

**From:** Bob Wright <BWright@friendsoftheriver.org>  
**Sent:** Tuesday, January 14, 2014 9:41 AM  
**To:** BDCP.Comments@noaa.gov  
**Subject:** BDCP comment letter attached and submitted herewith  
**Attachments:** 1 14 14 BDCP prelim cmt ltr.pdf; 1 14 14 attach 1 BDCP cmt ltr.pdf; 1 14 14 attach 2 BDCP cmt ltr.pdf; 1 14 14 attach 3 BDCP cmt ltr.pdf; 1 14 14 attach 4 BDCP cmt ltr.pdf

Dear NOAA and Ryan Wulff, NMFS:

Attached please find our formal comment letter of today, January 14, 2014, and its four attachments that are incorporated by reference, on the BDCP public draft Plan and draft EIR/EIS that were issued in December 2013 for public review.

We would appreciate a reply confirming that our comment letter and its attachments have been received. We expect to submit additional comments and/or join in additional comments on or before the present comment due date of April 14, 2014.

Please call if you have any questions.

Sincerely,

Bob Wright  
Senior Counsel  
Friends of the River  
Sacramento, CA  
(916) 442-3155 x207



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

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June 4, 2013

Samuel D. Rauch  
Acting Assistant Administrator for Fisheries  
NOAA Fisheries Service

Michael L. Connor  
Commissioner  
U.S. Bureau of Reclamation

Gary Frazer  
Assistant Director-Endangered Species  
U.S. Fish and Wildlife Service

Bob Perciasepe  
Acting Administrator  
U.S. Environmental Protection Agency

Addresses and additional Addressees at end of letter

**Re: COMMENT LETTER/Fundamental BDCP Process Violations of ESA, NEPA and the Clean Water Act**

### [ATTACHMENT 1]

Dear Federal Agencies, Officers, and Staff Members:

#### INTRODUCTION

Extinction is forever. Consequently, the Endangered Species Act (ESA) obligates federal agencies “to afford first priority to the declared national policy of saving endangered species.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978); *see also, Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1084-5 (9<sup>th</sup> Cir. 2005).

This is a comment letter to alert you to foundational violations of law and fundamental analytical deficiencies in the Bay Delta Conservation Plan (BDCP) process being carried out by the federal Bureau of Reclamation and California Department of Water Resources (DWR). Our concern is with the proposed Delta Water Tunnels and the devastating impact the diversions of freshwater for the Tunnels would have on the Delta, the Sacramento River watershed, and endangered fish species which are in catastrophic decline in Northern California. As recently

explained by the U.S. Fish and Wildlife Service (USFWS) “There is clear evidence that most of the covered fish species have been trending downward.” (USFWS Staff BDCP Progress assessment, Section 1.2, p. 4, April 3, 2013). USFWS, National Marine Fisheries Service (NMFS), Environmental Protection Agency (EPA) and California Department of Fish and Wildlife (DFW) have submitted insightful and scientifically sound comments (also known as the “Red Flag” comments) on the Administrative Drafts of the BDCP. Your legitimate concerns have not been addressed by the BDCP lead agencies and have jeopardized your ability to complete your ESA obligations. The laws being violated or to be violated by the ongoing BDCP process include the ESA and National Environmental Policy Act (NEPA). The purpose of this letter is to summarize several of the most profound illegalities and deficiencies for you. We urge you to refrain from providing your stamp of approval on the BDCP and to keep pushing for an endangered species-centered approach towards Delta governance.

The Tunnels, both of which would be 40 feet in diameter and 35 miles long, would have the capacity to take 15,000 cubic feet per second (cfs) (though only three intakes with a total capacity of 9000 cfs are now planned at the start it would be easy to add two additional intakes down the road to achieve the total capacity of 15,000 cfs.). It is time for some common sense. It is hard to imagine that the exporters would pay the additional billions of dollars to construct the 15000 cfs Tunnels capacity *unless* the true plan and project is to operate at that level. That is an enormous quantity of fresh water approximately equal to the entire average summer flow of the Sacramento River at the location of the proposed new North intakes. Consequently, massive quantities of freshwater would be taken out of the Sacramento River upstream from the Delta near Clarksburg for the benefit of subsidized agricultural water interests south of the Delta.

The “take” of endangered species, which is prohibited by the ESA, includes “harm” as action constituting a “take.” 16 U.S.C. § 1532(19). “Harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or shelter.” 50 C.F.R. § 17.3 ( USFWS ESA Regulations). The NMFS ESA Regulations add “spawning, rearing, migrating” to the means by which habitat modification or degradation kills or injures wildlife. 50 C.F.R. § 222.102.

In addition to prohibiting federal agency actions unless determined not likely to jeopardize the continued existence of any endangered species, Section 7 of the ESA *also* prohibits actions unless determined to not likely “*result in the destruction or adverse modification of [critical] habitat of such species. . .*” 16 U.S.C. § 1536 (a)(2). (Emphasis added). “Actions” include “actions directly or indirectly causing modification to the land, *water*, or air.” 50 C.F.R. 402.02 (Emphasis added).

The massive diversions of freshwater for the Delta Water Tunnels would result in the destruction or adverse modification of critical habitat-- the freshwater-- for several endangered fish species including: winter-run Chinook salmon, 50 C.F.R. § 226.204; Central Valley Spring-run Chinook salmon, 50 C.F.R. §§ 226. 211(a)(6), and 226.211(k)(5); and Central Valley steelhead 50 C.F.R. § 226.211(a)(7), and § 226.211(l)(5). The critical habitat areas designated for these species include the precise reaches of the Delta, the Sacramento River, and certain sloughs

including Elkhorn, Georgianna, Miners, Steamboat, and Sutter sloughs that would be deprived of freshwater by reason of diversion upstream from the Delta for the Delta Water Tunnels.

The National Marine Fisheries Service (NMFS) recently reiterated its previous “Red Flag” comment that the Delta 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). That is just one of many critical issues that have been flagged by NMFS and USFWS as to how the Delta Water Tunnels would threaten endangered fish species. Given that the BDCP’s adverse modification to critical habitat will jeopardize the continued existence of various endangered and threatened species and the lack of effective mitigation or alternatives analysis for such adverse modification, the BDCP cannot serve as the legitimate basis for any Section 7 analysis or Section 10 permits. Moreover, the BDCP process is unlawfully preceding rather than following the setting of new flow objectives under the Clean Water Act (CWA) and public trust doctrine, which all responsible agencies admit are essential to informing planning decisions for the Delta and the watershed.

**THE BDCP IS NOT A LEGITIMATE HCP AND THE BDCP PROCESS VIOLATES THE ESA BY ATTEMPTING TO SUPPLANT ESA SECTION 7 REQUIREMENTS WITH LONG-TERM REGULATORY ASSURANCES**

The BDCP is not a legitimate Habitat Conservation Plan (HCP) because it does not actually ensure the continued existence of the relevant endangered species. 50 C.F.R. § 17. The ESA only allows for incidental take when the overall purpose of the authorized action is to “enhance the propagation or survival of the affected species.” 15 U.S.C. § 1539 (a)(1)(A). The BDCP will not enhance the propagation or survival of threatened Delta species. The purpose of the BDCP is to ignore the dire Delta ecosystem challenges by building around it rather than improve it. This is a rerun of the old “peripheral canal” that was blocked in June 1982 by a referendum vote of about 63% to 37%. The only difference now is that the exporters and the State claim they want to do this for the fish in spite of overwhelming evidence that the tunnels will destroy fish populations.

