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CA Save Our Streams Council

May 7, 2018

Karla Nemeth
Director
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By email and US Mail
cwf_amendment@water.ca.gov

Re: **Comments Regarding the State Water Project (SWP) Contract Amendment for the California WaterFix (CWF): Flaws in the SWP Contract Amendment and Process**

Negotiations now underway on a SWP Contract Amendment for CWF do not comply with Water Code § 147.5 requirements for public disclosure and hearings, California Environmental Quality Act (CEQA) requirements for analysis of substantial environmental impacts, or Legislative oversight recommended by the Legislative Analyst Office. These concerns are expanded below, along with a summary of previous comments submitted for a related proposed SWP Contract extension that has not yet been completed.

The Legislative Analyst Office has pointed out that, without oversight, "*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.*" [3]

We urge the SWP Contractors and DWR to seek this Legislative oversight hearing to avoid costly mistakes while spending time and expending ratepayer resources on amendments. Here are some examples of DWR and SWP contractor overreach that need Legislative oversight and modification before proceeding:

1. Expenditures, both direct and indirect, that will rely on the General Fund as a result of the negotiated language in the proposed SWP contract extension amendments.

2. Expenditures that obligate general fund costs by extending the term of the State Water Project repayment contract. Adding another 50 years to the existing 75 years for repayment of debt. The water tunnel costs are estimated to more than triple the current total debt of the SWP, pledging ratepayer and property taxpayer funds as payment. Ratepayers originally agreed to fund a project that was estimated to cost $1.75 Billion. Liabilities and long-term debt for the SWP has ballooned to roughly $7 billion.[4] Now ratepayers and taxpayers who will use the tunnels will need to fund an additional $17 billion.

3. Compliance with Water code section 85089(a) *...that requires mitigation, including mitigation required pursuant to Division 13 (commencing with Section 21000 of the Public Resources Code), required for the construction, operation, and maintenance of any new Delta water conveyance facility.*

4. Compliance with Water code § 12937 (b) and § 12934 (d). In response to the State Auditor's questions regarding DWR's use of a projected surplus of $293 million in SWP revenue for the Delta Tunnels (CWF), DWR claimed that such surplus funds may be spent on new SWP facilities such as the Delta Tunnels (CWF).[5] The Delta Tunnels (CWF) are not listed in Water Code § 12934 (d) nor in the existing SWP Contracts. Further given the extensive maintenance costs ignored at the Oroville Dam for example, and other facilities, there are serious questions regarding the use of these funds for such purposes instead of facilities' operations and maintenance costs.[6]

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[3] http://www.lao.ca.gov/analysis_2009/resources/res_anl09004003.aspx

[4] https://www.water.ca.gov/-/media/DWR-Website/Web-Pages/About/Financials/Files/SWRDS-CAFR-Final-FY-2017.pdf Financials 2017

[5] http://www.auditor.ca.gov/pdfs/reports/2016-132.pdf See pages 20-21

[6] https://www.mercurynews.com/2018/02/07/oroville-dam-feds-unsure-whether-they-will-pay-for-spillway-repairs/ See also https://garamendi.house.gov/media/press-releases/congressmembers-garamendi-and-lamalfa-seeks-clarity-fema-authority-fund-repairs

Summary of original written comments submitted to DWR regarding the SWP Contract Extension amendment, for which the final environmental report and required compliance with Water Code § 147.5 has not occurred:

A. Failure to accurately identify and account for existing required maintenance and proposed future capital SWP costs necessary just to maintain existing facilities:

1. Reconstructing the Oroville Spillway & the Thermalito pump-generating plant;
2. Reinforcing facilities against seismic failure;
3. Correcting subsidence damage;
4. Implementing a drainage solution on the Westside of the San Joaquin Valley and resulting pollution and downstream damages to existing users caused in part by groundwater substitution, exchanges, transfers and irrigation of toxic soils;
5. Implementing the Oroville hydroelectric FERC license project conditions; and
6. Obtaining a renewed Federal Energy Regulatory Commission (FERC) license for the SWP's southern hydroelectric plants.

B. The costs in A, above, are substantial costs that the property taxpayers and ratepayers need to know before indenturing their communities with an additional $17 billion in new project capital costs such as required for the Delta Tunnels (CWF).

C. The SWP contract extension amendment gives DWR and SWP contractors a 50 year blank check with ratepayers and property taxpayers on the hook for these unknown amounts and costly bills and also allows riskier financing tools even as the SWP faces the uncertainty of climate changes and deferred maintenance. The proposed SWP Contract Extension amendments from 2014 include new authorization for SWP revenue bonds to be issued to:

1. "Finance repairs, additions, and betterments to most facilities of the SWP <u>without regard to whether the facilities were in existence prior to January 1, 1987, which is the current Contract requirement in Article 1(hh)"(8)</u>; [The Delta tunnels (CWF) are not on the current list so this change appears to open the door to add the additional $17 billion in debt needed to fund this tunnel conveyance addition, new water right and diversion. There is substantial public interest in the environmental impacts of this project and any hidden financing mechanisms.][7] and
2. <u>"Finance other capital projects (not already in the list in the SWP Contract Article 1(hh) for which revenue bonds could be sold)</u> when mutually agreed to by DWR and at least 80 percent of the affected Contractors." MWD and Kern County Water Agency control roughly 72% of the project so this reduced approval for debt issuance would require only a few additional contractors and concentrates even greater control of the State Water Project with a few contractors.
3. Debt reserves are reduced further despite unforeseen hydrological, geological and climate change events. The amendments allow for the purchase of riskier investments, including purchase letters of credit and surety bonds. The governing bond resolution was changed so the debt service reserve requirement is also weaker than for the typical municipal water enterprise at only 50% of maximum annual debt service.

