

CA Save Our Streams Council



June 26, 2018

Senator Hertzberg, Chair
Natural Resources and Water
California State Senate
State Capitol, Room 5046
Sacramento, CA 95814

Senator Stone, Vice Chair
Natural Resources and Water
California State Senate
State Capitol, Room 5046
Sacramento, CA 95814

Email: sntr@sen.ca.gov

Re: July 3rd Informational Hearing: Overview of the proposed contract amendments between the Department of Water Resources and State Water Project Contractors.

Dear Chairperson Hertzberg, Vice-Chair Stone and Members of the Committee:

On behalf of the ratepayers and taxpayers represented by the undersigned, we write to request greater transparency and reliable answers regarding the impacts of proposed State Water Project (SWP) Contract amendments, including the proposed 50-year SWP Contract Extension amendments and other as-yet-unspecified Delta Tunnels (California Water Fix) Contract

amendments. At present, the proposed amendments are poorly defined and explained and have potential adverse impacts far beyond their apparent scope. We urge your Committee to request that the Joint Legislative Budget Committee not schedule its hearing on the SWP Extension Contract Amendments while major questions noted below remain unanswered. The Legislative Analyst and State Auditor must first review the fiscal impacts of the proposed contract changes and the relationship of both sets of amendments to the proposed Department of Water Resources (DWR) Delta tunnels project now known as California WaterFix [dubbed earlier and at various times as the Bay Delta Conservation Plan (BDCP), and Delta Habitat Conservation and Conveyance Program (DHCCP)].

We extend our thanks to you and the Committee for holding an informational hearing on these far-reaching SWP Contract amendments to help fill critical information gaps. There is much information that remains unknown regarding the extensive changes to the SWP contracts that are being proposed and how the changes will impact property taxes, water rates, the fiscal integrity of the SWP and General Fund, and finally how the changes, if adopted, could impact Public Trust values, the environment, and other water users. Our primary areas of concern are explained below:

SWP Contract Amendments Are In Flux & Have Not Completed CEQA Requirements.

Neither the proposed SWP Contract Extension amendments nor the as-yet-unspecified WaterFix Contract amendments (still in flux with on-going negotiations) have fully completed the California Environmental Quality Act (CEQA) requirements. There is a reason that California law requires CEQA compliance for these amendments. The lack of required analysis, public reporting, and the piecemeal approach to these amendments, creates a fog of complexity for the public and the Legislature, undermining appropriate Legislative oversight.

SWP Amendments Would Obligate Taxpayers & Ratepayers to Fund Tunnels Without a Vote.

Despite the many unknowns regarding the SWP contract amendments, DWR has prematurely requested that the Legislature commence the *last* step in the contract amendment procedural process --a Joint Legislative Budget Committee hearing. The fundamental problem with this approach is that, once this last Legislative procedural step has occurred, DWR will likely claim statutory authority to finalize the SWP contract extension and purportedly other amendments. Largely by fiat after specified contractors act,¹ the SWP Contract Extension amendments would automatically extend the existing 75 year contract term by another 50 years, thus obligating property taxpayers and ratepayers for DWR's WaterFix debt. They would also drastically change the definition of water system facilities, removing requirements that now limit payment to those SWP projects in existence prior to 1987.²

DWR Amendments Hide Financial Impacts & Conceal Circumvention of Propositions 13 & 26.

DWR claims the SWP Contract Extension amendments are unrelated to the WaterFix tunnels project, but investment banks evaluating financing strategies for the Delta tunnels have indicated that extension to a 50 year term and inclusion of WaterFix as a project under the State Water Project are essential.³ In fact, some SWP contractors have asserted that all SWP contractors must either pay for WaterFix, forfeit their current SWP contract, or find another SWP contractor to pay their share of the costs of constructing and operating WaterFix.⁴ SWP contractors like Metropolitan Water District (MWD) claim that if WaterFix is part of the SWP list of projects then they are subject to the required property tax obligations⁵ and contract payments. Further, MWD claims any increase in water rates or property tax rates are "voluntary" and thus, not subject to the

voter requirements or limitations on the use of property taxes and issuance of debt contained in Propositions 13 or 26.⁶

Basic Planning and Financial Feasibility Analyses Required by California and Federal Engineering Guidelines Are Not Provided.

