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SOUTHERN CALIFORNIA WATERSHED ALLIANCE

RESTORE THE DELTA

Fishable, Swimmable, Drinkable, Farmable by 2010

AQUALLIANCE

DEFENDING NORTHERN CALIFORNIA WATERS

***CA Save Our Streams Council***

March 4, 2013

Carl Torgersen
Deputy Director of the State Water Project
California Department of Water Resources Contract Extension
1416 9th Street, Room 1640-H4
Sacramento, CA 95814

Via email: watercontractextension@water.ca.gov

Below is our letter to DWR Director Mark Cowin. Please accept this letter as a public comment for the water contract extension process.

March 3, 2014

Mark Cowin, Director
Department of Water Resources
1416 9th Street
Sacramento, CA 95814

**Re: The Proposed 3D-Billing Authorization Amendment to the Existing State Water Project [SWP] Water Supply Contracts would likely shift Fish and Wildlife Costs Incurred by the SWP to the General Fund for 40-75 Years, Limiting Legislative Authority, Changes and Oversight**

Dear Director Cowin:

At the last Water Supply Contractor Extension negotiation session, the SWP contractors urged the adoption of the existing Davis-Dolwig Act language[1] into 40 to 75 year water supply contracts. Furthermore, SWP contractors requested no water supply contract charges for required regulatory permit costs along with operation and maintenance charges for these required fish and wildlife facilities and recreation facilities be charged to the contractors.

**State Negotiators should be Directed to Deny the SWP Contractor Request that would Thwart Legislative Power and Shift Unknown Costs to the General Fund—These are Project Costs not General Fund Costs.**

We urge you to direct your negotiators to deny the proposed changes in the Objective 3D: Billing Authorization. The goal of such a contract change is likely to thwart Legislative oversight. Absent Legislative appropriations, this action would lock up in 40 to 75 year contracts this language, thereby shifting costs for fish and wildlife and recreation to the General Fund. Locking this language into such long term contracts would likely protect the SWP contractors at the expense of other General Fund appropriations. Given limited budgets, it is not clear how these required fish, wildlife and recreation measures would be paid. There has been discussion of interest baring accounts generating the revenue, but these costs are likely to be substantial and are a required permit for the SWP facilities. If adopted by DWR, the only remedy for the Legislature, if there is one, would be fraught with legal challenges under contract law.

**State Negotiators should be directed to deny the Adoption of existing Davis-Dolwig Act language into these 40 to 75 Year Contracts.**

The California State Legislative Analyst Office (LAO) has issued a series of reports indicating the approximately 10% costs of the SWP are allocated to fish, wildlife and recreation.[2] Many times, there are no such benefits. These costs are substantial. In addition, under the Governor's proposed peripheral water tunnels, such fish and wildlife costs along with operation and maintenance are likely to cost billions. Adopting contract language that would shift these types of costs from the water supply contract charges to the taxpayers or General Fund would have serious consequences. The LAO has indicated, "This allocation of costs without Legislative approval conflicts with the Legislature's exclusive constitutional authority to set its expenditure priorities by making appropriations."[3] Originally only "enhancements" to

[1] California Water Code § 11900-11925

[2] ***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. Seehttp://www.lao.ca.gov/laoapp/budgetlist/PublicSearch.aspx?Yr=2011&KeyCol=401

[3] See http://www.lao.ca.gov/laoapp/budgetlist/PublicSearch.aspx?Yr=2011&KeyCol=401

fish and wildlife were to be funded by the taxpayer and the General Fund.[4] Governor Ronald Reagan's DWR Director Gianelli explained the cost allocation this way, "*The mitigation of damages to fish and wildlife resources should be mentioned because it differs greatly from recreation and fish and wildlife enhancement. Requirements for preserving existing, or pre-project fish and wildlife resources, or for mitigation of damages to them, produce no new benefits. …. Water project funds are used for fish and wildlife mitigation facilities and operations. These costs are project costs and are reimbursable" [emphasis added]*[5]

**Deny Contract Amendment Objective 3D: Billing Authorization.**

The proposed SWP Contractor language is broad and, under questioning, includes both capital costs and operation and maintenance costs. Specifically the Contractors want, "*Costs incurred to develop, construct, support or maintain fish and wildlife enhancement or public recreation….including Costs incurred to secure or comply with a permit, license or other approval issued by any federal, state, or local agency, shall not be included in the prices, rates and charges imposed for water and power and* ***shall not be reimbursable by the contractors pursuant to the Contract****."* (emphasis added)

The General Fund has already been tapped for excessive unjustified costs that are necessary mitigation costs of the SWP and its beneficiaries. The Legislative Analyst has brought this to the Legislature's attention on numerous occasions: "*Given the "off-budget" nature of SWP (the Legislature only approves SWP positions, not expenditures), the DWR has been able to pursue development of SWP projects without expressed legislative consent, later retroactively billing the Legislature and the state's purse for its estimate of the state's share of the costs of those projects. This runs up against, and potentially conflicts with, the Legislature's exclusive constitutional authority to set its expenditure priorities by making appropriations.*"[6] Such a contract amendment would tie the hands of the Legislature and its constitutional power. Existing and future permit costs such as those envisioned by the proposed peripheral water tunnels conveyance and BDCP permits would be a necessary project cost and should be borne by the water supply contractor beneficiaries. Compliance with Water Code Section 85089(a)