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[7] There are twenty separate challenges to DWR's Delta Tunnels approvals under state law, including the California Environmental Quality Act, the California Endangered Species Act, the 2009 Delta Reform Act, among other claims, were filed in August 2017. This litigation includes 82 public agencies, nonprofit groups, and landowners, including water districts, reclamation districts, utilities, environmentalists, and farmers.

Conclusion

We are hopeful the change in leadership at DWR can bring in a new era of transparency and accountability to the ratepayers and taxpayers who have contributed more than $257 million dollars, including some $84.8 million in public funding[8] towards the Delta Tunnels (CWF) and yet, still has not produced an economic or financial analysis to demonstrate the financial viability of the tunnels.[9] However, we note there is much left to do to achieve this goal of transparency and accountability.

1. Despite repeated promises there is no off-ramp for those contractors who do not want to pay any part of the Delta tunnels' estimated $17 billion dollars in costs.
2. Skyrocketing costs and shaky legislative and administrative oversight plague this contentious conveyance project. It still lacks a proper system of governance. According to audits the project has failed to keep important documents and follow state required competitive bidding processes, thereby inflating costs through expensive consultants without proper credentials. Without strengthened oversight, California can look forward to more of the same, including project cost overruns.
3. It appears that abuses identified by the Legislative Analyst Office continue.[10] These include
   - An over–allocation of total SWP costs to recreation;
   - Recreation costs are incurred without Legislative review, thus obligating taxpayers without legislative approval.
   - Regulatory compliance costs are being allocated by DWR to Davis–Dolwig, thus obligating taxpayers and the general fund.

Despite the thousands of 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.[11] Metropolitan Water District has voted to put up some $10.8 billion dollars, provided they have more control over this state project and greater authority to make substantive political decisions concerning water supply and water rights. It appears from the limited public view of the proposed contract amendment negotiations that relaxing existing contract rules for buying and selling water is the likely vehicle for further subsidizing the water purchases of the agricultural water contractors and their financial participation in the tunnel project. However, the cost of relaxing rules on water trades to the environment, water quality, existing water rights and downstream uses do not appear at the forefront of these negotiations and by law must be considered and mitigated.[12] These include

[8] Misuse of Taxpayer Funds found by Federal Audit see https://apnews.com/3bd4ba28a69448cebff3dbdd15a8c5d1 & https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_BayDeltaPlan_Public.pdf

[9] See the State Auditor Report http://www.auditor.ca.gov/pdfs/reports/2016-132.pdf

[10] http://www.lao.ca.gov/analysis_2009/resources/res_anl09004003.aspx

[11] Water Code §85089 and Op.Cit. See the State Auditor Report.

[12] See Pub. Resources Code, § 21166; CEQA Guidelines, § 15162

discharges of arsenic laden groundwater into drinking water canals[13] 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.[14]

Thank you for the opportunity to comment.

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

[14] Ibid.

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May 7, 2018

Mr. Randy Record
Members of the Board of Directors
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RE: Board Memo 8-2 - Adopt CEQA determination and approve and authorize the distribution of Appendix A for use in the issuance and remarketing of Metropolitan's bonds – **OPPOSE**

Board Memo 8-3 - Adopt the CEQA determination and adopt Fourth Supplemental Subordinate Resolution to the Master Subordinate Resolution Authorizing the issuance of up to $80 Million of Subordinate Water Revenue Bonds, 2018 Series; and approve expenditures to fund the costs of issuance of the Bonds – **OPPOSE**

Dear Chairman Record and Board Members:

We OPPOSE Board memos 8-2 and 8-3 for reasons described below.

Board Memo 8-2 (Appendix A Issuance of MWD Bonds)

This letter updates several of the most important issues we have raised in previous letters to the MWD Board of Directors and management, which are incorporated by reference.[i] We also attach a list of detailed comments and questions prepared by Water Authority staff on the 3,729 proposed changes made to the February 1, 2017 Appendix A redline draft (Redline Draft) (Attachment 2 to 8-2) by MWD management, and request review and a response by MWD management, bond counsel, underwriter's counsel and other members of the financing team.

1) ***MWD's new "biannual" process for review of Appendix A disclosures has made Board oversight more difficult.*** Board Memo 8-2 attaches a February 1, 2017 Redline Draft for review by the Board of Directors; however, this is not the most recent Appendix A used by MWD in connection with the sale of bonds. MWD updated Appendix A on May 10 and June 22, 2017, to include changes that are not included in the Redline Draft.

The "biannual" procedure MWD management is now following[ii] has made it more difficult, not easier, for board members to track changes to prior bond disclosures. Indeed, it was not even possible to track the changes that were actually made for prior MWD bond sales based on the information provided by staff in Board Memo 8-2; instead, independent research was needed to see what MWD's bond disclosures actually were for the May and June 2017 bond sales.

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We ask again that management consider modifying its process so that updates that are actually made carry forward to the next set of proposed changes. This way, when MWD distributes a redline draft to the board, members can rely on the fact that the draft actually contains the most recent bond disclosures, not an outdated version. It is unnecessarily difficult and time consuming to try to track changes under the process management is now following.