Incredibly, after having expended more than a quarter of a billion dollars on planning (including some \$84.8 million in hidden public subsidies for federal contractors⁷), DWR still has not produced a defensible economic or financial analysis to demonstrate the financial viability of the WaterFix tunnels project.⁸ As can be seen in Table below, independent analysis that actually followed federal and DWR guidelines⁹ for such a fundamental project feature as a benefit cost analysis show the WaterFix produces little benefit, while adding more than \$16 billion to the current SWP contract debt that already totals more than \$7 billion dollars.¹⁰

Table 1: Comparisons of BDCP and WaterFix Alternatives to Existing Conditions show that: (1) project costs far outweigh economic benefits, (2) project alternatives yield only small increases in water over Existing Conditions, and (3) financing plans are constantly changing and incomplete.

Alternative	Environmental Documents	Annual Average Delta Exports (MAF)	Required Restoration Acreage	Project Yield (TAF)	Estimated Costs	Benefit /Cost Ratio	Financing Status
Existing Conditions	2016 Final EIR/EIS	4.7 to 4.9 ³	28,500 ⁶	--	--	--	--
BDCP ¹	2013 Draft EIR/EIS	4.3 to 4.9 ⁴	153,114 ⁴	392 ⁴	\$16.0 billion ⁴	0.3 to 0.5 ⁷	Abandoned
California WaterFix ²	2015 Supplemental DEIR/SDEIS 2016 Final EIR/EIS 2018 Supplemental EIR/EIS	4.3 to 4.7 ⁵	5,000 to 13,340 ⁵	172 ⁵	\$16.7 billion ⁵	0.2 to 0.4 ⁸	Constantly Changing

Table notes:

1. BDCP Conservation Measure 1 (Alternative 4)
2. California WaterFix Alternative 4A
3. 2016 Final EIR/EIS
4. 2013 Draft EIR/EIS
5. 2016 Final EIR/EIS
6. Existing Biological Opinions, 2008 and 2009
7. Dr. Jeffery Michael. 2012.
https://www.google.com/url?q=http://www.pacific.edu/Documents/school-business/BFC/BenefitCostDeltaTunnel_06%252014%25202012.pdf&sa=U&ved=0ahUKEwiW8srDkEjbAhVHITQIHxe4AaEQFggEMAA&client=internal-uds-cse&cx=005639619055895320543:9xrezxluw50&usg=AOvVaw3VYVDtiIB45NigzdVz6dmy
8. Dr. Jeffery Michael. 2016.
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfi/x/exhibits/docs/RestoretheDelta/part2/RTD_257.pdf

With major debt still outstanding from the original SWP general obligation bonds,¹¹ fundamental questions must be asked:

