

FRIENDS OF THE RIVER

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July 29, 2014

Dear BDCP.Comments@noaa.gov (via email)

Re: Comment Letter on BDCP Plan, EIR/EIS, and Implementing Agreement Including Violations of NEPA, CEQA and the ESA

Friends of the River (FOR) objects to approval of the Bay Delta Conservation Plan (BDCP). Our 12 prior comment letters of: January 14, 2014 including our earlier comment letters of June 4, August 13, September 25, and November 18, 2013 that were attached to the January 14, 2014 letter; January 28, 2014; March 6, 2014; May 15, 2014; May 21, 2014; May 28, 2014 (joint letter with the Environmental Water Caucus); June 11, 2014 (Environmental Water Caucus) and July 24, 2014 are repeated, adopted and incorporated herein by FOR by this reference. In addition, FOR adopts and incorporates by this reference all comments by other organizations, public agencies, and individuals submitted by the close of the BDCP comment period on July 29, 2014, including but not limited to the three comment letters submitted July 28, 2014 on behalf of the California Sportfishing Protection Alliance (CSPA), that do not support approval of new upstream conveyance and that are not in conflict with FOR's comments.

On the one hand, the 40,000 pages of BDCP drafts violate the NEPA regulation, 40 C.F.R. 1502.7, specifying that Draft EIS text shall normally not exceed 150 pages and "for proposals of unusual scope or complexity shall normally be less than 300 pages." Here, the volume was calculated to overwhelm the public.

On the other hand, and more importantly, there was silence on the profound issue of whether to increase the capacity to divert more water from the Sacramento River, sloughs, and the San Francisco Bay Delta or instead begin to reduce exports. The BDCP agencies ignored and refused to consider any alternatives that would reduce exports. Consequently, there was no alternatives section "sharply" defining the issues as required by 40 C.F.R. 1502.14, and no rigorous exploration and objective evaluation of "all reasonable alternatives" required by that regulation.

Our detailed comments follow.

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INTRODUCTION

Friends of the River (FOR) objects to the approval of the Bay Delta Conservation Plan (BDCP) including the Delta Water Tunnels, Preferred Alternative 4, of the Draft Environmental Impact Report/Environmental Impact Statement EIR/EIS. (EIR/EIS, 3-3). That alternative is referred to as the BDCP “Proposed Action” in Chapter 9 of the Plan. FOR also objects to the approval of any other existing, revised, or new alternative that would include new, upstream conveyance from the Delta.

The Water Tunnels would divert enormous quantities of water from the Sacramento River near Clarksburg, California. The water would be shipped south through two giant, 40-mile long Tunnels 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. There would also 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.

FOR objects to preparation, approval, or issuance of a BDCP Final EIR, Final EIS, Final EIR/EIS, Final Plan, and/or Final Implementing Agreement (IA) for the BDCP. The Draft EIR/EIS and Plan issued for public review in December 2013 and the Draft IA issued in May 2014 are so inadequate for the purpose of providing meaningful public and decision-maker review that a new Draft EIR/EIS, Draft Plan, and Draft IA must be prepared and issued to provide an adequate basis for such review pursuant to the requirements of the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), and the Endangered Species Act (ESA). The 40,000 pages of project advocacy and speculation making up the BDCP Plan, Draft EIR/EIS, appendices and IA are worthless for the purpose of providing informed public and decision-maker review.

VIOLATIONS OF ALTERNATIVES REQUIREMENTS UNDER NEPA, CEQA, and ESA

D) THERE IS NO LEGALLY SUFFICIENT DEVELOPMENT AND ASSESSMENT OF BDCP ALTERNATIVES

Development and evaluation of a range of reasonable alternatives are the declared “heart” of both the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) required EISs and EIRs. Despite that, the alternatives section (Chapter 3) of the Draft EIR/EIS and the Endangered Species Act (ESA) required Alternatives to Take section (Chapter 9) of the BDCP Draft Plan fail to include even one, let alone the CEQA, NEPA and ESA required range of, reasonable alternatives that would increase water flows in the San Francisco Bay-Delta by reducing exports. These serious violations of law require corrective action by developing and including the required range of reasonable alternatives in a new Draft EIR/EIS and Alternatives to Take Chapter in the BDCP Plan. A new public review and comment period is necessary so the public can evaluate and comment on a range of reasonable alternatives.

“The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality with a stable regulatory framework.” (Plan, 5. 1-1, all citations to BDCP Plan chapter and page number unless otherwise indicated). “The BDCP will contribute to the restoration of Sacramento-San Joaquin River Delta (Delta) ecosystems largely by addressing ecological functions and processes on a broad landscape scale. Proposed actions will result in fundamental, systemic, long-term physical changes to the Delta. These changes include substantial alterations to water conveyance and management and extensive restoration of tidal, floodplain, and terrestrial natural communities.” (*Id.*)

“The complexity [of chapter 5] is inevitable because of the large size of the Plan Area, the large number of natural communities and covered species addressed, the scale of the covered activities, the long-term horizon of the Plan, the intrinsic and often highly variable properties of the Bay-Delta environment (e.g., salinity gradients, hydrology, projected effects of climate change) and the confounding effects that climate change may have on ecosystems and species in the Plan Area.” (Plan, 5. 1-2).

The BDCP omission of alternatives reducing exports to increase flows is deliberate. 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, all citations to Draft EIR/EIS chapter and page number unless otherwise indicated). “There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta.” (*Id.*). The omission of a range of reasonable alternatives reducing exports to increase flows violates CEQA, NEPA and the ESA. The failure to include even one alternative reducing exports to increase flows is incomprehensible. Alternatives reducing the exporting/diversion of water are the obvious direct response to the claimed BDCP purpose of “reducing the adverse effects on certain listed [fish] species due to diverting water.” (*Id.*)

The BDCP agencies have been marching along for at least three years in the face of “red flags flying” in their deliberate refusal to develop and evaluate a range of reasonable alternatives, or indeed, any alternatives that would increase flows by reducing exports. Three years ago the National Academy of Sciences declared in reviewing the then-current version of the draft BDCP that: “[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan.” (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011).

More than two years ago, on April 16, 2012, the Co-Facilitators of the EWC transmitted a short, 1 ½ page letter to Gerald Meral, Deputy Secretary of the California Resources Agency, sharing “concerns with the current approach and direction of the [BDCP] project and we would like to share those concerns with you.” (Letter, p. 1). Most of the paragraphs in the letter dealt with the types of issues involving consideration of alternatives. The penultimate paragraph of the letter specifically pointed out:

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 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.

(Letter, p. 2). We have already attached (for BDCP.Comments@noaa.gov) and incorporated by reference a copy of the April 16, 2012, EWC letter. (FOR/EWC comment letter May 28, 2014).

On December 15, 2012 by email, and December 17, 2012 by letter, Nick Di Croce, Co-Facilitator of the EWC transmitted the EWC's Reduced Exports Plan to the California Resources Agency Deputy Secretary and requested "that you include it among the alternatives to be included in the BDCP." On November 18, 2013, FOR submitted a comment letter in the BDCP process urging those carrying out the BDCP to review the "Responsible Exports Plan [a later, more detailed version of the Reduced Exports Plan]" proposed by the 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. 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."(FOR November 18, 2013 comment letter at p. 3, Attachment 4 to FOR January 14, 2014 comment letter).

FOR specifically pointed out (at p. 3, fn. 1) that the plan was online at

<http://www.ewccalifornia.org/reports/responsibleexportsplanmay2013.pdf>.

By this letter, we repeat the demand for consideration of the "Responsible Exports Plan" (2013) alternative (attached to FOR May 21, 2014 comment letter) and reasonable variants on that alternative. This demand follows up EWC's similar requests from April 16, 2012 and FOR's requests that have to date been ignored in the BDCP process. Obvious variants on the Responsible Exports Plan alternative creating a range of reasonable alternatives will include reducing exports to both more and less than the 3,000,000 acre-feet limit on exports called for by the Responsible Exports Plan alternative as well as phasing in reductions in exports over time.

The BDCP agencies have failed to produce an alternatives section that "sharply" defines the issues and provides a clear basis for choice among options as required by NEPA Regulations. 40 C.F.R. § 1502.14. The choices presented should include increasing flows by reducing exports, not just reducing flows by increasing the capacity for exports as is called for by *all* of the so-called "alternatives" presented in the BDCP Draft Plan and EIR/EIS. No matter how badly

the BDCP proponents do not want to reduce exports and increase flows, during the Draft CEQA, NEPA and ESA processes inclusion of such alternatives as part of a range of reasonable alternatives is mandatory.

By way of brief summary, actions called for by the Responsible Exports Plan alternative include no development of new upstream conveyance; reducing exports to no more than 3,000,000 acre-feet in all years in keeping with State Water Resources Control Board (SWRCB) flow criteria; water efficiency and demand reduction programs including urban and agricultural water conservation, recycling, storm water recapture and reuse; reinforced levees above PL 84-99 standards; installation of improved fish screens at existing Delta pumps; elimination of irrigation water on drainage-impaired farmlands south of the Bay-Delta; return the Kern Water Bank to State control; restore Article 18 urban preference; restore the original intent of Article 21 surplus water in SWP contracts; conduct feasibility study for Tulare Basin water storage; provide fish passage above and below Central Valley rim dams for species of concern; and retain cold water for fish in reservoirs.

The Responsible Exports Plan alternative calls for a statewide benefit-cost analysis to determine economic desirability of any plan or alternative; water availability analysis to align water needs with availability; protecting the Delta ecosystem pursuant to public trust obligations; and meeting NCCP recovery standards for listed fish species. Other obvious alternatives would include actions ranging from meeting ESA recovery standards for listed fish species, to halting the planting of almond orchards that cannot be fallowed in dry years on desert lands receiving export waters, to consideration of the development of desalinated water supplies as is being done in the San Diego County Water Authority. (Plan, 9-43).

A) THE FAILURE OF THE BDCP AGENCIES TO EVEN CONSIDER THE RESPONSIBLE EXPORTS ALTERNATIVE IS INEXPLICABLE GIVEN THAT THE ALTERNATIVE WAS CONSIDERED, ALBEIT INADEQUATELY, BY THE DELTA STEWARDSHIP COUNCIL AND FOUND TO BE ENVIRONMENTALLY SUPERIOR IN MANY RESPECTS

The Delta Stewardship Council (DSC) issued the Recirculated Draft Program Environmental Impact Report (RDEIR) for the Draft Delta Plan back on November 30, 2012. Included was Delta Plan Alternative 2. (RDEIR 25-4). The RDEIR stated that “Development of Alternative 2 was informed by proposals from environmental organizations led by the

Environmental Water Caucus. It involves sharply decreased water exports from the Delta and its watershed to areas that receive Delta water (limited to a maximum of 3,000,000 acre-feet/year).” (*Id.*)

The RDEIR conceded that “Overall, Alternative 2 would have less water quality impacts than the revised Project, because it involves fewer facilities and less diversions of water from the Delta and Delta watershed.” (RDEIR 25-6). The RDEIR also conceded that “Alternative 2 contributes more to improving conditions for biological resources and arresting ecosystem decline than the Revised Project.” (RDEIR 25-7). Finally, it was conceded that the EWC Alternative “would also eliminate the water quality impacts associated with agricultural runoff water from Tulare Late Basin agriculture and areas with drainage constraints in the San Luis Drainage Area. It is thus environmentally superior to the Revised Project with respect to these types of impacts.” (RDEIR Executive Summary, ES-10; 25-18). Ultimately, the DSC did not adopt Alternative 2, claiming that it was “slightly environmentally inferior to the Revised Project primarily because of its impacts on water supply reliability.” (RDEIR 25-17, 18).

The lawfulness of the DSC Delta Plan and the compliance of the Delta Plan EIR are presently in litigation in the Sacramento County Superior Court. FOR is one of the plaintiffs challenging the DSC’s actions under CEQA and the Delta Reform Act. Whether or not the DSC proceeded in the manner required by law when it did not adopt the EWC Alternative is one subject of that litigation. Here, it is inexplicable that the BDCP agencies did not even consider or disclose the EWC Alternative or develop any other alternatives reducing exports for inclusion in the BDCP Draft EIR/EIS and in the draft alternatives to take chapter of the BDCP Draft Plan.

Instead of enthusiastically embracing the duties mandated by our environmental laws to develop and consider a range of reasonable alternatives, the BDCP proponents have concealed or misrepresented reasonable alternatives presented to them. The EWC Responsible Exports Plan has been concealed and ignored. It is excluded from the alternatives chapters in the BDCP Plan and Draft EIR/EIS.

**B) DECLINING FISH POPULATIONS CRY OUT FOR EVALUATION OF ALTERNATIVES
INCREASING FLOWS**

There should be a range of alternatives in the BDCP Draft EIR/EIS starting with the Responsible Exports Plan and related variants of that alternative. As pointed out in our previous comment letters (March 6, 2014 letter, January 14, 2014 letter and its four attachments) several listed fish species are already in catastrophic decline in the subject area. 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 listed endangered and threatened fish species including Winter-Run Chinook Salmon, Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt.