2) ***The Redline Draft does not fairly disclose risks associated with reduced demand for MWD water.*** We have written many letters describing our concerns that Appendix A does not fairly disclose risks associated with reduced demand for MWD water that has already occurred, and which may reasonably be expected to continue to decline. We have noted that MWD's forecasts of the future demand for MWD water vary significantly from the projections of its member agencies, because many of them have local projects that will ***permanently reduce demand for MWD water***.[iii] MWD chooses to ignore these projects in its planning processes by including in its supply projections only local projects that already exist or are under construction. The Redline Draft also includes a change stating that an acre-foot of water is enough to supply three average families in and around the home for one year, instead of two (Redline Draft at page A-7). MWD should disclose the basis for this suggested change and the fact that it would represent a significant and potentially material reduction in retail water use that has also not been accounted for in MWD's demand projections in its Integrated Resources Plan or otherwise.

Some of the specific disclosure techniques we have questioned include: a) use of historical numbers that are not reasonably projected to be repeated, and which ignore actual, material changed circumstances; b) inappropriate use of averaging; c) creation of a new label called "water transactions," rather than reporting MWD water sales and wheeling revenues for what they are; and d) attribution of reduced demand to conservation efforts rather than acknowledging the real factors driving reduced demand for MWD imported water (and which have nothing to do with MWD's conservation programs).[iv]

We objected many times to MWD's characterization of revenues received for wheeled water under the Exchange Agreement as the sale of MWD water at a discount. This is the first Appendix A presented for board approval that proposes to change the longstanding and commonly used financial terminology referring to "water sales," "water sold," "water sales revenues," "water purchases" and "water sales projections," to employ MWD's new terminology, ***"water transactions."*** We appreciate this step toward acknowledging the Court of Appeal decision that the ***wheeling law applies to the Exchange Agreement***, and that the revenue MWD receives are in fact wheeling revenues, not the sale of MWD water at a discount.[v] But while we appreciate the apparent effort to improve disclosure of these facts, we are concerned that this particular highly nuanced change will make understanding of the relevant data even more confusing if not misleading. There is no apparent reason why MWD does not simply account separately and clearly for the portion of MWD's revenue received from water sales and the portion of MWD's revenue received from providing wheeling service.[vi]

3) ***The Redline Draft does not fairly disclose risks associated with potential loss of wheeling revenues.*** There are important and different considerations and risks associated with MWD wheeling revenue projections as compared to water sales. First and foremost, the Exchange Agreement gives the Water Authority the right to determine, in its sole discretion, and subject only to five (5) years written notice, whether to permanently reduce the amount of water to be wheeled via MWD facilities. As you know, the Water Authority Board of Directors is continuing to assess whether wheeling water through MWD's facilities is cost-effective. The Water Authority board will only make a decision once all of the facts are

available, including a final legal determination of the Water Authority's claim for ***offsetting benefits***, a claim which also is not disclosed in the Redline Draft. The potential addition of billions of dollars of costs associated with allocating the respective twin tunnels costs to transportation will also impact the economics of the Water Authority's decision. MWD should disclose the risks associated with the loss of wheeling revenues in Appendix A.

4) ***The risks associated with California WaterFix are inconsistent with the Board's investment policy and fiduciary duty to protect public funds.*** The risks associated with California WaterFix are more clearly presented in the Redline Draft than they had previously been presented to the MWD Board of Directors. The risks are great and include spending MWD ratepayer dollars to ***speculate*** on investments that are not needed by MWD or its ratepayers and are instead being made for the benefit of Central Valley Project (CVP) farmers, with respect to which MWD management admits, "receipt of...revenues cannot be assured." Redline Draft at page A-17. Moreover, it seems certain that the CVP farmers will not be willing or able to pay that share of costs in full, because they have already expressly declined to do so. If MWD is planning to fund the second tunnel to sell at a loss, it should disclose that fact and explain why its ratepayers should make up the shortfall, let alone assume 100 percent of the risks of project development for the benefit of entities and ratepayers that are outside of MWD's service area.

MWD has described the MWD Board vote approving funding of up to 64.6 percent of the project, or $10.8 billion, as the "financial exposure to MWD." Redline Draft at page A-16. While it has also disclosed that the actual cost of the WaterFix project "may differ materially" from the costs reported in the Redline Draft, and that the 64.6 percent does not include the "acquisition of transfers" (Redline Draft at page A-17), which will further increase MWD's share of the costs and risks of the project, it has not disclosed that the MWD Board vote approving the project ***did not set any cap on the project's cost and gave the General Manager complete discretion how much cost MWD may incur and pay, as well as discretion to change the Board of Director's investment policy as necessary***. The risk, therefore, potentially far exceeds any numbers included in the Redline Draft. Delegation of the Board's authority over MWD's investment policy should also be disclosed at page A-72 of the Redline Draft.

MWD has stated that the annual cost of the project will be $515 million if everything is completed on time and on budget, which MWD itself acknowledges will not occur. Redline Draft at page A-17. MWD should disclose that this amount is expressed in 2017 dollars, represents a ***100% increase over its current annual SWP costs,*** which must be paid while the project is being constructed and financed over the 15-year or longer period while no water supply benefits are being provided. Similarly, while MWD discloses that "[t]here can be no assurance all of the permits and approval [for WaterFix] will be obtained by the responsible parties in a timely manner ***or at all***" (emphasis added), it does not describe any risk assessment or the magnitude of such an eventuality and associated costs over time. MWD should provide some estimate of the amount of sunk costs its ratepayers may have to pay if it continues on its present spending plan, but the project is ultimately abandoned.

The Redline Draft makes it clear that MWD will be issuing its own revenue bonds and be solely at risk and financially responsible for the Central Valley Project share of the costs for the second tunnel: "Metropolitan expects that it would finance this entire amount [$5.6 billion for the second tunnel] through parity obligations under either its Master Senior Resolution or Master Subordinate Resolution, or through a combination of both." Redline Draft at page A-17. MWD should disclose that 1) no more water is provided by construction of the second tunnel to its ratepayers (as per MWD's April staff report); and 2) new legal challenges may be presented based on a variety of legal theories including Proposition 26, gift of public funds, waste of public funds, unlawful delegation of the board's authority to the General Manager and others. While the DWR validation claims are disclosed in the Redline Draft, the claims regarding MWD's payment of the additional $5.6 billion for the second tunnel are of a different nature.

