

Letter	Comment #	Comment	Relation to Final EIR/EIS
Earth Law Center	1	<p>Earth Law Center (ELC) welcomes the opportunity to provide these comments on the Bay Delta Conservation Plan/California WaterFix Final Environmental Impact Report/Environmental Impact Statement issued December 22, 2016 ("Final EIR/EIS"). ELC is a non-profit organization that advances legal rights for ecosystems and species to exist, thrive, and evolve. ELC particularly supports the development of water rights for waterways as critical to their long-term well-being.</p> <p>ELC incorporates by reference the following attached letters:</p> <ul style="list-style-type: none"> (1) The November 9, 2015 comment letter from ELC to the U.S. Army Corps of Engineers (Corps) on the application to construct the California WaterFix program pursuant to Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act; (2) The October 22, 2015 comment letter from ELC to the DWR et al. on the Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS); and (3) The March 28, 2013 comment letter from ELC to the State Water Resources Control Board (SWRCB) on the Bay-Delta Water Quality Control Plan (Bay-Delta Plan) draft Substitute Environmental Document (SED). <p>Additionally, ELC incorporates by reference the October 5, 2015 letter from Restore the Delta and partners (including ELC) to the Secretary of the Interior et al. requesting that California WaterFix comply with the CWA.</p>	This comment contains background information only. This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.
Earth Law Center	2	<p>Summary</p> <p>ELC finds that the "response to comments" contained in the Final EIR/EIS does not sufficiently respond to the serious legal concerns raised by ELC regarding the inadequate flow regime proposed under California WaterFix (formerly the Bay Delta Conservation Plan, or "BDCP"), nor were the specific legal concerns raised by ELC addressed through substantive changes to the Final EIR/EIS. In specific, this letter discusses three areas of ongoing concern:</p> <ul style="list-style-type: none"> (1) In order to meet California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA) requirements, the Final EIR/EIS must evaluate alternatives that incorporate instream flows protective of Delta fish species and habitat, regardless of whether such alternatives require actions outside of the expertise and regulatory control of the Lead Agencies; (2) California WaterFix cannot be integrated into the Bay-Delta Plan consistent with the CWA, nor should the Lead Agencies attempt to undercut the ongoing public Bay-Delta Plan update process; and (3) Implementation of California WaterFix will violate water quality standards under the CWA, preventing necessary certification under CWA Section 401 ("401 Certification"). <p>ELC asks that the Lead Agencies incorporate these comments, as well as those previously submitted by ELC, into a revised EIR/EIS to be released for public review.</p>	The items in this summary are addressed individually below. This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.
Earth Law Center	3	California WaterFix Must Evaluate Alternatives that Incorporate Instream Flows Protective of Delta Fish Species and Habitat	Please see the response to this comment in ELC's July 28, 2014 letter (DEIR/DEIS letter #1636, Volume 2, Final EIR/EIS). This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.

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		<p>As background, ELC’s July 28, 2014 comment letter describes the failure of the 2013 Draft Environmental Impact Report/Environmental Impact Statement (Draft EIR/EIS) to meet CEQA and NEPA standards due to its lack of reasonable alternatives, namely those that would protect Delta fish species and habitat. Under CEQA, the Lead Agencies must consider a reasonable range of alternatives, including alternatives that “would avoid or substantially lessen any significant effects of the project.” Such alternatives must be considered “even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” Similarly, under NEPA, the Lead Agencies must “inform decisionmakers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.”</p> <p>Addressing these CEQA and NEPA shortcomings, ELC’s comment letter asserted that the Lead Agencies must, at minimum, include alternatives that would achieve flows similar to those described in the SWRCB’s August 2010 flow criteria report, which uses science to determine the amount of flows fish need to survive. Unfortunately, such an alternative was never developed, and the Final EIR/EIS once again fails to include alternatives that are fully protective of Delta ecosystems. While Alternative 8 would achieve some level of Delta restoration and fish recovery, its proposed flow levels still fall well short of those identified in the SWRCB’s August 2010 flow criteria report.