarcity has defined and will continue to define the future of the Delta and all that is linked to it.” *Delta Challenges* 28. However:

Many approaches used in water-scarce environments elsewhere are under-utilized in the Delta. While adjustments to the infrastructure as it ages are essential, opportunities exist to *simultaneously* redefine bold action as we pursue *proven* (although not always initially popular) ways to work more effectively with what we have. Examples include the following:

Groundwater recharge and conjunctive use offer storage potential beyond that available for surface waters.

Delta Challenges 26 (emphasis added) (citations omitted).

We have previously provided detailed comments on the feasibility of portfolio alternatives that include surface storage, either within, north, or south of the Delta. *See* Delta Alliance July 29, 2014, Comments. Our comments included a discussion of Sites Reservoir, also known as North of Delta Offline Storage (“NODOS”) as an integral component of a BDCP/Fix portfolio alternative. A “Sensitivity Analysis of Operations with the BDCP” was and is referenced by the NODOS website.

<http://www.water.ca.gov/storage/northdelta/index.cfm#NODOSDocs>, last visited October 27, 2015. The document is still not available to the public. The Lead Agencies should consider it, and if it has not been produced, should produce it and an analysis of integral operation of BDCP/Fix conveyance with NODOS as an alternative to the preferred project. The NODOS Draft EIR was previously provided. A NODOS Investigation Highlights booklet is attached hereto (Attachment 9).⁶

The currently preferred Fix twin tunnels (Alternative 4A) and the identical previously preferred BDCP twin tunnels (Alternative 4) both have the ability to take from the Delta more water more often than the existing infrastructure system. That ability could make sense in the context of restoring the Delta ecosystem and restoring the ability of the “SWP and CVP to deliver up to full contract amounts” while doing less damage to the Delta ecosystem. 2009 NOI, 74 FR 7258. The ability to take more water at times of abundance makes sense when the project also has the ability to convey and store it for use at times of scarcity.

Conveying “surplus” Delta water to groundwater banking facilities so it could be drawn upon when Delta flows are low and exports are most harmful would provide a more reliable water supply and ease the damage of exports to the Delta ecosystem. Alternatives 4 and 4A do not have that ability. The BDCP “does not significantly reduce pressure on the Delta during drier periods.” Saracino and Mount, et al., *Panel Review of the Draft Bay Delta Conservation Plan* 30 (September 2013) (“Mount Report”) (reviewing Alternative 4 in the 2013 administrative draft BDCP) (attached to our July 29, 2014 comments). “Expanding potential storage, particularly groundwater storage, would have created considerably more flexibility in exports” allowing more water to be harvested in wet years and conserving environmental flows during periods of scarcity. Mount Report 22. Alternative 4A has not meaningfully changed this dynamic. This was the original rationale for new high-capacity conveyance, referred to in BDCP promotional materials as “Big gulp, little sip,” that the BDCP/Fix has failed to fulfill.

There is no logic whatsoever in the tunnels’ initial intake capacity being set at 9,000 cfs absent integral storage components. There is only the danger, and perhaps probability, that the high-capacity tunnels will be used to meet the project’s expressed goal of providing full contract amounts while wreaking further havoc on the Delta ecosystem. This looming disaster is only made more frightening by considering that the tunnels themselves have a capacity to divert 15,000 cfs (a scenario previously given serious consideration by the Lead Agencies) and could be so employed by adding two

⁶ We are aware that the Sacramento Valley Water Management Agreement eyes the NODOS project as a source of new water for local interests. However, the project has been languishing at a snail’s pace and integration with the DCP/Fix could benefit all interested parties.

additional intakes (that have already been designed) and related diversion components (that have also already been designed).

Increased water use efficiency/conservation, in both urban and agricultural settings, has the potential to produce up to 4.1 million acre-feet of new water annually. Delta Plan 92. In the context of recovering the Delta ecosystem, “Making water conservation a continual, long-term, statewide investment is a necessary part of accepting water scarcity.” *Delta Challenges* 26 (citations omitted). Although much of California depends on Delta water for *some* portion of its water supply, the relative contribution of Delta water compared to regional sources is small. *See* Delta Plan 78 (Attachment 19).

Conservation and groundwater recharge are necessary to restore the capacity to deliver up to full contract amounts while at the same time reducing harm to the Delta ecosystem and restoring its health. These elements are reasonably related to the project’s purpose and were unreasonably excluded from any meaningful consideration.

