



July 10, 2017

**VIA PERSONAL DELIVERY**

California Senate Natural Resources and Water Committee  
Attn: Chairman Robert M. Hertzberg, Vice Chairman Jeff Stone, and Committee Members  
State Capitol, Room 5046  
Sacramento, California 95814  
Phone: (916) 651-4116

Re: Opposition to AB 1000

Dear Chair Hertzberg, Vice Chair Stone, and Committee Members:

I write to strongly urge the California Senate Natural Resources and Water Committee (“Committee”) to reject Assembly Bill 1000 (“Bill”). The Author intends the Bill to exclusively target one project—a public private partnership known as the Cadiz Valley Water Conservation, Recovery and Storage Project (“Project”)<sup>1</sup>. The Project has been comprehensively reviewed and independently approved by two public agencies and validated by 12 trial and appellate court opinions. The Project will actively manage and beneficially use water from the vast and underutilized aquifer system underlying Cadiz’s 34,000-acre private property in California’s eastern Mojave Desert (“Property”). Despite a comprehensive, open and transparent environmental review and judicial validation of the Project, the Bill now proposes to “gut and amend” an Assembly Bill focused on water meters to grant new and additional environmental review authority to the State Lands Commission (“SLC”) and the Department of Fish and Wildlife (“DFW”) regardless of their respective jurisdiction or duplicative evaluations in such a Project.

**The Bill Is the Result of Bad Process.**

The gutting and amendment of AB 1000 illustrates an egregious abuse of power. While ‘gut and amend’ legislation is generally controversial because it circumvents the normal legislative vetting process, AB 1000 does so to take aim at a particular company for purely political motives—devoid of factual basis. This is a bill of attainder—legislation that seeks to punish a discrete individual or group without the benefit of the due process afforded by a trial.

This type of legislative action is expressly prohibited by the United States and California Constitutions.<sup>2</sup> There is no question that AB 1000 is designed to single out one company and a particular project—the hallmark of a bill of attainder—for added scrutiny by SLC that no other water use project must undergo. Indeed, the first sentence of the press release from Assemblywoman Friedman, the author of AB 1000, announcing the legalization specifically calls out the Cadiz Project. Her Twitter feed, which describes AB 1000, makes this clear as well.

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<sup>1</sup> As a point of fact, other water agency facilities are impacted by the legislation; e.g. Mojave Water Agency, City of 29 Palms.

<sup>2</sup> The United States and California Constitutions prohibit the passage of a “bill of attainder.” (U.S. Const., art. I, 10; Cal. Const., art. I, § 9.) A bill of attainder is a “legislative act which, without a judicial hearing, designates a punishment upon a person or specified class.” (*Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 305-306.)

Moreover, the added review is entirely unnecessary. As discussed below, the Project has been subject to thorough environmental review under the California Environmental Quality Act (“CEQA”), which found that the Project operations would not cause any long-term significant environmental impacts. The CEQA findings were challenged by many of the proponents of AB1000 during reviews by Santa Margarita Water District (“SMWD”), which certified the Final Environmental Impact Report, and the County of San Bernardino (“County”), a responsible agency that granted approvals for the groundwater withdrawals. The opponents’ claims were rejected and the public agency decisions were successively upheld in their entirety through challenge in both California Superior Court and the California Court of Appeals.

As a result, the Court has validated the Project’s compliance under the law including the findings that it is environmentally benign. But facts are irrelevant to the politically-motivated opposition. AB 1000, as gutted and amended, ignores the comprehensive environmental review for the Project and instead seeks to mount a new regulatory challenge for the Project ex post facto. Such result is procedurally biased (released over a holiday weekend in an effort to circumvent the firestorm of opposition now being mounted), and threatens to establish an alarming precedent for any infrastructure project in the state. The bill should therefore not be allowed to proceed.

