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## FRIENDS OF THE RIVER

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March 6, 2014

[BDCP.Comments@noaa.gov](mailto:BDCP.Comments@noaa.gov) (via email)

**Re: COMMENT LETTER/Preliminary Comments on Fundamental BDCP Violations of the ESA**

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

### INTRODUCTION

This is our second early 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 follows up our letter of January 14, 2014 and 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.

*We attach and incorporate by reference a copy of the recent seven page letter (including attachments) from the California Advisory Committee on Salmon and Steelhead Trout to the Director of the California Department of Fish and Wildlife dated February 26, 2014.* The Advisory Committee concludes among other things that: “The BDCP does not meet the requirements of Fish and Game Code 2820 for an NCCP and cannot legally be approved because it will contribute to the further decline of Sacramento River Winter Run and Spring Run Chinook salmon.” (Letter p. 1). The Advisory Committee also concludes that: “In summary, the Bay-Delta Conservation Plan does not meet the requirements of the California Endangered Species Act or the Natural Communities Conservation Plan Act to recover Sacramento River winter-run and spring-run Chinook salmon.” (Letter p. 4).

For the same reasons, the BDCP Water Tunnels plan likewise does not meet the requirements of the ESA and cannot legally be approved because it will contribute to the further decline of Sacramento River Winter Run and Spring Run Chinook salmon.

## ESA AND NEPA VIOLATIONS PRECLUDING INFORMED PUBLIC REVIEW

As we have said before, the Water Tunnels would divert enormous quantities of water from the Sacramento River near Clarksburg, California. 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).

The Sacramento River Winter Run Chinook Salmon is listed as an endangered species under the ESA. 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. 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. Yet in complete disregard of these undisputed facts, no Biological Assessment has been prepared and issued by the federal Bureau of Reclamation with respect to the BDCP Water Tunnels project. Also, no final or even draft Biological Opinion has been prepared by the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (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.

The failure to prepare Biological Assessments and Biological opinions prior to issuing the BDCP draft Plan and EIR/EIS for what in the absence of those documents deliberately causes uninformed public review is astonishing. The Ninth Circuit Court of Appeals has repeatedly held that: "Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement." *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1210 (9<sup>th</sup> Cir. 2010). *Accord, Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1027 (9<sup>th</sup> Cir. 2012)(en banc), *cert. denied*, 133 S.Ct. 1579 (2013); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9<sup>th</sup> Cir. 2009). We doubt that even the ardent advocates for the Water Tunnels who prepared the 40,000 pages of BDCP advocacy documents would contend that taking large quantities of water away from the River, sloughs, and Delta does not have "any possible effect, whether beneficial, benign, adverse or of an undetermined character."

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. 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).

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.

### 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.

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

(incl. 1 attachment)

Sincerely,

/s/ E. Robert Wright

Senior Counsel  
Friends of the River