As explained last year 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). The National Marine Fisheries Service (NMFS) has pointed out that the Water Tunnels threaten the “potential extirpation of mainstream Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit. . .” (NMFS Progress Assessment, § 1.17, 12, April 4, 2013). As explained by the EPA in its 2013 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, p. 1-2, March 28, 2013). The EPA has also explained with respect to Administrative Drafts of the BDCP documents that “many of these scenarios of the Preferred Alternative ‘range’ appear to decrease Delta outflow (p. 5-52), 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 Delta Reform Act requires 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). The SWRCB did develop flow criteria, published at: www.swrcb.ca.gov/waterrights/water_issues/bay_delta/flow 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.

These recommendations have not been the basis for the BDCP's preferred Water Tunnels project, and would preclude development of the preferred alternative making that alternative infeasible pursuant to water quantity and quality considerations. In contrast, EWC's Responsible Exports Plan alternative reduces exports to increase flows and is designed to comply with SWRCB flow criteria. The BDCP Draft EIR/EIS does not use the SWRCB flow criteria to evaluate alternatives, nor does the BDCP process await completion of pending SWRCB proceedings to update flow objectives.

The basic, flawed BDCP premise that taking water away from the fish and their habitats will be good for them is both nonsensical and contrary to science. As the EPA has noted, "[t]he benefits of increasing freshwater flows can be realized quickly and help struggling fish populations recover." (EPA comments on the Bay-Delta Water Quality Control Plan; Phase 1; SED, March 28, 2013 at 1). It is necessary that the BDCP process develop and consider a range of reasonable alternatives that increase Delta outflow. Fair evaluation and consideration of a range of alternatives reducing exports would be a required first step in that process.

Alternatives reducing exports are consistent with the claimed project purpose of "Reducing the adverse effects on certain listed species due to diverting water." (EIR/EIS, ES-10). Such alternatives are also consistent with findings that "the Delta is now widely perceived to be in crisis. There is an urgent need to improve the conditions for threatened and endangered fish species within the Delta." (*Id.*). On the other hand, the stated purpose to "restore and protect the

ability of the SWP and CVP to deliver up to full contract amounts” is contrary to the prevalence of “paper water” reflected by “information indicating that quantities totaling several times the average unimpaired flows in the Delta watershed could be available to water users based on the face value of water permits already issued.” (*Id.* at ES-10 & 11). Alternatives such as the Responsible Exports Plan alternative are 21st century alternatives focused on cost-effective measures, such as conservation and recycling, to establish a more reliable water supply, as opposed to costly huge delivery projects further depleting our rivers and the San Francisco Bay-Delta.

None of the positive water supply availability action measures in the Responsible Exports Plan alternative (or the NRDC’s Portfolio alternative) have been included as alternatives or portions of alternatives in the BDCP Draft EIR/EIS or alternatives to take Plan chapter. The Water Tunnels proponents have “tunnel vision” confined to the sole alternative of developing new upstream conveyance. Moreover, there is no consideration of the lost opportunity cost that would result from the billion dollar construction and operation of the Water Tunnels instead of the development of such modern water supply measures as conservation and recycling.

C) THE ABSENCE OF A RANGE OF REASONABLE ALTERNATIVES VIOLATES CEQA, NEPA AND THE ESA

The failure to include a range of reasonable alternatives violates CEQA. An EIR must “describe a range of reasonable alternatives to the project...which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” 14 Code Cal. Regs (CEQA Guidelines) § 15126.6(a). “[T]he discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” 14 Code Cal. Regs § 15126.6(b). Recirculation of a new Draft EIR/EIS will be required by CEQA Guidelines Section 15088.5(a)(3) because the Responsible Exports Plan alternative and other alternatives that would reduce rather than increase exports have not been previously analyzed, but must be as part of a range of reasonable alternatives.

In addition, EIR conclusions must be supported by substantial evidence. “Argument, speculation, unsubstantiated opinion or narrative...does not constitute substantial evidence.” CEQA guidelines, § 15384. All that the BDCP Draft EIR/EIS contains to support the Preferred Project alternative is argument, speculation, unsubstantiated opinion, narrative and saying “we don’t know.” For example, the Draft EIR/EIS made “no determination (ND)” findings under NEPA as to whether the Water Tunnels, even after “mitigation,” would have adverse impacts on spawning, incubation habitat, and migration conditions for winter-run Chinook salmon and spring-run Chinook salmon; and migration conditions for fall-run Chinook salmon, steelhead, green Sturgeon, and white Sturgeon. (EIR/EIS, ES-73, ES-75, ES-77, ES-79, ES-81, & ES-83). A new Draft EIR/EIS must be prepared and recirculated because “the draft EIR[EIS] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” CEQA Guidelines § 15088.5(a)(4).

The rules under NEPA are similar. Under the NEPA Regulations, “This [alternatives] section is the heart of the environmental impact statement. The alternatives section should “sharply” define the issues and provide a clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14. The EIS alternatives section is supposed to “Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a). Moreover, if “a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.” 40 C.F.R. § 1502.9(a).

Instead of discussing all major points of view, lost in the 40,000 pages of BDCP Plan and Draft EIR/EIS advocacy and speculation are any alternatives reducing exports and increasing flows instead of constructing and operating expensive new upstream diversions with the capacity to increase exports and reduce flows. Under NEPA as well as CEQA, recirculation of a new Draft EIR/EIS will be required because of the extreme deficiencies in the current Draft EIR/EIS. The deficiencies in the Draft EIR/EIS cannot and will not be evaded by responses to comments in a Final EIR/EIS.

With respect to the ESA, we have commented several times over the past year that the failure of the federal agencies to prepare the ESA required Biological Assessments and Opinions violates both the ESA Regulations “at the earliest possible time” requirement and the NEPA Regulations “concurrently with and integrated with” requirement. (50 C.F.R. § 402.14(a); (40 C.F.R. § 1502.25(a); FOR January 14, 2014 comment letter and its four attachments). The missing Biological Assessments and Biological Opinions would be essential to any meaningful public review and comment on a project claimed to be responsive to declining fish populations.

As conceded by BDCP Chapter 9, Alternatives to Take, the analysis of take alternatives must explain “why the take alternatives [that would cause no incidental take or result in take levels below those anticipated for the proposed actions] were not adopted.” (BDCP Plan, Chapter 9, pp. 9-1, 9-2). Here, the lead agencies failed to even develop let alone adopt alternatives reducing exports and increasing flows to eliminate or reduce take. The agencies ignored the Responsible Exports Plan (and the earlier Reduced Exports Plan version) alternative that was handed to them on a silver platter a full year *before* they issued the Draft Plan and Draft EIR/EIS for public review and comment.

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS and Chapter 9 of the BDCP plan have led to a Draft EIR/EIS and Alternatives to Take analysis “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.”

D) ALTERNATIVES CONCLUSION

The most important and fundamental planning decision in the history of the Delta will be whether to finally begin to reduce exports and increase flows or to develop massive, new upstream conveyance from the Delta. An epic choice will be made between those two basic options. The BDCP Plan and Draft EIR/EIS are hopelessly deficient because they fail to set out this choice, let alone illuminate, the bases for making the epic decision that will determine whether five or more endangered and threatened species of fish become extinct.

The failure to include any alternatives reducing exports was an intentional, bad faith violation of NEPA, CEQA, and the ESA. The omission was calculated to deprive the public of

the opportunity to support an alternative that the exporters do not want to see the light of day. Extinction is forever. Alternatives reducing exports that would make extinction less likely must be developed and considered in a new Draft EIR/EIS and alternatives to take evaluation process.

II) ADDITIONAL REASONS WHY THE BDCP DRAFT EIR/EIS FAILS TO PROVIDE AN ADEQUATE RANGE OF ALTERNATIVES UNDER CEQA AND NEPA.

The BDCP logic that removing water from the Delta will help restore it is the ecological equivalent of a modern doctor bloodletting a patient in order to cure illness. Science undeniably shows that the project will be harmful, but government has chosen to carry on anyway.

There is a critical problem with the BDCP Draft EIR/EIS. CEQA and NEPA require proposals of reasonable alternatives to the project, but the BDCP Draft EIR/EIS alternatives are essentially the same plan dressed up in different outfits; there is no proposed alternative.

A) THE BDCP'S PROPOSED OBJECTIVES, PURPOSE, AND NEED.

The alternatives to the project must be determined in light of what the project's goals are. The BDCP serves two purposes: (1) restore and protect ecosystem health to the Delta; and (2) create a reliable water supply within a regulatory framework. BDCP Draft EIR/EIS Chapter 2 Page 1.

The BDCP's fundamental purpose is to "make physical and operational improvements to the SWP system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and CVP south-of-Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations." BDCP Draft EIR/EIS Chapter 2, Page 2. Broken down, the alternatives considered must (1) make physical improvements to the State Water Project; (2) restore and protect ecosystem health in the Delta; and (3) restore and protect water quality in the CVP with a stable regulatory framework. BDCP Draft EIR/EIS Chapter 2, Page 2.

The BDCP's proposed objectives make no mention of creating new conveyances from the Delta. However, the alternatives assume it is necessary to divert new water from the upper Sacramento River.

B) DESCRIPTION OF ACTION ALTERNATIVES

The Draft BDCP includes 15 proposed action alternatives and one CEQA-mandated no action alternative. The 15 action alternatives vary in location, design, conveyance capacity, and the rules that would determine the operation of conveyance facilities. BDCP Draft EIR/EIS Chapter 3, Page 2.

The 15 proposed alternatives branched out of four preliminary alternatives. These four preliminary alternatives propose a: (1) through-Delta conveyance with opportunistic Delta operations and potential new storage; (2) through-Delta conveyance with San Joaquin River isolation; (3) dual conveyance: isolated conveyance between the Sacramento River SWP CVP pumping plants and through-Delta conveyance with San Joaquin River isolation; or (4) isolated conveyance between the Sacramento River and SWP and CVP pumping plants. BDCP Draft EIR/EIS Chapter 3, page 6. These four preliminary alternatives that establish the potential range of alternatives, all but one of the proposed 15 projects fall under category 3 or 4 with a conveyance from the Sacramento River. Draft BDCP EIR/EIS 3 – 14-16. These alternatives include plans 1A, 1B, 1C, 2A, 2B, 2C, 3, 4, 5, 6A, 6B, 6C, 7, 8, and 9. BDCP Draft EIR/EIS Chapter 5, Pages 14-16. Alternatives that are separated by letters following the number (e.g. 1A, 1B, 1C) have “only one or a handful of differences.” BDCP Draft EIR/EIS Chapter 3, Page 40.

1) North and South Delta Intakes

Every proposed alternative other than the no action alternative would build new intakes along the Sacramento River. BDCP Draft EIR/EIS Chapter 3, Pages 14-16. The project identifies 12 sites for these potential intakes, 7 along the Sacramento River’s east bank, and 5 along the west bank. BDCP Draft EIR/EIS Chapter 3 page 85. The BDCP allowed for a maximum of 5 intakes for many of the alternatives, and each intake would divert a maximum of 3,000 cfs. BDCP Draft EIR/EIS Chapter 3, Page 85. Alternative 9 is the only variant, as it would create two 7,500 cfs intake structures at where the Sacramento River meets the Delta Cross Channel and Georgiana Slough. BDCP Draft EIR/EIS Chapter 3, Page 86.

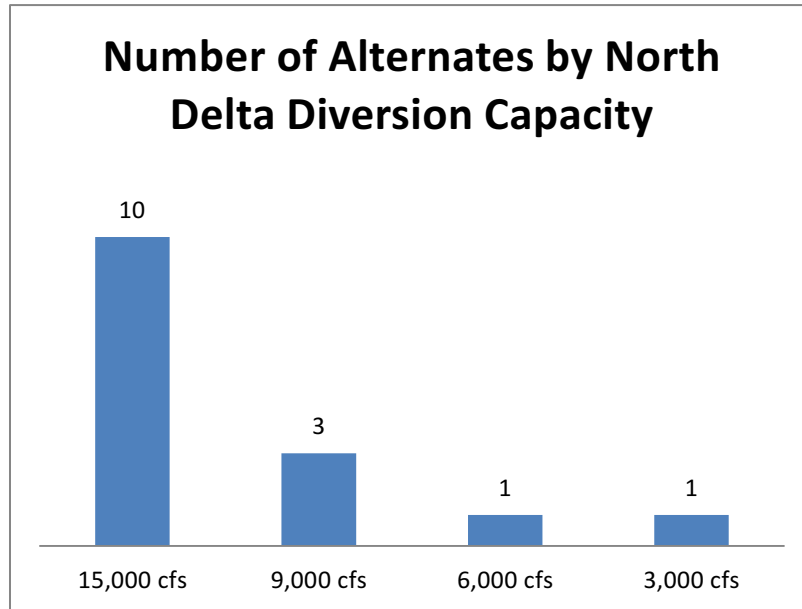
Aside from alternative 9, every proposed intake is along the same ~20 mile stretch of the Sacramento River. BDCP Draft EIR/EIS Appendix 3, Figure 2. Some intakes would be canals

while others would be tunnels, and some would be on the west bank while others would be on the east bank, but otherwise they are all 3,000 cfs intakes along the same ~20 mile stretch of the same river. BDCP Draft EIR/EIS Chapter 3, Page 87. Moving an intake down a mile does not constitute a material alternative or alteration. The alternative intakes are different versions of the same plan.

