To protect and restore California Rivers by influencing public policy and inspiring citizen action.

FRIENDS OF THE RIVER

1418 20TH STREET, SUITE 100, SACRAMENTO, CA 95811

PHONE: 916/442-3155 ● FAX: 916/442-3396

WWW.FRIENDSOFTHERIVER.ORG

January 14, 2014

BDCP.Comments@noaa.gov (via email)

Re: COMMENT LETTER/Preliminary Comments on Fundamental BDCP Violations of ESA, NEPA, and CEQA

Dear Federal and California Agencies, Officers, and Staff Members Carrying out the BDCP:

INTRODUCTION

This is our preliminary Comment Letter on the public draft Bay Delta Conservation Plan (BDCP) and public draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) issued in December 2013. This letter focuses on the adverse modification of critical habitats for five threatened and endangered fish species that would be caused by the proposed BDCP Water Tunnels. Extinction is forever. The fish face an extinction crisis. The BDCP Water Tunnels would adversely modify designated critical habits and thus promote species extinction and preclude species recovery. ***The BDCP Water Tunnels project is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify designated critical habitat for at least five Endangered and Threatened fish species.***

This letter follows up our earlier comment letters to you of June 4, August 13, September 25, and November 18, 2013 (all posted on the BDCP website) and our meeting with Bureau of Reclamation, National Marine Fisheries Service (NMFS), United States Fish and Wildlife Service (USFWS) and United States Environmental Protection Agency (EPA) representatives in Sacramento on November 7, 2013. Each of our earlier comment letters is attached hereto (pages showing cc.s deleted from the attachments) and incorporated herein by this reference. We will submit or join in one or more additional comment letters after we have completed review of as much of the 40,000 pages of BDCP documents as we are able to review.

ESA VIOLATIONS AND RELATED NEPA AND CEQA VIOLATIONS PRECLUDING INFORMED PUBLIC REVIEW

The Water Tunnels would divert enormous quantities of water from the Sacramento River near Clarksburg, California. The water would be shipped through two giant Tunnels about 40 miles long to the south for diversion to the Central Valley and State Water Projects. As a result of this massive diversion, enormous quantities of water that presently flow through the

Sacramento River and sloughs to and through the Sacramento-San Joaquin Delta would not reach the Delta, and flows would be reduced in the Sacramento River and sloughs. Also, there would be adverse cumulative effects ranging from rising sea levels and reduced snowpack and runoff due to climate change to changes in upstream reservoir operations and current preservation of flows for fishery purposes all the way upstream to the Shasta, Trinity, Oroville, and Folsom reservoirs. The Water Tunnels are identified as Alternative 4, the California Department of Water Resources (DWR)' Preferred Alternative. (BDCP Draft EIR/EIS, 3-3).

As a result of the discussion at our November 7, 2013 meeting with the federal agency BDCP representatives, it was confirmed that the factual matters set forth in our September 25, 2013 comment letter are correct. ***First,*** it is correct that the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA. Likewise, it is correct that the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA. ***Second***, it was confirmed that the reaches of the Sacramento River, sloughs, and the Delta that would lose significant quantities of freshwater and freshwater flows through operation of the proposed BDCP Water Tunnels are designated critical habitats for each of these five listed endangered and threatened fish species. ***Third***, it was confirmed that no Biological Assessment has been prepared and issued by the federal Bureau of Reclamation with respect to the BDCP Water Tunnels project. ***Fourth***, it was confirmed that no final or even draft Biological Opinion has been prepared by NMFS or USFWS with respect to the impacts of the operation of the BDCP Water Tunnels on the five listed species of fish or their critical habitats.

NMFS reiterated its previous "Red Flag" comment in 2013 that the Water Tunnels threaten the "potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit. . . ." (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013). In comments on the Administrative Drafts, the EPA explained that "many of these scenarios of the Preferred Alternative 'range' appear to decrease Delta outflow (p. 5-82), despite the fact that several key scientific evaluations by federal and State agencies indicate that more outflow is necessary to protect aquatic resources and fish populations." (EPA Comments on Administrative Draft EIR/EIS, III Aquatic Species and Scientific Uncertainty, Federal agency Release, July 18, 2013).