This entire process has up until recently been predicated on the untenable claim that taking more freshwater away from the Sacramento River upstream from the Delta and thus reducing flows would somehow be good for the endangered species of fish. We did not see any compelling evidence to support this unlikely conclusion. Now the process is predicated on the new claim that in the words of Jerry Meral, California Deputy Resources Secretary and lead State Official for the BDCP, “BDCP is not about, and has never been about saving the Delta. The Delta cannot be saved.” (Sacramento Bee, p. A3, April 30, 2013). That statement is fully consistent with the April 11, 2013 response by the California Resources Agency to the reiterated Red Flag comment of the NMFS about the “potential extirpation of mainstem Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit” referred to above. The Resources Agency response basically writes off the salmon, pointing fingers at other conditions-- “climate change is going to cause challenging conditions for winter-run that BDCP alone cannot address.” (Resources Agency response, April 11, 2013). If the State has determined that the Delta ecosystem cannot be saved and this assumption pervades the BDCP

analysis, the plausibility that the BDCP can constitute an adequate HCP has been seriously undermined.

The State appears to have convinced itself that the future extirpation of the salmon is inevitable and blames other contributing, cumulative problems such as climate change. Fish and wildlife agencies cannot, however, merely resolve that the Delta ecosystem is ill-fated and throw up their hands; rather, they must implement feasible, effective mitigation measures and alternatives. The ESA does not allow such easy avoidance of its mandates. “[A]n agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action, that deepens the jeopardy by causing additional harm.” *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 930 (9<sup>th</sup> Cir. 2007). Given that the BDCP is intended to serve as the basis for the issuance of Incidental Take Permits, the fish and wildlife agencies must demonstrate additional, more rigorous analysis in fulfilling their ESA duties.<sup>1</sup>

ESA Section 7 consultation procedures are mandatory because the Bureau of Reclamation is a federal agency taking action with respect to the Delta Water Tunnels. The USFWS and NMFS must issue a Biological Opinion finding that the HCP does not jeopardize the continued existence of any endangered or threatened species. The BDCP process, however, is founded on the unlawful mixing, piecemealing, segmenting of the mandatory Section 7 consultation process with and from other Authorized Entities such as Westlands Water District ESA Section 10 processes. (Plan, 1-1). Other Authorized Entities such as Westlands are CVP water contractors through Reclamation. Because the areas that will be affected by the BDCP involve designated critical habitat for several species, the Services must not only reach a “no jeopardy” conclusion, but must also find that the action does not adversely modify these critical habitat areas. “[I]f the areas . . . [are] designated as critical habitat, any future section 7 consultation would be required to also determine whether the proposed action would destroy or adversely modify the critical habitat, *an inquiry that is broader than the jeopardy analysis.*” *Center for Biological Diversity v. Bureau of Land Management*, 422, F.Supp.2d 1115, 1144-45 (N.D. Cal. 2006) (emphasis added). Removing freshwater deliveries from critical habitat areas and replacing it with dubious mitigation measures elsewhere will surely not satisfy ESA’s mandates to refrain from adversely modifying critical habitat and avoiding jeopardy to the continued existence of endangered species.

In Chapter 6, NMFS and USFWS would tie their ESA Section 7 hands behind their backs for fifty years by way of Regulatory Assurances including the “No Surprises rule” for the water contractors. (Plan, 6-28, 29). The problem is that the BDCP does not contain convincing evidence that it will actually recover the species at issue and there are no guaranteed protective actions if species populations begin to crash. This approach lacks legal validity given that the BDCP will ensure the demise of the Delta ecosystem without anyone taking accountability.

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<sup>1</sup> “On the basis of the BDCP, USFWS and NMFS are expected to issue Section 10 permits. An integrated biological opinion (BiOp) on coordinated long-term operation of the CVP and SWP will be completed, and will incorporate the conservation strategy as part of its proposed action.” (Administrative Draft BDCP, p. 1-7 (March 2013).

This adulterated Section 7 consultation process, discussed below, coupled with a Section 10 “Habitat Conservation Plan” long-term Regulatory Assurances and the “No Surprises rule” for the exporters would be carried out in the face of declining water quality and declining populations of endangered fish species and admitted adverse impacts and scientific uncertainty with respect to taking additional massive quantities of freshwater out of critical habitat upstream from the Delta. Yet, the BDCP will free the contractors from any obligation to provide adequate water for fish, even if the BDCP fails to achieve recovery goals. This action would be astonishing in its scope and its trampling on the fundamental ESA federal agency obligation “to afford first priority to the declared national policy of saving endangered species.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). This action if carried out would be so contrary to the language and purpose of the ESA as to raise the appearance of impropriety.

A function of ESA Section 10 HCP’s is to allow private property owners to make economically viable use of their lands avoiding “Regulatory Takings” issues under the Fifth Amendment of the Constitution. Those issues could arise if such use would be prevented because of prohibitions against adversely affecting critical habitat for endangered species on the land owners’ property. No such issues are present here. The contractors do not own the water in the Sacramento River and the Delta. The water is a public resource. Even the permits for use of the water are held by the Federal and State governments— not the contractors.

The contractors also have little to do with the HCP’s mitigation funding; thus, the proposed mitigation is largely untied to the Delta Water Tunnels. According to the Plan, “Funding from a variety of state and federal sources will be available to pay for the majority of the conservation measures that will provide the substantial public benefits of the BDCP.” (Plan, 1-2). The public— meaning the taxpayers— would pay for the conservation measures as well as for mitigating all effects resulting from the new upstream Delta Water Tunnels conveyance with the exception of the project footprint itself. More importantly, there is no convincing evidence that the proposed conservation measures will actually protect and restore endangered fish species. It is well-understood that healthy ecosystems require healthy river flows.<sup>2</sup> Given this premise, habitat restoration on the ground is not a substitute for taking away crucial freshwater habitat. Consequently, there is no nexus between either the fish or the contractors and the BDCP mitigation and conservation measures.

Given all of these circumstances, the mixing and segmenting of the mandatory Reclamation ESA Section 7 consultation process with and from the ESA Section 10 Regulatory Assurances for the contractors would violate the ESA. Regulatory Assurances and the “No Surprises Rule” have no place here, most notably because the decline of Delta fish species is not an “unforeseen circumstance,”<sup>3</sup> -- it is all but assured with the passage of the BDCP. Likewise, the Delta Water tunnels have no place in an HCP. The Tunnels need to be removed from the HCP. Your agencies can approve the BDCP if you find that it “will not appreciably reduce the

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<sup>2</sup> California Water Solutions Now, “A Report From Member Organizations of the Environmental Water Caucus,” Third Edition, 2011.

<sup>3</sup> 50 C.F.R. § 17.

likelihood of the survival and recovery of the species in the wild.” 16 U.S.C.A. § 1539. (a)(2)(B)(iv). There is simply no evidence in the BDCP to support such a conclusion.

### **THE BDCP PROCESS VIOLATES THE ESA BY SUBSTITUTING ADVOCACY FOR REASONED ENVIRONMENTAL EVALUATIONS AND BY POSTPONING THE ESA SECTION 7 CONSULTATION PROCESS UNTIL AFTER THE BDCP DECISION IS MADE TO CONSTRUCT THE DELTA WATER TUNNELS**

The Supreme Court has explained that “The obvious purpose of the requirement [in ESA § 7(a)(2)] that each agency ‘use the best scientific and commercial evidence available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” *Bennett v. Spear*, 520 U.S. 154, 176 (1997). The BDCP advocacy documents are riddled with speculation and surmise.