#### **The Bill Violates the Principles of CEQA.**

On its face, the Bill seeks to add Section 1815 to the Water Code. Specifically, the proposed statute reads:

“a transferor of water shall not use a water conveyance facility that has unused capacity to transfer water from a groundwater basin underlying desert lands that is in the vicinity of a national monument, a national preserve, a national park, a state or federal wilderness area, or state lands to outside of the groundwater basin **unless the State Lands Commission, in consultation with the Department of Fish and Wildlife, finds that the transfer of water will not adversely affect the natural or cultural resources, including groundwater resources or habitat, of those federal and state lands.**” [emphasis added].

In so doing, it fundamentally violates CEQA codified at California Public Resources Code Sections 21000 et. seq., and the CEQA Guidelines codified in the Code of Regulations, Title 14, Division 6, Chapter 3. One of the fundamental principles of CEQA is that the whole of a project must undergo one environmental review; “piece-mealing” environmental review of a project is not allowed.<sup>3</sup>

The CEQA process is designed to front load environmental project review by gathering comments from all potential approving agencies at the outset to shape the project by addressing agency concerns through the Notice of Preparation.<sup>4</sup> Contrary to this, the Bill effectively erases the past six years of environmental review and litigation relating to the Project and tacks on an additional “approval” never

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<sup>3</sup> See CEQA Guidelines § 15378(a); *Orinda Association v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171 [court rejected county’s attempt to approve demolition permit separately from application to develop the same site because the project is the “whole of an action” with potential environmental impacts].)

<sup>4</sup> CEQA Guidelines §§ 15080-15096.

contemplated by the 136 agencies<sup>5</sup> that reviewed the Project, which included DFW.

The Bill's proposed additional review comes after the Project obtained approval by several agencies and withstanding two layers of review by the California judicial branch. Per California law, once an EIR has been certified and no legal challenge has been successful, the EIR is conclusively presumed to comply with CEQA. Only narrowly tailored exceptions permit additional environmental review of a project once this threshold has been met, none of which are applicable here.<sup>6</sup>

Thus, without explanation, the Bill proposes to re-open a Project that was the subject of a robust CEQA review—with its EIR already extensively considering the Project's impact on "natural," "cultural," "groundwater" and "habitat" resources, among other things. This process exceeded the basic requirements under CEQA. For example, and even though not required by CEQA, SMWD provided a 100-day public comment period, more than twice as long as CEQA requires, received 125 comments, held an additional public meeting, a community workshop, and two technical sessions at the University of Redlands in order to provide the public with access to the scientists and groundwater experts who had conducted the environmental analysis. The Project was also the subject of extensive groundwater, recharge and drawdown studies (described further below).

After the EIR was certified, the County, a designated responsible agency with independent responsibilities, reviewed the Project under its Desert Groundwater Management Ordinance ("Ordinance"). Under the Ordinance, the County separately reviewed and approved a Groundwater Monitoring Mitigation and Management Plan ("GMMMP") for the Project that included terms and conditions that enabled the County to prevent overdraft or other undesirable results from the Project.<sup>7</sup> The County process included hiring its own independent experts, and concluded that, with these added protections [under the GMMMP], the Project "will prevent waste and unreasonable use of water without causing undesirable results for other legal users of water, the environment, or other public interests."<sup>8</sup>

The adequacy of both the EIR—which, again, exhaustively provided review of the Project's natural and cultural resources—and the GMMMP is unquestionable after being successfully upheld at trial and the Court of Appeal. Several lawsuits were filed in 2012 by, among others, the Center for Biological Diversity, the National Parks Conservation Association, the San Bernardino Valley Audubon Society and the Sierra Club, San Gorgonio Chapter (collectively, "Center for Biological Diversity").

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<sup>5</sup> The Notice of Preparation of the draft EIR was sent to 17 individuals and addresses associated with federal agencies, 30 individuals and addresses associated with state agencies and 89 individuals and addresses associated with local and regional agencies.

<sup>6</sup> Once an EIR is certified, absent a successful legal challenge within the limitations period, the EIR is "conclusively presumed to comply" with CEQA, and the agency's role in the project approval is complete unless further discretionary approval is required. (Pub. Res. Code § 21167.2; Guidelines § 1516a2(c) ["Once a project has been approved, the lead agency's role in project approval is completed unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval."]; *San Diego Navy Broadway Complex Coal. v. City of San Diego* (2010) 185 Cal.App.4th 924, 939-941 [lead agency was not required to revise the certified EIR because it did not grant any additional discretionary approval].) Absent a subsequent discretionary approval, the lead agency has no jurisdiction to require or prepare additional environmental review. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479; *Melom v. City of Madera* (2010) 183 Cal.App.4th 41, 48-49 ["agencies are prohibited from requiring further environmental review" unless the conditions in section 21166 are met].)