2) North Delta Capacity

Among the 15 proposed alternatives, 10 of them have a 15,000 cfs north Delta capacity. BDCP Draft EIR/EIS Chapter 3 Pages 14-16. 13 of the 15 projects have a 9,000 cfs or greater north Delta capacity. *Id.* Only two of the proposed alternatives offer a new conveyance below 9,000 cfs, alternatives 3 and 5. Alternative 3 offers a 6,000 cfs conveyance capacity, which is still over half the capacity of the maximum 15,000 cfs proposals. Alternative 5 offers the lowest cfs capacity of any of the proposed alternatives at 3,000 cfs. BDCP Draft EIR/EIS Chapter 3, Pages 14-16.

The BDCP Draft EIR/EIS concedes: “each alternative... would involve some level of construction of conveyance facilities/improvements to the system for diverting water to the existing SWP and CVP south Delta export facilities.” BDCP Draft EIR/EIS Chapter 3, Page 40. There is a clear discrepancy here between the BDCP’s range of alternatives and those mandated by relevant laws. Ten approaches to diverting the same amount of water out of the same river are not alternative plans; these are different methods to accomplishing the same plan. Also, the BDCP assumes the necessity that every single alternative would require some diversion. There is no proposal that offers a solution for Delta conservation and water management without diversions.



3) Total Conveyance Capacity

The BDCP also considers two types of conveyances. The Dual Conveyance and the Isolated Conveyance. BDCP Draft EIR/EIS Chapter 3, Page 16. The dual conveyance would use the existing south conveyance to supplement the new north conveyance, while the isolated conveyance would rely solely on the new northern conveyance. BDCP Draft EIR/EIS Chapter 3 Page 16.

The Dual Conveyance would keep the existing SWP/CVP facilities at the south Delta to supplement the north Delta diversions. Other than that the northern diversion would serve as the primary diversion. BDCP Draft EIR/EIS Chapter 3, Page 16. In other words, every proposed alternative would still have the capacity to pump 15,000 cfs out of the Delta when combined with the SWP/CVP. See BDCP Draft EIR/EIS Chapter 3, Pages 14-16, Figures 3-9 to 3-18.

The Isolated Conveyance doesn't keep the southern facilities as auxiliary. Id. Alternates 6A, 6B, and 6C are the only alternates with an isolated conveyance, and they all convey 15,000 cfs. Either way, every plan would result in a 15,000 cfs conveyance and every plan other than alternate 9 would result in the construction of a new northern conveyance. The only difference in these plans is that some propose pipelines, some canals, and others a combination of the two. BDCP Draft EIR/EIS Chapter 3, Pages 46-79.

4) Conservation/Stressors

Every action alternative uses the same BDCP Steering Committee Proposed Project that the BDCP uses. BDCP Draft EIR/EIS Chapter 3, Page 14-19. The only alternatives that have some degree of variation are alternatives 5, 7, and 9.

Alternative 5 is similar in every conservation aspect other than it would restore 25,000 rather than 65,000 acres of tidal habitat. BDCP Draft EIR/EIS Chapter 3, Page 71. Alternative 7 only differs in that 40 (rather than 20) miles of channel margin habitat would be enhanced, and 20,000 (rather than 10,000) acres of seasonally inundated floodplain would be restored. BDCP Draft EIR/EIS, Chapter 3, Page 77. Finally, alternative 9 would only differ in locations for restoration or enhancement activities due to the different conveyance method of the project. BDCP Draft EIR/EIS Chapter 3, Page 82.

5) 50 Year Incidental Take Permit

Every plan other than the mandated no action alternative involves the issuance of a 50-year ITP and a NCCP permit. BDCP Draft EIR/EIS Chapter 3, Page 2. Not a single proposed plan attempts to mitigate damages through a plan that would not require the issuance of a ITP, let alone a 50 year ITP, the maximum. See BPCP Draft EIR/EIS Chapter 3, Pages 14-16.

C) THE PROPOSED ALTERNATIVES ARE INADEQUATE UNDER CEQA.

The Draft BDCP EIR/EIS range of alternatives violates CEQA. CEQA requires that projects discuss alternatives or feasible mitigation measures available that “substantially lessen the significant environmental effects of such projects.” Cal. Pub. Res. Code § 21002 (West 2014)(emphasis added). The purpose of an EIR is to “identify alternatives to the project, and to indicate the manner in which those significant effects can be avoided or mitigated.” Cal. Pub. Res. Code § 21002.1(a). Here, the EIR has failed to identify alternatives to the project, and failed provide a manner in which the significant effects could be avoided or mitigated.

Also, the EIR “need not consider every conceivable alternative to a project,” but it must “consider a reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation.” 14 Cal. Code Regs. § 15126.6(a) (West 2014). The

discussion of alternatives must focus on “alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project.” 4 Cal. Code Regs. § 15126.6(b) (West 2014). This is necessary even if these alternatives would impede to some degree the attainment of the project objectives or would be more costly. *Id.*

Thus, CEQA has two general requirements for alternatives: (1) The alternatives must substantially lessen the environmental effects of the project in light of its goals and objectives; and (2) the range of potential alternatives must foster informed decision-making.

1) The proposed alternatives do not lessen significant environmental effects.

The chief goal of alternatives and mitigation measures under CEQA is to avoid environmental harm. *Laurel Heights Improvement Ass’n. v. U.C. Regents*, 47 Cal. 3d 376, 403 (1988). An EIR alternative should “feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects.” 14 Cal. Code Regs. § 15126.6(c) (West 2014). Alternatives considered under CEQA must: “(1) offer substantial environmental advantages over the project proposal; and (2) “[be] feasibly accomplished in a successful manner” considering the economic, environmental, social and technological factors involved.” *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara Cnty.*, 52 Cal.3d 553, 566 (1990).

Here, no alternative provides any substantial environmental advantages over the project proposal and the BDCP Draft EIR/EIS inherently assumes that there is no feasible way to accomplish the goals of the project other than creating a North Delta conveyance.

Every alternative proposed would result in a north Delta diversion, but no alternative makes an effort to substantially lessen one or more of the significant effects. This is evident through the EIR alternatives’ identical total diversion capacity, use of similar intakes/intake locations, use of the exact same conservation measure for every proposed alternative, and the issuance of 50 year incidental take permits for every alternative.

First, the proposed alternatives all retain a 15,000 cfs total diversion capacity. See Draft BDCP EIR/EIS, 3-14. The alternatives may vary in the amount of water they take from the north Delta, but they all retain the capacity to pull up to 15,000 cfs, so no effort has been made to

substantially lessen the environmental effects cause by pumping water from the delta. No matter the alternative chosen, the total diversion capacity remains the same.

Second, the Draft BDCP EIR/EIS alternatives fail to consider smaller intakes, or alternatives that do not require the building of new intakes. Other than alternative 9, the intakes are all the same size, and relatively in the same location, so no environmental harm is mitigated in regards to the intakes either.

Finally every alternative uses essentially the same conservation measures and would attain a 50 year incidental take permit. The alternatives are intended to lessen significant environmental effects of the project, yet none of them are able to reduce the environmental harm done to a point where the take permit could be reduced or eliminated. A possible cause of this is that every single alternative uses almost the exact same conservation method, so no environmental harm would be mitigated from implementing one alternative over another.

2) The Draft EIR fails to provide a reasonable range of alternatives.

The Draft BDCP EIR/EIS fails to provide the required “reasonable range of alternatives to the project or to its location.” 14 Cal. Code Regs. § 15126.6(a) (West 2014). The adequacy of the range of alternatives is governed by the rule of reason. 14 Cal. Code Regs. § 15126.6(f) (West 2014). The rule of reason states that the EIR must set forth those alternatives necessary to permit a well-reasoned choice. *Id.* The two primary factors that must be considered in applying the rule of reason are the feasibility of the alternatives and alternate locations. *Id.*

A feasible alternative must consider suitability, economic viability, availability of infrastructure, general plan consistency, other plans of regulatory limitations, jurisdictional boundaries, and whether the proponent can reasonably acquire, control, or otherwise have control of the alternative site. 14 C.C.R. § 15126.6(f)(1) (West 2014).

Alternative locations must also be considered in determining whether alternatives provide a reasoned choice. Locations that would avoid or substantially lessen any of the significant effect of the project need be considered for inclusion in the EIR. 14 C.C.R. § 15126.6(f)(2)(A) (West 2014).

The BDCP Draft EIR failed to provide a reasonable range of alternatives through its 15 quasi-alternatives that are far too similar in their north Delta diversion capacity, total diversion capacity, intake locations, and conservation measures, to provide a well-reasoned choice.

(a) North Delta/Total Diversion Capacity

The alternatives proposed in the Draft EIR/EIS all assume the necessity of a new diversion in the north Delta and most would still use the existing southern conveyance as well. Supra. This poses multiple problems in terms of CEQA: (1) the alternative north Delta conveyances and total conveyance capacity of the alternatives do not provide any substantial environmental advantages over the BDCP; and (2) the similarity in the alternative diversions do not provide a reasonable range of alternatives to permit a well reasoned choice.

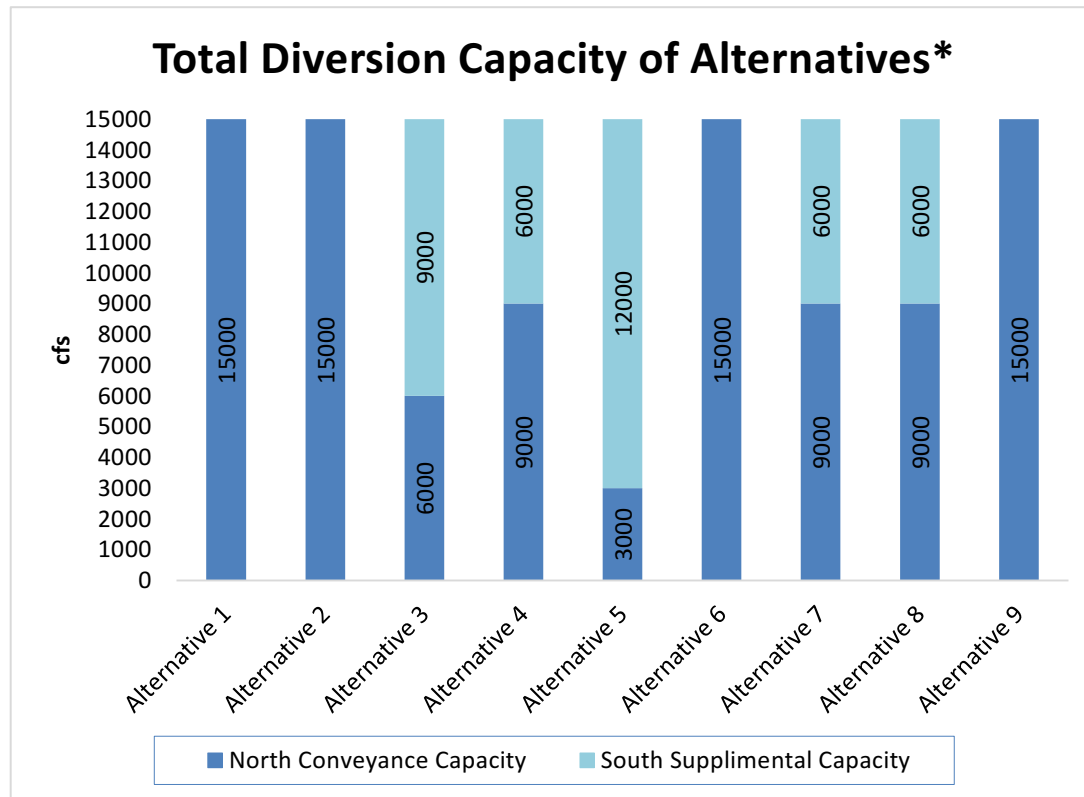
The problem with the lack of environmental advantages of diversion capacity is two-pronged. When the north Delta diversions are viewed in conjunction with the total diversion capacity of each proposed alternative, no substantial environmental impacts are avoided, no matter the choice.

The Draft BDCP EIR/EIS alternatives offer little to no difference in the amount of water the project would pull out of the Delta when the north Delta conveyance is observed in conjunction with the existing south Delta conveyance. The Draft BDCP EIR provides the diversion capacity for the north conveyances.