The basic legal problem that the NMFS and USFWS face in attempting to review the BDCP Plan administrative draft documents is that the cart has unlawfully been placed before the horse. The Plan recites that it will “provide the basis for a biological assessment (BA) that supports new ESA Section 7 consultations between the U.S. Department of the Interior, Bureau of Reclamation (Reclamation), USFWS and NMFS. The parties seeking take authorizations pursuant to the BDCP and the associated biological assessments are referred to as the *Authorized Entities*.” In addition to including seven federal and state water contractors such as Westlands Water District the authorized entities also include the Bureau of Reclamation and DWR.

The consultations need to go before not after the BDCP process. The ESA Section 7(a)(2) prohibitions against jeopardy of continued existence of any endangered species and against “destruction or adverse modification of habitat of such species” is effectuated by consultation and assistance by the NMFS and USFWS with the subject federal action agency. 16 U.S.C. § 1536(a)(2). Here, the federal action agency is Reclamation. Additionally, in fulfilling the requirements of Section 7(a)(2) “each agency shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). Biological assessments are required under 16 U.S.C. § 1536(c)(1). It is improper to rely entirely on the BDCP documents to fulfill your discrete and independent obligations to conduct a Biological Assessment, a Section 7 consultation, a Biological Opinion (including a Reasonable Prudent Alternatives Analysis), and an HCP.

The joint NMFS and USFWS Regulations provide that “Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. “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 (9<sup>th</sup> Cir. 2012)(en banc)(first emphasis added, second emphasis in opinion), *cert. den.*, 133 S.Ct. 1579 (2013), quoting 50 C.F.R. 402.14(a). The term “agency action” under the ESA is to be construed broadly. *Karuk Tribe*, 681 F.3d at 1021. “Agency Action” includes programmatic plans. *Pacific Rivers v. Thomas*, 30 F.3d 1050, 1053-4 (9<sup>th</sup> Cir. 1994); *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 623 F.Supp.2d 1044, 1052, 1054 (N.D. Cal. 2009). In addition to consultation and preparation of a biological assessment, formal consultation including preparation of a Biological Opinion beyond that contained in the BDCP are plainly required here.

The starting point for analysis under the ESA formal consultation process is data and information supplied by the federal agency followed by NMFS and USFWS evaluations of the status of listed species and critical habitat and the effects of the action and cumulative effects on the listed species and the critical habitat. 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).

In this setting of taking away massive quantities of freshwater from the critical habitat for the fish coupled with cumulative effects ranging from rising sea levels to changes in upstream reservoir operations to reducing flushing of the Delta, the Delta Water Tunnels would be the final nail in the coffin for endangered species of fish ranging all the way from where the Delta meets the Bay, upstream through the Sacramento River and sloughs to the Shasta, Trinity, Oroville, and Folsom reservoirs. This extinction crisis cries out for additional ESA Section 7 consultations, biological assessment, formal consultation and the Biological Opinions that go beyond the information provided in the BDCP.

To proceed in a manner required by law, Reclamation, NMFS and USFWS need to withdraw from or suspend participation in the BDCP process. The next step would be to carry out the ESA Section 7 process including consultation, biological assessment, formal consultation and a Biological Opinion by NMFS and USFWS. This process should, at the very least, include a new alternatives analysis that analyzes options that would actually help sustain and recover endangered species. Then, and only then, would there be an adequate informational and analytical basis for a BDCP evaluation of which alternative to choose ranging from the Environmental Water Caucus (EWC) and Friends of the River reduced exports and no new conveyance alternative up to the massive 15,000 cfs Delta Water Tunnels alternative. It should be noted that both the EWC and Portfolio alternatives are 21<sup>st</sup> Century alternatives calling for increased water conservation and recycling to meet future water supply needs. The BDCP process postponing legitimate habitat and endangered species evaluation until after the horse is out of the barn violates both the spirit and the language of the ESA.

### **BDCP PROCESS VIOLATIONS OF LAW INCLUDE FAILURES TO PERFORM CLEAN WATER ACT AND PUBLIC TRUST DOCTRINE ANALYSIS AND TO SET FLOW OBJECTIVES**

The BDCP process is upside down under the Clean Water Act (CWA) and California state law as well as under the ESA. The decision whether to select the Delta Water Tunnels alternative needs to await California State Water Resources Control Board (SWRCB) performance of Clean Water Act and public trust doctrine analysis including the setting of flow objectives necessary to preserve the Delta, the rivers, and the endangered fish species. That needs to be done before, not after, a tragic, foundational decision is made choosing the alternative of developing massive new upstream conveyance—the Delta Water Tunnels. As explained by EPA in its recent letter to the SWRCB, “The State Board. . . has recognized that increasing freshwater flows is essential for protecting resident and migratory fish populations.” (EPA letter to SWRCB re: EPA’s comments on the Bay-Delta Water Quality Control Plan; Phase 1; SED, pp. 1-2, March 28, 2013)



The Delta Reform Act requires in pertinent part that “For *the purpose of informing planning decisions* for the Delta Plan and the Bay Delta Conservation Plan, the board [SWRCB] *shall*, pursuant to its public trust obligations, *develop flow criteria* for the Delta ecosystem *necessary to protect public trust resources*. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions.” California Water Code § 85086 (c)(1)(emphasis added).

The determination of flow criteria by the SWRCB has *not* been done. The federal agencies participate in the SWRCB processes. The SWRCB process is the correct one to set flow objectives as opposed to the BDCP Delta Water Tunnels process. Moreover, SWRCB determined water quality standards are then subject to EPA review for approval or disapproval under section 309 of the Clean Water Act. The BDCP process is simply a DWR effort to make a premature and unlawful decision to develop the massive Delta Water Tunnels before rather than after determining whether updated flow objectives would even allow such quantities of water to be diverted upstream away from the Delta. Selection of the Tunnels alternative is a planning decision. By law, BDCP planning decisions must be informed by SWRCB determinations. The most important BDCP planning decision to ever be made--whether or not to construct new upstream conveyance--cannot be made lawfully until the SWRCB determinations have been made.

Because the BDCP process is trying to push forward with the Delta Water Tunnels before rather than after SWRCB Clean Water Act and public trust doctrine analysis and setting of new, stricter flow objectives, and EPA review thereof, the BDCP process has, consequently, also failed to conduct the water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water required under the California Environmental Quality Act (CEQA) according to the California Supreme Court’s decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4<sup>th</sup> 412, 429, 430, 434, 440-441 (2007).

In the absence of completion of SWRCB proceedings and EPA review regarding water availability, public trust doctrine analysis, and determination of new, stricter flow objectives, there is not the informational and scientific basis to sustain selection of the Delta Water Tunnels alternative under NEPA, CEQA or the ESA.

## **CONCLUSION**

The BDCP process is fatally flawed with foundational illegalities that will not be subject to dismissal or evasion by way of responses to comments on a future draft EIS/EIR. In the absence of the required ESA Biological Assessment, Formal Consultations and Biological Opinions and in the absence of completed SWRCB proceedings and EPA review thereof a draft BDCP EIS/EIR would not be sufficient for informed review by the public and the decision-makers. It is time now for the federal agencies to withdraw from the unlawful BDCP process and follow ESA Section 7 and federal Clean Water Act and California CEQA and public trust doctrine procedures.