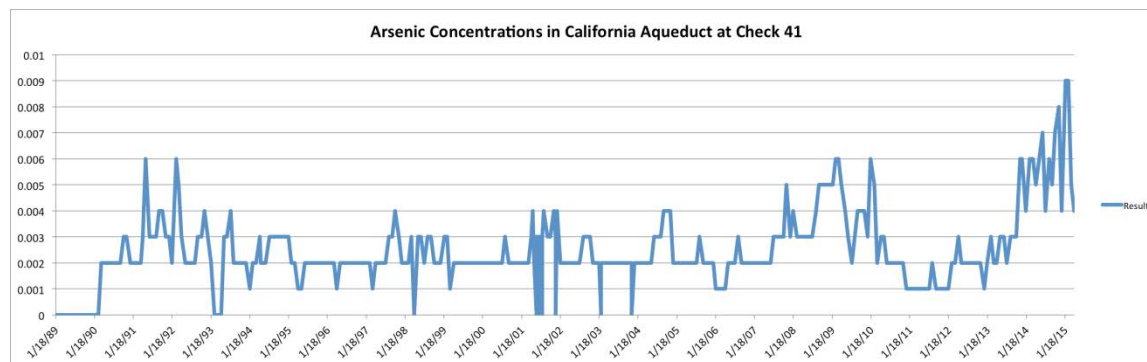
1. Will the Cal WaterFix financing, including the 'dry-hole' take or pay aspects of the proposed contract amendments, imperil the financial integrity of the entire SWP given the extensive costs facing the existing project even without the proposed tunnels?
2. Where is the repeatedly promised off-ramp for those contractors who do not want to pay for WaterFix's estimated more than \$17 billion dollars in additional costs?
3. With the skyrocketing costs and the shaky legislative and administrative oversight that plague this decade-old, contentious conveyance project, where is the public and transparent system of governance?
4. Where are the cost control and state contracting changes required to remedy the State Auditor's findings that the project has failed to keep important documents¹² and failed to follow state required competitive bidding processes,¹³ thereby inflating costs through expensive consultants without proper credentials. Will ratepayers, property taxpayers and all Californians look forward to more of the same, including project cost overruns?
5. Will the abuses identified by the Legislative Analyst Office continue?¹⁴
 - An over-allocation of total SWP costs to recreation and mitigation thereby increasing general fund costs and reducing SWP contractor costs;
 - Obligating taxpayers without legislative approval when recreation costs are incurred without Legislative review.
 - Regulatory compliance costs for mitigation and recreation are being allocated by DWR to Davis-Dolwig (Water Code § 11925), thus obligating taxpayers and the general fund. For example, the proposed contract language [Agreement In Principle (AIP)] fails to define "preservation" vs. "enhancement." Article XIII of the proposed AIP purports to define certain costs as reimbursable under the proposed amendments. DWR in the contract extension amendments is relying on the undefined "enhancement" term to result in additional obligations to the General Fund. This proposed language creates confusion when, in fact, so called "enhancements" are in fact mitigation obligations of the existing SWP and federal CVP projects to restore 28,500 acres of habitat under the current Biological Opinions for the projects pursuant to state and federal law. Further confusion and expense to the General Fund is likely once mitigation requirements under the Federal Energy Regulatory Commission are established. This lack of clarity also opens the door for General Fund or other taxpayer funds to be used for recreation benefits that are the responsibility of the contractors or do not exist and yet, are charged to the General Fund.

A Viable Plan for Financing the Delta Tunnels Project is Still Missing.

Despite the many thousands of billed dollars represented by all the contractors, bond lawyers and consultants in the SWP contract amendment negotiations (whose annual salaries likely eclipse that of the Governor), the required financing plan for this tunneling project remains elusive.¹⁵ Metropolitan Water District has voted to put up \$10.8 billion dollars, pending reaffirmation at another meeting, provided they have more control over this state project and greater authority to make substantive political decisions concerning water supply and water exports. It appears from the limited public view of the still on-going contract amendment negotiations that relaxing existing contract rules for buying and selling water is the likely payoff to MWD for further subsidizing the water purchases of the agricultural water contractors and their financial participation in the tunnels project. However, the cost of relaxing rules on water sales and exchanges to the

environment, water quality, existing water rights and downstream uses do not appear at the forefront of these negotiations, yet by law they must be considered and mitigated.¹⁶ Adverse impacts for example, include discharges of arsenic-laden groundwater into drinking water canals¹⁷ and discharges of toxic selenium laden groundwater into canals that serve endangered species and livestock uses that likely would be impacted by the accumulation of this contaminant downstream.¹⁸

Figure 1: According to DWR data¹⁹, Arsenic concentrations in the California Aqueduct, downstream of where groundwater has been pumped into the canal, have increased markedly in 2015 and are approaching the Maximum Contaminant Level for drinking water of 0.010 mg/L.



Unfinished SWP Contract Amendments Open the Door to Abuse and a Piecemeal Approach.

