



FRIENDS OF THE RIVER

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

916/442-3155 • FAX: 916/442-3396 •

WWW.FRIENDSOFTHERIVER.ORG

July 24, 2014

The Honorable Sally Jewell
Secretary of the Interior
Washington DC

Eileen Sobeck
Assistant Administrator, NOAA Fisheries
Silver Spring, MD

John Laird
Natural Resources Agency Secretary
Sacramento, CA

Mark Cowin
Director, Calif. Dept. of Water Resources
Sacramento, CA

Gina McCarthy
Administrator, U.S. EPA
Washington DC

Chuck Bonham
Director, Calif. Dept. of Fish and Wildlife
Sacramento, CA

Will Stelle
Regional Director, NMFS
Seattle, WA

David Murillo
Regional Director, Bureau of Reclamation
Sacramento, CA

Ren Lohofener
Regional Director, U.S. Fish and Wildlife Service
Sacramento, CA

BDCP.Comments@noaa.gov (via email)

Additional Addressees at end of letter

Re: Comment Letter on Profoundly Disturbing Abuses of the BDCP Process

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

Before the close of the comment period Friends of the River will submit detailed comments on the Bay Delta Conservation Plan (BDCP) Draft Plan, Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) and Draft Implementing Agreement (IA). Our purpose here is to summarize several profoundly disturbing abuses of the BDCP National Environmental Policy Act ((NEPA), California Environmental Quality Act (CEQA), and Endangered Species Act (ESA) processes being carried out by your agencies.

The Deliberate Omission of any True BDCP Alternatives

The BDCP Draft EIR/EIS alternatives chapter and Draft Plan alternatives- to- take chapter fail to include any real alternatives, let alone the required range of reasonable alternatives to the new water conveyance upstream from the already imperiled San Francisco Bay-Delta—the BDCP Water Tunnels. 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 designated critical habitats in the Sacramento River and sloughs to and through the Bay-Delta would not reach the Delta. Flows would be reduced in the Sacramento River, sloughs and Delta to the detriment of listed and other fish species. All of the so-called

project alternatives set forth in the Draft Plan and Draft EIR/EIS are simply different versions of the same project. They all create a capacity to divert more water by way of new conveyance upstream from the Delta. And they do so in the face of the ESA Section 7 command prohibiting federal agency actions that “result in the destruction or adverse modification of [critical] habitat of [listed] species.” 16 U.S.C. § 1536 (a)(2)

The failure of the BDCP Drafts to include so much as one alternative reducing exports seems at first blush astonishing. After all, a claimed purpose of the BDCP Plan is “Reducing the adverse effects on certain listed [fish] species due to diverting water.” (BDCP Draft EIR/EIS Executive Summary, p. ES-10). As the National Academy of Sciences warned back in May 2011-- in commenting on an earlier version of the BDCP Plan-- “Scientific reasons for not considering alternative actions are not presented in the plan.” (Report in Brief, p. 2, May 5, 2011). More than two years ago, the Environmental Water Caucus (EWC) (a coalition of over 30 organizations including Friends of the River) pointed out to the California Resources Agency Deputy Secretary:

The absence of a full range of alternatives, including an alternative which would reduce exports from the Delta. It is understandable that the exporters, who are driving the [BDCP] project, are not interested in this kind of alternative; however, in order to be a truly permissible project, an examination of a full range of alternatives, including ones that would reduce exports, needs to be included and needs to incorporate a public trust balancing of alternatives. (April 16, 2012, letter, p. 2).

There has been a complete failure to develop and evaluate alternatives reducing diversions/exports including the EWC Reduced Exports Plan transmitted to the California Resources Agency in December 2012 as well as the more detailed Responsible Exports Plan developed in May 2013.

In fact, this BDCP process ignoring and concealing obvious and direct alternatives that would reduce the “adverse effects on certain [listed] fish species due to diverting water” is not astonishing. It is a deliberate, bad faith, end run on the alternatives analysis requirements of NEPA, CEQA, and the ESA. The exporters have money, lobbyists and power. They are driving the project. They do not want the public including environmental organizations, Indian tribes, Northern California, and San Francisco Bay-Delta interests to have a BDCP alternative that they could support. This concealment and silencing of any alternatives that would reduce exports as opposed to all of the current BDCP alternatives that increase the capacity for exports is calculated to increase the likelihood of the BDCP proponents getting what they want. This bad faith omission of alternatives reducing exports skews the debate in favor of new conveyance and against reducing exports since no other alternatives are presented.