Please call Robert Wright, Senior Counsel, Friends of the River, (916) 442-3155 x207 with any questions you may have. We would be happy to meet with you in person to answer questions you may have. Thank you in advance for your anticipated attention to the grave issues raised by this comment letter.

Sincerely,

/s/ E. Robert Wright

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Senior Counsel  
Friends of the River

/s/ Katy Cotter  
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August 13, 2013

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Addresses and additional Addressees at end of letter

**Re: COMMENT LETTER/Inaccurate and Misleading BDCP Project Description and Project Segmentation**

**[ATTACHMENT 2]**

Dear Federal Agencies, Officers, and Staff Members and Deputy Secretary Meral:

This Comment Letter is submitted to you by the following public interest organizations in an effort to protect the Delta and California rivers: Friends of the River; Environmental Water Caucus, Nick Di Croce, Co-Facilitator; Restore the Delta, Barbara Barrigan-Parrilla, Executive Director; California Water Impact Network (C-WIN), Carolee Krieger, President; California Sportfishing Protection Alliance (CSPA), Bill Jennings, Executive Director; Pacific Coast Federation of Fishermen's Associations, Zeke Grader, Executive Director; Institute for Fisheries

Resources, Pietro Parravano, President; Southern California Watershed Alliance, Conner Everts, Executive Director; California Striped Bass Association, Jackson Chapman, State Board President; Foothill Conservancy, Reuben Childress, Water Conservation Associate; and California Save Our Streams Council, Lloyd Carter, President, Board of Directors.

The Environmental Protection Agency (EPA), National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and Bureau of Reclamation submitted many excellent and scientifically sound comments on the Bay Delta Conservation Plan (BDCP) Administrative Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on July 18, 2013. There is, however, a fundamental BDCP inaccuracy that is accepted at face value in the July 18, 2013 Release for your comments that is so profound that early correction is necessary. The Release states in pertinent part: “The Admin Draft reflects the significant downsizing of the proposed conveyance project that occurred in 2012 in direct response to federal and state wildlife agency comments. That downsizing includes a reduction in the number of intakes from 5 to 3, a reduction in the maximum diversion capacity from 15,000 to 9000 cubic feet per second (cfs), and a change to gravity-flow tunnels that would not require pressurization and additional pumping plants to move water.” (Release, p.1, July 18, 2013).

The reduction in the number of intakes is an obvious subterfuge intended to make the proposed project look smaller in response to federal agency concerns even though the ultimate 15,000 cfs carrying capacity of the Tunnels is preserved. In fact, the two Tunnels have actually been *increased* in diameter from 33 feet to 40 feet. Consequently, the Delta Water Tunnels project has not been downsized at all. Instead, the Administrative Draft fails to provide the “accurate, stable, and finite project description” required by the California Environmental Quality Act (CEQA) and the accurate project description required by the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). By this same subterfuge, the BDCP process unlawfully segments, piecemeals and chops up the project into different phases by seeking approval now based on intake capacity when the intent is to actually operate in the future at the capacity of the Tunnels. That also violates the ESA, NEPA, and CEQA.

## **FACTS**

The intakes, though massive in size, are a comparatively small part of the proposed enormous water conveyance facilities. The two Tunnels have actually increased in size from a proposed diameter of 33 feet in 2012 to what is now the Preferred Alternative, Alternative 4. Under Alternative 4, the two Tunnels would be about 35 miles long, 150 feet underground, with an internal diameter of 40 feet and an external diameter of 44 feet. (Administrative Draft EIR/EIS, pp. 3-54, 3C-17, March 2013).

Because of the greater size of the Tunnels, the quantity of total “Tunnel muck” to be removed, treated, and disposed of would increase by about 41%. (Id., p. 3C-17, 18). “Tunnel muck generated by the boring process is a plastic mix consisting of soil cuttings and soil conditioning agents (water, air, bentonite, foaming agents, and/or polymers/biopolymers). Before the muck, or elements of the muck, can be reused or returned to the environment, the muck must be managed and at a minimum, go through a drying-water solids separation process and a possible physical or chemical treatment. The daily volume of muck withdrawn from the tunneling operations is estimated at approximately 7000 cubic yards per day.” (BDCP

Administrative Draft Chapter 4, Covered Activities and Associated Federal Actions, p. 4-9). Moreover, “Because of the high groundwater level throughout the proposed Tunnel alignment area, extensive dewatering. . .and groundwater control in the tunneling operation and shaft construction would likely be required.” (Administrative Draft EIR/EIS, p. 3C-18).

Under Alternative 4, there would be a combined enormous “dual-conveyance” diversion capacity. “The total diversion capacity for the south Delta export facilities would remain constant at 15,000 cfs. . . .” (Id., p. 3-54).

We are informed and believe and on that basis contend to you that the capacity of the Tunnels in the Preferred Alternative either remains at 15,000 cfs, or is now greater than that. To fulfill your responsibilities under the ESA, NEPA and CEQA you must ensure that the next draft BDCP EIR/EIS and Plan completely and comprehensively describe and disclose the true capacity of the Tunnels. Environmental impacts and impacts on endangered species and critical habitat must be evaluated at true capacity operating levels. As the Bureau of Reclamation comments point out, “The current BDCP analysis assumes no operational impacts to upstream reservoir operations.” (Reclamation clarification added July 16, 2013 p. 1). That astonishing and incredible assumption given a capacity of 9000 cfs becomes an even more glaring violation of ESA and NEPA analytical duties given a capacity of 15,000 cfs.

The estimates of dollar costs to implement the BDCP are set forth in Chapter 8 of the Administrative Draft Plan entitled “Implementation Costs and Funding Sources”. Chapter 8 sets forth that 50 year permit term total estimated costs for the intakes and pumping plants would amount to only about \$1 billion in contrast to over \$7 billion for the Tunnels, and \$9.7 billion for the Tunnels adding in the “Tunneling contingency.” (Administrative Draft BDCP Plan, Chapter 8, Table 8-7, p. 8-14, April 2013). Of course, given the current exceeding of the estimates for the cost of the Oakland-San Francisco Bay Bridge reconstruction by a factor of 4, it would be consistent with recent California large project public works engineering and construction experience if the Tunnels wind up actually costing far more than \$9.7 billion. As columnist Dan Walters recently explained (Sacramento Bee, p. A3, July 29, 2013) Oxford University professor Bent Flyvbjerg has published a paper entitled “Delusion and Deception in Large Infrastructure Projects,” 51 California Management Review 170 (Winter 2009). The professor explains that “across the globe, large infrastructure projects almost invariably arrive late, over-budget and fail to perform up to expectations.” The underlying reasons are “delusions born of ignorance, deceptions to make projects sound more feasible than they truly are, and bad luck.” Dan Walters explains that the Delta Water Tunnels are “based on assumptions of need and utility that are questionable and may be, to use Flyvbjerg’s words, ‘delusions’ or perhaps ‘deceptions.’”

In physical size, complexity, and cost, the Tunnels greatly exceed the intakes in magnitude. Given the massive size and length of the Tunnels, construction process of many years, massive costs in comparison to cost for the intakes, and complexities including disposal and treatment of the Tunnel muck and dewatering for Tunnel construction, the only reasonable conclusion is that the intent of the contractors who would pay for the construction of the Tunnels, is to operate the project at the capacity of the Tunnels. Enormous additional costs result from building Tunnels to a greater size than would be used. Thus accepting the subterfuge that the project has been significantly downsized as a basis for ESA, NEPA, and CEQA analysis

would constitute a clear failure to proceed in the manner required by law. Making the project look smaller is quite different from actually making the project smaller.