Finally, MWD Act 239.2 limits MWD's aggregate revenue bond issuance to MWD's equity at the end of the last fiscal year prior to the issuance of such bonds. MWD's most recent Comprehensive Annual Financial Report (http://www.mwdh2o.com/PDF_Who_We_Are/2017%20CAFR_final.pdf) describes MWD's current debt to equity ratio in 2017 at 63.66 percent, or $2.46 billion in additional debt capacity. Based on these numbers, it is not clear how MWD plans to finance the $5.6 billion cost of the second tunnel without violating its own Act. Director Lewinger asked at last month's finance committee meeting whether the WaterFix obligation would impact MWD's ability to finance its own CIP and was told by staff that it would not. We request an explanation how all of this debt is planned to be issued and managed by MWD management.

5) ***MWD's simplistic disclosure of "average" rate impacts from WaterFix is inadequate.*** We hope that MWD will be more forthcoming in its media and outreach to be consistent with its acknowledgement that the WaterFix project will increase water rates by 33 percent. However, even having said as much based on MWD's projections, MWD is also well aware that there is no "average" ratepayer, and that the rate impacts from WaterFix will vary greatly among MWD member agencies based upon their demand characteristics and usage patterns as well as how MWD allocates its costs. ***At a minimum, a range of rate impacts should be provided.*** For example, the Water Authority has calculated that rate impacts could be as high as $23.30, or as low as 55 cents per household per month, depending on where MWD assesses WaterFix costs on rates and what interest rate is assumed. MWD has not provided any rate sensitivity analysis that would demonstrate the point at which agencies are likely to seek water supply and delivery services using mechanisms and providers other than MWD, or explained how these and other MWD fixed costs will be paid if agencies continue to do so.

6) ***The rate litigation disclosures are partially incorrect and incomplete.*** First, the disclosures should be amended to make clear the important ruling by the Court of Appeal that the wheeling law applies to the Exchange Agreement. As noted earlier, this has been a subject of dispute between the Water Authority and MWD for a very long time and has important implications for how MWD describes and discloses its revenues and risks. Now that the Court has decided the issue, MWD must correct its disclosures accordingly.

Second, it should be noted that ***the Court of Appeal applied Proposition 26 to MWD's rates,*** in ruling that inclusion of MWD's Water Stewardship Rate in the Exchange Agreement price was a breach of the Exchange Agreement by MWD. The changes MWD has included at page A-65 of the Redline Draft are completely contrary to the Court of Appeal's ruling, suggesting deletion of language stating that Proposition 26 applies to special districts "such as Metropolitan," and continuing to include language that MWD "believes" its rates are "not taxes under Proposition 26." This is a misleading statement that appears to suggest Proposition 26 is not applicable to MWD's water rates and charges, whereas it has now been decided that it is applicable.

Finally, the Court of Appeal's ruling on the Water Stewardship Rate was that demand management costs are not properly included in transportation rates. Neither the trial court nor Court of Appeal made any statement limiting this determination to the 2011-2014 record, as stated by MWD. The only basis for such a change would be a substantive change in the nature of the costs being incurred by MWD, but no such evidence has ever been presented by MWD.

7) ***Many of the 3,729 changes in the Redline Draft are not to update changed circumstances, but to support MWD's litigation positions and characterizations***. MWD's Chief Financial Officer has explained the thousands of changes to MWD's Appendix A over the last few years as being necessary to report "changed circumstances." However, we have noted that changes to MWD's Appendix A frequently appear to be driven by MWD positions and characterizations as they evolve in the litigation. The current proposed Redline Draft is no exception, as many proposed changes are designed to characterize many costs that have previously been described as water supply costs to now being costs of MWD's distribution system, without any factual basis supported by cost of service. In this regard, we believe MWD should also disclose in Appendix A the dispute over whether the rate model it uses to set its rates and charges is a public record.

Board Memo 8-3 (Additional Borrowing as Specified)

For reasons we have also previously expressed,[vii] we are not comfortable with MWD board resolutions finding it necessary to borrow more money, when the use of borrowed funds is so uncertain. At this point, we have no way of knowing what funds are planned to be spent on the second tunnel. The issuance of debt is not reasonable when it is impossible to know in advance how MWD will spend borrowed money or even what the CIP will consist of given MWD's practice of adding large projects and changing the CIP *ex post facto.*

Sincerely,

Michael T. Hogan	Keith Lewinger	Elsa Saxod	Fern Steiner
Director	Director	Director	Director

Attachment: Detailed comments and questions on Redline Draft

cc: Jeff Kightlinger, MWD General Manager
Marcia Scully, MWD General Counsel
Gary Breaux, MWD Chief Financial Officer
June Skillman, MWD Manager of Budget and Rates

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[i] We incorporate by reference all of our prior letters raising questions and concerns about MWD's financial disclosures including those dated June 11, 2017, April 30, 2017, February 14, 2017, February 12, 2017, February 8, 2017, December 11, 2016, June 15, 2016, June 11, 2016, October 12, 2015, June 5, 2015, November 17, 2014, May 12, 2014, December 9, 2013, June 7, 2013, May 13, 2013, February 11, 2013, November 5, 2012, October 8, 2012, August 29, 2012, August 20, 2012, February 13, 2012, August 22, 2011, May 16, 2011, April 9, 2011, December 9, 2010 and September 22, 2010. We note that many comments we have provided in the past have not been substantively addressed by changes in the Official Statement Appendix A; we do not repeat, but incorporate by reference all of issues and letters and attachments, copies of which are in MWD's possession.