"The goal of the ESA is not just to ensure survival but to ensure that the species recover to the point it can be delisted." *Alaska v. Lubchenko,* 723 F.3d 1043, 1054 (9th Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1070 (9th Cir. 2004). Pursuant to the commands of the ESA, each federal agency "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species *or result in the destruction or adverse modification of [critical] habitat of such species*. . . ." 16 U.S.C. § 1536(a)(2)(emphasis added). "[T]he purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary to the species' survival but also essential for the species' recovery." *Gifford Pinchot,* 378 F.3d 1059, 1070. Also, "existing or potential conservation measures outside of the critical habitat cannot properly be a substitute for the maintenance of critical habitat that is required by Section 7 [of the ESA, 16 U.S.C § 1536]." *Gifford Pinchot,*

378 F.3d 1059, 1076. The failure to prepare the ESA and National Environmental Policy Act (NEPA) required Biological Assessments and Opinions analyzing the threatened adverse modification of critical habitats renders the draft EIR/EIR essentially worthless as an environmental disclosure and informational document under NEPA. The draft EIR/EIS is also premature and unlawful under the ESA.

The ESA Regulations (50 C.F.R. § 402.14(a)) require that "Each Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. . . ." *Karuk Tribe of California v. U.S. Forest Service,* 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied,* 133 S.Ct. 1579 (2013). The Biological Assessments and Biological Opinions are the written documents that federal agencies must prepare during the ESA consultation process. The NEPA Regulations require that "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the. . . Endangered Species Act. . . ." 40 C.F.R. § 1502.25(a). "ESA compliance is not optional," and "an agency may not take actions that will tip a species from a state of precarious survival into a state of likely extinction." *National Wildlife Federation v. National Marine Fisheries Service,* 524 F.3d 917, 929-30 (9th Cir. 2008).

The Biological Opinion is to determine "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R § 402.14(g)(4).

Consequently, against this threat of extinction, conducting the draft EIR/EIS public review and comment stage without Biological Opinions or even Biological Assessments and draft Biological Opinions, leaves the public in the dark and violates both the ESA and NEPA. Conducting the NEPA environmental draft process prior to and in a vacuum from the ESA consultation process violates the ESA command to carry out the ESA process "at the earliest possible time" and violates the NEPA command to conduct the NEPA and ESA processes "concurrently" and in an "integrated" manner.

The public and the decision-makers now have what they do not need: 40,000 pages of advocacy from the consultants including self-serving speculation that the adverse effects of reducing flows in the Sacramento River, sloughs, and Delta will be offset. ***The public and the decision-makers do not have what they do need and are entitled to by law***: the federal agency Biological Assessments and Biological Opinions required by the ESA and NEPA.

This draft EIR/EIS circulated prior to preparation and circulation of federal agency prepared Biological Assessments and Biological Opinions is "so inadequate as to preclude meaningful analysis," 40 C.F.R. § 1502.9(a), because the public and decision-makers do not have the basic federal agency analyses required by the ESA to determine whether DWR's preferred alternative—the BDCP Water Tunnels— is even a lawful alternative, let alone an environmentally acceptable alternative.

Just as the inadequate draft EIR/EIS violates NEPA, the draft EIR/EIS is so fundamentally and basically inadequate and conclusory in nature that meaningful public review

and comment are precluded which also violates the California Environmental Quality Act (CEQA). 14 Code Cal. Regs. § 15088.5(a)(4). As the California Supreme Court said in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* 40 Cal.4th 412, 449 (2007), "Especially given the sensitivity and listed status of the resident salmon species, the County's failure to address loss of Cosumnes River stream flows in the Draft EIR 'deprived the public . . . of meaningful participation' [citation] in the CEQA discussion. (See CEQA Guidelines, Cal. Code Regs., tit. 14, § 15065, subd. (a)(1)[potential substantial impact on endangered, rare or threatened species is per se significant].)"

CONCLUSION

In the absence of answers to basic questions including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, the draft BDCP EIR/EIS is not sufficient for informed review by the public and the decision-makers. It will be necessary at minimum under the ESA, NEPA and CEQA for the federal and state agencies to prepare, issue, and circulate for public review a ***new draft*** EIR/EIS concurrently with and integrated with Biological Assessments and Biological Opinions. 40 C.F.R. §§ 1502.9(a); 1502.25(a) (NEPA); 14 Code Cal. Regs. §§ 15065(a)(1); 15088.5(a)(CEQA). Then, and only then, would the public and the decision-makers have the opportunity to engage in meaningful analysis of a preferred project alternative and informed comparison with other alternatives.

Finally, we reiterate that the BDCP Water Tunnels project is in fact prohibited by the ESA because it would adversely modify designated critical habitat for at least five endangered and threatened fish species. The fact that the ESA required consultations would result in determinations in the Biological Assessments and Opinions that the preferred project alternative is prohibited by the ESA does not justify the unlawful evasion and postponement of the consultations.

Please call Robert Wright, Senior Counsel, Friends of the River, (916) 442-3155x 207 with any questions you may have.

(incl. 4 attachments)

Sincerely,

/s/ E. Robert Wright

Senior Counsel
Friends of the River

/s/ Kathryn Cotter
Legal Counsel
Friends of the River