The Mount Report, reviewing then-preferred Alternative 4 in September 2013, was commissioned by ex officio BDCP Steering Committee members American Rivers and The Nature Conservancy. In their July 29, 2014, comments on Alternative 4 (“American Rivers 2014 Comments”) these organizations summarized the Mount Report’s findings:

While finding that Conservation Measure 1, including the new north Delta diversion, may improve conditions for Delta smelt, the overall conclusion is that the plan will not significantly improve the ecosystem as a whole or assure reliable water supply.

We regretfully conclude that the plan, in its current draft form, will not make a sufficient contribution to the attainment of the co-equal goals as required by applicable laws.

American Rivers 2014 Comments 2. As all are aware, the “coequal goals” are “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” These were also the originally proffered twin promises of BDCP/Fix that thus far have not been fulfilled.

As discussed above at section III.C.1., 2015 RDEIR/S further narrows the description of purpose and need. It also eliminates the 90,000 or more acres of habitat restoration and breaks the promise to meet the “gold standard” of a Habitat Conservation Plan and Natural Communities Conservation Plan proffered from the earliest days of the BDCP to assure its environmental benefits.

Left are single-focus giant diversion facilities and conveyance tunnels.⁷

⁷ EcoRestore, a recently announced separate program to restore Delta habitat, is little more than a branding effort. Much of the habitat restoration proffered by EcoRestore is merely the implementation of measures already required by federal regulators as a condition of continued operation of the SWP and CVP. These orders are long-standing and EcoRestore does not represent any new, increased, or significant effort to restore Delta habitats or repair the Delta ecosystem.

3. The Lead Agency Arguments Against A Portfolio Alternative Lack Merit.

The arguments against *even considering one* portfolio alternative with even *one* portfolio element are found at 2013 Draft EIR/S Appendix 3A § 3A.11.1.1 at 3A-82–83. This section rejects a call from the Natural Resources Defense Council to consider a portfolio alternative and generally eliminates *any* portfolio approach as well. The principal argument is that portfolio elements are “beyond the scope of an HCP/NCCP focused on the Delta.” 2013 Draft EIR/S 3A-81. The first part of this answer, that an HCP/NCCP cannot accommodate portfolio elements, is gone because preferred Alternative 4A is not an HCP/NCCP and the idea of BDCP/Fix qualifying as an HCP/NCCP is, for all practical purposes, dead. The second part, that Fix is focused on the Delta, begs the question and ignores the overwhelming consensus that single-focus in-Delta projects cannot solve the problems of water supply and in-stream ecological needs, which are two sides of the same coin.

The arguments further conflate the call for portfolio-based alternatives with a demand to instantaneously implement the entire California Water Plan. Considering an alternative that includes *some* significant storage is not the same as a demand to solve all of the state’s water problems in one fell swoop.

The arguments that “DWR has no control over” local programs, *id.*, and that generally portfolio elements are beyond DWR’s reach is also without merit. First, the document and project are joint products of the Lead Action Agencies, DWR *and* Reclamation. The resources of the federal government are available for this project. Second, the elements are within DWR’s reach:

a. DWR has no control of local water supply and recycling.

The water contractors are integral partners, along with the federal and state governments, in the BDCP/Fix process. They have been voting members of the BDCP steering committee from the beginning—unlike environmental groups that were *ex-officio* members. *See Planning Agreement regarding the Bay Delta Conservation Plan*, October 6, 2006 (Attachment 10); *see also First Amendment to the Memorandum of Agreement Regarding Collaboration on the Bay Development and Conservation Plan 7* (2011) (Attachment 11) (parties to support contractors as applicants and permittees along with DWR). Indeed, the contractors are paying hundreds of millions of dollars to fund the BDCP/Fix planning effort. *Id.* at 10. And they *do* have control over local water supply and recycling as well as the money and expertise to implement these programs. The BDCP/Fix federal/state/local partnership is one of extraordinary capacity and opportunity. What better opportunity is DWR waiting for?

b. DWR’s support for such supply augmentation cannot transform the BDCP from an incidental take permit focused on the Delta into a broader focus.