<sup>7</sup> *Center for Biological Diversity v. County of San Bernardino* (Aug. 20, 2014) OCSC Case No. 30-2013-00633936, Statement of Decision at 5.

<sup>8</sup> *Id.*

The lawsuits alleged the EIR did not comply with CEQA and the approval of the GMMMP violated the County's Ordinance. In 2014, the Orange County Superior Court denied all of the opponent's claims and upheld the EIR and the GMMMP in their entirety, finding the Project operations will not cause a single significant long-term environmental impact and the Project complied with all aspects of CEQA.<sup>9</sup> In one of its rulings, the Superior Court specifically stated that the "EIR properly concluded that the Project will not substantially deplete the aquifer or interfere with groundwater recharge" and that "the mitigation measures, including those approved in an abundance of caution even where the record reflected no significant impacts, satisfy CEQA and are affective."<sup>10</sup>

The opponents appealed the decisions but again were unanimously defeated on May 10, 2016, with the Court of Appeals decision upholding the Project's environmental review and related decisions.<sup>11</sup> Among other things, the Court of Appeals found that the description of the Project and its "conservation objective" were accurate<sup>12</sup> and the Project will not exceed the bounds of reasonable beneficial use of water.<sup>13</sup> Of importance none of the opponents sought Supreme Court review of these decisions. Instead of exhausting their judicial remedies, they instead sought to pursue a purely political remedy: A bill of attainder.

In sum, the litigation victories conclusively determined the Project complied with CEQA and that there will not be a substantial depletion of groundwater. Any other potential challenge to the EIR has long since been barred when the statute of limitations.<sup>14</sup> The Bill seeks to make a mockery of the CEQA process by adding another layer of duplicative regulatory approval by DFW<sup>15</sup> and now SLC. As stated above, this would violate the CEQA statutory and regulatory framework that states that an EIR conclusively complies with CEQA once it is certified and no successful legal challenge has been made. Because the Project's environmental review has been upheld at every level and after several legal challenges, the Bill's mandate that it be subjected to further environmental review not contemplated when the Project was initially undergoing public agency review violates CEQA.

### **The Bill Sets a Public Policy Disfavoring the Finality of Agency Approval of Projects.**

Additionally, from a public policy standpoint, this Bill sets bad precedent. It notifies project

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<sup>9</sup>*Center for Biological Diversity v. County of San Bernardino* (Aug. 20, 2014 ) OCSC Case No. 30-2012-00612947, Statement of Decision at 4-7; see also *Center for Biological Diversity v. County of San Bernardino* (Aug. 20, 2014) OCSC Case No. 30-2013-00633936, Statement of Decision at 5 .

<sup>10</sup> *Center for Biological Diversity v. County of San Bernardino* (Aug. 20, 2014 ) OCSC Case No. 30-2012-00612947, Statement of Decision at 5-6.

<sup>11</sup> *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, 332; *Delaware Tetra Technologies v. County of San Bernardino* (2016) 247 Cal.App.4th 352; *Center for Biological Diversity v. County of San Bernardino* (May 10, 2016, G051080)[nonpub. opn.]; *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (May 10, 2016, G050881) [nonpub. opn.]; *Delaware Tetra Technologies v. Santa Margarita Water District* (May 10, 2016, G050869 [nonpub. opn]); *Delaware Tetra Technologies v. Santa Margarita Water District* (May 10, 2016, G050864) [nonpub. opn].

<sup>12</sup> *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 345-346.

<sup>13</sup> *Center for Biological Diversity v. County of San Bernardino* (May 5, 2016) 2015 WL 2760538, p. 3.

<sup>14</sup> Pub. Res. Code § 21167 [thirty day statute of limitations to challenge an EIR].