Even if the alternatives' diversion capacities are taken at face value, it still reveals that two-thirds of the proposed alternatives would have a 15,000 cfs diversion capacity in the north Delta, no different from the BDCP. However, the five other alternatives that seem to offer a smaller diversion from the delta are not much different.

All the dual conveyance proposals would supplement the north Delta diversions with the existing south Delta conveyance, which means that regardless of which action alternative is

observed, every single out would have the capacity to divert 15,000 cfs from the delta.



*Alternatives 1ABC, 2ABC, and 6ABC have been consolidated under their respective numbers.

There is no alternative other than the mandated no action alternative that would provide a solution for water management and restoring the Delta without creating a new conveyance. The BDCP EIR implicitly assumes the necessity of new conveyances, and assumes it necessary to retain the capacity to divert 15,000 cfs from the delta no matter the alternative.

Every alternative proposed with a diversion capacity below 15,000 cfs is a dual conveyance alternative. These plans would all still use the existing south conveyance as well as the new north conveyance. *Supra*. This means that while they may be taking less water from the north Delta, they all have the ability to export 15,000 cfs from the delta. Delta Independent Science Board Review of the Draft BDCP EIR/EIS and Draft BDCP Page B-4 (May 15, 2014). The proposed action alternatives are a bait and switch. On the surface, these plans seem to offer a decrease in the amount of water they convey, but that is because the alternatives discussion only provides half the picture through discussing only the north Delta conveyances.

This similarity in the conveyances of the alternatives fails to give any substantial environmental advantages, since the same water will be pulled out of the delta, regardless of the plan chosen. There is also no reasonable range of alternatives. Every alternative proposed has the capacity to divert the same amount of water, so there was never any real opportunity to consider a substantively different plan. The conveyance capacity of the alternatives is inadequate under CEQA requirements.

(b) Intakes/locations

The BDCP Draft EIR also fails to consider alternatives regarding intakes. None of the proposed alternatives would lessen significant environmental effect nor would they offer a reasonable range of alternatives due to their limited scope. Other than alternative 9, every proposed north Delta intake would be a 3,000 cfs intake regardless of the alternative or the location of the intake. *Supra*. These intakes would all also be along the same 20-mile stretch of the Sacramento River.

The proposed alternative intakes do not provide any level of environmental advantage. The primary purpose of an alternative under CEQA is to mitigate environmental harm. Here, every intake would be a 3,000 cfs pump along the same 20 mile stretch of the Sacramento River. If the goal of the alternatives is to mitigate harm, why does every single one plan on building the same type of intakes along the same stretch of the Sacramento River? The only reasoning that would justify using this narrow scope of alternatives would be if nothing else was feasible, but the BDCP Draft EIR/EIS and the CDWR's Conceptual Engineering Report (CER) both provide feasible solutions that are not mentioned in the alternatives. The CER even listed different type of intakes that the BDCP could use, but none were even mentioned in the plan. BDCP CER 2 – 1-19.

Also, no alternative other than alternative 9 considers any modification to the existing modification to the existing pumps in the south Delta. See, BDCP Draft EIR/EIS Chapter 3 Page 79 (showing plans for changes to existing SWP and CVP, but no other alternative does so). The lack of any modification of this sort is especially suspicious in light of the Conceptual Engineering Report (CER) that was prepared by the CDWR. These feasible modifications would

help mitigate the existing damage done by the CVP and SWP, only one of the proposed alternatives even considers this.

(c) Conservation measure/Take permit

One of the criteria used to eliminate an alternative from detailed consideration in an EIR is “inability to avoid significant environmental impacts.” 14 Cal. Code Regs. § 15126.6(c) (West 2014). Through this criterion alone, every proposed alternative should be unreasonable under this analysis since they all use essentially the same conservation plan, and the same plan would result in no reduction of environmental damage over the BDCP.

The use of essentially the same conservation plan and the same 50-year incidental take permit no matter the selected alternative implicitly concedes that there is not enough of a difference between the alternatives to permit a well-reasoned choice.

D) THE PROPOSED ALTERNATIVES ARE INADEQUATE UNDER NEPA.

The BDCP Draft EIR/EIS fails analysis under NEPA as well as CEQA. NEPA requires that an EIS discuss alternatives to the project. 42 U.S.C. § 4332 (C)(iii) (West 2014). Federal agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. 4332(E) (West 2014). The alternatives are considered the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14 (West 2014). The alternatives under NEPA must (alongside other requirements): (1) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; (2) “devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits”; and (3) “include appropriate mitigation measures not already included in the proposed action or alternatives”; 40 C.F.R. § 1502.14 (West 2014). The BDCP Draft EIR/EIS has failed to meet these listed requirements.

In considering the range of alternatives required under NEPA, the courts apply the rule of reason. The rule of reason requires that the alternatives considered permit a reasoned choice as

far as the environmental aspects of the project. *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). An EIS “need not consider an infinite range of alternatives, only reasonable or feasible ones.” *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). The alternatives must derive from the project’s purpose and objectives. *Id.* Thus, the primary consideration is whether the alternatives permit a well-reasoned choice in light of the project’s purpose and objectives.

The fact that all these alternatives are in reality the same project when observed as a whole raise concerns regarding NEPA on multiple grounds. First, the BDCP has not performed its duty to “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated”. 40 C.F.R. § 1502.14 (a) (West 2014). Second, the BDCP has not included “appropriate mitigation measures not already included in the proposed action or alternatives.” *Id.* Third, because the alternatives are the same plan in different outfits, the BDCP alternatives fail to permit a well-reasoned choice in light of the project’s purpose and objectives.

1) The BDCP does not perform its duty to rigorously explore and objectively evaluate all reasonable alternatives.

The EIS required under NEPA must “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a) (West 2014). The BDCP alternatives are so narrowly tailored that they inherently assume that there is no reasonable and feasible way to carry out the project’s objectives without creating new conveyances.

2) The BDCP has not included appropriate mitigation measures not already included in the proposed action or alternatives.

Every BDCP Draft EIR/EIS alternative retains a 15,000 cfs diversion capacity, a 50-year incidental take permit, and uses essentially the same conservation measures as the BDCP. The alternatives serve the purpose of to mitigate environmental damage but no damage has been mitigated. No matter the alternative, water diverted from the delta, the potential harm to endangered species, and the conservation measures remain essentially identical.

3) The BDCP alternatives fail to permit a well-reasoned choice in light of the project’s purpose and objectives because the alternatives are the same plan in different outfits.

As shown above, there are too many stark similarities between the alternatives proposed by the BDCP Draft EIR/EIS to the BDCP and to each other for the alternatives to permit a well-reasoned choice. If the BDCP Draft EIR/EIS alternatives are the “heart of the EIS,” then the alternatives are inadequate. The fact that they all create a new conveyance, all retain a 15,000 cfs conveyance capacity, all require a 50 year incidental take permit, all but one create 3,000 cfs intakes along the same stretch of the Sacramento River, all culminate to show that there are no alternatives, there is only the same project dressed up in different outfits. These quasi-alternatives provide no choice in alternative projects, only different ways to carry out the same one.

E) CONCLUSION

For the foregoing reasons the alternatives proposed under the BDCP Draft EIR/EIS are inadequate under both CEQA and NEPA. A new EIR/EIS appropriately assessing whether alternatives to the BDCP are available should be prepared.

ADDITIONAL VIOLATIONS OF NEPA AND CEQA

I) PROCEDURAL VIOLATIONS OF CEQA AND NEPA

The BDCP and the accompanying Draft EIR/EIS are plagued with improper procedure and are contrary to key environmental statutes, including CEQA, NEPA, and ESA. This comment addresses several of the critical procedural deficiencies under CEQA and NEPA, as well as deficiencies in §10 of the ESA. The errors committed by the BDCP in this laborious, drawn-out process necessitates, at the very least, redrafting the EIR/EIS. Several of the issues, including the structure and presentation of the Habitat Conservation Plan (HCP) mandate that the project not move beyond the planning stages.

CEQA and NEPA require that any project with potential environmental impacts prepare a document that thoroughly analyzes the anticipated impact. While there is some difference in how the state and federal statutes then approach what actions should be taken, the intent and

practicality of the final document is essentially the same: to sufficiently present and analyze the environmental impacts so that decision makers and the general public are well informed. (*Laurel Heights Improvement Ass'n. v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 405 (1988)) (for the CEQA requirement); (*Or. Natural Desert Assn. v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1122 (9th Cir. 2010)) (for the NEPA requirement). In order to meet the broad intent and detailed requirements of these acts, a series of guidelines have established the procedure and basic content of the EIR/EIS. Further, case law has established the boundaries of what is considered a sufficient analysis under the guidelines. Particularly relevant to the deficiencies of the BDCP's Draft EIR/EIS are requirements regarding the sufficiency of information within the document. (14 Cal. Code Regs. §15151) (CEQA sufficiently informational); (*Dry Creek Citizens Coal. v. Cnty. of Tulare*, 70 Cal. App. 4th 20, 26 (1999)) (interpreting NEPA to determine that full disclosure qualifies as sufficiently informational). In tandem with the sufficiently informational requirement, the draft EIR/EIS must take a "hard look" at the environmental impact under NEPA. (*Ctr. for Biological Diversity v. U.S. Dept. of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010)) (for the NEPA requirement). The document can, of course, only do this if it is sufficiently informational. Under both statutory requirements there are serious breaches of NEPA and CEQA guidelines. In short, the Draft EIR/EIS does not meet the standards of a sufficiently informational document and must be redrafted.

The BDCP, as a whole project, is also riddled with fatal issues under the ESA. As presented the Plan is an infrastructure project masquerading as a Habitat Conservation Plan (HCP) in order to obtain the required Incidental Take Permits under §10 of the ESA. There are significant flaws with the process the BDCP uses to present the plan to the Federal issuing agencies. Consequently there are also significant flaws with the steps that are required to validate the BDCP as a HCP. These flaws bring serious questions of the intentions and utility of the BDCP and consequently, the underlying legality of the entire project.

A) THE DEFICIENCY IN THE ARTICULATION OF PROJECT OBJECTIVES & LANGUAGE IS CONTRARY TO CEQA REQUIREMENTS.

CEQA requires that any proposed project state the project goals in the Environmental Impact Report (EIR). (CEQA Guidelines §15124(b)). This statement should be "clearly written" and "help the lead agency develop a reasonable range of alternatives to evaluate in the EIR

and... aid the decision makers in preparing findings or a statement of overriding considerations.” (*Id.*). The statement of objectives must also contain the fundamental, “underlying purpose of the project.” (*Id.*). The inclusion and sufficiency of these elements are essential in determining the overall validity of the EIR. Put simply, the Draft EIR for the BDCP does not fulfill even these basic requirements.

The BDCP vainly attempts to conform to CEQA requirements through form alone. It states that the fundamental project objectives are to “make physical and operational improvements to the SWP [State Water Project] system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and the CVP [Central Valley Project] south-of-Delta, and water quality in a stable regulatory framework, consistent with statutory and contractual obligations.” (EIR/EIS, 2-2). Laid out in this single sentence are several very distinct and very different goals. These distinct goals break down into either increasing water exports to the Central Valley or restoring the already decimated Delta ecosystem.

The language of the Draft EIR echoes the goals articulated by the Sacramento-San Joaquin Delta Reform Act of 2009 “to provide for the sustainable management of the... [Delta] ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure....” (Cal. Water Code §85001(c) (West 2014)). The major deviation between the two sets of fundamental objectives is the description of securing the water supply. The BDCP focuses on the water supply for south-of-Delta regions, whilst the Delta Reform Act is meant to assure water security for the entirety of California, including the watersheds that feed the Delta. This tension between the statutory objectives and the BDCP’s CEQA objectives is indicative of the inadequacy present in the Draft EIR.

The EIR breaks down the overall project objectives into several programmatic objectives. These objectives include obtaining “incidental take permits for covered species,” “improv[ing] the Delta ecosystem,” and “restor[ing] and protect[ing] the ability of SWP and CVP to deliver up to full contract amounts.” (EIR/EIS, 2-2—2-3). The BDCP then addresses several specific conveyance issues on the programmatic level, including improving safety and infrastructure in light of seismic and climate change threats; and at the very bottom of the list, “identify[ing] new

operations and a new configuration for conveyance of water entering the Delta from the Sacramento River watershed to the existing SWP and CVP pumping plants in the southern Delta by considering conveyance options in the north Delta that can reliably deliver water.” (EIR/EIS, 2-3—2-4).