DWR is currently in negotiations with SWP contractors to make additional permanent changes to the contracts specifically with regard to the WaterFix project.²⁰ In theory, greater water management flexibility for the contractors is a worthy goal. But is amending the SWP contracts the best way to achieve that goal? And even if it is, how do we ensure that any changes to those contracts do not have unintended negative consequences to the environment or some of the contractors or third parties to those contacts? **Figure 1** shows one example of how existing transfers and exchanges are impacting downstream users, drinking water, health and treatment costs. Does the proposed language under discussion represent a major weakening of protections for the State, the environment and third parties? The relaxation of water transfer and exchange provisions through SWP contract amendments contemplated would allow permanent transfer of water between SWP contractors, in order to allow urban SWP contractors like MWD to permanently purchase water from agricultural SWP contracts like the Kern County Water Agency and to gain a permanent allocation of capacity from the tunnels for MWD to sell to federal contractors or others.²¹ This demands further public and Legislative oversight before finalizing these far reaching amendments.

Santa Barbara County also faces major constraints on its ability to absorb debt for the tunnels and other project infrastructure costs facilitated by the proposed amendments --at least without exposing taxpayers and ratepayers to major new risks.²² The proposed tunnels would not be a reliable source of water for the Santa Barbara County Flood Control and Water Conservation District, which like all south of the Delta SWP contractors, must comply with the 2009 Delta Reform Act and cut back its dependence on water from north of the Delta. The district anticipates the need to spend scarce water dollars on firming up its own local supplies.

Conclusion: The Required Joint Legislative Budget Hearing Pursuant to Water Code § 147.5 Should Not Be Scheduled While Major Questions Remain Unaddressed.

Once the required Water Code § 147.5 hearing is held, the Legislature will lose oversight of additional amendments to SWP contracts. If adopted, the proposed SWP Contract amendments will impose far reaching financial impacts on ratepayers and property taxpayers, as well as, the environment. As you are undoubtedly aware, the 1960 general obligation bond referendum to finance construction of the California State Water Project addressed changes to the water-supply contracts, stating simply: "Such contracts shall not be impaired by subsequent acts of the Legislature during the time when any of the bonds authorized herein are outstanding and the State may sue and be sued with respect to said contracts." Some of those bonds are still outstanding.²³ We remain concerned that the proposed SWP contract amendment changes may indeed impair the finances for the existing State Water Project.²⁴

We urge further investigation into the impacts of the proposed SWP contract amendment changes, especially prior to proceeding with any Legislative action that could later be challenged due to the fiscal impacts and impairment to the existing project and compliance with existing law²⁵. We urge your committee to request a postponement of the Joint Legislative Budget Committee Hearing on the SWP Contract Extension Amendments until both the Legislative Analyst and State Auditor can review the fiscal impacts of the proposed contract changes and the relationship to DWR's proposed WaterFix project.

Sincerely,



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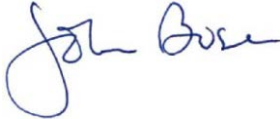
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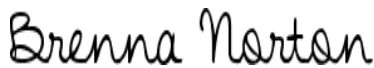
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References

¹ "The Proposed Amendment takes effect provisionally when 15 or more SWP PWAs with an aggregate of 3,200,000 acre-feet of Table A have signed it and 60 days after a final judgment has been made by a court validating the Proposed Amendment.." MWD 6/12/2018 Board Meeting, Revised 9-2 @ pg 2

<http://mwdh2o.com/PDFWWACurrentBoardAgendas/06122018%20BOD%209-2%20B-L.pdf>

²[http://www.mwdh2o.com/PDF Who We Are Proposed Property Tax Rates/Consolidated%20Contract%20through%20Amendment%20No.%2028.pdf.pdf](http://www.mwdh2o.com/PDF%20Who%20We%20Are%20Proposed%20Property%20Tax%20Rates/Consolidated%20Contract%20through%20Amendment%20No.%2028.pdf.pdf) See water system facilities identified in Article 1(hh) (8)