The BDCP/Fix is no longer pursuing a section 10 incidental take permit. As we pointed out in our November 16, 2011, comments on the First Amendment to the Memorandum of Agreement, description of the project as “issuance of ESA permits” has never been a legally adequate or factually accurate description of the “major federal action” in any event.

c. Many of the aspects of a portfolio approach can only be accomplished through Integrated Water Management.

“Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management.” August 26, 2014, EPA Comments 3. *See also* subparagraph a above. What better opportunity to integrate water management on a project-specific basis is DWR waiting for?

D. Including A Portfolio Alternative In The 2015 RDEIR/S Would Avoid The Significant Adverse Environmental Effects/Unmitigated Environmental Impacts Identified In The 2015 RDEIR/S.

1. The Preferred Project And Present Alternatives Have Numerous Adverse Effects That Could Be Eliminated By A Portfolio Alternative.

Among the many adverse effects/unmitigated impacts of the project are the following:

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

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.

This negative impact is an inherent part of the project. Changing the points of diversion to the north Delta means that water that would, under existing conditions, flow through the Delta and contribute to dilution of salinity will be diverted before it reaches Delta streams and sloughs and diverted through the tunnels directly to the export pumps. Shifting exports to existing south-Delta diversion points will not reasonably be expected to avoid this impact because south Delta pump operations themselves draw salt water upstream from the bay and contribute to the problem and self-limit the ability to pump from the south Delta location. *See* Attachment 13 hereto.

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 DEIR 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* § IV.B below.

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 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. Questionable conclusions include the following:

1) The increase in long-term average chloride concentration at Staten Island would be 25%. 2015 DEIR 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, as discussed at section IV.A.2, existing applicable water quality objectives are recognized as inadequate. 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 the 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* (DWR and DFG

2003) (Attachment 12). 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/Unmitigated Impact WQ-14 Degradation Of Water Quality By Increased Mercury Concentrations.

The Lead Agencies propose wetland creation as mitigation for the loss of wetlands due to project facilities replacing existing wetlands. First, there is no good evidence that “wetland creation” can ever be an adequate replacement for existing wetlands. This is especially true here. Wetland projects that enhance existing wetlands elsewhere create no new wetland areas. Therefore they do not mitigate the destruction of other wetlands for project construction because the wetlands that were destroyed are not replaced and there is a decrease in total wetland area equal to the amount of wetlands destroyed by the project. *See* 2015 ISB DEIR Review 6–7. The idea that wetlands can be created from farmland, other land that is not already a wetland or emergent wetland, or from uplands is highly speculative and unproven. These attempts often end up as mud holes that may look in some respects like a wetland but have little ecological function. This type of wetland creation cannot serve as mitigation for the destruction of wetlands because the outcome is too speculative and theoretical to serve as a concrete mitigation measure. While there may be an offset in the amount of acres of “wetland,” there is no evidence that these created wetlands will replace the biological functions of the destroyed wetlands. In fact, evidence is to the contrary. At the very minimum, the ratio of “created” wetlands to destroyed wetlands would have to be very high.

This mercury pollution is an unlawful violation of water quality standards and must be removed from the project because it cannot be justified on the basis that it is a mitigation measure. It is pollution without any justification.

f. Unmitigated Destruction Of Wetlands.

For the reasons discussed in subparagraph e immediately above, the destruction of wetlands for the construction and operation of project facilities remains an adverse effect/significant unmitigated impact.

g. 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. The Lead Agencies have the capacity to do exactly the modeling that was foregone. They have done it for other alternatives, and it showed significant adverse effects. Such modeling is the basis for all the impacts analysis on water quality. Abrupt departure here is suspect.

The Lead Agencies have failed to take the requisite “hard look” at this impact. Taking that look is indisputably within their capacity and it is required to comply with NEPA and CEQA. In its absence, this impact must be considered adverse and significant.

h. 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. 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 at subparagraph c. above and section IV.B below. The impacts on longfin smelt, therefore, must be considered adverse and significant.

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

This impact is significant. ES-54. The proposed mitigation measure, AQUA-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 as described at subparagraph c. above and section IV.B below. 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.

j. 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.

k. Significant Impacts/Effects On Aesthetics And Delta-As-Place.

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 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.

l. Adverse Environmental Impacts On Recreational Navigation Of The Head Of Old River Barrier And Violation Of Federal Statutory Navigability Requirements.