The current BDCP Draft’s omission of the range of reasonable alternatives required by law requires the preparation of a new Draft Plan and Draft EIR/EIS and a new public review period to attempt to cure this fatal flaw.

The Deliberate BDCP Website Suppression of Comments

After the 40,000 pages of BDCP project advocacy called the Draft Plan and Draft EIR/EIS were released in December 2013 for public review and comment, the BDCP website was closed to the posting of comments and correspondence from the public. Consequently, an organization or individual attempting to wade through the 40,000 pages of self-interested project advocacy to spot

the issues and figure out the truth is unable to learn from the comments and correspondence from other organizations and individuals who are not project proponents. The public's ability to be informed regarding this project including cons as well as claimed pros would have been facilitated by having access to comments and correspondence made by others during the review process. Instead, the BDCP agencies have done their very best to keep the public in the dark about issues spotted by those who are not project proponents.

This blinding of the public to critical environmental information even extends to comments by sister agencies. Here are just a few of the many possible examples of comments from public agencies that the citizen using the BDCP website does not get to see. "The BDCP is based upon this misrepresentation: that a massive new twin tunnel system, which would greatly reduce the natural flow of water through the Delta, qualifies as a 'conservation' project to restore the Delta ecosystem and protect species already verging on extinction." (County of San Joaquin comments, p. 1, July 9, 2014). Another example is: "Chapter 8 of the current BDCP does not provide the detailed information necessary for potential participating agencies to evaluate individual agency cost-benefit (or feasibility) of the proposed project." (San Diego County Water Authority, p. 2, June 2, 2014). There is the June 24, 2014, comment letter from the Delta Stewardship Council. The public trying to understand the project is not informed that the State agency responsible for ultimately determining whether the BDCP is consistent with the Delta Plan has found that the BDCP EIR: should "Identify the water available for export and other beneficial uses under alternative flow criteria considered in the draft EIR/S" (Letter p. 1), "The benefits of tidal marsh restoration to Delta smelt are likely overstated" (p. 2), "Water quality impacts are compared to SWRCB water quality objectives with little regard to specific water quality needs of aquatic species of concern" (*Id.*), "San Francisco Bay should be included in the scope of the analysis, especially for water quality" (p. 12), and so forth.

This is a double attack on the truth and on informed public review of the proposed project. The BDCP agencies have refused, as shown above, to identify, develop, or consider in the Draft Plan and Draft EIR/EIS any alternatives that would reduce exports. At the same time, the agencies have also shut down the BDCP website to the posting of public comments and correspondence to prevent independent organizations and individuals from informing the public about alternatives and critical information that the exporters do not want the public to see.

The government agencies would not be blinding themselves and the public to alternatives reducing exports while at the same time eliminating public comment and correspondence from the BDCP website if the agencies actually believed the BDCP proponents' claims about the asserted benefits of the project. The silencing of comments on the BDCP website is powerful evidence that the BDCP proponents are afraid of the facts and the truth.

Friends of the River objects to approval of the BDCP and is in favor of reducing exports. That said, Friends of the River also believes in the American tradition of democracy and informed, indeed spirited, public debate of important and controversial issues. Because of that, we have been seeking and obtaining copies of BDCP comment letters under the Freedom of Information Act beginning in February 2014 and posting them on our website at www.friendsoftheriver.org/bdcpcomments . We have been posting all comment letters we have obtained regardless of whether the particular comments oppose or favor the Water Tunnels. The government agencies should be doing what we have been forced to do. That is the American way.