</p> <p>In its “response to comments,” the Lead Agencies argue that the Final EIR/EIS does not incorporate flows similar to the SWRCB’s August 2010 flow criteria report because these flows “could not be achieved without adverse impacts to cold water management for fisheries in the Sacramento, Feather, and American rivers....” Additionally, the Lead Agencies retort that such an alternative could not be achieved “without reductions in non-SWP and non-CVP water rights diversions,” and that “[t]he purpose and need of this EIR/EIS would not allow changes to these water rights users.”</p> <p>These responses are inadequate. First, alternatives that require action beyond the legal control of the Lead Agencies – including reductions of non-SWP and non-CVP water rights diversions – are not barred from consideration. To the contrary, alternatives must be examined that include “all appropriate methods of accomplishing the aim of the action, including those without the area of the agency’s expertise and regulatory control as well as those within it.” While non-SWP and non-CVP water rights diversions may be outside the regulatory control of the Lead Agencies, all water rights – including pre-1914 water rights – are broadly subject to the public trust doctrine, waste and unreasonable use doctrine, and other legal mandates that can be used to achieve water savings for the long-term benefit of both ecosystems and humans (including future generations). Accordingly, California WaterFix should not tie its own hands by failing to develop such alternatives.</p>	
Earth Law Center	4	<p>Second, the Final EIR/EIS also improperly dismisses an alternative based on the SWRCB’s August 2010 flow criteria report due in part to potential cold water management impacts. While the SWRCB’s report does explain that its proposed flow criteria may need to be “tempered” to maintain adequate cold water resources, it concludes that this can be achieved through adaptive management based on temperature and water supply modeling analysis. However, rather than developing an alternative that meets both of these needs – that is, maximizing Delta flows while still allowing for sufficient cold water management, as suggested by the SWRCB’s August 2010 flow criteria report – the Final EIR/EIS dismisses such an alternative outright.</p> <p>In justifying this decision, the Lead Agencies once again point to their broad inability to reduce water diversions, which they recognize could mitigate “some of the impacts to cold water management” but then claim “cannot be feasibly accomplished” through the project. As discussed above, such reductions are possible, and alternatives outside the regulatory control of the Lead Agencies must still be considered. The Lead Agencies must not use the status quo of vastly over-allocated water</p>	Please see the response to this comment in ELC’s July 28, 2014 letter (DEIR/DEIS letter #1636, Volume 2, Final EIR/EIS). This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.

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		rights as an excuse for ignoring forward-thinking project alternatives that could achieve thriving Delta ecosystems.	
Earth Law Center	5	<p>As an added point, the preferred alternative (Alternative 4A) itself would exacerbate water temperature impacts on numerous fish species. For example, looking at the Sacramento River at Bend Bridge from May through September, Alternative 4A would result in 55 percent more years in which water temperature exceedances reach the “red” level of concern – the highest such level – compared to existing conditions. When compared to the no action alternative, Alternative 4A once again results in a greater number of “red” level temperature exceedances. With Alternative 4A and other alternatives implicating their own significant temperature concerns, the exclusion by Lead Agencies of an alternative with greater Delta flows due to correctable temperature concerns appears disingenuous.</p> <p>Considering these concerns, ELC asks that the Lead Agencies revise the Final EIR/EIS to include alternatives that significantly reduce Delta exports and increase outflow similar to the flows proposed in the SWRCB’s August 2010 flow criteria report.</p>	<p>The temperature results that compare Alternative 4A to Existing Conditions are largely driven by climate change and not Alt 4A. The comparison of Alt 4A to NAA is more appropriate as a “with project” vs. “without project” comparison. CEQA case law allows CEQA lead agencies to take future conditions, such as occur under a No Project (No Action) Alternative, into account when assessing the significance of impacts under CEQA. (See <i>Neighbors for Smart Rail v. Exposition Metro Line Construction Authority</i> (2013) 57 Cal.4th 439, 454; see also Master Response 1, Environmental Baselines.) For the analysis referred to by the commenter, the NAA vs. Alt 4A comparison indicates that there would be a 5% increase in years in the red level of concern. As noted in the text (in Impact AQUA-40), “These differences would not be biologically meaningful to winter-run Chinook salmon spawners and eggs, as the 4 years constitute a small proportion of the 82 year period used for this analysis, as long as the years were not consecutive, which they were not in this case.” Therefore, this would result in a “not adverse” impact.</p> <p>This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.</p>