[ii] In our June 11, 2016 letter, we explained in detail our concerns as board members regarding MWD management's proposal to change the process for board member review of bond disclosures to a "biannual" review rather than a review each time MWD issues bonds for sale to the public. We later made a standing request in our June 15, 2016 letter (responding to Gary Breaux's June 14 letter "Narrowing Down Board Approval" of bond disclosures). We renewed this request again in our February 12, 2017 letter, *as we struggled to track the edits that were sent to the Board of Directors, which were also not based on the then most recent version of Appendix A and in fact were edits to a draft Appendix A that was never finalized or used in connection with a bond offering we could identify.*

[iii] See for example, letters dated September 6, 2017 (Meeting Summary and Request for Information); August 3, 2017 (Discrepancies between MWD's and Member Agencies' 2015 Urban Water Management Plans; and MWD's July 13, 2017 Letter Denying Request for Opportunity to Present Information to MWD Board of Directors) and July 9, 2017 (Water Planning and Stewardship Committee Item 8c: Report on MWD's 2015 Urban Water Management Plan - REQUEST TO MAKE A PRESENTATION TO MWD BOARD OF DIRECTORS). We incorporate all of these letters and attachments, copies of which are in MWD's possession.

[iv] These and many other concerns with the "lexicon" and techniques MWD chooses to employ in its Appendix A are detailed in the letters noted at endnote i.

[v] While there are numerous edits to the Appendix A to revise former claims that MWD's wheeling of the Water Authority's Colorado River represents a "sale" of MWD water at a discount, this language still appears at page A-22 of the Redline Draft: *"In consideration for the conserved water made available to Metropolitan by SDCWA, a lower rate is paid by SDCWA for the exchange water delivered by Metropolitan."* This language is not redlined in the Redline Draft but should also be changed to be consistent with the ruling by the Court of Appeal.

[vi] Distinguishing wheeling revenue from water sales would also help to more clearly report data and risks associated with hydrologic variability which affects MWD water sales but not wheeling revenues. MWD's failure to distinguish (i.e., account for) water sales from wheeling will grow more and more misleading over time, as the Water Authority's QSA supplies increase to 280,000 acre-feet annually by 2021. See April 30, 2017 letter RE MWD's Appendix A, Board Distribution Draft dated 04/26/17.

[vii] See June 11, 2017 letters RE Board Memo 8-1: Adopt CEQA determination and adopt Ordinance No. 150 determining that the interests of MWD require the use of revenue bonds, etc. and RE Board Memo 8-2: Adopt CEQA determination and adopt Third Supplemental Subordinate Resolution to the Master Subordinate Resolution, etc., copies of which are in the possession of MWD and incorporated herein by reference.

Attachment to May 7, 2018 letter re: Board Memos 8-2 and 8-3

Detailed comments and questions prepared by Water Authority staff on the 3,729 proposed changes made to the February 1, 2017 Appendix A Redline Draft (Attachment 2 of 8-2)

A-1, 2, 36, 38, 40-41, 97 and several other places: *Water Transactions.* See letter explanation. Use of this opaque terminology is unnecessarily imprecise.

A-1: *Metropolitan's charges are not subject to PUC or state or federal regulation.* MWD should add that it is subject to the requirements of Proposition 26 and other California statutory and constitutional limitations on rate-setting.

A-7: *Current Water Conditions, Colorado River.* Replacing "net diversions" with "base supply" makes it unclear if 2018's projected "base supply" of Colorado River water includes the Water Authority's Colorado River supplies. Please clarify.

A-9: *Local water supplies.* The inclusion of this section under the heading, "Metropolitan's Water Supply" (A-6) confuses the reality that local supplies by definition are not MWD water supplies. MWD has no obligation to "insure" the entire water supply of Southern California and it is not prudent to do so. As noted in prior comments letters, if MWD retains this description of local water supplies, it must also include the Water Authority's 280,000 acre-feet of Colorado River water, which it is legally obligated to report and treat as a local water supply.

A-11: *Term of State Water Contract.* Given that there is not yet any agreed amendment to the SWC, what is the basis of the added language that the term extends not to 2035, but "until all DWR bonds issued to finance construction of project facilities are repaid, whichever is longer"? Also, what is the basis of MWD's explanation that some but not all amendments of the SWC must be submitted for review by the Legislature?

A-20: *Conserved water vs. exchange water.* The suggested edits appear to be litigation driven to support the continued argument that MWD's wheeling of the Water Authority's Colorado River supplies constitutes the sale of MWD water. This should be changed to be consistent with the ruling by the Court of Appeal that the wheeling law applies to the Exchange Agreement. This is also discussed in the Water Authority Delegates' letter.

A-22: *Water Authority's IID and canal lining water is wheeled by MWD and does not represent the sale of MWD water at a discount.* This issue is addressed in the body of the delegates' letter.

A-29: *San Bernardino Valley MWD coordinated operating agreement.* Please explain this deletion and why this is no longer part of MWD's SWP Programs.

A-32: *Water produced from fallowing.* Please clarify whether water produced from fallowing MWD's land in the Palo Verde Irrigation District is included in the tally and if not, where the program savings from this program is reflected.

A-35: *Demand management programs.* MWD should note that sources of revenue other than the WSR and grant funds are used to fund demand management programs. There is no evidence supporting

MWD's statement, which we do not believe is factually accurate, that there are either reduced MWD infrastructure costs or system capacity made available by demand management programs, or that all users benefit.