At the programmatic level, the BDCP proponents have essentially glossed over any concrete environmental goals for the project and focused exclusively on water conveyances and ensuring there is money to support the massive investment in the infrastructure required to support increased water transfers. Of the acknowledged programmatic goals, two deal with conservationist measures. One of these, the processing of ITPs, ensures that any other activity conducted under the auspices of conservation will not be subject to prosecution under the Endangered Species Act, protecting the plan proponents in the likely event that endangered or threatened species are irreversibly harmed. The other programmatic conservation goal is AS BROAD AS the overall project goal regarding conservationist measures. The wording of the fundamental project goal and programmatic goal is essentially the same. There are no specific elements enunciated or programmatic actions even remotely developed in this introductory statement that detail how the BDCP plans to “improve the Delta ecosystem.” This format is incompatible with the CEQA guidelines for outlining the project goals and the statute’s overall intent to provide stringent environmental protection. (*Mountain Lion Found. v. Fish and Game Comm’n*, 16 Cal. 4th 105, 112 (1997)) (agencies must interpret the statute to award the fullest environmental protection when developing goals).

The Draft EIR’s statement of objectives is neither clearly written nor useful in developing a range of alternatives. It does not meet either of the primary, statutory goals that a statement of objectives must fulfill (providing information for policy makers and those who did not participate in the process to make a good decision). The statement is obfuscation in plain words, a statement of misinformation that eviscerates the concept of conservation in the same utterance that it sets ecosystem protection as a primary goal. The reason behind this is simple: where the plan delves into the specifics of water conveyances and infrastructure, it keeps the conservation methods intentionally broad, thereby absolving itself of any duty to discuss concrete conservationist measures. The plan attempts to follow CEQA guidelines and the requirements of the 2009 Delta Reform Act, but only does so solely through lip service; instead favoring the

interests of water-hungry plan proponents. This structure artificially limits the EIR to considering ONLY conveyance measures and alternatives. In refusing to adequately address conservation goals on the same programmatic level as the conveyance goals in the statement of objectives, the BDCP proponents have violated CEQA guidelines. The project's underlying and specific goals have been artificially constructed. As an artificial construction, the EIR fails basic CEQA requirements and cannot, under any circumstance, be considered sufficiently informational. At the very least, the statement of objectives must be redrafted to include an outline of specific conservation methods or desired outcomes to fully inform policy makers and the public of the basis for the development of the BDCP.

B) THE DEFICIENCY WITH THE PROJECT OBJECTIVES & LANGUAGE IS CONTRARY TO NEPA REQUIREMENTS

The purpose statement of an Environmental Impact Statement (EIS) must “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” (40 C.F.R. §1502.13 (2014)). This regulation allows the preparing agencies a significant amount of leeway in defining a project and expressing the underlying goals. The courts have routinely upheld the broad nature of the regulation; but the BDCP still fails to conform to even this basic statutory requirements.

The Draft EIR/EIS is a joint document, designed to fulfill both CEQA and NEPA requirements. Immediately following the CEQA objectives and purpose statement, the BDCP lists objectives and needs in an effort to satisfy the NEPA regulations. In the purpose statement, the document reiterates the attempts of the Plan to provide for the co-equal goals established in the Sacramento-San Joaquin Delta Reform Act of 2009 by “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (EIR/EIS, 2-5) (This seemingly contradicts the CEQA purpose of assuring only south-of-Delta water supplies). The purpose statement breaks down three primary goals of the BDCP: dealing with applications for ITPs, “improv[ing] the Delta ecosystem,” and allowing the SWP and CVP to deliver up to full contract amounts for water deliveries. (EIR/EIS, 2-4).

The Draft EIS then enunciates the underlying purpose and underlying need in consecutive sections, with further subsections relating to specific needs the Plan proponents have identified in

the Delta, including: Delta Ecosystem Health and Productivity, Water Supply Reliability, and Delta Hydrology and Water Quality (§2.4; §2.5; 2-5.1-2-5.3). (EIR/EIS, 2-4—2-7). These sections divulge vague, summary descriptions of the issues facing the Delta. These descriptions include a primarily pessimistic look at the declining ecosystem health, an emphasis on the water disparity that plagues California, and brief mentions of climate change and other challenges to a stable Delta hydrology. (EIR/ESI, Ch. 2, 2-4—2-7). Essentially, these need sections identify the severe issues facing the Delta, without any acknowledgement of the complex interplay and competing interests also present.

When evaluating project goal and need statements under NEPA, there are minimal guiding regulations; essentially requiring a brief description of the underlying purpose of the project and the alternatives presented in the EIS. (40 C.F.R. §1502.13 (2014)). In addition to the proscribed guidelines, there is also a significant amount of case law that guides how a project should be defined, including the description of a project's purpose AND need. The central element of an EIS is a good faith and “objectively hard look” at the potential environmental impact of any proposed project. (*City of Sausalito v. O’Neil*, 386 F.3d 1186, 1207 (9th Cir. 2004)). In order for this requirement to be met, the Draft BDCP EIS must contain sufficient information, including a valid, concise, and informative purpose and need statement. *Id.*

The purpose statement contained in the EIS seems to interpret the brevity requirement in favor of vagueness. This vagueness leads to the same issue that plagues the Project under CEQA regulations: artificially narrow construction of project goals. An EIS cannot define a project with artificially narrow goals. (*Jones v. Regents of Univ. of Cal.*, 183 Cal. App. 4th 818, 826-27 (2010)). Overly broad or possibly contradictory project goals are not acceptable because they preclude meaningful disclosure of environmental impacts. (*Env’t Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm’n*, 470 F.3d 676 (7th Cir. 2006)); (see also *Simmons v. U.S. Army Corps of Eng’rs* 120 F.3d 664 (7th Cir. 1997)).

The BDCP falls into the category vehemently derided by the courts. The co-equal goals offer an overly broad definition that has allowed for the manipulation of alternatives to focus solely on water conveyance. The subsequent purpose and need statements further emphasize a single goal (water conveyances) instead of the established coequal goals. In doing so, the EIS

issued for the BDCP violates the Congressional intent behind NEPA. In constructing the project definitions to not award equal weight to the established co-equal goals, the EIS has violated NEPA procedural requirements. Focusing almost solely on conveyance and water security issues, at the expense of the already identified conservationist goals fails the sufficiently informational requirement. As such the document cannot be considered valid and cannot be adopted without redrafting and recirculation of a new Draft BDCP Plan and a new Draft EIR/EIS.

C) THE DRAFT EIR/EIS DOES NOT TAKE A SUFFICIENTLY HARD LOOK AT THE PLIGHT OF THE DELTA SMELT.

NEPA and CEQA both require the EIR/EIS to be sufficiently informational. (Cal. Water Code §15121(a); 40 C.F.R. §1502.1). In addition to this requirement, the EIR/EIS must also take a “hard look” at the environmental impacts of any proposed project. (Cal. Water Code §15121(a) (“inform... of the significant environmental effect of a project [and] identify possible ways to minimize the significant effects...”); (40 C.F.R. §1502.1 (“Statements shall be concise, clear, and to the point, and shall be supported by evidence....”)). (See also Cal. Water Code §15126.2).

The courts have unabashedly adopted this doctrine in determining the sufficiency of an EIR/EIS. (See generally *City of Sausalito v. O’Neill*, 386 F.3d 1186 (9th Cir. 2004); *Nat’l Audubon Soc’y v. Dept. of the Navy*, 422 F.3d 174 (4th Cir. 2005)). When evaluating a document under CEQA, the hard look doctrine requires that the EIR describe significant environmental impacts and describe any possible mitigation measures or why the project should move forward in light of the impacts. (Cal. Water Code §15126.2(a)-(b)). In NEPA practice, the hard-look doctrine means examining and disclosing all of the significant environmental impacts in the EIS, as well as examining reasonable alternatives. (40 C.F.R. §1502.14(a)).

The BDCP and its accompanying EIR/EIS do not meet the hard-look disclosure requirements under CEQA and NEPA regulations, beyond the project description issues raised above. Rather than the frank and full look required by the law, the Plan and its associated documents instead force false optimism onto the ecological challenges facing the Delta; sacrificing objectivity in order to satiate the demand for water in the Central Valley. This section

of the comment focuses on the issues particularly relevant to the already heavily litigated Delta smelt, and the disparities between existing conservation plans and the BDCP's treatment of the issue.

1) The BDCP Does Not Take a Sufficiently “Hard Look” at the Major Stressors Affecting the Delta Smelt Population.

Just one example of BDCP deficiencies is the incredibly optimistic assessment of the threat facing the Delta smelt. Normally, optimism is to be commended, except where realistic expectations are both the norm and required by law. In regards to the Delta smelt, there are several critical issues; including salvage, salinity, and critical habitat modification, that are not addressed sufficiently in the BDCP documents. Consequently, the EIR/EIS fails to take the required “hard look” at the environmental impact of the BDCP.

The issue of overall salvage and take is dodged throughout the majority of the BDCP and the Draft EIR/EIS. “Salvage of delta smelt at the south Delta facilities could increase in the future if the population size increases as a result of the BDCP or other actions; however, this will not represent an increase in loss as a proportion of the population.” (Plan, 5.5-35). The above statement blithely assumes that salvage will not be a problem with any new north Delta facilities, and any increased salvage at the existing south Delta facilities will be the result of overall increased Delta smelt population. Such an assessment ignores several critical factors regarding the threatened nature of the Delta smelt. It is an oversimplification of the factors resulting in the overall decline of the Delta Smelt population and a blatant misrepresentation of the overall stressors on the Delta smelt.

Furthermore the Plan states, “[m]any of the conservation measures proposed under CM1 constitute a continuation of existing operational criteria being implemented under the biological opinions... that currently constrain State Water Project and Central Valley Project operations.” (Plan, ES-10). This statement seems to presuppose that the existing scientific information and conservation actions regarding the Delta smelt will feature prominently in the BDCP and any future changes to the Delta infrastructure. This assessment is blatantly not the case; there are only a smattering of references to the previous Biological Opinions and prior science throughout the BDCP. There is no succinct, centralized section that discusses the integration of the BDCP

with existing, legally required ecological initiatives. This deficiency is a violation of the “hard look” required under both CEQA and NEPA, and mandates the redrafting of the EIR/EIS.

The existing BiOp (from 2009) identifies multiple stressors on the Delta smelt population, including: decline in food availability, predation, multiple contaminants, low dissolved oxygen, excessive turbidity, alterations in Delta hydrodynamics, increases in temperature, increases in salinity, and entrainment. (*Independent Expert Panel Review of the Family Farm Alliance’s Information Quality Act Correction Requests*, 5-6, prepared for the Environmental Protection Agency (2009), available http://www2.epa.gov/sites/production/files/documents/ocap-iqa-appeal-response-expert-review_0.pdf). The BiOp, and follow-up independent reviews, notes that it is nearly impossible to predict which of the stressors has the most impact on the Delta smelt population. However, it does identify long-term changes, such as outflow and salinity; and the decline in food resources as key factors. (*Id.* at 6). While entrainment is a major issue (and perhaps one of the most easily managed) for the delta smelt, it is also one of the least critical in fostering the recovery of the species. (*Id.*). The BiOp, the myriad of litigation involving the validity of the BiOp, and the independent evaluations of the BiOp all make this abundantly clear.

Yet despite the numerous other critical factors affecting the Delta smelt, entrainment is one of the primary focuses of the BDCP and its accompanying EIS. In constructing the north of Delta conveyance facilities, the BDCP touts improved entrainment systems than the existing facilities south of Delta. In limiting entrainment of the Delta smelt, the BDCP hopes to fulfill its conservation goals without substantively addressing any of the other numerous (and arguably more critical) factors relating to destruction of the fish’s habitat.

This myopic approach to Delta smelt conservation is in direct contradiction to NEPA guidelines. The limited scope of the EIS’s evaluation of the proposed project on the Delta smelt is inconsistent with the “objective hard look” standard. Simply focusing on one element affecting the Delta smelt does not fully disclose the environmental risks or impacts in any meaningful way. The refusal to incorporate good, existing scientific data regarding the threats and proposed resolutions to recover the Delta smelt population cannot be deemed valid. At best it

is willful ignorance of existing scientific data; at worst it is a deliberate attempt to subvert required conservation programs through obfuscation.

2) The BDCP Does Not Sufficiently Integrate Existing Science and Therefore Fails to Take a Sufficiently Hard Look at the Conservation Measures Required for the Delta Smelt Population.

The Draft EIR/EIS places a small, two-paragraph description of the relationship between the BDCP and the existing Biological Opinions in Chapter 1, which is cross-referenced in the Executive Summary. (Plan, 1-9). This minor reference is fundamentally flawed in several ways. First and foremost, it refers to a state of the Biological Opinion that is no longer true. As of March 2014, the Ninth Circuit certified the existing BiOp as valid. (*San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014)). The BDCP instead maintains that this BiOp must be revised and brushes aside any further discussion of being bound by the existing science. (Plan, 1-9) (“In 2011, these BiOps were remanded... [and] revised BiOps are to be issued by December 1, 2014 (USFWS) and February 1, 2017 (NMFS)...the joint BiOp for the BDCP will cover only those operations that occur after the new water conveyance facilities are operational [after 2026]...”). This presupposition ensures that the discussion regarding necessary steps to conserve and foster repopulation of the Delta smelt under the BDCP is fundamentally flawed.