Earth Law Center	6	<p>California WaterFix Cannot Be Integrated into the Bay-Delta Plan Consistent with the CWA</p> <p>Like those preferred alternatives before it, Alternative 4A of the Final EIR/EIS cannot be integrated into the Bay-Delta Plan in a manner that is consistent with the CWA. Under the CWA, the state must adopt science-based flow criteria that protect (not “reasonably” protect) the most sensitive beneficial use. However, Alternative 4A results in flows that are similar to or worse than existing conditions, which are widely considered inadequate to protect Delta fish and habitats. As one example, compared to the no action alternative, Alternative 4A results in a decrease in average annual Delta outflow under all scenarios (H3, H3+, and H4) in both “all” water years (i.e., all water year types combined) as well as in critical years, during which aquatic species face the greatest challenges. Overall, the inadequate flows put forth in the Final EIR/EIS fall well short of what is needed to prevent violations of beneficial uses necessary to protect Delta systems and species.</p> <p>In addressing ELC’s concerns over CWA compliance, the “response to comments” gives the following response (amongst others):</p> <p>[T]he [SWRCB] is preparing an updated [sic] to the [Bay-Delta Plan], which is considering reasonable protection of beneficial uses.... It is assumed that the results presented in the Final EIR/EIS would be considered by the [SWRCB]; however, the final [Bay-Delta Plan] may include additional actions. Following completion of the updated [Bay-Delta Plan], SWP and CVP operations would need to be reviewed to determine if the operations continued to comply with the updated plan.</p> <p>The “wait and see” approach taken by the Lead Agencies fails to address ELC’s concern that California WaterFix is fundamentally incompatible with the CWA. Were Alternative 4A to be integrated into the state’s revised Bay-Delta Plan, the resultant flow objective(s) would fail to protect the most sensitive beneficial uses, as required by the CWA. In order to ensure CWA compliance, the Lead Agencies should instead support development of a science-based Bay-Delta Plan update that protects flows in accordance with ecosystem needs, and then develop its preferred alternative based off this update.</p>	<p>This comment is about the Bay Delta Plan, CWA, flow, and the response to previously submitted comments. This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.</p>
Earth Law Center	7	<p>ELC also restates its concern that California WaterFix is attempting to circumvent the ongoing public process to update the Bay-Delta Plan. Such changes to Delta flows and hydrodynamics must be evaluated through public review before the SWRCB, the only state body authorized to change water</p>	<p>This comment is about the Bay Delta Plan, CWA, and flow. This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.</p>

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		<p>quality standards. California WaterFix proponents should not attempt to circumvent the process by making its operational criteria seem inevitable and necessary; they are neither. Instead, potentially necessary flow criteria must be the subject of careful and critical review in the SWRCB's Bay-Delta Plan update process, including review for consistency with the CWA, before California WaterFix may proceed.</p>	
Earth Law Center	8	<p>Implementation of California WaterFix Will Violate Water Quality Standards Under the CWA, Preventing Necessary 401 Certification</p> <p>Based on similar reasoning as above, and as described in detail in the attached 2015 letter from ELC to the Corps, California WaterFix would result in water quality violations under the CWA and therefore cannot receive the necessary 401 Certification it needs for a CWA Section 404 permit. One requirement for 401 Certification is for the proposed project to meet water quality standards under CWA Section 303. As implementing U.S. EPA regulations assert, 401 Certification "shall" include a statement providing a "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." Such water quality standards encompass both the designated uses of a water body and the water quality criteria established to protect those uses, as well as antidegradation requirements. In other words, "a project that does not comply with a designated [i.e., beneficial] use of the water does not comply with the applicable water quality standards."