³ For example, in September, 2014, staff at the Metropolitan Water District of Southern California acknowledged that the proposed SWP contract amendments are a necessary step in BDCP financing: <http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003735248-1.pdf> Similarly, Kern County Water Agency staff explained in September 2013 that “DWR and SWP Contractors need to come to agreement on a contract extension that matches the term of the BDCP and provides the SWP Contractors with a more appropriate role in managing SWP expenses.” Kern County Water Agency, “Resolution of Issues Necessary to Inform a Development of a Business Case to Support a Decision on Continued Funding for the Bay Delta Conservation Plan and the Delta Habitat Conservation and Conveyance Program,” at 1 (Sept. 23, 2013). Also, in response to a State Water Project Contractors Authority’s request for proposal regarding financing the BDCP in March 2014, Morgan Stanley stated: “**Water Supply Contracts.** We understand that DWR’s water supply contracts are in the process of being extended, likely to 2085, or 50 years from 2035 when most expire. Clearly, in order to finance the substantial costs associated with CM1 in the BDCP, the extension of these contracts is essential to allow for the amortization of financing payments over a long period of time.” Morgan Stanley, “State Water Project Contractors Authority: Response to Request for Qualifications and Proposals for Underwriting Services,” at pg 8 (March 19, 2014).

⁴ See, e.g., Metropolitan Water District of Southern California, Modernizing the System: California WaterFix Finance and Cost Allocation, available online at: http://www.mwdh2o.com/DOCSVCsPubs/WaterFix/assets/cawaterfix_finance_costallocation_whitpaper_factsheet.pdf , at 7-8, 20-21

⁵ See Water Code § 11652 (SWP contractors “shall, whenever necessary, levy upon all property in the state agency not exempt from taxation, a tax or assessment sufficient to provide for all payments under the contract”).

⁶ See for example MWD's bond statement page 16@ [http://mwdh2o.com/PDF Who We Are/1.4.7.2_MWD_2015_SerA1_A2.pdf](http://mwdh2o.com/PDF%20Who%20We%20Are/1.4.7.2_MWD_2015_SerA1_A2.pdf)

⁷ Misuse of Taxpayer Funds found by Federal Audit see <https://apnews.com/3bd4ba28a69448cebff3dbdd15a8c5d> & https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_BayDeltaPlan_Public.pdf

⁸ See the State Auditor Report <http://www.auditor.ca.gov/pdfs/reports/2016-132.pdf>

⁹ The Department of Water Resources (DWR) has an Economic Analysis Guidebook that provides a comprehensive description of DWR’s approach to benefit-cost analysis and its importance to project planning and assessment. <http://www.pacific.edu/Documents/school-business/BFC/WaterFix%20benefit%20cost.pdf> Water Fix benefit cost analysis used an artificially low 2% discount rate. Federal government guidelines recommend the use of a 7% discount rate. The DWR Economic Analysis Guidebook endorses a 6% discount rate. See The Office of Management and Budget has links to [Guidelines and Discount Rates](#) for Benefit-Cost Analysis of Federal Programs ([Circular No. A-94 Revised](#))

¹⁰ <https://www.water.ca.gov/-/media/DWR-Website/Web-Pages/About/Financials/Files/SWRDS-CAFR-Final-FY-2017.pdf> State Water Resources Development System Comprehensive Annual Financial Report for the fiscal years ended June 30, 2017 and 2016. See pg 48.

¹¹ <https://www.water.ca.gov/-/media/DWR-Website/WebPages/About/Financials/Files/SWRDS-CAFR-Final-FY-2017.pdf> State Water Resources Development System Comprehensive Annual Financial Report for the fiscal years ended June 30, 2017 and 2016 pg 48.