### **MISLEADING PROJECT DESCRIPTION AND PROJECT SEGMENTATION**

Though the BDCP EIR/EIS is intended to be a programmatic level analysis of some aspects of the “Habitat Conservation Plan”, it is intended to be “a site-specific analysis of the proposed tunnel export facility” including “direct project-level impacts from facilities operations. . .” (EPA comments pp. 1-2). EPA has already explained that “The level of engineering detail provided for the tunnels, however, is not commensurate with the level of site-specific information typically provided in an EIS for a project that will require federal permits.” (EPA comments, V). EPA recommended “that the DEIS provide a level of detail that supports meaningful calculations of anticipated direct and indirect effects of the project-level elements, and clarify whether this EIS is meant to support a permit decision for CM1.” (*Id.*). In the words of USFWS, the DEIS “will need a clear and concise project-level description of the water conveyance facilities (CM1-Proposed Action and 15 alternatives), including a description of the physical, chemical, and biological changes resulting from CM1.” (USFWS comments “2.3 Incomplete Project Description”, p.5).

The EPA recognized that the Tunnels would be part of the problem not the solution. “Compared to the No Action alternative and existing conditions, many of the 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 the Scientific Uncertainty).

The Bureau of Reclamation, NMFS and USFWS have all recognized that the BDCP EIR/EIS advocates for the project and/or is biased. (Bureau Comments p. 1) (NMFS Comments p. 2)(USFWS Comments p. 1). The consultant prepared BDCP Administrative Draft Plan chapters and Draft EIR/EIS are indeed biased advocacy documents. The consultants are getting paid enormous sums of money to advocate for the Delta Water Tunnels. That is one reason why we pointed out in our June 4, 2013 Comment Letter that the federal agencies need to withdraw from the unlawful BDCP process and instead proceed under ESA §7 federal agency Biological Assessment, consultation, and Biological Opinion processes. By starting with the biased advocacy documents instead of agency ESA and Clean Water Act work product the water contractors have cleverly seized direction and control of the process from the federal agencies as well as bogged down the federal scientific and expert personnel with assessing and attempting to cope with reams of advocacy, bias, surmise, and speculation.

Making the project look smaller by way of a subterfuge is part of the bias and advocacy the federal agencies are confronted with in the BDCP process.

### ***CEQA Requirements***

The courts have stated over and over that “An accurate, stable and finite project description is the sine qua non [absolutely indispensable requirement] of an informative and legally sufficient EIR. [citation deleted]. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. [citation deleted]. Only through

an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives." *E.g.*, *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal.App.4<sup>th</sup> 645, 654 (2007) (project description held unstable and misleading) (internal quotation marks deleted). "The entirety of the project must be described, and not some smaller portion of it." *Id.* "The Guidelines specify that every EIR must set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact. (Guidelines, § 15124.)" *Id.* "The description must also include 'a general description of the project's technical, economic and environmental characteristics, considering the principal engineering proposals if any and supporting public-service facilities.' (Guidelines, § 15124, subd. (c))" *Id.* at 654-5.

Just as the EIR in *San Joaquin Raptor Rescue Center*, 149 Cal.App.4<sup>th</sup> 645, 660 needed to include analysis of impacts that would result from peak levels of operation, the same is true of the BDCP EIR/EIS for the Delta Water Tunnels. Under CEQA, where it is reasonably foreseeable that an entire facility will be used in the future or there will be future expansion, and that will change the scope or nature of the project or its environmental effects, analysis of that future use or expansion must be included in the EIR. *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 396 (1988). Under CEQA, environmental impact analysis for a project cannot be limited to water supply for the first stage or first few years. The EIR "must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4<sup>th</sup> 412, 431 (2007). Also, "the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decision-making under CEQA." *Id.* at 432.

Consequently, it must be presumed that the operating capacity of the Water Tunnels will be used. Just as it made no sense to build a facility of a certain size in the University of California case and not ultimately use the entire facility, it likewise makes no sense that the contractors would not ultimately use the full capacity of the Water Tunnels.

### ***NEPA Requirements***

Under NEPA an agency may not divide a project into multiple actions to avoid producing a single EIS on the overall project. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9<sup>th</sup> Cir. 2006). The scope of the required EIS is set forth in the NEPA regulation at 40 C.F.R. 1508.25. *Great Basin Mine Watch*, 456 F.3d at 968-9. "Connected actions" that should be discussed in the same EIS include actions that automatically trigger other actions that may require an EIS, actions that cannot or will not proceed unless other actions are taken previously or simultaneously, and actions that are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. 1508.25 (a)(1). The Tunnels and intakes are, obviously, connected actions. The operating capacity of the Tunnels must be disclosed and accurately described and evaluated in the EIS.

### ***ESA Requirements***

Applicants seeking an incidental take permit must provide “a complete description of the activity sought to be authorized.” 50 CFR § 17.22(b)(1)(i); § 222.307(b)(4)(“detailed description”). Hiding the true carrying capacity of the Delta Water Tunnels by conflating the intake capacity of the proposed project with the actual carrying capacity of the Tunnels, composing the lion’s share of the project, violates this requirement.

Furthermore, describing a project by an intentional, and largely pretextual, bottleneck does not provide a complete description for agency findings or the ESA Section 10(c) notice and review. Section 10(c), “protects the informational interest of those who participate in that process,” and “a denial of the ability to participate meaningfully in the §10 permit process is an injury that is procedural or informational in nature.” *Cary v. Hall*, 2006 WL 6198320, \*11 (C.D. Cal., September 30, 2006) (internal quotations omitted). Completing the project description by stating the actual carrying capacity of the Delta Water Tunnels and basing ESA analysis on that capacity would be the starting point for scrutiny of the impacts of the project on endangered species and critical habitat.

Projects may not be inaccurately described or chopped up for piecemeal review under the ESA. The ESA requires evaluation of the *entire* agency action. *Connor v. Burford*, 848 F.2d 1441, 1452-1454 (9th Cir. 1988). The Bureau of Reclamation, NMFS and the USFWS are all federal agencies. All federal agencies have a substantive duty to ensure that their authorization of a project will not jeopardize the survival of listed fish or adversely modify the species’ critical habitat. *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1127-8 (9th Cir. 2012). The starting point for beginning to comply with that statutory duty is to accurately describe and evaluate the full scope and capacity of the entire project.

The largest and most expensive part of the overall project includes the Delta Water Tunnels and their carrying capacity of 15,000 cfs or more of water away from designated critical habitat for endangered species of fish. Unless and until the Tunnels themselves are downsized, the true carrying capacity of the Tunnels must be disclosed and the environmental and endangered species and habitat impacts of operations at capacity must be the basis for analysis under CEQA, NEPA, and the ESA. The conveyance project has *not* been downsized.

### **CONCLUSION**

The BDCP process and the consultant-prepared Plan and EIR/EIS chapters are permeated throughout by bias, advocacy, speculation and surmise. That is true from the very foundation, starting with the claim that simply taking two intakes out of the project accomplishes downsizing. The biggest parts of the conveyance facilities are the Water Tunnels. The capacity of the project is the capacity of the Tunnels and all future EIR/EIS work must be based on that reality.

Meanwhile, of course, the BDCP process remains fatally flawed with foundational illegalities set forth in our June 4, 2013 Comment Letter. As we said then, ESA Section 7, federal Clean Water Act, and California CEQA and public trust doctrine procedures must precede rather than follow the BDCP process.