Making the head of Old River barrier a permanent engineering structure is a significant change in the physical environment and makes a temporary seasonal (although longstanding) impairment to recreational boating permanent.

The severe negative impact on boaters of barriers to recreational navigation is documented in the comments we submitted to Lead Agency DWR on March 18, 2015, with regard to their proposed Emergency Drought Barriers Project (Attachment 13). Our Drought Barrier Comments also point out that barriers to recreational navigation violate the act of Congress admitting California to the union, which requires keeping "all navigable waters within the said State shall be common highways, and forever free." This barrier and the cumulative impact of the many barriers proposed at various locations by the Lead Agencies and others violate this act of Congress. *See* 9 Stat. 453 (1850).

Those comments are incorporated here and apply equally to this barrier. The many letters from boaters objecting to barriers to recreational navigation attached to our Drought Barrier Comments are worth perusal.

This is a significant impact/adverse effect that must be analyzed, avoided, or mitigated.

2. Alternatives Containing One Or More Portfolio Element Would Avoid/Eliminate/Mitigate To A Level Of Insignificance The Adverse Effects.

Enhancing in-Delta flows by providing new water while at the same time taking pressure off of groundwater supplies and providing new water could eliminate the adverse water quality and groundwater impacts described above. By providing new water, the portfolio approach would also allow reduction or elimination of massive new infrastructure in the most scenic part of the Delta that damages the Delta as place and impairs recreational boating and other recreation. This could eliminate impacts k and l described above. New water also allows more flexibility in diversions that could eliminate impacts.

Providing more flow in the Delta is the key to restoring the Delta ecosystem. Providing new water allows more flow to remain in the Delta because it provides a substitute for drawing down Delta flows as a source of supply.

The impacts listed in sections 1a–j above could be eliminated by including one or more of the portfolio elements listed at section II.C. Providing additional groundwater recharge capacity through modest new infrastructure in the Southern California, which could use water available at times of surplus (perhaps in conjunction with new north of Delta surface storage), would eliminate adverse effects GW-8 and GW-9. The Water Replenishment District of Southern California engages in groundwater recharge. *See generally Water Replenishment District of Southern California Engineering and Survey Report*, March 5, 2015 (Attachment 14). Agencies like WRPDSC provide partners for eliminating the adverse effects of GW-8 and GW-9 through increased recharge. Providing surface storage by itself would also eliminate adverse effects GW-8 and GW-9 because it would provide water supplies alternative to further drawing down already depleted aquifers.

Surface storage and groundwater recharge would also eliminate adverse effects WQ-7 and WQ-11 because “new water” available from groundwater recharge and/or surface storage would replace water drawn from Delta flows, leaving more water available for in-stream flow. It is the reduction in freshwater flows that causes increases in EC and chloride concentrations. For example, installation of the Suisun Marsh Salinity Gates was mitigation for impacts of the SWP and CVP diminishing freshwater flows in the first place. *See, e.g.,* Chris Enright, DWR, *Suisun Marsh Salinity Control Gate: Purpose, Operation, and Hydrodynamics/Salinity Transport Effect 3* (Attachment 15).

Conservation creates new water to replace water inappropriately drawn from Delta flows at times when there is inadequate flow to support both exports and in-stream needs.

Integrated Water Management allows the coordination of local, regional, and statewide supplies. It allows water to go where it is needed most when it is needed most from the least environmentally harmful means of supply. The CVP and SWP systems, along with interconnected regional canals, link the water management districts of concern in almost all of California in a “water internet.” Many of the water management districts of concern are already BDCP/Fix partners. Why not use this partnership to implement Integrative Water Management *for this project*?

A multi-focus solution alternative can have a new point of diversion as its major (or a major) element. The new point of diversion could be located exactly where the Alternative 4A point of diversion is located. The alternative could retain the current design of the twin tunnels. *Addition of some complimentary component that would alleviate the adverse impacts by working in conjunction with the tunnels* would satisfy the legal requirements of NEPA and CEQA. We are not asking the Lead Agencies to give up their project or pursue a radically different alternative. We are asking them to take a hard look at an alternative that fills the critical gaps in all of the currently proposed alternatives and preferred project, and makes the project work.

Development and consideration of such an alternative is all the more imperative in light of the failure of BDCP’s habitat restoration component.