¹² See <http://www.auditor.ca.gov/pdfs/reports/2016-132.pdf> pg 36

¹³ See <http://www.auditor.ca.gov/pdfs/reports/2016-132.pdf> pg 23

¹⁴ http://www.lao.ca.gov/analysis_2009/resources/res_anl09004003.aspx Also see LAO Policy Concerns and Recommendations Made in Past Years. We have raised concerns in the past (again, see “Funding Recreation at the State Water Project,” as well as our analyses of the 2009-10 and 2010- 2011 Governor’s budgets) over DWR’s practice of using SCRB to calculate the state’s share of SWP costs. Most importantly, the practical implication of the use of this methodology (as implemented by DWR) is that DWR assigns cost responsibility to the state for aspects of SWP that lack any direct recreational component. See

<http://www.lao.ca.gov/laoapp/budgetlist/PublicSearch.aspx?Yr=2011&KeyCol=401>

¹⁵ Water Code §85089 and Op.Cit. See the State Auditor Report.

¹⁶ See Pub. Resources Code, § 21166; CEQA Guidelines, § 15162

¹⁷ <http://www.restorethedelta.org/wp-content/uploads/Environmental-Advocate-Cmts-WWD-SLC-Pump-in-Monitoring-2018-Cal-Aqueduct....pdf>

¹⁸ See <http://www.restorethedelta.org/wp-content/uploads/Final-Cmt-Ltr-Delta-Mendota-Canal-Groundwater-Pump-in-DEA-18-007-and-FON...-1.pdf>

<http://www.restorethedelta.org/wp-content/uploads/Environmental-Advocate-Cmts-WWD-SLC-Pump-in-Monitoring-2018-Cal-Aqueduct....pdf>

¹⁹ See https://www.water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Water-Quality/Documents/Water-Quality-Assessment-of-NonProject-Turnins-to-the-California-Aqueduct_2015.pdf?la=en&hash=DF0AAD3515C7170683E17A4D5893207B66D44130 &

<http://www.restorethedelta.org/wp-content/uploads/Final-Cmt-Ltr-Delta-Mendota-Canal-Groundwater-Pump-in-DEA-18-007-and-FON...-1.pdf>

²⁰ See <https://www.water.ca.gov/Programs/State-Water-Project/Management/California-Water-Fix-contract-amendment>

²¹ See http://mwdh2o.granicus.com/MediaPlayer.php?view_id=12&clip_id=6670 Metropolitan Water District of Southern California WaterFix Workshop March 27, 2018 [33:53 – 2:25:42]

²² See, e.g., C-WIN, *The Unaffordable and Unsustainable Twin Tunnels: Why The Santa Barbara Experience Matters* 7, 9, 18 (July 2016)

<https://a11.asmdc.org/sites/a11.asmdc.org/files/pdf/The%20Unaffordable%20Twin%20Tunnels%20-%20Why%20the%20Santa%20Barbara%20Experience%20Matters.pdf>.)

²³ <https://www.water.ca.gov/-/media/DWR-Website/Web-Pages/About/Financials/Files/SWRDS-CAFR-Final-FY-2017.pdf> State Water Resources Development System Comprehensive Annual Financial Report for the fiscal years ended June 30, 2017 and 2016 pg 48.

²⁴ See California Water Code § 12937. The Burns-Porter Act of 1959, approved by referendum of the voters in November 1960. November 1960, Proposition 1 (the Burns-Porter Act referendum, now California Water Code § 12930-12944) won by a margin of just 174,000 votes out of a total electorate of 5.8 million voters. To allay public fears their water would be given away for private gain and help secure passage of the referendum, Governor Pat Brown “stipulated the water contracts could not be changed by the Legislature as long as [the SWP’s general obligation] bonds were outstanding.” Also see DWR News Office, Special Fall 2000 Edition, California State Water Project: Past, Present, Future, pg. 20.

http://wdl.water.ca.gov/pubs/dwrnews/dwr_news_special_edition_2000/dwr_news_special_edition_2000.pdf

²⁵ See, e.g., DWR, California Climate Science and Data (June 2015)

https://www.water.ca.gov/LegacyFiles/climatechange/docs/CA_Climate_Science_and_Data_Final_Release_June_2015.pdf.) & See, e.g., SWRCB, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (Aug. 3, 2010)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/final_rpt.shtml.)