Misrepresenting Taking Water to be a “Conservation” Plan

The only difference between the BDCP and this same Governor’s “peripheral canal” that was rejected by a 2-1 statewide referendum vote in June 1982 is that the project proponents, their lobbyists, their lawyers, and their supporters inside the government have come up with the clever trick of calling this a “conservation” plan. That trick is Orwellian. War is not “peace,” lies are not “truth,” and a new water diversion is not “conservation.” The same interests at work now succeeded in essentially destroying the San Joaquin River decades ago by constructing the Friant Dam and diverting most of the water south. As a result, a 60 mile stretch of this once mighty river is dry almost all of the time. Having succeeded in greatly reducing the flows from the south through the Delta, the same interests now seek to reduce the flows through the Delta from the Sacramento River in the north by approving and operating the Water Tunnels. The Effects Analysis chapter (chapter 5) of the Draft Plan admits that the new upstream diversion would reduce flows but blames climate change as the most likely culprit for future salmon population extinctions. That chapter also claims that the adverse effects on listed species and habitats would be outweighed by various conservation measures having nothing to do with the Water Tunnels and that are to be paid for by the public rather than the exporters taking the water.

This massive new upstream diversion would include the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) tying their ESA hands behind their backs for 50 years by way of regulatory assurances and the “No Surprises Rule” included in the Implementing Agreement. The California Department of Fish and Wildlife (CDFW) would likewise give away its powers and responsibilities for the 50 year term of the proposed permit. In the face of admitted declining fish populations caused by water diversions and the admitted worsening future threats caused by climate change, this giveaway by the fishery agencies 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, 185 (1978). *This proposed 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 § 10 Habitat Conservation Plans 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 exporters.

The exporters also have nothing to do with proposed mitigation funding; mitigation would be paid for by way of bonds or other public funds. The public, meaning the taxpayers, would pay for the conservation measures as well as for attempting to mitigate adverse effects resulting from the new upstream conveyance with the exception of the project footprint itself. Habitat restoration on the ground is no substitute for taking away designated critical freshwater habitat. Consequently, there is no nexus between either the fish or the contractors and the BDCP mitigation and conservation measures.

Again, calling this a “conservation” plan is a clever trick. New upstream conveyance needs to be treated lawfully for what it really is-- a proposed new diversion project to take massive

quantities of freshwater away from the lower Sacramento River, sloughs, and the San Francisco Bay-Delta. New upstream conveyance is not properly or lawfully a “conservation” plan or part of a lawful Habitat Conservation Plan.

Secret BDCP Planning with the Exporters and their Consultants

There are references throughout the BDCP Drafts including the “Effects Analysis” chapter of the Plan to the meetings with federal agency scientists “during the August 2013 workshops.” (Example, Plan ch. 5, p. 5. 1-32). There have been negotiations and meetings by the agencies with the exporters--the “water takers” -- who have had the seats that count on the inside of the process. Those interests are the “winners” in the BDCP processes. The ignored “water givers”-- the fish, the River, the Delta, Delta and Northern California agriculture, fishing, business, recreation and public interests have been excluded from the inside process.

The federal agencies are apparently trying to cover up issues that should have been resolved before the public Draft BDCP document review period commenced. These issues are instead being secretly planned to be decided in the Final BDCP Plan and EIR/EIS without being aired in new Draft documents and a new public review period. The close of the BDCP comment period in a few days affords time to only mention several examples since the subject documents were just obtained from the federal agencies under the Freedom of Information Act (FOIA). These examples come from something called the “BDCP Federal Open Issues Tracker:”

“OPEN” ISSUES THAT WILL REQUIRE FURTHER REFINEMENTS BETWEEN DRAFT AND FINAL

1. ISSUES WITH CM 1 OPERATIONS

1. Real Time Operations

- a. **STATUS:** Further work is needed on four issues: . . . ; 2) whether the High Outflow Scenario (HOS) draws from Oroville only or whether other COA [Coordinated Operations Agreement] “adjustments” will occur; 3) whether water transfer programs are part of meeting the HOS requirements, and if so, how to address their NEPA/CEQA-related effects; . . .

2. High Outflow Scenario (HOS) and Decision Tree

- a. **STATUS:** At present only the HOS appears to be permissible based upon the best available science. The Services will only authorize operations that meet permit issuance criteria. The State’s proposed project may therefore need to be changed at the time of permit issuance.
- b. The Plan needs to more clearly and specifically state the scientific work related to HOS/Decision Tree that will be carried out prior to operations with respect to salmonids.

4 . CVP Upstream Operations.