It was thought by BDCP proponents that massive amounts of new shallow-water habitat would provide enough ecological benefit to allow for diversion of more water

without net damage to the ecosystem. The entire BDCP was premised on the assumption that habitat could be substituted for flow. In essence, BDCP visionaries theorized that habitat restoration would be a source of “new water.” The intensive investigation and modeling of this assumption, at a cost of tens of millions of dollars over six years, proved that it doesn’t work. It was worth a try but it doesn’t work. Now what?

The answer is to refine the project by including sources of new water that are already *proven* to work. The law and common sense demand that the Lead Agencies at least develop and consider such an alternative before making a decision to either abandon the whole effort through adoption of the no-action alternative or adopt a project that has severe negative environmental consequences *and* falls far short of the aspirations of project proponents.

Integration of a portfolio approach could well resuscitate the dream-come-true of an HCP and the attendant fifty-year take permit that the Action Lead Agencies and contractors desire.

E. Screening Alternative 9A Was Unreasonably Eliminated And The 2015 RDEIR/S Should Include A Detailed Analysis Of Alternative 9A.

The 2010 SWRCB Flow Criteria Report, commissioned by the California Legislature for use in making BDCP planning decisions, concluded that restoration of 75% of unimpaired Delta flow was the minimum needed to protect public trust resources. This finding deserves serious consideration. However, the Lead Agencies have dismissed attaining 75% of unimpaired flow and further dismissed *any* percentage of unimpaired flow as a metric for the preferred Alternative.

Summarily dismissed screening Alternative 9A was the only alternative addressing attainment of 75% of unimpaired flow.

Although the confused presentation of materials makes it difficult to discern with any certainty the Lead Agencies’ reason or reasons for eliminating alternatives from detailed consideration, it appears that Alternative 9A was eliminated because 1) “based upon preliminary model analysis, both of these alternatives [Alternatives 8A and 9A] would result in reductions in water deliveries to [upstream] Sacramento River water rights holders in order to achieve the flow and water quality objectives in these operations alternatives,” 2013 Draft EIR/S App. 3A table 3A-17 at 3A-150; and 2) “preliminary modeling analysis indicates that Delta outflow criteria could not be accomplished even with reducing deliveries to upstream water rights holders.” *Id.* App. 3A table 3A-14 at 3A-148. The Lead Agencies further argue that “[r]educed water diversions from these water rights holders cannot be feasibly accomplished through approval of the BDCP [because] these water rights holders are not applicants for the BDCP.” *Id.* 2013 App. 3A 3A-68.

First, DWR has, in important past agreements, paid upper Sacramento Valley water rights holders for forgoing use of their rights on a per acre-foot basis so DWR could meet its environmental in-stream flow obligations and water supply goals. Phase 8 Settlement Agreement 14–15 (Attachment 16). DWR has also agreed to share costs with upstream rights holders to help them develop new local projects to provide new water and allow more in-stream flow—available downstream to DWR for meeting environmental obligations and water supply goals. *See* Phase 8 Settlement Agreement *passim*. The Phase

8 settlement is closely related to the *Sacramento Valley Water Management Agreement* (Attachment 17), a partnership between DWR, Reclamation, upstream Sacramento River water rights holder, the water contractors, and others.

Indeed, Alternative 4A itself depends upon “spring outflow criteria, which are intended to be provided through the acquisition of water from willing sellers.” 2015 RDEIR/S 4.1-6. A significant restoration of Delta flows, including a successful BDCP/Fix, may involve similar agreements and acquisitions in the future. Dealing appropriately and lawfully with upper Sacramento River water rights holders and other upstream diverters is feasible and may be part of a reasonable alternative that is based on achieving a percentage of unimpaired flow. The impairment-of-upstream-rights reason provided for summarily dismissing Alternative 9A was not reasonable.

Second, the flow objectives could be met in a phased approach over time. Achievement of 75% of unimpaired flow might take 20 years or more as a BDCP/Fix portfolio alternative is implemented. In considering the environmental effects of its proposed actions, Congress directed all federal agencies to consider “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.” 42 U.S.C. § 4332(C)(iv). The Lead Agencies have summarily dismissed screening Alternative 9A based on local short-term uses of upper Sacramento Valley water rights holders and failed to consider resolving short-term considerations in light of the need for long-term ecological productivity of the Delta ecosystem. Achievement of 75% of unimpaired flow (or any percentage of unimpaired flow) does not have to happen on project ribbon-cutting day. Project milestones could include, for example, 60% within five years of project operation, 65% within ten years, 70% within 20 years, 75% within 25 years; or any other phased implementation of some ultimate percentage of unimpaired flow *as determined through detailed analysis as part of a portfolio alternative*. The BDCP was conceived as a fifty-year plan. These time horizons are reasonable in light of the project description, purpose, and need.