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

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

/s/ Katy Cotter

Katy Cotter, Legal Counsel

Friends of the River

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September 25, 2013

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Acting Regional Administrator  
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Jerry Meral  
Deputy Secretary  
California Resources Agency

Addresses and additional Addressees at end of letter [ATTACHMENT 3]

Re: Comment Letter/Supplementing our June 4, 2013 Comment Letter on Fundamental BDCP Process Violations of ESA, NEPA, and the Clean Water Act.

Dear Federal Agencies, Officers, Staff Members and Deputy Secretary Meral:

This is a comment letter to focus on the adverse modification of critical habitat for five Threatened and Endangered fish species, which would occur under the Bay Delta Conservation Plan (BDCP). This letter supplements our earlier comment letter to you of June 4, 2013. Under the BDCP, vast amounts of water will be diverted from the Sacramento River near Clarksburg, California. The water will be shipped through two tunnels roughly 35 miles south for the Central Valley and State Water Projects. As a result of this massive diversion, countless acre feet of water which would normally flow to the Sacramento-San Joaquin Delta (Delta) will now never reach the Delta. ***The BDCP Delta Water Tunnels project is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify critical habitat for five Endangered and Threatened fish species.***

With respect to the ESA, the water will never reach the designated critical habitat for five Endangered and Threatened fish species: the Sacramento River Winter-Run Chinook Salmon, the Central Valley Spring-Run Chinook Salmon, the Central Valley Steelhead, the Southern Distinct Population Segment of the North American Green Sturgeon, and the Delta Smelt.

The Sacramento River Winter-Run Chinook Salmon is listed as an Endangered species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River extending from River Mile 0 near the Delta to River Mile 302, which is far north of the proposed BDCP diversion near Clarksburg. 50 CFR § 226.204. The BDCP identifies reduced habitat due to water storage and water conveyance systems as a stressor and threat to the species. BDCP EIR-EIS Administrative Draft, 11A-47 (March 2013). Nevertheless, the BDCP proposes to divert massive amounts of water from the Winter-Run Chinook Salmon's critical habitat.

The Central Valley Spring-Run Chinook Salmon is listed as a Threatened species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0612, Long -121.7948, near Mile 0, upstream to Elk Slough (38.4140, -121.5212) in Clarksburg, California. 50 CFR § 226.211(k)(5)(i). The BDCP identifies several threats and stressors to the Central Valley Spring-Run Chinook Salmon, which include flow reductions causing increased water temperature and habitat elimination or degradation due to water conveyance systems. BDCP EIR-EIS Administrative Draft, 11A-83, 11A-76 (March 2013). In disregard of these threats and stressors, the BDCP proposes to worsen these effects by diverting water away from the Spring-Run Chinook Salmon's critical habitat.

The Central Valley Steelhead is listed as Threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0653, Long -121.8418, near Mile 0, upstream to Elk Slough in Clarksburg. 50 CFR § 226.211(l)(5). The BDCP states that threats and stressors to the Steelhead include water storage and conveyance systems as well as flow reductions contributing to increased water temperatures. BDCP EIR-EIS Administrative Draft, 11A-129, 11A-133 (March 2013).

The Southern Distinct Population Segment of North American Green Sturgeon is listed as Threatened under the ESA. 50 CFR § 17.11. Critical habitat for this species is designated to include the Sacramento–San Joaquin Delta including all waterways up to the elevation of mean higher high water within the area defined in California Water Code Section 12220. 50 CFR § 226.219(a)(3). The National Marine Fisheries Service's website provides a map displaying Green Sturgeon critical habitat: <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/greensturgeon.pdf>. The map indicates that the critical habitat includes the Sacramento River from Mile 0 near the Delta to upstream beyond the proposed intake site near Clarksburg. The BDCP identifies increased water temperatures and habitat loss as threats and stressors to the Green Sturgeon. BDCP EIR-EIS Administrative Draft, 11A-162 – 65 (March 2013).

The Delta Smelt is listed as Threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include “all contiguous waters of the legal Delta.” 50 CFR § 17.95–e–Fishes–Part 2. The US Fish and Wildlife Service's website provided a map displaying some of the Delta Smelt's critical habitat: [http://www.fws.gov/sfbaydelta/maps/delta\\_smelt\\_critical\\_habitat\\_map.pdf](http://www.fws.gov/sfbaydelta/maps/delta_smelt_critical_habitat_map.pdf). The map indicates

that the Delta Smelt's critical habitat includes the Sacramento River near Mile 0 upstream to the proposed BDCP intake site near Clarksburg. The BDCP identifies several threats and stressors to the species, including water exports and increased water temperature. BDCP EIR-EIS Administrative Draft, 11A-8 – 11 (March 2013).

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). "Actions" include "actions directly or indirectly causing modification to the land, *water*, or air." 50 C.F.R. § 402.02 (Emphasis added). As listed species, the Sacramento River Winter-Run Chinook Salmon, the Central Valley Spring-Run Chinook Salmon, the Central Valley Steelhead, the Southern Distinct Population Segment of the North American Green Sturgeon, and the Delta Smelt each receive protection under the ESA. Further, their designated critical habitat also receives ESA protection.

As mentioned above, the BDCP itself identifies stressors and threats to each of the five species. Common threats and stressors to the five species include habitat loss due to water conveyance systems and increasing water temperatures. The BDCP Water Tunnels will worsen these threats and stressors in each species' critical habitat. By diverting massive amounts of water from the Sacramento River, the BDCP will literally reduce the amount of habitat available to these five species in their critical habitats. Additionally, the massive diversion will reduce flow in the critical habitat and contribute to a further increase in water temperature.

"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 (9<sup>th</sup> Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9<sup>th</sup> Cir. 2004). "[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. Moreover, "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.

Taking the water and flows away from the Endangered and Threatened fish species would not insure their survival let alone insure their recovery and delisting. On-the-ground habitat restoration is not a lawful substitute under the ESA for maintaining the critical habitat of and in the waters of the Sacramento River, sloughs, and Delta.

The reduction of water and flows and increase in water temperature are adverse modifications of critical habitat. The BDCP ignores all the conservation measures, including critical habitat designations, NMFS and USFWS have taken to protect five federally listed species. If approved, the BDCP will undo years of conservation efforts, adversely modify critical habitat, and further jeopardize the continued existence of five listed species. Approval of the BDCP would violate the ESA. Consequently, the BDCP Water Tunnels are not a permissible project under the ESA. Please call Robert Wright at (916) 442-3155 x207 if you have any questions.

Sincerely,

/s/ E. Robert Wright  
E. Robert Wright  
Senior Counsel  
Friends of the River

/s/ Patrick Huber  
Patrick Huber  
Legal Intern  
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November 18, 2013

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Jerry Meral  
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California Resources Agency

Addresses and additional Addressees at end of letter [ATTACHMENT 4]

**Re: COMMENT LETTER/Supplementing our June 4, August 13, and September 25, 2013 Comment Letters on Fundamental BDCP process Violations of ESA, NEPA and the Clean Water Act**

Dear Federal Agencies, Officers, and Staff Members and Deputy Secretary Meral:

This letter follows up our earlier comment letters to you of June 4, August 13, and September 25, 2013 (all posted on the Bay Delta Conservation Plan website) and our meeting with your representatives in Sacramento on November 7, 2013. We deeply appreciate the scientifically sound and insightful Red Flag and Administrative Draft comments made during the Bay Delta Conservation Plan (BDCP) process by the staff of the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), Bureau of Reclamation (Reclamation), and the Environmental Protection Agency (EPA). We appreciate the candor

reflected in previous staff written comments made despite the pressure to approve the Water Tunnels desired by the exporters regardless of the consequences.