A-36: *Cause of lower than budgeted water sales.* This is a good example of where the use of the term "transactions" is more confusing than helpful. Wheeling revenues are not variable, water sales are. Combining the two buffers the extent to which MWD's water sales projections were over-estimated. Further, there is no evidence that the success of MWD's conservation measures directly resulted in reduced demand for MWD water. It would be helpful if MWD actually accounted for water supplies and established a baseline against which conservation investments may actually be measured, but thus far, it has declined to do so. As such, there is no evidence to support the statements made about the reason for MWD budget shortfalls.

A-36-37: *Preferential rights.* The Water Authority has commented many times that whether or not preferential rights are "used" is not up to MWD, but rather, preferential rights are held by the member agencies.

A-38-40: *Local supplies.* MWD's statements incorrectly describe the Water Authority's IID and canal lining water by not describing them as "local supplies," which is what they are and which MWD is contractually required to do. This section again reflects the confusion caused by commingling MWD water sales with wheeling revenues for disclosure purposes. The Redline Draft states, "[c]onsumer demand and locally supplied water vary from year to year, resulting in variability in the volume of Metropolitan's water transactions," changing the prior, more accurate statement that those factors result in variability of MWD's water <u>sales</u>. It is clear from the techniques MWD is employing in the Draft Redline that it is seeking to minimize material changes (e.g., Water Authority's reduced demand) and the reality that there is reduced demand for MWD water. The Water Authority's independent Colorado River supplies should be distinguished in the historical table at page A-39 in order for it not to be affirmatively misleading.

A-47: *Purpose of MWD's CIP.* MWD is recharacterizing its entire CIP from a program "to meet future water demands" to one that involves "infrastructure and system reliability projects, either as upgrades to existing capital assets or replacements and refurbishments of existing facilities, etc.," as if none of the CIP will be built to meet future water demands. MWD has also completely eliminated its "Cost of Service" identification of its CIP and replaced the historical six categories of CIP cost with seven completely different and new categories of CIP costs. No explanation is offered for these changes or how they comport or are consistent with the cost of service report, budget and rates the board set just last month.

A-48: *Capital Investment Plan Financing.* The description of the Board's internal funding objective to fund 60 percent of capital program expenditures from current revenues is not a board policy that has been observed in recent years, in which MWD has used pay-as-you-go-funding to meet budget shortfalls and at other times, established budgets based on 100% pay-as-you-go-funding. The description of MWD's capital investment plan financing is not accurate and does not reflect the actual facts how MWD management has used pay-as-you-go funds

A-51: *Metropolitan Revenues.* The statements in this section are misleading due to the proposed changes from "water sales" to "water transactions." MWD water sales accounted for the majority of MWD's revenues since the mid-1980's, but that began to change in 2003 when the Water Authority wheeled its first 10,000 acre-feet of Colorado River water. By 2016, the volume of the Water Authority's wheeled water was 178,920 acre-feet and that number will grow to 280,000 acre-feet by 2021. These numbers are material and the difference between MWD water sales and wheeling revenues is material. MWD should not make the changes in the REDLINE DRAFT that will obfuscate these important facts.

A-53, 59: *Type of service, class of service and class of customers.* "Type" of service, "class of service" and "class of customer" are not the same thing. MWD's declaration that it has only one class of "customer" is misleading. While all of its customers are indeed MWD member agencies, MWD had admitted repeatedly that the demand characteristics and service patterns of its "customers" varies greatly, and those are the factors that must be accounted for when MWD allocates its costs and sets its rates. However, its cost of service process is entirely lacking this basic step in the cost of service process. See April 9, 2018 letter RE April 9 Finance and Insurance Committee and April 10 Board Meeting, Agenda Item 8-1 approving budget for fiscal years 2018/19 and 2019/20, etc. and attached Cost of Service Rate Review dated April 8, 2018, by Municipal & Financial Services Group.

A-56: *Tier 1 and Tier 2 water supply rates and Purchase Orders.* The description of Tier 1 and Tier 2 supply rates are as misleading as MWD's Purchase Orders: MWD plans to receive no Tier 2 water sales revenues and its Purchase Orders do not represent any kind of purchase commitment to MWD. See Water Authority letters dated November 17, 2014 RE Board Memo 8-1 - Approve the proposed terms for Purchase Orders with Member Agencies, etc.; October 13, 2014 letter RE Finance and Insurance Committee Item 6c - Update on Purchase Orders, January 14, 2013 letter RE Amended and Restated Purchase Order for System Water to be Provided by MWD; December 27, 2012 letter RE Amended and Restated Purchase Order, etc.; and October 8, 2012 letter RE Board Memo 8-3 - Approve the form of the amended and restated Purchase Order, etc. All of these letters are in the possession of MWD and are incorporated herein by reference. See also comments on MWD's Purchase Order contained in prior letters on MWD's updates to Appendix A, listed in endnote i to the delegates' letter.

A-57: *Litigation disclosures.* This issue is addressed in the delegates' letter.

A-58: *Availability or use of MWD water or distribution system.* It is impossible to understand what MWD intends by the changes to its description of "other charges," from, *"[t]he following paragraphs describe the additional charges for the use of Metropolitan's water, to the following paragraphs describe the additional charges for the use of Metropolitan's distribution system.'* While these are presumed to be litigation driven changes, as discussed in the delegates' letter, there is no explanation for how these proposed changes tie, if at all, to MWD's cost of service.

A-63: *Financial Reserve Policy.* MWD's description of its maximum reserve policy as a "target" rather than a cap is a reinvention of history. See March 21, 2018 letter from Director Lewinger to CFO Gary Breaux RE budget and rate questions, which is in the possession of MWD and incorporated herein by reference.