Unimpaired flow as a metric of achieving restoration of restored Delta flows deserves further consideration in light of the findings of the Flow Criteria Report:

In order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows.

These criteria include:

- 75% of unimpaired Delta outflow from January through June;
- 75% of unimpaired Sacramento River inflow from November through June; and
- 60% of unimpaired San Joaquin River inflow from February through June.

Flow Criteria Report 5.

The current Fix approach of Alternative 4A to Delta flows, measuring bypass flows at the new point of diversion, is not consistent with the Flow Criteria Report or the California Legislature’s directive to restore Delta flows (discussed at section IV. below).

Bypass flows were not the metric developed to protect public trust resources and do not address restoring natural Delta flows.

We do not suggest, and have never suggested, that the Lead Agencies are required to adopt the Flow Criteria Report as the flow requirements for BDCP/Fix. It is an informational document and was prepared for the SWRCB by an independent panel of eminent Delta scientists. We do suggest that it is due considerable regard rising to the level of further consideration as part of an alternative that starts out by including the elements, in addition to conveyance, that will be required to implement it and not disrupt water supply or other environmental needs. Such elements might include any of the portfolio elements as discussed herein and/or modifications, such as an unimpaired flow+ alternative, just as Alternative 4A depends upon an H3+ operational scenario.

In this light, Alternative 9A (or its derivative(s)) should be given full consideration in a further revised RDEIR/S.

IV. Preferred Alternative 4A Does Not Comply With The Delta Reform Act.

A. On The Whole, Alternative 4A Does Not Advance The Coequal Goals And, In The Long Term, Hinders Achievement Of The Coequal Goals.

1. The Coequal Goals And Inherent Sub-goals Apply To BDCP/Fix.

The Delta Reform Act (“Act”) requires that all state agencies conform their actions to the Act’s coequal goals, which are the pole star of Delta policy. The coequal goals are “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” Cal. Water Code § 85054. Inherent in the coequal goals are the subgoals of “[r]estor[ing] Delta flows and channels to support a healthy estuary and other ecosystems,” Cal. Water Code § 85302(e)(4), and “[i]mproving water quality to meet drinking water, agriculture, and ecosystem long-term goals.” Cal. Water Code § 85302(e)(5). That these requirements apply to the BDCP/Fix is not in dispute.

2. Alternative 4A Does Not Restore Delta Flows Or Protect Public Trust Resources Within the Meaning Of The Act.

The Act provides that “the public trust doctrine shall be the foundation of state water management policy and [is] particularly important and applicable to the Delta.” Cal. Water Code § 85023. Restoring and maintaining adequate Delta flows is the cornerstone of meeting public trust obligations with respect to Delta water management policy.

Alternative 4A relies, in large measure, on extant standards in the SWRCB 2006 Bay-Delta Water Quality Control Plan as implemented through Water Rights Decision No. 1641 (“D-1641”). *See, e.g.*, 2015 RDEIR/S 4.1-9 n.17 (“an alternative operation for spring outflow would be to follow flow constraints established under D-1641”); *see also id.* at 4.1-10–12. However, it has been established that D-1641 standards are inadequate to protect public trust resources. The Flow Criteria Report, commissioned explicitly to

guide the Lead Agencies in this regard, concludes that “[r]ecent Delta flows [as controlled by] ... existing regulatory requirements included in the 2006 Bay-Delta Plan are insufficient to support native fishes for today’s habitats.” Flow Criteria Report 5 & n.3. *See also* Delta Plan 148 (“The best available science suggests that currently required flow objectives within and out of the Delta [D-1641] are insufficient to protect the Delta ecosystem.”).

In many respects, the NEPA and CEQA conclusions of no adverse effect/significant impact are based on the project not violating applicable laws and regulations with respect to water quality, even though the project admittedly causes some water quality degradation.