<sup>15</sup> DFW, in fact, has already reviewed the Project as a responsible agency. It submitted a comment letter on the draft EIR for the Project on February 28, 2012 and each of its comments were thoroughly addressed in the final EIR. As a "responsible agency" for the Project, DFW was only permitted to review "those project activities which are within [its] area of expertise or which [it is] required to" carry out or approve or "which will be subject to the exercise of powers by" DFW. (CEQA Guidelines § 15096(d); Pub. Res. Code § 21002.1 ["A responsible agency shall be responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve."].) And SMWD's certification of the EIR is conclusive as to DFW's review of the document unless certain narrow exceptions are met. (CEQA Guidelines § 15162.)

proponents—including citizens, public agencies and private entities—that regardless of the approvals obtained, a project may still be halted. The Bill may paralyze decision makers from pushing forward projects this state needs with the fear of endless regulatory review. And it calls into question the finality of decisions made by the judicial branch.

**There is No Credible Debate Over the Basin’s Recharge Rate.**

A robust evaluation of the Basin’s recharge rate was completed as part of the 2012 EIR for the Project. Using updated modeling techniques based on site-specific data, the studies concluded that the long-term average recharge in the Project area is 32,000 acre-feet per year (“AFY”).<sup>16</sup> The lower (and outdated) estimates of recharge cited by Project opponents did not have the modeling tools or local climate data that are now available to account for the watershed’s complexities.<sup>17</sup>

Specifically and without rebuttal, the recharge estimate of 32,000 AFY has been corroborated through field measurements at the Cadiz and Bristol Dry Lakes. In 2012, the Desert Research Institute—the non-profit environmental research arm of the Nevada System of Higher Education—measured actual discharge by evaporation from the Cadiz and Bristol Dry Lakes over a six-month period using hundreds of measuring installations.<sup>18</sup> When adjusted for a full year, evaporative discharge from the dry lakes was found to be greater than 30,000 AFY, even considering existing agricultural pumping and brine withdrawals for salt mining in the watershed (1,500-5,000 AFY). The evaporative discharges corroborate the aquifer modeling because under a natural state the recharge cannot be less than the evaporative losses from the aquifer system.

The lower estimates cited by Project opponents cannot be reconciled with the newly measured discharge data and therefore these lower estimates are not credible. However, for the avoidance of doubt about the potential for impact if the recharge rate is incorrect, the FEIR evaluated the Project operations at rates of recharge at 5,000 AFY, 16,000 AFY and 32,500 AFY.<sup>19</sup> The FEIR found no significant impacts on the desert environment<sup>20</sup> at any of these rates, including an assumed recharge rate 85% less (5,000 AFY) than suggested by actual data.<sup>21</sup> At the end of Project operations, the vast aquifer system will continue to be more than 86%-93% full even if there were zero recharge for the next 50 years. Additional studies found that, due to the hydrologic separation between springs in the mountains and groundwater in the alluvial aquifer system at the Project site, pumping will have no effect on the springs.<sup>22</sup>

The work performed to calculate the recharge estimate was peer reviewed by leading geology, hydrology and environmental experts who participated on a Groundwater Stewardship Committee

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<sup>16</sup> The model is described in detail in Draft EIR Vol. 4, Appendix H1 Cadiz Groundwater Modeling and Impact Analysis, Sub-Appendix A, Cadiz Groundwater Conservation and Storage Project, by CH2M Hill, July 2010.

<sup>17</sup> The EIR did not ignore these prior recharge estimates for Fenner Valley Basin (basin). In fact, the EIR addressed all of the prior recharge estimates in the basin and then analyzed the methods used to assess their reliability. The prior studies are described in detail in the Draft EIR Vol. 1, Section 4.9.1, Hydrology and Water Quality, pp. 4.9-32 to 4.9-39.

<sup>18</sup> Final EIR Vol. 7, Appendices L1, Estimated Evaporation From Bristol and Cadiz Dry Lakes and L2 quantifying Evaporative Discharge from Bristol and Cadiz Dry Lakes.