The BDCP does discuss the preexisting Biological Opinion for the Delta smelt in very minor detail.

The BDCP is expected to result in very low levels of entrainment relative to conditions prior to implementation of the USFWS (2008a) BiOp, and is expected to maintain total proportional entrainment loss across all SWP/CVP Delta export facilities at levels below those achieved under the current USFWS BiOp. The BDCP provides the additional benefit of natural communities restoration, which is expected to increase the extent of tidally influenced habitat, including tidal marshes, and shallow subtidal habitats, in the Plan Area. Proposed restoration areas are spatially diverse, are within and adjacent to currently important habitats, and are expected to provide a range of habitat conditions, SOME [emphasis added] of which will be suitable for delta smelt spawning and rearing.

(Plan, 5.5-35). Further discussion of the USFWS BiOp occurs over the course of about a page. The BDCP concludes that impacts will be beneficial on the poor Delta smelt, with “low certainty.” (Plan, 5.5.1-42). The limited discussion of the overall Biological Opinions, and

particularly discussion regarding the Delta smelt, ensures that the neither the Draft BDCP nor the Draft EIR/EIS executes the required hard-look at environmental impacts.

Subsuming the existing BiOps into a larger regulatory framework dilutes and quietly disappears fundamental and mandated recovery methods. Refusing to address the existing BiOps evidences a desire to avoid legally mandated conservation steps. Furthermore, the time gaps between the existing BiOps and the proposed, integrated opinions for the project allow for severe degradation and the possible extinction of the Delta smelt. In structuring the BDCP's proposed integration with existing, legal requirements in such a tenuous manner, the plan proponents are attempting to free themselves from the constraints imposed by existing conservation requirements. This is again a violation of the "hard look" required under NEPA and CEQA. Rather than acknowledge the existing science and preexisting conservation requirements, the BDCP has only mentioned that these elements exist before promoting its own optimistic assessment of the stressors affecting the Delta smelt. This is contrary to the law, and requires the redrafting of the EIR/EIS in order to fully embrace existing science and provide the mandated "hard look."

3) The BDCP Does Not Take a Sufficiently "Hard Look" at the Future Requirements of Conservation in the Delta in its Approach to Structuring Future Biological Opinions in either the Plan or the Draft EIR/EIS.

In addition to not adopting, or at least mostly appropriating, the existing Biological Opinion in a faithful attempt to conserve the Delta smelt, the production any further Biological Opinions will be disturbingly fragmented. Such production is contradictory to the stated goal of encapsulating everything Delta-related in a stable regulatory framework. The BDCP discusses a revised BiOp to cover activities that occur "after the new water conveyance facilities are operational." (Plan, 1-9). In the interim, the Plan wants the existing BiOps to remain the governing documents; all but precluding usage of new BiOp documents during the 50-year life of the permit, with the exception of the single joint document to be produced in approximately 2026. (Plan, 1-9). The plan proponents are seeking a fifty-year carte blanche without any attendant responsibility, and in the process assuring species destruction through a subversive and abusive ESA process.

The Draft EIR/EIS seems to confirm the fatalistic impulse behind plan proponent's logic, stating, "fundamental changes to the Delta are certain to occur... add[ing] to the difficulty of resolving the increasingly intensifying conflict between the ecological needs...and the need to provide adequate and reliable water supplies." (EIR/EIS, 2-7). This statement solidifies the Plan's attitude towards conservationist measures. With the changing nature of the Delta ecosystem, the plan attempts to persuade us that it will be unable to accurately accommodate conservation needs. This will certainly be true if it cannot abide by and produce accurate and timely biological opinions. In approaching the BiOps in such a fragmentary way, the BDCP is creating a self-fulfilling prophecy of species extinction, contrary to the law.

D) CONCLUSION

Spread across the Draft EIR/EIS and the overall BDCP, are significant and fatal errors in procedure and structure. While this is unsurprising giving the complex and convoluted nature of CEQA and NEPA, it does not mean that the BDCP should be shown leniency. The project is simply too complex and far-reaching to ignore these serious deficiencies. In determining project descriptions, the Draft EIR/EIS fails the sufficiently informational and "hard look" requirements under NEPA. The project is ill defined and vague. This necessitates, at the very least, redrafting the project objectives to more fully encompass the established co-equal goals of conservation and water security. Furthermore, the Draft EIR/EIS fails the "hard look" requirements by not fully incorporating the best existing science, including existing Biological Opinions, regarding the stressors affecting the Delta smelt. This is a violation under both CEQA and NEPA. Only through serious redrafting and revision can all of the issues currently affecting the BDCP be fixed, and until that time, the legal requirements for the project to move forward have not been met. Due to the complexity of the issues, it may be best to simply abandon the project before committing massive amounts of funding to an improper project.

II) FAILURE TO ANALYZE CUMULATIVE IMPACTS UNDER NEPA AND CEQA

The Bay Delta Conservation Plan is an enormous project which, if approved, would cause widespread, environmental impacts. However, many of these impacts remain unevaluated in the Draft BDCP and EIR/EIS. These impacts, even if individually insignificant in some instances, accumulate to cause significant cumulative impacts. Some of the BDCP's significant

cumulative impacts include the geographic scope of effects, dredging, operational impacts to upstream reservoir operations, and the recreation industry.

As a result of California's history with large projects, we can expect the initial projections to be inflated by the time the project reaches implementation. "[A]cross the globe, large infrastructure projects almost invariably arrive late, over-budget and fail to perform up to expectations." Dan Walters, Op-Ed., *Is Bay Bridge Fiasco a Harbinger for Future Projects?*, Sac. Bee, July 28, 2013, §A3. (quoting Bent Flyvberj, "Delusions and Deception in Large Infrastructure Projects." (51 California Management Review 170) (Winter 2009)). The underlying reasons are "delusions born of ignorance, deceptions to make projects sound more feasible than they truly are, and bad luck." (Dan Walters *supra*). The BDCP is "based on assumptions of need and utility that are questionable and may be ... 'delusions' or perhaps 'deceptions.'" (Dan Walters, quoting Bent Flyvberj *supra*). In fact, limiting the analysis of cumulative impacts makes the "project[] sound more feasible than [it] truly [is]" but the overall report is misleading. To prevent this misrepresentation of project benefits, the BDCP must be all-inclusive, transparent and accessible so that the public can adequately review the proposal before further action is taken.

Both NEPA and CEQA require that the lead agency assess the cumulative environmental impacts of a project using the best available information and tools available. The laws mandate that a cumulative impact analysis is required when a project is proven to be significant in combination with the effects of past projects, other current projects and future projects. Further indicators that an analysis is necessary are the past, present and foreseeable future projects that are closely connected that will have a probably effect on the environment.

However, the Delta Independent Science Board cautions that danger of speculation does not allow an agency to omit discussion of uncertainties surrounding the effects of a project: "[A]voiding clear articulation of uncertainties is not the same as avoiding speculation." Delta Independent Science Board, *Review of the Draft EIR/EIS for the Bay Delta Conservation Plan*, (May 15, 2014). Excluding uncertainties deprives the public and government agencies of the opportunity to evaluate and assess unanticipated impacts on human activity and the environment.

The current, narrow geographic scope must be expanded to include all potential impact areas, such as effects from dredging tunnel muck and effects on the recreation industry in and around the Delta region. Here are a few examples of issues that are not properly considered on a programmatic level.

A) LIMITED GEOGRAPHIC SCOPE OF EFFECTS

The Plan's geographic scope is narrowly limited to where the new infrastructure will be located and where it will directly or indirectly impact previously built resources. (EIR/EIS, 18.3.3). San Pablo Bay and the San Francisco Bay are two impacted bays that are not included in the BDCP's defined boundaries for the EIS. *Id.* This excludes cumulative impacts from the Draft BDCP:

The Plan Area terminates at Carquinez Bridge, effectively excluding the entirety of San Francisco Bay. As a result, impacts to water quality, aquatic habitats, fish and wildlife, and estuarine dynamics in the San Francisco and San Pablo Bays have not been considered adequately in the Draft EIR/EIS and Effects Analysis. 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.

Letter from Barbara Salzman, President, Friends of the San Francisco Estuary, to Felicia Marcus, Chair, Water Resources Control Board (Oct. 30, 2013) (accessed on July 17, 2014). The Draft EIR/EIS states that it, "consider[s] significant effects of the proposed alternatives within certain boundaries as determined by direct impacts, tunnel areas, temporary and permanent power, visual or auditory impacts and impacts to national register listed districts or potential districts. (EIR/EIS, 18-45). However, the consequences that will result from the activities within the boundaries of the current geographic scope as defined by Chapter 18 will "extend downstream to affect [excluded] bays." Delta Independent Science Board, to Randy Fiorini, Chair, Delta Stewardship Council, and Charlton Bonham, Director, California Department of Fish and Wildlife (May 15, 2014) (accessed on July 17, 2014). Changes in these omitted bays as a result of the proposed new water conveyance infrastructure will impact the Draft BDCP's Plan Area. *Id.* For example, any changes in sedimentation within the Delta will cause environmental impacts outside the plan's geographic scope. *Id.* at 9. Further, the San Pablo Bay and the San

Francisco Bay will affect the “tidal fluxes and salinity intrusion into the Delta. Many fish species also migrate into or through these areas.” *Id.* A geographic scope that fails to include the San Pablo Bay and the San Francisco Bay will fail to analyze the whole of the cumulative impacts.

B) TUNNEL MUCK AND DREDGING MATERIAL

The enormous size of the new infrastructure would require substantial excavation of land in addition to treatment of the resulting “tunnel muck”. The Plan has increased in size from a proposed diameter of 33 feet in 2012 to what is now the Preferred Alternative, Alternative 4. (Administrative Draft EIR/EIS, pp. 3-54, 3C-17, March 2013). Under Alternative 4, the conveyance would be about 35 miles long, 150 feet underground, with an external diameter of 44 feet. *Id.* In order to install these enormous tunnels, “Tunnel muck” (also known as dredged material) needs to be excavated: “In the world of tunneling, “muck” refers to the excavated, toothpaste-like material that is bored from the ground below and transported by conveyor belts or rail carts to a staging area above...tunneling can produce a lot of material.” Richard Stapler, Deputy Director, Communications, California Natural Resources Agency, “Muck: A Reusable Material from Tunneling” (June 13, 2013) (accessed on July 22, 2014).¹ The Draft EIR/EIS alleges that the attempts to mitigate the inevitable adverse effects to air quality from the extensive and necessary use of large, construction machinery: “Site selection...such as locations within 10 miles of construction feature would minimize truck travel to help address air quality effects [and] implementing a construction equipment exhaust reduction plan...would also help reduce adverse effects.” (EIR/EIS, 31.5.1.4). Regardless of the Plan’s proposed travel zone, there will be a substantial increase in greenhouse emissions from countless trips by large trucks to move the excavated tunnel muck away from the construction sites: “[I]mpacts include pile driving, every day for a year. Trucks will be moving “tunnel muck,” excavated to build the tunnels, 24 hours a day, seven days a week—causing an increase in greenhouse gas emissions.” Galen Kusic, *Skepticism Growing toward ‘Twin Tunnels’ Project: Gov. Brown’s Bay Delta Conservation Plan in Hot Water*, San Francisco Bay View (May 7, 2014) (accessed July, 17, 2014).² Furthermore, the Draft EIR/EIS only mentions a ten mile zone for mitigating the trucks

¹ http://baydeltaconservationplan.com/news/blog/13-06-13/%E2%80%9CMuck_%E2%80%9D_A_Reusable_Material_from_Tunneling.aspx

² <http://sfbayview.com/2014/05/skepticism-growing-toward-twin-tunnels-project-gov-browns-bay-delta-conservation-plan-in-hot-water/>

emissions, but omits any reference to final dump sites and reuse sites that will undoubtedly adversely affect the air quality. The expansive tunnels will demand a great number of trucks to remove the tunnel muck.

The Draft EIR/EIS suggests that not only will they mitigate the adverse effects to the environment resulting from excavating the “tunnel muck” but that these measures will result in positive contributions: “[Selected reuse strategies, implementation of spoils, RTM, and dredged material reuse plans could result in beneficial effects associated with flood protection and response, habitat creation, and depth to groundwater in areas where the ground level is raised.”

(EIR/EIS, 31.5.1.4). The Draft EIR/EIS focuses on the reusability of the tunnel muck, but fails to adequately address the costs associated with the excavation and transportation of vast amounts of the earth. (EIR/EIS, 31.5.1.4). The Draft EIR/EIS recites a litany of benefits from reuse of the excavated land: “It is anticipated that one or more of the disposal and reuse methods could be implemented in any individual spoil, reusable tunnel material (RTM), or dredged material site.” (EIR/EIS, 31.5.1.4). While the report lists likely adverse effects resulting from reuse of the “tunnel muck”, it fails to explore the costs associated with “implementation of material reuse plans”:

Depending on which combination of these approaches is selected, implementation of material reuse plans could create environmental impacts related to ground disturbance, noise, release of hazardous materials, traffic, air quality, water quality, and Important Farmland or farmland with habitat value for covered species.