Of the thirty-five water quality impacts listed for Alternative 4A in Table ES-9, none is listed as “beneficial” although the table key provides for a beneficial listing. 2015 RDEIR/S ES-45. One is listed as adverse/significant. We believe many more water quality impacts are actually adverse, including, but not limited to impacts WQ-11 and WQ-7, discussed above. Even on the project proponents reckoning, the project has net negative effect on water quality.

Water quality is a function of flow. The project’s failure to restore Delta flows causes its failure to improve water quality.

3. The Benefits, If Any, To OMR Reverse Flows And Delta Smelt Entrainment, Are Outweighed By The Project’s Negative Effects.

The impetus for new points of diversion in the north Delta is to move the diversion points away from Delta smelt habitat areas so operations can continue when smelt are in the area of the south Delta intakes. Further impetus is to avoid the limiting effect of reverse OMR flows on the ability to pump. Regulatory restrictions and the self-limiting factor of drawing salt water upstream limit operations of the south Delta pumps.

There are incidental environmental effects of these water supply goals. However, the many negative impacts of the project far outweigh any incidental positive effects. Further, according to the most recent analysis of Alternative 4A, it does not significantly contribute to water supply reliability if operated as promised.

The project, on the whole, does not contribute to the coequal goals and has many attributes that will interfere, over the long term, with attaining the coequal goals.

B. Alternative 4A And All The Alternatives Fail To Comply With The Act Because They Lack Adaptive Management.

California Water Code section 85321 requires 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.” Rebranding the project as California WaterFix and deleting 65,000 or more acres of habitat restoration does not repeal section 85321. Legislative intent was to protect the Delta from a mega-diversion project gone awry. The Lead Agencies have acknowledged, throughout the process, that effective adaptive management is essential to ensuring that high-capacity diversion tunnels do not harm the

Delta ecosystem. Revising the project description to delete the goal of achieving HCP status does not change that dynamic. An effective, fully developed and described, adaptive management program is essential to the legal sufficiency of Alternative 4A and to any claim to the scientific legitimacy of the effects analysis, operational criteria, and environmental review documents. Practice in the scientific community (which develops and implements adaptive management programs) has been to interpret the Act's adaptive management requirements to required "science-based adaptive management of all ecosystem and water management programs in the Delta." *Mount Report 99* (citing Cal. Water Code § 85308(f)).

Indeed, much of Alternative 4A's commitment to not harming the Delta ecosystem depends on, and is deferred to, adaptive management. The Lead Agencies acknowledge a great deal of scientific uncertainty about Alternative 4A's effects on the Delta ecosystem, and depend upon adaptive management to ensure mitigation of adverse effects. Adaptive management "will be used to consider and address scientific uncertainty regarding the Delta ecosystem and to inform implementation of the operational criteria" 2015 RDEIR/S4.1-6.

At bottom, all of the EIR/S assumptions about environmental impacts depend on effective adaptive management. However, Alternative 4A's (like the BDCP's) adaptive management is largely a repetition of slogans about what adaptive management should be. 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 ISB put it, "We are not looking here for a primer on adaptive management." 2015 ISB DEIR 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”).

The water contractors, mentioned in the *Mount Report* as being given veto authority over any change in the initial operating criteria that sets export rates, characterize the “need to restore adequate water supplies to protect the state’s environmental resources” as “throwing more water at the problem.” Letter from Byron Buck, Executive Director, State and Federal Water Contractors Association to Phillip Isenberg, Chairman, Delta Stewardship Council 1, March 3, 2011 (Attachment 18).

To be legally sufficient, the adaptive management program must be fully formed and circulated for public comment before any decision is made to approve the project. It cannot be deferred to some future time after project approval. “If adaptive management and monitoring are central to California WaterFix, then details of how they will be done and resourced should be developed at the outset (now) so they can be better reviewed, improved, and integrated into related Delta activities.” 2015 Delta ISB Review 6.

The Act and Delta Plan require that all water management decisions be based on adaptive management and that adaptive management be based on the best available science. “The Delta Reform Act requires that the Delta Plan be based on and implemented using the best available science, and requires the use of science-based, transparent, and formal adaptive management strategies for ongoing ecosystem restoration and water management decisions.” Delta Plan 34. The Lead Agencies stated that reliance on adaptive management would be “based on best available science” but have deferred any content of adaptive management to the future. 2013 Draft EIR/S 3-207.