</p> <p>California WaterFix falls well short of meeting water quality standards. The Lead Agencies propose a flow regime that is largely equivalent to those that have been failing to protect Delta ecosystems and species for years, and which would actually result in reduced flows under many scenarios. If implemented, California WaterFix would fail to protect multiple beneficial uses of affected waterways and will violate water quality standards. These beneficial uses include "rare, threatened or endangered species habitat," "estuarine habitat," "spawning, reproduction, and/or early development," and other sensitive beneficial uses that will be impacted further by the project.</p> <p>Because it cannot meet water quality standards, California WaterFix cannot obtain the required 401 Certification it needs for a CWA Section 404 permit to advance the project. In order to receive the necessary CWA Section 404 permit, Lead Agencies must revise and recirculate California WaterFix with a new reasonable alternative that sufficiently increases flows to ensure the full protection of all beneficial uses. ELC invites the Lead Agencies to read the attached November 9, 2015 comment letter from ELC to the Corps for additional information.</p>	<p>This comment is about water quality, CWA, flow, and alternatives development. This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.</p>
Earth Law Center	ATT 1	<p>Comment letter from ELC to the U.S. Army Corps of Engineers (Corps) on the application submitted by the California Department of Water Resources (DWR) to the Corps to construct the California WaterFix program pursuant to Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (November 9, 2015).</p>	<p>This attachment is a comment letter from the Earth Law Center to the U.S. Army Corps of Engineers (Corps) on the application submitted by the California Department of Water Resources (DWR) to the Corps to construct the California WaterFix program pursuant to Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (November 9, 2015). It contains comments received during a previous comment period and does not raise any substantive new environmental issues that weren't addressed in the Final EIR/S. The Earth Law Center's previous comments were responded to in Volume 2 of the Final EIR/S, letter 2077. The Clean Water Act section 404 and 401 regulatory compliance processes are separate from the CEQA/NEPA process.</p>

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Earth Law Center	ATT 2	Comment letter from ELC to the U.S. Army Corps of Engineers (Corps) on the application submitted by the California Department of Water Resources (DWR) to the Corps to construct the California WaterFix program pursuant to Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (November 9, 2015).	This attachment was received during a previous comment period and does not raise any substantive new environmental issues that were not previously addressed in Volume 2, response to comment letter 2077 of the Final EIR/S.
Earth Law Center	ATT 3	Comment letter from ELC to the State Water Resources Control Board (SWRCB) on the Bay-Delta Water Quality Control Plan (Bay-Delta Plan) draft Substitute Environmental Document (SED) (March 28, 2013). Regarding the SED, water quality, the Clean Water Act, and flow	This is attachment is a letter to the State Water Resources Control Board regarding a draft of the Substitute Environmental Document. This attachment does not raise any environmental issue related to the Final EIR/EIS.
Earth Law Center	ATT 4	Meeting and Exceeding Water Quality Criteria, and Preventing Degradation of San Francisco Bay-Delta Estuary Water Quality" (Oct. 6, 2015), available at: http://bit.ly/2joi1dN .	This attachment was received during a previous comment period and does not raise any substantive new environmental issues that were not previously addressed in Volume 2, response to comment letter 650 of the Final EIR/S.
Earth Law Center	ATT 5	See Bay Delta Conservation Plan/California WaterFix Final EIR/EIS – "Volume II: Response to Comments," available at: http://baydeltaconservationplan.com/FinalEIREIS/FinalEIR[EIS_ResponseToComments.aspx .	This attachment is a link that is not working and does not raise any environmental issue related to the Final EIR/EIS.
Earth Law Center	ATT 6	See SWRCB, "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem" (Aug. 3, 2010).	This attachment is a SWRCB report and does not raise any environmental issue related to the Final EIR/EIS.

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Earth Law Center	ATT 7	Recirculated Draft Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay–Sacramento San Joaquin Delta Estuary, San Joaquin River Flows and Southern Delta Water Quality, Executive Summary (Sept. 2016).	This attachment is regarding a draft of the Substitute Environmental Document by the State Water Resources Control Board. No specific comments outlined where in this attachment comments relate to the Final EIR/EIS. This attachment does not raise any environmental issue related to the Final EIR/EIS.
Earth Law Center	ATT 8	SWRCB, “Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary,” p. 9 (Dec. 13, 2006).	This attachment is a SWRCB report and does not raise any environmental issue related to the Final EIR/EIS.