<sup>19</sup> Details of the model scenarios are in the Draft EIR Vol. 4, Appendix H1 Cadiz Groundwater Modeling and Impact Analysis, Section 7; see also Final EIR Vol. 6, p. 3.1-4.

<sup>20</sup> Changes in the water table deep below ground surface cannot impact flora or fauna that rely on surface water.

<sup>21</sup> Draft EIR Vol. 1, Section 4.9.3 Hydrology and Water Quality, and Section 4.6.5 Geology and Soils, pp. 4.6-27 to 4.6-32 and pp. 4.6-35 to 4.6-38.

<sup>22</sup> Final EIR, Vol. 6, Master Response on Springs, 3.4.

("GSC"), assembled by the CEQA Lead Agency. The GSC consists of twelve technical experts, university scholars, water utility providers, and non-profit professionals, including Dr. Charles Groat, former director of USGS.<sup>23</sup> In April 2012, the GSC reviewed the groundwater modeling and impact analysis and composed a Final Report regarding the proposed Project that is included in the Final EIR.<sup>24</sup> The GSC affirmed the model results and proposed monitoring and mitigation strategies that were incorporated into the GMMMP.<sup>25</sup>

To address one of the Project opponent's concerns post certification of the FEIR, Anthony Brown, one of Southern California's most respected hydrologists and Principal Hydrologist at Aquilogic, Inc., conducted an independent review of the Project hydrology and evaluated the criticisms asserted by Project opponents, as a condition of dismissing a post-approval litigation challenge.<sup>26</sup> Brown's report again found that the range of recharge estimates used to assess possible project impacts was reasonable and conservative, and that the Project, as approved, will not lead to significant impacts to critical resources.<sup>27</sup>

#### **The Recharge Rate is A Red Herring Based on the Project Conditions Imposed by the County.**

The debate over the recharge rate is also mooted by the conditions imposed by the County of San Bernardino's approval of the Project,<sup>28</sup> which placed a hard floor on the lowering of the groundwater table at 80 feet during the first 15 years of operation and a maximum of 100 feet for the life of the Project.<sup>29</sup> This means that in the unlikely event that the recharge rate is less than estimated by the FEIR and consequently the water table were to decline more rapidly than projected, the County's conditions would require pumping mitigations, including termination of Project pumping, if necessary to avoid continual declines in groundwater levels.<sup>30</sup> Thus, for the avoidance of doubt, the Project was lawfully conditioned in a manner that honors the lower recharge estimates, even though they are unlikely to occur.

Consistent with the 2014 Sustainable Groundwater Management Act ("SGMA"),<sup>31</sup> the conditions to

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<sup>23</sup> The experts are described in the Draft EIR Vol. 2, Appendix B2 Groundwater Stewardship Committee October 2011 Summary of Findings and Recommendations, pp. 5 to 11.

<sup>24</sup> That analysis is included in the Draft EIR Vol.4, Appendix H1 Cadiz Groundwater Modeling and Impact Analysis. A summary report of the GSC findings is included as an appendix to the Updated GMMMP (Final EIR Vol. 7, Appendix B1 Updated GMMMP, Sub-Appendix A Groundwater Stewardship Committee April 2012 Summary of Findings and Recommendations).

<sup>25</sup> *Id.*

<sup>26</sup> Anthony Brown's Report can be found here:

<http://www.cadizinc.com/downloads/Review%20of%20the%20Groundwater%20Hydrology%20of%20the%20Cadiz%20Project.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> This concept that pumping must be limited to recharge has been referred to as the "Water-Budget Myth" (Bredehoeft and others, 1982). It is a myth because it is an oversimplification of the information that is needed to understand the effects of developing a groundwater system. As human activities change the system, the components of the water budget (inflows, outflows, and changes in storage) also will change and must be accounted for in any management decision. Understanding water budgets and how they change in response to human activities is an important aspect of groundwater hydrology; however, as we shall see, a predevelopment water budget by itself is of limited value in determining the amount of ground water that can be withdrawn on a sustained basis. <https://pubs.usgs.gov/circ/circ1186/pdf/circ1186.pdf> at p. 15-16.