Every scientific peer review that has been conducted of the adaptive management “plan” concludes that it is not an adaptive management plan as that term is used in the scientific community, but rather a vague promise for a future adaptive management plan. These promises, rather than an actual plan, all reviewers have concluded, are not acceptable. There is consensus in the scientific community that the Lead Agencies’ deferral of adaptive management violates the principles of best available science.

V. The Change In The Project Is Too Fundamental To Be Accomplished Through An Amended Project Description And Requires Issuance Of A New NOI/NOP.

All of alternatives 1–9 described in the 2013 Draft EIR/S were HCPs. The changed project description is intended to eliminate any HCP from the project. This is a different project, not a permissible change or “lessening” of the project. Those cases that allow a changed project description to “lessen” a project do so on the rationale that the environmental balance is thereby tipped in favor of the environment. A smaller project has fewer and less severe impacts.

Here, the opposite is the case. The conservation “gold standard” of an HCP, promised to the public from the outset, has been abruptly abandoned. This tips the balance sharply against the environment and in favor of outright water diversion without any real environmental benefit. The current project description and alternatives that include mitigations and “environmental commitments” are not of the same basic nature as the original project.

If project proponents want to pursue this entirely different kind of project, they are, of course, at liberty to do so—so long as they comply with CEQA and NEPA by issuing a new NOI/NOP and initiating a NEPA/CEA process for this new and different undertaking.

VI. We Join With And Incorporate The Comments Of Others.

We agree with many of the comments being made, and that have been made, by other parties. We do not repeat them here. Repetition of other comments is not necessary to exhaust remedies for purposes of NEPA and we join and incorporate the comments of others that address CEQA/NEPA inadequacies for the purpose of exhausting NEPA administrative remedies. Exhaustion is satisfied because the agencies are on notice of our concerns and they have had a chance to address them in detail by their detailed presentation in the comments of others. Where we use CEQA terminology here, the NEPA equivalent terminology is also intended to be included. We join other commenters' criticisms including the inadequacy of mitigations; undisclosed or unanalyzed impacts; the failure to consider a reasonable range of alternatives; the unstable project description; the false, misleading, and inadequate project description; failure to adequately define baseline conditions; failure to analyze secondary effects; failure to describe and evaluate reasonable and feasible mitigation measures that could eliminate or substantially lessen significant environmental impacts of the project; unlawful segmentation and deferral of environmental review (piecemealing).

We also join with and incorporate the comments of others pointing out that the project and environmental documents do not comply with the Delta Reform Act, state and federal endangered species acts, the federal Clean Water Act, and the Porter Cologne Water Quality Control Act.

VII. State Funds May Not Be Used For Anything Associated With The Project.

This is in part a comment on the project, in part a comment on the Draft BDCP and in part a comment on the RDEIR/S.

California Water Code section 85320(b) provides that:

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:

(1) Complies with Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game code.

Chapter 10 provides the specifications required to qualify as an NCCP. Alternative 4A does not qualify as an NCCP. It is therefore ineligible for *any* state funding.

The BDCP provides that much funding comes from the water contractors. 2013 Draft BDCP 8-65. However, state funding is shown for aspects of public benefits associated with the BDCP. *Id.* 8-65–8-69. These funding assumptions were made at a time when it was thought that the BDCP would comply with Chapter 10. They are now

void. A revenue bond is a bond secured by specific revenue—here it was thought the revenue would be payments from the water contractors based, at least in part, upon water deliveries. This constitutes state funding within the meaning of Water Code section 85320(b)(1) and is now impermissible.

2013 Draft BDCP section 8.3.3 discusses the issuance by DWR of revenue bonds, to be repaid over time by the water contractors. This is no longer permissible. State funding is prohibited, regardless of whether it is provided with agreements for repayment.

It is unclear how Alternative 4A will be funded, but state funds may not be used. Rebranding the project, revising the project description, and re-circulating the environmental documents does not make it a “new” or “different” project within the meaning of Water Code section 85320. Project proponents could adopt the no-project alternative and start a new project with whatever funding sources are appropriate. But they have elected not to do that.

To the extent that mitigations or environmental commitments are premised on state funding, they are inadequate and cannot be relied on for environmental analysis.

VIII. Conclusion.

We thank the Lead Agencies for the opportunity to present these comments and for considering our views.

Sincerely,

/s/Michael A. Brodsky
Michael A. Brodsky