- a. **STATUS:** Recent refinements to real-time operations state that meeting BDCP exports will require an (unspecified) accounting between the CVP and the State project. This accounting needs to be clarified and agreed upon.
- b. This change raises several fundamental issues of project operations and Project impacts and it may trigger additional NEPA/CEQA analyses. This change may also affect the scope

and timing of the ESA section 7 consultations associated with the BDCP. (PRELIMINARY WORKING DRAFT-FOR INTERNAL USE ONLY-MARCH 28, 2014).

These are just a few examples of critical issues that are being dealt with in secret with the project proponents being at the table while the public is relegated to trying to find out what is going on behind closed doors by Freedom of Information Act requests. The Effects Analysis chapter in the Plan represents over and over that the “only” changes in upstream operations will involve Oroville and the Feather River. It turns out that is not the case. Other upstream reservoir operations and upstream reaches of other rivers will also be affected. These critical issues of “adjustments” to other reservoir operations, water transfers, salmon survival questions, and change between the CVP and State project need to be aired openly in a new Draft Plan and Draft EIR/EIS circulated for a new public review and comment period. That is necessary to allow the public to have the opportunity to comment on the actual project as it is and will be as opposed to finding out those critical details after the horse is out of the barn and the public comment period is over.

The Deception and Delusion in the BDCP

“[A]cross the globe, large infrastructure projects almost invariably arrive late, over-budget and fail to perform up to expectations. Cost overruns and benefit shortfalls of 50% are common; cost overruns above 100% are not uncommon.” Flyvbjerg, Garbuio and Lovallo, *Delusion and Deception in Large Infrastructure Projects*, 51 California Management Review 170, 171-2 (winter 2009). “The underlying reasons for all forecasting errors can usefully be grouped into three categories: delusions or honest mistakes; deceptions or strategic manipulation of information or processes; or bad luck.” (*Id.* at 172). [P]oliticians, planners, or project champions deliberately and strategically overestimate benefits and underestimate costs in order to increase the likelihood that their projects, and not their competition’s, gain approval and funding. These actors purposefully spin scenarios of success and gloss over the potential for failure.” (*Id.* at 173).

Large California infrastructure project proponents are masters of delusion and deception as evidenced by the explosion of the forecasted cost of the new San Francisco-Oakland Bay Bridge span from \$1 billion to \$6 billion.

Here, the BDCP project proponents are striving to be the all-time champions of carrying out “delusion and deception in large infrastructure projects.” The only true statewide benefit-cost study of the proposed Water Tunnels project conducted so far concluded two years ago that “We find the tunnels are not economically justified because the costs of the tunnels are roughly 2.5 times larger than their benefits.” Eberhardt School of Business, Business Forecasting Center, University of the Pacific, *Benefit-Cost Analysis of Delta Water Conveyance Tunnels* (July 12, 2012). “The recent recession is a powerful reminder that no amount of financial engineering can change the fundamental economics of an investment from bad to good.” (*Id.* at 13).” [I]t is clear that the Delta water conveyance tunnels proposed in the draft BDCP are not justified on an economic or financial basis.” (*Id.*). This helps explain the absence of information in the Draft Implementing Agreement about who is going to pay for what as well as the ongoing efforts of the exporters to quietly shift as many of the billions of dollars of costs as possible to taxpayers and to urban and suburban ratepayers.

Again, the deliberate omission of any alternative reducing exports and not including new upstream conveyance, coupled with the refusal to post correspondence and comments on the

BDCP website, aids and abets the deception of the public with respect to the environmental, economic, and financial risks and drawbacks of the Water Tunnels.

Finally, what could be more deceptive or delusional than falsely claiming or actually believing that taking more water away from the fish and their habitats will be good for them and is “conservation?”

The Adaptive Management and Decision Tree Bad Jokes on the Public

Over and over again throughout the Draft Plan, Draft EIR/EIS and Draft Implementing Agreement adaptive management and the decision tree are referred to as the future procedures that will save the fish from all of the claimed “uncertainties” in the BDCP. If the exporters have the money, political power and influence to get the controversial Water Tunnels approved now, that would evidence the worthlessness of adaptive management and the “decision tree” in the future. Now, the billions of dollars to build the Water Tunnels have not been spent. After that investment is made and the Water Tunnels have been constructed and are ready for operation adaptive management and the decision tree will be puppets dancing to the tunes played by the exporters. The exporters would then have an additional argument for their lobbyists and lawyers to make-- that the exporters invested billions of dollars in the development of the Water Tunnels and cannot equitably be stopped from filling them with water. The same powerful interests that succeeded in destroying the once mighty San Joaquin River will not hesitate to turn the Delta into a salty, polluted, stagnant pond.

