



# FRIENDS OF THE RIVER

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September 29, 2015

**Re: Supplemental Comments on Draft Environmental Impact Statement (EIS) for Coordinated Long-Term Operation of the Central Valley Project (CVP) and State Water Project (SWP)**

Dear Mr. Nelson:

*Introduction*

These are supplemental comments submitted today on behalf of Friends of the River. These comments are submitted on the Draft EIS for Coordinated Long-Term Operation of the CVP and SWP. These comments supplement those made earlier today on behalf of the Environmental Water Caucus and its over 30 coalition members including Friends of the River.<sup>1</sup> It is difficult if not impossible to imagine a closer relationship for NEPA and CEQA purposes than that between the proposed new Bay Delta Conservation Plan (BDCP)/California Water Fix Delta Water Tunnels and the long-term operations of the CVP and SWP. Planned long-term operations of the CVP and SWP system determine whether the Delta Water Tunnels proposed by the BDCP/Water Fix even arguably might make any sense for water supply purposes. In turn, whether or not the new conveyance proposed by the BDCP/Water Fix is approved will make a major difference in the actual long-term operations of the CVP and SWP system.

Despite this extremely close relationship, separate environmental review processes for the Water Fix Delta Water Tunnels on the one hand, and the long-term CVP and SWP operations on the other hand, are underway. A Draft EIS has been prepared with respect to the long-term project operations with the comment period closing today. A separate Draft EIR/EIS and Recirculated Draft EIR/Supplemental Draft EIS have been prepared for the Water Fix Tunnels with the comment period closing October 30, 2015. The Bureau of Reclamation is the federal lead agency for both of these NEPA processes.

This deliberate separation of the Water Tunnels NEPA and CEQA process from the NEPA compliance process for the Coordinated Long-term Operation of the CVP and SWP is segmentation –also referred to as piecemealing --of environmental review. That segmentation violates NEPA and CEQA.

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<sup>1</sup> Because of the refusal of Reclamation to grant an extension, it has been virtually impossible on a crash basis to develop comprehensive comments on the Draft EIS.

***The Segmentation of Environmental Review of long-term Operations from the Proposed Delta Water Tunnels Violates NEPA and CEQA***

The NEPA Regulations are codified at title 40 of the Code of Federal Regulations (C.F.R.). The NEPA Regulations specify that “Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. . . Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” (40 C.F.R. § 1502.4(a).<sup>2</sup>

Pursuant to NEPA Regulation 40 C.F.R. § 1508.25(a), multiple federal actions must be evaluated in the same environmental impact statement if they are connected, cumulative, or similar. Here, the long-term operations on the one hand, and proposed Delta Water Tunnels on the other hand, are all three. They are connected, cumulative, and similar. To assist the Bureau in complying with NEPA, we include the full text of the Regulation in the footnote.<sup>3</sup>

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<sup>2</sup> In *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 972-73 (2d Cir. 1976), the court explained that:

To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA. [citations omitted]. The guidelines of the Council on Environmental Quality make it clear that the statutory term “major Federal actions” must be assessed “with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated.” 40 C.F.R. s 1500.6(a) (1975). The transfer decision is plainly a consequential, if not an inseparable, feature of the construction project.

<sup>3</sup> 40 C.F.R. § 1508.25. Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be: (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to

The NEPA Regulations also require that agencies “Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.” § 1500.2(c). *See also* § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”).

The rules under CEQA are similar to those under NEPA in prohibiting segmenting environmental review. CEQA requires that “an agency must use its best efforts to find out and disclose all that it reasonably can” about a project being considered and its environmental impacts. *Vineyard Area Citizens v. City of Rancho Cordova*, 40 Cal.4<sup>th</sup> 412, 428 (2007). Under CEQA a “project” is defined as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . .” 14 Code Cal. Regs (CEQA Guidelines) § 15378(a). The courts have explained that:

Theoretical independence is not a good reason for segmenting environmental analysis of the two matters. Doing so runs the risk that some environmental impacts produced by the way the two matters combined or interact might not be analyzed in the separate environmental reviews. Furthermore, if the two matters are analyzed in sequence (which was a situation here) and the combined or interactive environmental effects are not fully recognized until review of the second matter, the opportunity to implement effective mitigation measures as part of the first matter may be lost. *Tuolumne County Citizens for Responsible Growth v. City of Sonoma*, 155 Cal.App.4<sup>th</sup> 1214, 1230 (2007).

Preparing separate environmental impact statements for long-term operation of the CVP and SWP, and the Delta Water Tunnels proposed by the BDCP/Water Fix in the Delta is unlawful segmentation of environmental review under NEPA.

To be crystal clear, if the Bureau of Reclamation proceeds with these separate environmental review processes, the Bureau is truly proceeding in the face of “red flags flying.” The U.S. Environmental Protection Agency (EPA) commented last year during the BDCP environmental review process that:

#### Upstream/Downstream Impacts

The Federal and State water management systems in the Delta are highly interconnected, both functionally and physically. The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and *require changes in upstream operations, which may result in indirect environmental impacts that*

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assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

*must also be evaluated.* We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts. (EPA comments on Draft Environmental Impact Statement for the Bay Delta Conservation Plan, San Francisco Bay Delta, California (CEQ# 20130365), p. 3, August 26, 2014)(emphasis added).<sup>4</sup>

There would be no proposal to develop the massive and expensive Delta Water Tunnels if there were not to be long-term CVP and SWP operations. Likewise, long-term CVP and SWP long-term operations will be vastly different depending on whether or not the Delta Water Tunnels are developed. The Introduction to the Water Fix RDEIR/SDEIS includes among the Water Tunnels project objectives;

Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts held by SWP contractors and certain members of San Luis Delta Mendota Water Authority, and other existing applicable agreements. (Water Fix RDEIR/SDEIS Introduction, p. 1-9).

To proceed in the manner required by NEPA (and CEQA), the Bureau of Reclamation must cease these two separate environmental review processes. The Bureau of Reclamation must instead prepare and issue for public review one new Draft EIS/EIR comprehensively analyzing in one environmental review process and one Draft EIS the environmental impacts of both the Coordinated Long-Term Operation of the CVP and SWP and the proposed BDCP/Water Fix Delta Water Tunnels. Because of the segmentation, the Draft EIS is “so inadequate as to preclude meaningful analysis” in violation of NEPA. 40 C.F.R. § 1502.9(a).

### *Conclusion*

The Bureau of Reclamation, in order to comply with NEPA, must prepare and issue for public and decision-maker review and comment one Draft EIS on both the coordinated long-term operation of the CVP and SWP, and the proposed BDCP Water Fix Delta Water Tunnels.

Sincerely,

/s/ E. Robert Wright  
Senior Counsel  
Friends of the River

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<sup>4</sup> In its detailed comments attached to the letter, EPA further explained that:

The Draft EIS does not include a comprehensive description of the CVP and SWP with and without new North Delta intake facilities or through-Delta operations. Such information as needed to assist the reader in understanding how the water delivery system operates under Existing Conditions and how it would change under CM1 [Delta Water Tunnels] alternatives. (Detailed Comments, p. 22).