As a result of the discussion at our meeting, it is now 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 Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. 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 is 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 is confirmed that no Biological Assessment (BA) has been prepared and issued by the federal Bureau of Reclamation with respect to the BDCP Water Tunnels project. *Fourth*, it is confirmed that no final or even draft Biological Opinion (BO) 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.

In a nutshell, commencing the public review period on a Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) in the absence of the Biological Assessments and Biological Opinions will violate the ESA requirement that each federal agency review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat, and enter into formal consultation if that is the case. 50 C.F.R. § 402.14(a). Such premature review will also violate the National Environmental Policy Act (NEPA) requirement that agencies prepare a draft EIS “concurrently with and integrated with environmental impact analyses and related surveys and studies required” by the ESA. 40 C.F.R. § 1502.25(a). Yet this premature and unlawful draft EIS/EIR public review process—confronting the public with biased advocacy documents depriving the public of the essential ESA required analyses prepared by the federal agencies—is exactly what is now intended with a planned release date for the draft EIS/EIR of December 13, 2013. Further, diversions of large quantities of water from the Sacramento River will certainly impair the critical habitat areas mentioned above to the extent that they will adversely modify critical habitat in violation of Section 7 of the ESA.

This year, NMFS reiterated its previous “Red Flag” comment 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). Even the BDCP Administrative Drafts prepared by the project proponents’ consultants admit that the operation of the Water Tunnels would have adverse

effects on the designated critical habitats for each of the five listed fish species. (BDCP Appendix 5.1, March 2013, Winter-Run Chinook Salmon p. 5.1-21; Spring-Run Chinook Salmon p. 5.1-29; Steelhead p. 5.1-, 37; Green Sturgeon p. 5.1-40; and Delta Smelt p. 5.1-12). ***The public will have what it does not need:*** unsupported advocacy from the consultants speculating that the adverse effects will be offset. ***The public will not have what it does need:*** the federal agency Biological Assessments and Biological Opinions required by the ESA.

Despite the fact that extinction is forever and that the ESA obligates federal agencies “to afford first priority to the declared national policy of saving endangered species,” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978), Reclamation, NMFS and USFWS are joining with the California Department of Water Resources (DWR) in allowing the release of a draft EIS/EIR for a 120 day public comment period commencing December 13, 2013. However, the public draft EIS/EIR will be “so inadequate as to preclude meaningful analysis,” requiring circulation of a revised draft down the road pursuant to the command of NEPA Regulation 40 C.F.R. § 1502.9(a). (All Regulation citations will be to the NEPA Regulations at 40 C.F.R. § 1500.1 et seq. unless otherwise indicated). We urge your agencies to take this last opportunity to withhold your approval of these documents until the ESA required analysis has been conducted.

**THE DRAFT EIS/EIR ALTERNATIVE ANALYSIS WILL BE INADEQUATE UNLESS IT INCLUDES A TRUE ANALYSIS OF AN ALTERNATIVE THAT DOES NOT INCLUDE NEW CONVEYANCE**

“[T]he alternatives analysis section is the ‘heart of the environmental impact statement.’” 40 C.F.R. § 1502.14. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). The purpose of the EIS process is to allow the public to weigh in on which feasible alternative is best for the environment and to afford the decision-makers the ability to make an informed choice among alternatives. Instead, this Draft EIS/EIR process avoids furnishing critical information required by the ESA: the Biological Assessments from Reclamation and the Biological Opinions, or at least Draft Biological Opinions, from NMFS and USFWS.

We urge you to review the “Responsible Exports Plan” proposed by the Environmental Water Caucus (EWC) as an alternative to the preferred tunnel project. This Plan calls for reducing exports from the Delta, implementing stringent conservation measures but no new upstream conveyance. This Plan additionally prioritizes the need for a water availability analysis and protection of public trust resources rather than a mere continuation of the status quo that has led the Delta into these dire circumstances.<sup>1</sup> Only that alternative is consistent with the EPA statements indicating that more outflow is needed to protect aquatic resources and fish populations. The EWC Responsible Exports Plan is feasible and accomplishes project objectives and therefore should be fully analyzed in a Draft EIS/EIR.

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<sup>1</sup> The Responsible Exports Plan can be found on the Friends of the River web site here: <http://www.ewccalifornia.org/reports/responsibleexportsplanmay2013.pdf>



**THE DRAFT EIS/EIR WILL BE SO INADEQUATE AS TO PRECLUDE  
MEANINGFUL ANALYSIS BECAUSE OF THE ABSENCE OF ESSENTIAL  
INFORMATION REQUIRED BY THE ESA AND NEPA**

The Draft EIS/EIR cannot pass muster under NEPA or ESA because it does not have adequate information to contribute to a “meaningful analysis.”

“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 (9<sup>th</sup> Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9<sup>th</sup> 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 have the ESA required Biological Opinions analyzing the threatened adverse modification of critical habitats renders the Draft EIS/EIR essentially worthless as an environmental disclosure and informational document.

The ESA Regulations (40 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 (9<sup>th</sup> Cir. 2012) (en banc)(emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013). 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 (9<sup>th</sup> Cir. 2008). Consequently, against this threat of extinction, conducting the draft EIS public review and comment stage without Biological Assessments or Biological Opinions leaves the public in the dark and violates both the ESA and NEPA. In the absence of the ESA required analyses, the draft EIS/EIR will be “so inadequate as to preclude meaningful analysis” in violation of NEPA. 40 C.F.R. § 1502.9(a).

**THE IMPACT ANALYSIS OF THE PREFERRED PROJECT—THE BDCP WATER  
TUNNELS—IS CURSORY AND INADEQUATE**

NEPA requires that “Impacts shall be discussed in proportion to their significance.” 40 C.F.R. § 1502.2(b). NEPA specifically includes as factors in evaluating significance impacts on “ecologically critical areas”; effects that are likely to be highly controversial; the “degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical”; and whether “the action threatens a violation of federal, state, or

local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(3), (4), (9) and (10). The BDCP Water Tunnels alternative easily satisfies these categories, as the Tunnels threaten the extinction of fish species listed as endangered or threatened and will adversely modify designated critical habitats by substantially reducing water and flows in the critical habitats.

All federal agencies are required by NEPA to “make every effort to disclose and discuss at appropriate points in the draft [environmental impact] statement all major points of view on the environmental impacts of the alternatives including the proposed action.” 40 C.F.R. § 1502.9(a). Consequently, Reclamation, NMFS and USFWS are required to disclose and discuss in the Draft EIS the point of view that DWR’s preferred project—the BDCP Water Tunnels—threatens the extinction of the five listed fish species and would threaten to adversely modify the designated critical habitat for these listed fish species. Moreover, the agencies are required to disclose and discuss in the Draft EIS that, if the formal ESA consultations including Biological Assessments and Biological Opinions fail to demonstrate that the Water Tunnels would not be likely to jeopardize the continued existence of any of the listed fish species or result in the destruction or adverse modification of the designated critical habitats of such species, the Water Tunnels would not be a permissible or permissible project under the ESA.