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[4] http://www.c-win.org/webfm_send/13. *Originally, the General Fund paid the costs assigned to recreation, and fish and wildlife purposes. Since 1989, those costs not reimbursed by the General Fund offset an equal amount the SWP owes the California Water Fund. Recreation and fish and wildlife enhancement costs are non-reimbursable by SWP contractors. (However, contractors are responsible for reimbursing mitigation costs related to recreation, fish and wildlife.)*

[5] *DWR Bulletin 117 pg 8*

[6] http://www.lao.ca.gov/analysis_2009/resources/res_anl09004003.aspx Points include: *Over–Allocation of Total SWP Costs to Recreation; Operational Costs at Recreation Incurred Without Legislative Review; Regulatory Compliance Costs Are Being Allocated by DWR to Davis–Dolwig: The DWR has allocated a portion of the added costs of these facilities to Davis–Dolwig and the state, rather than including them in charges to SWP contractors, even though these costs are the result of regulatory requirements that must be met to operate the hydroelectric plant. Currently, these regulatory–related costs for providing recreation at Lake Oroville amount to approximately $1.5 million annually. However, DWR has estimated that these regulatory–related costs could increase to $11.5 million per year, for a period of 50 years.*

requires such mitigation along with operation and maintenance costs for this mitigation to be borne by the state and federal water project contractors.

**The Contract Amendment Objective 4: Affording the Opt Out Provision of the Exorbitant BDCP-DHCCP Costs Should Be Allowed.**

Finally, it is unclear why after 21 months of negotiations, Objective 4, the opt-out of payment for the BDCP-DHCCP peripheral tunnels project was dropped. As Deputy DWR Director Laura King-Moon testified at the BDCP Oversight hearings[7] when Mr. Frazier, Chair of the Assembly Committee on Accountability and Administrative Review, asked about the ability for contractors to opt out of the BDCP, and what would the effect of that be, she stated:

> "*If some contractors did not want to participate, other contractor's costs potentially would go up and their water supplies associated with the project would go up, so it would balance itself out in that regard.*" replied Ms. King Moon.
>
> "*So opting out undermines the ability to finance the project. Has the administration made it clear to the contractors that opting-out is not an option for them?*" asked Mr. Frazier.
>
> "*We have not made anything like that clear,*" replied Ms. King Moon.

It is clear meetings are taking place and decisions have been proffered, however, the public and the Legislature have not been privy to these meetings and decisions. The SWP Contractors wrote to you on January 28, "*…there is general agreement on an assumption that North of the Delta SWP contractors will be largely excluded from repayment obligations for the costs of BDCP CM1, although they would continue to be responsible for past obligation for existing facilities and Endangered Species Act compliance that are existing obligation of SWP contractors….providing enhanced management tools, individual SWP contractors would be able to sell or exchange their supply as needed to other SWP contractors on a willing partner basis.*" We have requested a copy of the "December 2013 Deal Points", however, as yet we have not received them.

Also SWP Contractors and DWR representatives have conducted 'secret' Executive DHCCP Committee meetings to develop the Delta Habitat Conservation and Conveyance Program (DHCCP), which provides the engineering and environmental analysis used by DWR and state and federal contractors to promote the BDCP and obtain the necessary federal and state permits to export more water supplies. Again, required minutes of these meetings of public agencies have been requested, but not been made available.

We remain concerned that these proposed contract amendments will in fact socialize more of the costs while privatizing the benefits of a project that has already received substantial taxpayer funds. Such a lack of transparency in the corporate world might be referred to as collusion. Relying on access to the debt market through DWR with the implied back stop of the General Fund, more disclosure of reduced debt reserves and sources of revenue—water sales and property taxes—need the public spotlight. Hopefully, both the public and the Legislature will be fully informed before billions of dollars of "permit"

[7] http://mavensnotebook.com/2014/02/19/assembly-oversight-hearing-on-the-funding-structure-and-economic-impacts-of-the-bay-delta-conservation-plan-part-1/

costs associated with water supply projects are transferred for decades—40 to 75years--to the taxpayers and General Fund. Again we urge you to direct DWR negotiators to deny Objective 3D: Billing Authorization.

We look forward to your response. Thank you for consideration of these views from groups representing hundreds of thousands of ratepayers and taxpayers throughout the State of California.

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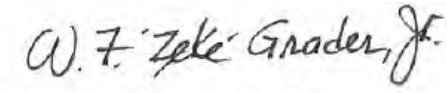

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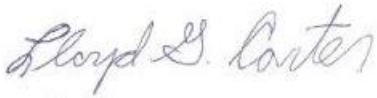

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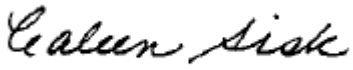

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cc: Interested Parties