A-64: *Short term revolving credit facilities.* Please clarify the status of the two short-term revolving credit facilities, reference to which has been stricken by the proposed edits.

A-65, 66-70: *Proposition 26 and litigation challenging rate structure.* These issues are addressed in the delegates' letter.

A-87-90: *State Water Project vs. "contract and California WaterFix."* MWD is confusing the discussion of features of the State Water Project as compared to WaterFix, and appears to assume that they may be treated as the same project for some purposes but not for others. For example, it is unclear whether MWD believes that it has the power to levy ad valorem taxes if its revenues are insufficient to pay for the second tunnel.

A-97-102: *Historical and Projected Revenues and Expenses.* MWD discusses its "comprehensive analytical process" to project revenues and expenses, but that is a substitute for planning based on actual facts. MWD wants to change terminology to make it appear that its water sales have not declined significantly and its projected demand for MWD water depends on ignoring the active plans of many of its member agencies and sub-agencies to conserve and develop local water supplies in lieu of reliance on MWD's imported water.

A-103-104: *Management's discussion.* Management's analysis depends on the same artifice recasting water sales as water transactions. There is no reasonable basis to believe that MWD's water rates will remain within the stated range if it moves forward with the financing of the second tunnel as currently planned.

May 7, 2018

Rosa Castro, Board Administrator
Jeffrey Kightlinger, General Manager

Metropolitan Water District of Southern California
700 North Alameda Street
Los Angeles, CA 90012

NOTICE OF BROWN ACT VIOLATION

DEMAND TO CURE OR CORRECT pursuant to Gov. Code §54960.1

and

DEMAND TO CEASE AND DESIST pursuant to Gov. Code §54960.2

REQUEST FOR PUBLIC RECORDS

Dear Board of Directors,

We write on behalf of Food and Water Watch ("FWW") and the First Amendment Coalition ("FAC") to call your attention to violations of the Ralph M. Brown Act, Government Code section 54950 et seq., by the Board of Directors of the Metropolitan Water District of Southern California (the "District"). This letter serves as a demand to cure and correct and cease and desist the practices constituting such violations, and as a request for public records pursuant to the California Public Records Act, Government Code section 6250 *et seq*.

In its meeting on April 10th, the District took action via a formal vote of approval to implement the California WaterFix; authorize the General Manager to execute certain agreements and agreement amendments related to financing, pre-construction and construction activities for California WaterFix; and authorize General Manager to negotiate draft terms and conditions for one or more multi-year transfers of State Water Project water supplies.

However, this vote was nothing more than a rubber stamp, and was a result of multiple serial communications between members of the Metropolitan Water District Board of Directors, both directly and with intermediaries, including Governor Brown. These communications were intended to lead to and actually resulted in a collective concurrence among a majority of the board members to approve the actions ultimately rubber stamped at the April 10th Board Meeting.

The Brown Act was designed ensure that local government agencies conduct the public's business openly and publicly, and that the public has an opportunity to meaningfully engage in the decision of the legislative body. Because this process took place behind closed doors, the public was prevented from witnessing and participating in the decision-making process, in clear violation of the Brown Act.

These serial meetings violate the Brown Act's prohibitions on serial meetings. (See Gov. Code § 54952.2(b) [prohibiting "a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body"].) The serial communications were themselves violations of the Brown Act, irrespective of any formal action being taken after they occurred. (*Id.*; See also.; *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal. App. 4th 860, 877.)

The facts substantiating these violations have been widely reported.

An April 11 article in the Voice of San Diego[1] stated (italics are added for emphasis): "Last Monday, Metropolitan staff called a press conference to announce the agency would abandon plans to build two tunnels and spend $5 billion to build just one. But a few of Metropolitan's 38 board members, led by *Brett Barbre of the Municipal Water District of Orange County, decided to see if they could find the votes anyway. After Metropolitan staff seemed to throw in the towel, Barbre said he expressed his "strong dismay" and then called Steve Blois, a Metropolitan board member from Ventura County. Then they started making calls, trying to sell other board members on the idea of paying $11 billion for two instead of $5 billion for one. By the middle of last week, it seemed like they might be on to something.* Perhaps there were enough water agencies in Southern California willing to stomach the risk."

Another article in the Voice of San Diego on April 19th[2] stated: "Brett Barbre, a Metropolitan board member from Orange County who whipped votes in favor of the project, said it had support from about 52 percent of the board going into the weekend. That was enough to pass, but barely. 'What we were lacking was cushion and the elusive 60 percent,' he said in an email. The governor made calls before Tuesday's vote and helped get that number up to 61 percent."

And in LA Times article that appeared on April 9th[3] MWD director Brett Barbre stated: "I think it's very close, ..."They just need to get 11% more and they can kill us."

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[1] https://www.voiceofsandiego.org/topics/government/tunnel-vision-what-the-big-water-vote-means/
[2] https://www.voiceofsandiego.org/topics/government/sacramento-report-how-jerry-brown-helped-get-the-tunnels-deal-across-the-finish-line/
[3] https://www.latimes.com/local/lanow/la-me-tunnels-vote-20180409-story.html

Brown Act violations are further evidenced by MWDOC Director Larry Dick's comment at their April 5th Municipal Water District of Orange County meeting that: "April 10th is Tuesday, we should be voting on this. *I happen to know from the best bookmaker at MWD, that says we have a guaranteed win on the two tunnels at 51.67%*"

At MWDOC's April 19th Water Policy Dinner with Karla Nemeth Brett Barbre explained how Neemeth worked very closely with MWD and Governor Brown to make phone calls prior to the vote. One of the phone calls he recounts is about the Glendale representative on the MWD board, Zareh Sinanyan, who "never shows up at the MWD board anyway for meetings... I had tried calling him, no response. Blois tried calling him, no response. Kightlinger, no response. *The only person that was able to get a hold of him was the Governor. And I'm not going to tell you what he did to get a hold of him*." And Barbre in the same meeting also, introduced Director Stephen J. Faessel from Anaheim as the "MWD director that put them over 50% for the twin tunnels."