Id. The Draft EIR/EIS does not adequately discuss costs associated with the disposal and reuse of spoils or the costs from the expansive material dredging: “Under the estimates released by the state, building the tunnels, three large intakes on the river and associated facilities would cost \$14.5 billion.” Bettina Boxall, *California Plan to Overhaul Water System Hub to Cost \$25 Billion*, Los Angeles Times (May 29, 2013) (accessed July 17, 2014).³

³ <http://articles.latimes.com/2013/may/29/local/la-me-delta-cost-20130530>

C) OPERATIONAL IMPACTS TO UPSTREAM RESERVOIR OPERATIONS

Despite the tunnels dependence on incorporating upstream reservoirs in order to ensure flow exports, the “BDCP analysis assumes no operation impacts to upstream reservoir operations.” Restore the Delta, *BDCP Would Make All This Worse*, quoting the Bureau of Reclamation’s comments on the Draft BDCP’s EIS (July 31, 2013) (accessed July 17th, 2014).⁴ The Draft BDCP dumps the issue of impacts to upstream reservoirs in a brief section entitled “Issues Not Carried Forward for Detailed Analysis”. The Draft EIR/EIS states “operational changes are not carried forward for detailed analysis because they are *too speculative* for meaningful consideration.” (EIR/EIS, 18.3.4) (emphasis added). In addition to pointing to climate change as a main contributor to upstream impacts, the plan declares that “current modeling shows that precipitation, rather than operational rules, is the largest cause of fluctuation at upstream reservoirs.” *Id.* While saying that fluctuations prevent a proper analysis, the report identifies that “Alternative 4 however, has some potential to increase fluctuation of reservoirs levels at Lake Oroville.” *Id.*

D) ADVERSE EFFECTS ON RECREATION

It is undisputed that the Delta is a popular, lucrative destination for water and land based recreation. The overlap in these activities increases the appeal of the Delta and many visitors engage in multiple activities in one day. The Draft EIR/EIS lays out a review of recreation in the Delta, including the many different activities on a daily basis: “Recreation users in the Delta often participate in multiple activities during a daily visit... [such as] boating and fishing...wildlife viewing, sightseeing, walking, picnicking, and camping.” (EIR/EIS, 15.1.1.1).

The Draft EIR/EIS accepts that the Delta is one of the premier attractions for land and water activity: “These waterways are used for boating, fishing, and other water-based and water-related recreation opportunities and are among the most popular waterways in the state for the pursuit of these activities. (EIR/EIS, 15.1.1.2.) For instance, the Delta is the fourth most popular boating destination: “Portions of the Delta...accounted for nearly half of the registered boats in the state...” (EIR/EIS, 15.1.1.1). Further, competitive activities not only bring positive attention to California but also bring revenue for the Delta region: “The Delta is one of the most

⁴ <http://restorethedelta.org/bdcp-would-make-all-this-worse/>

productive trophy bass fisheries in the nation, and numerous bass tournaments are held in the Delta throughout the year, including several corporate-sponsored tournaments (California Department of Fish and Game 2007a).” (EIR/EIS, 15.1.1.1).

The Draft EIR/EIS limits its conservation plan directly to lands overseen by the United States Fish and Wildlife Service: “The conservation plan identifies goals, objectives, and strategies only for the lands that are currently, or soon to be, managed by USFWS, regarding habitat restoration and enhancement and protection of cultural resources.” (EIR/EIS, 15.2.1.2). The Draft EIR/EIS projects that the timeline for construction undertakings “adjacent to or within certain recreation areas or sites could last from 1 to 7.5 years; Temporary effects (loss of recreation opportunity) are considered short-term if the duration is 2 years or less, or long-term, if the duration is more than 2 years.” (EIR/EIS, 15.3.3).

The Draft EIR/EIS assumes that because there is not absolute data projecting long-term use at certain recreation areas, the Draft EIR/EIS can circumvent analysis of areas managed through leases from outside agencies:

While recreational activities could be disrupted at ponds used for water ski instruction and hound racing, access to these parcels is subject to lease agreements with DWR. Due to the nature of these lease agreements, these activities could not reasonably be expected to continue for the long-term with any definitiveness, therefore, these facilities would not be considered long-term and/or well-established recreational facilities.

(EIR/EIS, 15.3.3.9).

The Draft EIR/EIS states that “property values may decline in areas that become less desirable in which to live, work, shop, or participate in recreational activities. For instance, negative visual- or noise-related effects on residential property could lead to localized abandonment of buildings.” (EIR/EIS, 16.3.3.9). But, Bill Wells, Executive Director of the California Delta Chamber of Commerce, commented that many of the businesses in the Delta that will feel the effects of the plan are locally owned businesses that are unlikely to withstand a shift to recreation activity in the region following California’s economic downturn. *Peripheral Tunnels Economic Impacts Inflated: Gov. Brown Refuses to Conduct Benefit-Cost Analysis; Cost Estimate has Tripled, Public will Pay*, Restore the Delta (August 5, 2013) (accessed on July 23,

2014).⁵ Agriculture, tourism and recreation are the main sources of commerce in the Delta. *Id.* According to the California Delta Chamber of Commerce:

While 75% of Delta boaters live within 75 miles of the Delta the region attracts visitors from all over the world with its 1,000 miles of waterways and vast opportunities for land based too. [But] [p]roposed disruptions to State Routes 4, 12, and 160 will limit the number of automobiles that visit the area. The 24 hour per day operations of pile drivers and huge trucks hauling ‘muck’ will further disrupt traffic as well as boating, fishing, hunting, bird watching, wine tasting and casual day trips to area towns, museums, and restaurants. The construction of giant intakes at the town of Hood will disrupt boat traffic on the Sacramento River. The proposed barriers on Georgiana Slough and elsewhere in the Delta will further block boat traffic.

Id.

E) NEPA Violations

NEPA defines a cumulative impact as a series of connected actions that, while appearing to be separate actions, all work to contribute to an aggregated impact:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508. For example, the EIR/EIS’s limited Geographic Scope of Effects for the study area prevents a full analysis of the ‘reasonably foreseeable future actions’ and project impacts. Connected actions that are not considered in the narrow geographic scope include any impact to either the environment or human activities that will result outside of the current area of study. Projects that will impact one contiguous system require an adequate analysis of the impacts in an EIS.

Narrowing the geographic scope of the effects does not act as a get out of jail free card. The agency must show all the effects from the project, including those outside the direct project area, even if the agency negligently failed to include measurements regarding the significance or

⁵<http://restorethedelta.org/peripheral-tunnels-economic-impacts-inflated-gov-brown-refuses-to-conduct-benefit-cost-analysis-cost-estimate-has-tripled-public-will-pay/>

insignificance of the effects on the San Pablo and San Francisco Bays. Further, analysis is problematic when the impact to the existing system and the system's capacity to sustain additional use generated from the project had not been prudently contemplated. *Id.* at 1199. Omitting two large bays that are vital to California proves that the Draft BDCP improperly fails to analyze supplementary uses required by the project and the affect to San Pablo and San Francisco Bay's current operations.

The "Connected actions" create a cumulative impact and must be discussed in the one single EIS. These "individually minor but collectively significant actions" (40 C.F.R. § 1508.7) cannot be broken up into separate segments so as to fragment what is in actuality a single project:

"Actions are *connected* if they (i) "[a]utomatically trigger other actions which may require environmental impact statements," (ii) "[c]annot or will not proceed unless other actions are taken previously or simultaneously," and (iii) "[a]re interdependent parts of a larger action and depend on the larger action for their justification."

40 C.F.R. § 1508.25(a)(1). Simply put, "[connected actions] are links in the same bit of chain"; unconnected actions are "separate segments of chain." *Northwest Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir.1995). NEPA necessitates an adequate cumulative analysis in every EIS for transparency and accessibility to the public: "To make an informed decision about how or whether to proceed with the proposed projects and to comply with NEPA, an agency must identify their potential combined environmental impacts and make that information available to the public." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 991 (9th Cir. 2004).

NEPA institutes a "hard look" standard of review to determine if several actions could result in a cumulative effect. If so, the agency is required to draft an EIS that includes detailed and calculated information regarding all potential effects. This "hard look" must be more than "general statements about possible effects and some risk do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." 40 C.F.R. § 1508.7.

The Draft EIR/EIS's treatment of adverse effects resulting from dredging for the tunnel construction to air quality is too brief. Contrary to NEPA's purpose to ensure the public has access to the information surrounding the Plan, glossing over these adverse effects undermines goals of transparency and accessibility. Bureau of Land Mgmt. at 991. Dredging tunnel material is a connection action with effects that domino into other environmental effects, such as air quality, and associated costs. 40 C.F.R. §1508.25(a)(1). The Draft EIR/EIS falls short of NEPA's "hard look" standard of review, which requires that the "EIS includes detailed and calculated information regarding all potential effect...and [more] than some risk". 40 C.F.R. §1508.7. For example, the explanation of the "construction equipment exhaust reduction plan" is not suitably detailed. (EIR/EIS, 31.5.1.4). The missing analysis of greenhouse emissions, costs, number of large trucks of removal, and the distance to final dump sites or reuse areas are all connected actions under NEPA and are not analyzed in the Draft EIR/EIS. The Draft EIR/EIS also states that placing dredging dump locations within ten miles from the construction site will help to mitigate air quality. *Id.* However, the Draft EIR/EIS fails to continue the analysis of potential mitigation measures. There is no discussion of final destination sites to store and/or reuse this dredged material. Establishing a ten-mile travel zone to "minimize truck travel" is misleading without information regarding the number of trucks and the projected demands on each truck. The "selected reuse strategies" are not explained in any detail, which violates NEPA's requirement for something more than a cursory explanation. *Id.* This attempt to purport "beneficial effects" is far too conclusory without the in depth analysis to create a context for readers.

The hidden costs around the excavation and transportation of the tunnel muck must be clearly presented. NEPA's "hard look" standard of review requires that the EIS contain "detailed and calculated information regarding all potential effects...and more than general statements..." 40 C.F.R. § 1508.7. Actions that may be "individually minor but [are] collectively significant actions..." must be fully analyzed. 40 C.F.R. § 1508.7. This cursory analysis of the tunnel constructions' adverse impacts on the environment omits a discussion of the costs and, more importantly, who will be bearing these costs. These omissions violate NEPA.

The stunted analysis of operational impacts to upstream reservoirs operations defies NEPA's definition of collected actions that are "collectively significant actions taking place over

a period of time.” *Id.* The upstream reservoirs have a direct effect on the Delta and various rivers. Importantly, the proposed conveyance would be a significant project and substantial invasion into the existing environmental system. The Plan erroneously points to other, existing factors as insurmountable obstacles to an analysis: “incremental actions when added to other past, present, and reasonably foreseeable actions regardless of what agency...or person undertakes such other actions...” 40 C.F.R. § 1508. Further, the EIS is responsible for evaluating “significant actions taking place over a period of time.” *Id.* The Draft EIR/EIS violates NEPA when it assumes no operational impact, leaning on current environmental factors such as fluctuation in precipitation and climate change. These existing factors are part of “past” and “present” actions that contribute to the overall impact. The new conveyance would be added to these factors in a single analysis. Plus, studies around climate change, precipitation, and independent management agencies are well established, so the argument that the EIR/EIS could not do slightly more analysis of the projects impacts upstream is attenuated. The Draft EIR/EIS cannot circumvent a proper analysis merely because there may be some uncertainty.

Both the National Marine Fisheries Service and the Bureau of Reclamation have stated that failure of the current Draft EIR/EIS to analyze upstream operations and the related consequences of operating the tunnels is inadequate to satisfy NEPA requirements. The Draft EIR/EIS needs to be redrafted to include the impacts of the tunnels on upstream reservoirs.

The Draft EIR/EIS fails to adequately analyze the potential adverse effects on recreation and the respective industry. NEPA requires that connected actions require a single EIS, but the Draft EIR/EIS does not present data either way on whether lands outside of the Draft EIR/EIS’s geographic scope will be affected, positively or negatively. 40 C.F.R. § 1508.25(a)(1). For example, the Draft EIR/EIS cannot exclude effects that are projected to occur outside the direct geographic scope as those effects are interdependent actions that are triggered by actions inside the Plan area. Moreover, the Draft EIR/EIS separates construction operations into long term and short term projections: “adjacent to or within certain recreation areas or sites could last from 1 to 7.5 years; Temporary effects (loss of recreation opportunity) are considered short-term if the duration is 2 years or less, or long-term, if the duration is more than 2 years.” (EIR/EIS, 15.3.3). But the Draft EIR/EIS does not discuss the possibility that “short-term” 2-year or less

construction projects may have impacts on recreation for periods equal to or longer than the long-term projections. However,

The EIR/EIS's preferred option, Alternative 4, does not satisfy NEPA's requisite "hard look" standard. The Draft EIR/EIS erroneously fails to look at the potential adverse impacts on a programmatic level:

"In the Cosumnes River Preserve, an east-west permanent transmission line would be constructed adjacent to the northern boundary of the preserve along Lambert Road, where CDFW manages the lands as an ecological reserve. There is no public access permitted within this part of the preserve; therefore, the placement of the transmission line would not displace any recreational facilities."