The exporters have already had sufficient control over the BDCP agencies to prevent the development and consideration of a BDCP reduced exports no new conveyance alternative. The exporters have had sufficient control over the BDCP agencies to exclude public comments and correspondence from the BDCP website. Given that successful track record of power and domination over the BDCP agencies, the so-called adaptive management and the decision tree will be no safeguards at all against the extirpation of listed fish species and the destruction of the Delta.

Corrective Actions

The BDCP agencies will eventually have the opportunity, should they choose to steam full speed ahead in the face of red flags flying, to convince the courts that they proceeded in the manner required by NEPA, CEQA and the ESA. That is, the agencies can try to convince the courts that they really did not have to develop and consider a range of reasonable alternatives reducing exports; it was okay to suppress public comments and correspondence from the BDCP website; it was okay to misrepresent a new water diversion as a “conservation” plan; and it is okay to make significant changes or “adjustments” in proposed project operations without disclosing and assessing those changes and adjustments in a new Draft Plan and Draft EIR/EIS.

The BDCP agencies have the opportunity to instead take a different path. That is, the agencies can present a range of reasonable alternatives reducing exports in a new Draft Plan, Draft EIR/EIS and Draft Implementing Agreement. The agencies can welcome instead of ban public comment and correspondence on the BDCP website during a new public review period on new draft BDCP documents. The agencies can take the proposed new conveyance out of the Habitat Conservation Plan and deal with any such proposal in the normal, lawful project review process. The agencies can make sure that significant changes or “adjustments” in proposed project

operations are disclosed in Draft environmental documents out for public review periods rather than attempting to unlawfully insert them in Final NEPA and CEQA documents to evade public review and comment. And there is so much more the agencies can, indeed must, do to represent the public as opposed to only representing the water takers. The agencies can require ESA consultations and California public trust doctrine analysis to take place before rather than after the BDCP Draft NEPA and CEQA processes so that the public can actually be informed by the work of agency scientists as opposed to attempting to wade through thousands of pages of financially-interested project proponent advocacy. The agencies can either finally admit that the costs of the Water Tunnels would be 2.5 times larger than the benefits or require their own statewide benefit-cost study to be performed comparing the Water Tunnels with reduced export alternatives.

CONCLUSION

The fish and the Delta are in peril. Extinction is forever. The 40,000 pages of BDCP project proponent advocacy are unworthy of the epic decisions to be made guiding the future of the fish, northern California Rivers, and the Delta. If this is not worth the environmental full disclosure required by law and the NEPA, CEQA and ESA required do-over, what is? Please call or email Robert Wright at (916) 442-3155 x207 or bwright@friendsoftheriver.org with any questions you may have.

Sincerely,

/s/ E. Robert Wright

Senior Counsel

Additional Addresses, all via email

Maria Rea, Assistant Regional Administrator
National Marine Fisheries Service

Michael Tucker, Fishery Biologist
National Marine Fisheries Service

Ryan Wulff, Senior Policy Advisor
National Marine Fisheries Service

Mike Chotkowski, Field Supervisor, S.F. Bay-Delta
U.S. Fish and Wildlife Service

Lori Rinek
U.S. Fish and Wildlife Service

Mary Lee Knecht, Program Manager
U.S. Bureau of Reclamation

Patty Idloff
U.S. Bureau of Reclamation

Deanna Harwood
NOAA Office of General Counsel

Kaylee Allen
Department of Interior Solicitor's Office

Tom Hagler
U.S. EPA General Counsel Office

Tim Vendlinski, Bay Delta Program Manager, Water Division
U.S. EPA, Region IX

Stephanie Skophammer, Program Manager
U.S. EPA, Region IX

Erin Foresman, Bay Delta Coordinator
U.S. EPA
Sacramento, CA

Lisa Clay, Assistant District Counsel
U.S. Army Corps of Engineers

cc:

Congressman John Garamendi
Third District, California

Congresswoman Doris Matsui
Sixth District, California