MWD's board adopted action was contrary to its own professional staff recommendation, an option according to its staff that was placed on at the 11th hour, increased Southern California ratepayer's financial obligation by $5.6 billion with zero water supply benefit for the region.

After three hours of public testimony with a large contingency of ratepayers raising concerns, MWD Director Gloria Gray moved the option that was not recommend by staff, and the board chair would not allow substitute motions.

In addition to the serial meeting violations described above, the agenda items were deficient. Government Code section 53635.7 requires that the posted agenda must contain "a brief general description of each item of business to be transacted or discussed at the meeting...." For any "decision that involves borrowing" $100,000 or more, the item must be "discuss[ed], consider[ed] and deliberate[ed]" as "a separate item of business." The revenue bond authorization for WaterFix will exceed $100,000, and was required to be agenized and discussed separately. Because it was not properly agenized, the Board's actions also violated Government Code section 54954.2.

Note that Government Code section 54952.6 defines "action taken" for the purposes of the Act expansively, i.e. as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

CURE AND CORRECT DEMAND

Pursuant to Government Code §54960.1, you have 30 days from the receipt of this demand to cure and correct the challenged actions by:

1. Rescind the actions taken by Metropolitan's Board of Directors on April 10, 2018 to approve to implement the California WaterFix; authorize the General Manager to

execute certain agreements and agreement amendments related to financing, pre-construction and construction activities for California WaterFix; and authorize General Manager to negotiate draft terms and conditions for one or more multi-year transfers of State Water Project water supplies; and "RESOLUTION 9238 OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA AUTHORIZING DISTRICT'S FINANCIAL SUPPORT OF CALIFORNIA WATERFIX AND AUTHORIZING THE GENERAL MANAGER TO NEGOTIATE, EXECUTE AND DELIVER VARIOUS FINANCING IMPLEMENTATION AGREEMENTS AND RELATED DOCUMENTS" and "RESOLUTION 9239 OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA AUTHORIZING DISTRICT'S PURCHASE OF CAPACITY INTEREST IN THE CALIFORNIA WATERFIX, THE FINANCING OF SUCH PURCHASE, AND OTHER ARRANGEMENTS, AND AUTHORIZING THE GENERAL MANAGER TO NEGOTIATE, EXECUTE AND DELIVER VARIOUS AGREEMENTS AND DOCUMENTS RELATED THERETO." Copies of all resolutions are linked below[4]

2. In order to provide a meaningful opportunity for informed public participation by members of the public, the Board must identify and publicly disclose the substance of any and all of the serial communications relating to the Board's April 10th vote, as described above, prior to any future discussion or action on this item.

If you fail or refuse to cure and correct as demanded, we may seek judicial invalidation of the challenged actions pursuant to §54960.1, in which case, we will also seek an award of court costs and reasonable attorney fees pursuant to Government Code §54960.5.

CEASE AND DESIST DEMAND

The Brown Act also provides a separate and distinct remedy allowing an interested person to "commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations," "to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body." Government Code §54960.

In order to avoid litigation to force the Board into compliance, FWW and FAC demand that the Board cease and desist from the practices set forth above, which impair the public's ability to participate in its government. Namely, the Board must acknowledge the Brown Act violations set forth above by making an unconditional commitment to refrain from the following practices in the future:

1. Refrain from any future serial communications outside of a public meeting on any item of business within its subject matter jurisdiction; and,

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[4] http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003738339-1.pdf
http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003738366-1.pdf
http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003738367-1.pdf

2. Agree to agendize any decision that involves borrowing $100,000 or more as a separate item of business.

Pursuant to Government Code §54960.2, you have 30 days from the receipt of this cease and desist demand to provide an "unconditional commitment" that the Board will refrain from engaging in the practices described above at any time in the future. The unconditional commitment must be approved by the Board in open session at a regular or special meeting as a separate item of business, and not on its consent agenda. If you fail or refuse to cease and desist as demanded, we may file an action pursuant to Government Code §54960, in which case, we will seek an award of court costs and reasonable attorney fees pursuant to Government Code §54960.5.

REQUEST FOR PUBLIC RECORDS

Pursuant to the California Public Records Act, Government Code section 6250 et seq. ("CPRA") we request that the District disclose the following:

(1) All communications between members of the Board of Directors of the Metropolitan Water District, their staff, and any third parties, relating to the District's April 10 decision to implement WaterFix between August 2017 and April, 10 2018; including use of personal mobile phones, text messages, personal emails, and personal and professional calendars

(2) All documents relating to the District's April 10 decision to implement WaterFix, including but not limited to any transcript, audio/video recording, and minutes of the closed session.

If any portion of the records requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. If you believe that any express provision of law exists to exempt from disclosure all or a portion of the requested records requested, you must notify us of the reasons for the determination not later than 10 days from your receipt of this request letter. (Gov. Code § 6253(c).) Any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing. (Gov. Code § 6255(b).)

Sincerely,

Brenna Norton
Senior Organizer
Food & Water Watch

David Snyder
Executive Director
First Amendment Coalition

CC: Metropolitan Water District Board of Directors
Marcia Scully, General Counsel