Additionally, given the absence of Biological Opinions, or even Draft Biological Opinions and Biological Assessments, there is no lawful basis for the federal agencies to downplay or minimize the extinctions and adverse modifications of designated critical habitats threatened by the BDCP Water Tunnels. Under the ESA, the only way for federal agencies to reach conclusions as to jeopardy of species existence or adverse modification of critical habitats is through ESA consultation including preparation of Biological Assessments and Biological Opinions. In the absence of these required steps there is no basis for federal agencies to attempt to join with the exporters and DWR in their biased advocacy for the BDCP Water Tunnels.

Regardless of whether these three federal agencies agree now with us that approval of the Water Tunnels would violate the ESA, their red flag comments and the Record so far have made it clear that there is at minimum significant uncertainty about whether the BDCP Water Tunnels project is permissible under the ESA that will not be resolved until the Biological Assessments and Opinions have been prepared.

A Draft EIS/EIR circulated prior to preparation and circulation of federal agency prepared Biological Assessments and Biological Opinions or at least Draft Biological Opinions will be “so inadequate as to preclude meaningful analysis,” 40 C.F.R. § 1502.9(a), because the public and decision-makers will 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.

**THE DRAFT EIS/EIR WILL BE SO INADEQUATE AS TO PRECLUDE  
MEANINGFUL ANALYSIS BECAUSE OF ABSENCE OF ESSENTIAL WATER  
QUANTITY AND QUALITY INFORMATION**

Like the absent analyses required by the ESA, the Draft EIS/EIR at this stage will also lack required water quantity and water quality analyses. The Delta Reform Act requires that “For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board [California State Water Resources Control Board (SWRCB)] shall, pursuant to its public trust obligations, develop flow criteria for the Delta ecosystem necessary to protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions.” California Water Code § 85086(c)(1). The SWRCB did develop Flow Criteria, published at:

[www.swrcb.ca.gov/waterrights/water\\_issues/bay\\_delta/deltaflow](http://www.swrcb.ca.gov/waterrights/water_issues/bay_delta/deltaflow) on August 3, 2010, p. 5. The criteria include:

75% of unimpaired Delta outflow from January through June;

75% of unimpaired Sacramento River inflow from November through June; and

60% of unimpaired San Joaquin River inflow from February through June.

Those recommendations have not been the basis for the BDCP Water Tunnels Administrative Drafts and would preclude development of the Water Tunnels making that alternative infeasible pursuant to water quantity and quality considerations.

On the one hand, the BDCP process fails to base the preferred alternative on the SWRCB flow recommendations made pursuant to the Delta Reform Act. On the other hand, the BDCP process does not await completion of the pending SWRCB proceedings developing updated flow objectives. Once the SWRCB concludes that process, EPA will review and approve or disapprove any new or revised water quality standards pursuant to Clean Water Act § 303(c). (EPA letter, EPA’s comments on the Bay-Delta Water Quality Control Plan; Phase 1; SED, March 28, 2013). As the EPA has noted, “[t]he benefits of increasing freshwater flows can be realized quickly and help struggling fish populations recover.” (*Id.* at 1). By proceeding before the SWRCB has completed its Water Quality Control Plan Update, BDCP will not benefit from the analysis disclosed in this process.

Consequently, the BDCP process has failed to conduct the water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water for the Water Tunnels required under the California Environmental Quality Act (CEQA) as determined by the California Supreme Court’s decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4<sup>th</sup> 412, 429, 430, 434, 440-441 (2007). Again, as in the case of the absent ESA analyses, basic analyses will be absent essential to determine whether the BDCP Water Tunnels, DWR’s preferred project is even feasible, let alone environmentally acceptable. Just as an inadequate draft EIS violates NEPA, a draft EIR so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment are precluded violates CEQA. 14 Code Cal. Regs. § 15088.5(a)(4).

## **THE DRAFT EIS/EIR WILL BE SO INADEQUATE AS TO PRECLUDE MEANINGFUL ANALYSIS BECAUSE OF ABSENCE OF OTHER ESSENTIAL INFORMATION**

At our November 7, 2013 meeting it was also confirmed that the Implementing Agreement (IA) will not be released with the draft EIS/EIR. The terms of the IA will be critical to informed public review of the preferred alternative. Consequently, the time for the public review period should not commence to run prior to release of the IA.

Dr. Peter Gleick, President of the Pacific Institute, and member of the U.S. National Academy of Sciences summarized several of the unanswered questions about the BDCP in his viewpoint published in the Sacramento Bee (November 6, 2013) entitled “*Delta project has many unanswered questions.*” The unanswered questions include: how much water would the new system take out of the Delta, what would the infrastructure or the water it provides cost, who is going to pay for it, there is no cost-benefit study including an evaluation of alternatives showing that the benefits of the Water Tunnels would exceed the cost, whether proposed ecosystem repairs and restoration would actually happen, what rules would govern the operation of the Water Tunnels and who would strictly monitor and enforce those rules, and what provisions would be put in place to change the operating rules as climate change increasingly alters water conditions. As Dr. Gleick says, “most scientists agree that a key to fixing the ecological problems of the Delta is to take less water out, not more.”

A critical example of absent BDCP analysis was pointed out by Reclamation: “The current BDCP analysis assumes no operational impacts to upstream reservoir operations.” (Reclamation clarification added to federal agency comments July 16, 2013 p.1). In addition to being in the dark upstream, the BDCP process is also in the dark at the downstream end. “The BDCP omits any analysis of possible effects on San Francisco Bay. . . As noted by the National Research Council review of BDCP in 2011: since BDCP aims to address management and restoration of the San Francisco Bay-Delta, this is a significant omission that must be rectified.”<sup>2</sup> Indeed, by reducing outflows from the Delta, the BDCP Water Tunnels would thereby reduce inflows into the Bay.

To sum it all up, the BDCP is at best ready for “scoping”. The public will not have adequate information to understand what this project is or would do to the environment, and the agencies will not have the analysis to support approval of such an expensive and dangerous to fish habitat and population project. There are more unanswered than answered questions about DWR’s preferred project, the Water Tunnels.

### **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, as well as the other missing analyses set forth above, the planned draft BDCP EIS/EIR will not be sufficient for informed review by the public and the decision-makers. It will be necessary at minimum under

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<sup>2</sup> (Letter p.2, From Barbara Salzman, President, Friends of the San Francisco Estuary to Felecia Marcus, Chair, State Water Resources Control Board, October 30, 2013, <http://friendsofestuary.weebly.com/comment-letters-from-friends.html>).

the ESA, NEPA and CEQA for the federal and state agencies to issue and circulate for public review a new draft EIS/EIR based on Biological Assessments and Biological Opinions. 40 C.F.R. § 1502.9(a) (NEPA); 14 Code Cal. Regs. § 15088.5(a)(CEQA). Then, and only then, would the public have the opportunity to engage in meaningful analysis of the preferred project alternative and informed comparison with other alternatives.

Please call Robert Wright, Senior Counsel, Friends of the River, (916) 442-3155x 207 with any questions you may have. Thank you for your anticipated attention to these issues.

Sincerely,

/s/ E. Robert Wright  
Senior Counsel  
Friends of the River

/s/ Kathryn Cotter  
Legal Counsel  
Friends of the River

/s/ Patrick Huber  
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To protect and restore California Rivers by influencing public policy and inspiring citizen action.

## FRIENDS OF THE RIVER

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January 14, 2014

[BDCP.Comments@noaa.gov](mailto: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 (9<sup>th</sup> Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9<sup>th</sup> 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/EIS 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.4<sup>th</sup> 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