<sup>29</sup> Final GMMMP (Sept. 2012), pp. 50, 95-97.

<sup>30</sup> Final EIR, Vol. 6, Master Response on Groundwater Pumping Impacts, p. 3.3-3.

<sup>31</sup> On September 16, 2014, Governor Jerry Brown signed into law a three-bill legislative package, composed of AB 1739 (Dickinson), SB 1168 (Pavley), and SB 1319 (Pavley), collectively known as the Sustainable Groundwater Management Act. The Governor's signing message states "a central feature of these bills is the recognition that

limit groundwater drawdown were designed to prevent “undesirable results” both during and following the Project’s 50-year planning horizon. Another condition of the approval of the Project was the establishment of the GMMMP to monitor conceptual environmental concerns. The GMMMP imposes strong oversight and robust monitoring requirements, well in excess of any existing legal requirement for the Project basins. If monitoring reveals possible impacts, there are numerous safeguards to curtail or stop pumping to prevent those adverse impacts. In this manner, groundwater withdrawals will be managed to avoid the undesirable effects that have resulted in critical conditions of overdraft in other groundwater basins in the State.

As a point of fact, even if the project opponents were right about the recharge rate, and the County floor were not in existence, the FEIR demonstrated that there were no significant environmental impacts. Potential impacts were evaluated with recharge rates of 5,000 AFY and 16,000 AFY.

### **The Project Water Will be Conserved and Beneficially Used.**

Increasing demand for water, extreme drought conditions, and regulatory restrictions have put a significant amount of pressure on traditional imported supply sources for Southern California. The Project proposes to conserve renewable groundwater that otherwise would be wasted to evaporation and provide a reliable, local water supply.

Every year, approximately 32,000 AF of groundwater migrates to the Cadiz and Bristol Dry Lakes, where it mixes with the highly saline groundwater underneath the lakes and then evaporates. The Project’s planned strategic groundwater pumping will capture 50,000 AFY, or more than the recharge of 32,500 AF, in order to stop an ongoing loss to evaporation that is presently occurring. By taking more than recharge for a 50-year period, the basin can be managed to stop this loss and provide long-term groundwater storage. If pumping were limited to the rate of recharge (32,000 AFY) groundwater would continue to be lost to evaporation at significant rates. Even with this additional necessary withdrawal, approximately 94% or more of the groundwater currently in the Basin will not be touched by the Project.

Fresh water from the Project will be delivered to retail water agencies throughout the seven-counties in the southern California area for municipal and industrial uses—deemed by the Water Code as the highest use” in the State.<sup>32</sup> Twenty percent of project supplies are reserved for the benefit of San Bernardino County. The Project will improve the reliability of water supplies, reduce dependence on imported water, enhance dry-year water supplies and water supply flexibility, and maximize the beneficial use of groundwater—all without harming the basin or desert ecosystem.

### **Conclusion**

AB 1000 is unconstitutional as intended and as written. If adopted, it will subject the State to litigation risk that is being incurred to further the purely political objectives of those seeking to stop a Project they don’t like. As discussed above, there are no facts of any kind that suggest the Project would harm the Mojave Desert ecosystem.

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groundwater management in California is best accomplished locally.” Additional bills signed by the Governor in 2015 to amend the California Water Code include SB 13 (Pavley), AB 939 (Salas), SB 226 (Pavley), and AB 617 (Perea).

<sup>32</sup> Cal. Water Code §106.

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Flora and fauna do not rely upon groundwater hundreds of feet beneath the ground. There are no seeps or ponds or springs that are in hydrologic connection with the surface. Evaporation does not contribute to desert morning moisture. Dry lakes composed of calcium chloride will not contribute to fugitive dust. Recharge of groundwater cannot be less than the natural discharge. These are truths based upon the application of the scientific method and laid open and revealed for all to see, review and critique in open public processes that have been followed to the letter of the law.

We urge you not to yield to the false narratives propagated by the cacophony of social media, steer clear of this political sophistry and reject the Bill.

Should you have any questions, please contact me at either 213-271-1600 or via email at [sslater@bhfs.com](mailto:sslater@bhfs.com).

Sincerely,



Scott Slater