Dear Senators XXX (or Representatives XXX):

On behalf of the undersigned, we are writing to express our deep concern regarding a key provision in proposed draft legislation to implement the Drought Contingency Plans (“DCP”) for the Upper and Lower Basins of the Colorado River System. The legislation authorizes the Secretary of the Interior to execute the DCP agreements and requires the Secretary to implement them according to their terms. Unfortunately, the draft legislation appears to preempt federal laws, including important environmental protection and public participation laws such as the Endangered Species Act (“ESA”) and the National Environmental Policy Act (“NEPA”). We strongly urge the draft DCP legislation be revised to ensure that this legislation would not preempt federal laws in the implementation of the Drought Contingency Plan.

We recognize that the intent of the plans is to protect reservoir elevations in Lake Mead and Lake Powell and prevent them from reaching critically low levels. However, there is no need for the proposed legislation to exempt the implementation of the DCP agreements from the application of laws, particularly environmental protection and public input laws, directly related to operation of the applicable Colorado River System reservoirs. Implementation of the DCP could have significant effects on the environment and public health, particularly regarding management of the Salton Sea in California.

Our concern of a sweeping waiver is not unfounded. The proposed DCP legislation adopts nearly identical language to the terms in the All-American Canal federal law waiver, on which the Ninth Circuit Court of Appeal based its finding that Congress intended to preempt federal environmental laws when it used the terms “Notwithstanding any other provision of law” and “without delay.” *Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S.,* 482 F.3d 1157 (9th Cir. 2007).

Our concern was reinforced when, in an effort to address issues raised by water districts about the application of this waiver language to state and federal water rights, the proposed legislative language was revised on March 18th with an additional provision that states that “nothing in this section shall be construed or interpreted as precedent for the litigation of, or as altering, affecting, or being deemed as a congressional determination regarding, the water rights of the United States, any Indian tribe, band, or community, any state or political subdivision or district thereof, or any person.”

This latest revision has only exacerbated the concern over a sweeping waiver of environmental laws because the omission of a specific reference regarding compliance with other laws such as ESA and NEPA appears to reinforce the conclusion that this draft legislation precisely intends to waive the application of all laws but for water rights.

We strongly urge the draft DCP legislation be revised to remove the federal waiver language (i.e., “Notwithstanding any other provision of law” and “without delay”). Instead, the DCP parties should work with Congress to draft more precise language to address any specific barriers to implementation of the DCP Agreements.

Thank you for your attention to this important matter.

Sincerely,