(EIR/EIS, 15.3.3.9). Narrowly focusing on this area in such a way limits a more comprehensive analysis of the cumulative impacts on the numerous recreation activities previously enumerated in the Draft EIR/EIS. This violates NEPA's requirement by overlooking the "past, present, and reasonably foreseeable future" impact on "collectively significant actions". 40 C.F.R. § 1508.7. Placing the "permanent transmission line" in an area where there is supposedly no public access does not preclude impacts to adjacent recreation that does not require direct access to that land, such as bird watching. But there is no discussion to this effect. Furthermore, the ecological reserve is purported to act as a northern boundary, which draws on an assumption that this will prevent any impact to the reserve itself. However, construction will undeniably impact the reserve and could cause a ripple effect. These actions are potentially connected, but there is no explanation in the EIS. By building the tunnels flush with an ecological reserve boundary it is inevitable that the construction, maintenance, and the close placement itself will cause adverse effects with the reserve. These effects could move through other areas in the Delta. Impacts in the ecosystem that fall outside the Plan area are further examples of connected actions that must be analyzed in the cumulative effects. The Draft EIR/EIS assumes that the impacts will and can be confined to where public access is not directly permitted. The Draft EIR/EIS's assumption fallaciously dismisses a necessary cumulative impacts analysis regarding the potential of effects on adjacent recreation.

The Draft EIR/EIS did not conduct impacts analysis on certain recreation areas due to an alleged lack of sufficient data modeling long-term usage. According to NEPA, an EIS must

analyze the cumulative effects resulting from the connected actions of past, present and “future actions regardless what agency...or person undertakes such other actions.” 40 C.F.R. §1508. Inconsistent with NEPA’s regulation, the Draft EIR/EIS relies on current lease agreements for access in its decision that this data allows them to circumvent a cumulative impact analysis: “[A]ccess to these parcels is subject to lease agreements with DWR. Due to the nature of these lease agreements, these activities could not reasonably be expected to continue for the long-term with any definitiveness...” (EIR/EIS,15.3.3.9). This reliance on third party leases as a baseline for neglecting to incorporate an analysis for these recreation areas violates NEPA’s cumulative impact standard for connected actions that contribute to an aggregated impact. 40 C.F.R. §1508.7. Moreover, the Draft EIR/EIS must incorporate “future actions regardless what agency . . . or person undertakes such other actions.” 40 C.F.R. §1508. In the missing analysis, the Draft EIR/EIS needs to elaborate on the “nature of the lease agreements”. There is no inclusion of any studies on lease behavior in past years even though these trends would be indicative of future behavior that can show whether these facilities should be treated as “well-established recreational facilities”. *Id.* The Draft EIR/EIS must account for past, present and foreseeable future actions and subsequent effects. But there is no such analysis, and the Draft EIR/EIS is relying on assumptions and conclusions.

Despite the proposition that there will be effective mitigation measures that reduce the impact on recreation activities and revenue for Delta businesses, the Draft EIR/EIS assumes that “the location of the proposed water conveyance facilities... would not cause adverse effects...”. (EIR/EIS,15.3.3.9). This statement is misleading at best and apposite to NEPA requirement to provide a fully developed analysis of the cumulative affects based on the “hard look” guideline that requires more than generalized statements. 40 C.F.R. § 1508.7.

F) CEQA VIOLATIONS

CEQA regulations state that: “[A]n EIR shall discuss cumulative impacts of a project when the project’s incremental effect is cumulatively considerable....” 40 C.C.R. §15130(a). Cumulative impacts are defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” 40 C.C.R. §15355. Specifically, CEQA defines cumulatively considerable as “the incremental

effects of an individual project are significant when viewed in connection with the effects of the past projects, the effects of other current projects, and the effects of probable future projects”. 40 C.C.R. §15065(a)(3). The most important indicators are environmental changes resulting from “incremental impacts of the projects when added to other closely related past, present, and reasonably foreseeable probably future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” 40 C.C.R. §15355. CEQA compels the lead agency(s) to “identify ways that environmental damage can be avoided or significantly reduced” and assists to “[p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.” *Id.* (Quoting Guidelines § 15002(a)(2)-(3)).

If the combined impact of the project is not significant then an EIR may only be required to provide a succinct explanation as to why the combined cumulative impact is insignificant: “[B]riefly indicate why the cumulative impact is not significant and is not discussed in further detail in the EIR. A lead agency shall identify facts and analysis supporting the lead agency’s conclusion that the cumulative impact is less than significant.” 40 C.C.R. §15130(a)(2). Nevertheless, discussion of the cumulative impacts is still required to address the “severity of the impacts and the likelihood of occurrence.” 40 C.C.R. §1530(b).

The Plan’s narrow geographic scope unlawfully limits the analysis of effects. A cumulative impact considers the individual effects together as well as effects of past, current and future projects. However, the Draft EIR/EIS’s limited scope of analysis focused directly on direct impacts and the proposed infrastructure prevents a proper, lawful cumulative impacts analysis. It is impossible to determine the incremental effects that contribute to a considerable cumulative effect when two significant bays are excluded, the San Francisco Bay and the San Pablo Bay. There are more than two individual impacts expected to affect these Bays if the new conveyance is implemented: “[I]mpacts to water quality, aquatic habitats, fish and wildlife, and estuarine dynamics” (Barbara Salzman). In addition, there will be changes in sedimentation in the Delta that is expected to cause effects outside the Plan area, as well as “tidal fluxes and salinity intrusion in the Delta” from the excluded Bays. (Randy Fiorini). The Draft EIR/EIS’s

narrow boundary prevents its scope of analysis and omits significant effect that will contribute to the cumulative impacts.

The Draft EIR/EIS's lack of focus on dredge tunnel muck operations excludes the cumulative impacts of the removal of excavated material. There are "two or more individual effects listed above, but the Draft EIR/EIS does not adequately analyze these considerable, incremental effects. Impacts from the dredging include but not limited to adverse effects to air quality, a substantial increase in greenhouse gas emissions from large construction vehicles removing the tunnel muck twenty-four hours a day, seven days a week, and further emissions from the power and energy used to for excavation and removal. Furthermore, the Draft EIR/EIS fails to contextualize these effects on the environment resulting from excavation and removal. The Draft EIR/EIS unlawfully skims over the connection between "effects of the past projects, the effects of other current projects, and the effects of probable future projects". 40 C.C.R. §15065(a)(3). The most important indicators are environmental changes resulting from "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." 40 C.C.R. §15355. At most, the Draft EIR/EIS offers a cursory reference regarding the required construction and the unavoidable impact on the environment: "Site selection...such as locations within 10 miles of construction feature would minimize truck travel to help address air quality effects [and] implementing a construction equipment exhaust reduction plan...would also help reduce adverse effects." (EIR/EIS, 31.5.1.4). Not only are these mitigation proposals weak on their face, but this brief statement blatantly violates CEQA's statement to provide a full analysis of projected cumulative impacts resulting from tunnel dredging over a period of time. While the Draft EIR/EIS offers an initial muck removal to sites ten miles away, they fail to address the long-term impacts of storage, transportation, or greenhouse emissions. The Draft EIR/EIS makes no mention of transporting the muck to a final destination, let alone how far this destination might be from the excavation. The lack of analysis of the probable extensive transportation over a period of time undermines CEQA regulations. The brief and unfocused discussion of the dredging impacts breaches CEQA's determination for cumulative impact studies when there are considerable, connected and incrementally significant impacts on the environment.

The Draft EIR/EIS's focus on its proposed benefits from reusing the tunnel muck results in an insufficient analysis under CEQA of the adverse effects from excavation and removal. The Draft EIR/EIS's alleged reusability and optimistic benefits from the tunnel muck is an assumption: "[Selected reuse strategies, implementation of spoils, RTM, and dredged material reuse plans could result in beneficial effects associated with flood protection and response, habitat creation, and depth to groundwater in areas where the ground level is raised." (EIR/EIS, 31.5.1.4). There is no detailed discussion of how these "reuse strategies" and implantation plans would operate. There also lacks detail regarding the specific outcomes of these proposals. Further, the Draft EIR/EIS avoids discussions of alternative scenarios where the "tunnel muck" cannot be reused and omits any discussion of associated costs. The Draft EIR/EIS contains the assumption that there is no significant impact from the dredging prompts CEQA's requirement for a succinct explanation as to why the combined cumulative impact is insignificant and must "identify facts and analysis supporting the lead agency's conclusion..." 40 C.F.R. §15130(a)(2). But there is no discussion or reference to this effect. Therefore, the Draft EIR/EIS assumes the benefits of reusing the dredged material but violates CEQA's requirement for a succinct statement explaining why there is no discussion supporting this assumption.

The Draft EIR/EIS side steps the issue of operational impacts to upstream reservoir operations by asserting the assumption that the data is too speculative to make provide any analysis. If an agency deems a project's impact insignificant, CEQA demands that there is at least a presentation of facts and analysis that supports that decision. This is to ensure a discussion of the "severity of the impacts and likelihood of occurrence." 40 C.F.R. §15130(b). The Draft EIR/EIS's passing mention of climate change and fluctuations in precipitation is a severely inadequate attempt to satisfy CEQA's requirements. The Draft EIR/EIS needs to provide a more detailed analysis, either to show the impacts are insignificant or to explain the impacts upstream as a result of implementing new infrastructure.

The Draft EIR/EIS underestimates the cumulative impacts of the project on recreation-based commerce in the Delta. CEQA dictates that when "two or more individual effects, which when considered together, are considerable" are significant and must be considered together. 40 C.F.R. §15355. However, the Draft EIR/EIS underrates the individual effects on Delta recreation from construction and maintenance of the new conveyance that will be forty-feet wide, thirty-

five miles long, and one hundred feet deep. The construction alone will be hugely disruptive to daily life in the region. But the Draft EIR/EIS ignores the interruption of daily commerce in the Delta region and fails to accurately evaluate all the impacts of the project. There is no analysis that sufficiently includes the economic impact to businesses and families in the Delta region that will be affected by this invasive project. Further, the analysis must include the conveyance “in connection with the effects of the past projects, the effects of other current projects, and the effects of probable future projects.” §15065(a)(3). The Draft EIR/EIS does not follow CEQA’s guideline here as it states the timeline for construction of the conveyance. The temporary projection of two years or less suggests that loss of recreation will pace the temporary construction projections. (EIR/EIS, 15.3.3). However, there is no analysis connecting the effects of “temporary” construction to past effects, other current project, or effects of future projects. Moreover, the Draft EIR/EIS neglects to discuss the likelihood or severity of effects to Delta recreation that may continue past the cessation of the construction timeline. The Draft EIR/EIS is not in accord with CEQA and must be amended.

G) CONCLUSION

Under NEPA and CEQA regulations, all connected actions must be discussed in a cumulative impacts analysis in the Plan’s EIS. The report is inherently incomplete since it fails to include numerous connected actions and other impacts from the project. First, the geographic scope of effects is far too narrow to allow for a comprehensive discussion of the effects from the new conveyance and relevant infrastructure. It is incomprehensible that an impact in one part of an interconnected system, such as the bays and Delta waterways, would only affect the direct impact area but would not travel to affect distant parts of the intertwined system. Even if this were possible in a land-based system, connected waterways are constantly responding to shifts in the system, like a ripple in a pond. It has been proven that excluding the San Francisco and San Pablo Bays is an egregious misstep and immensely undermines any attempt at the required cumulative impacts analysis. Second, “tunnel muck” dredging has many factors, more than the immediate construction of the infrastructure. Without incorporating these aspects in the cumulative impacts analysis the EIS cannot be consider lawful or complete. Third, operational impacts to upstream reservoirs is part of the connected system that requires analysis, yet the Draft EIR/EIS attempts to bypass the issue altogether. Legally, the Draft EIR/EIS needs to

identify the facts that allow them to ignore these important impacts, or it needs to incorporate an appropriate analysis into the EIS. Fourth, impacts to the recreation industry in and around the Delta are incredibly important, as they will affect a multitude of people and the ecosystem. However, the analysis is far too limited. The Draft EIR/EIS needs to be expanded from the current narrow geographic scope. It also needs to incorporate associated costs, and allow for impacts to the Delta not just directly around the immediate infrastructure but also downstream and upstream impacts from construction. For this reason, the Draft EIR/EIS doesn't provide the necessary context necessary for readers. The Draft EIR/EIS must adhere to NEPA and CEQA requirements in order to avail readers and California citizens of the projected consequences.

III) FAILURE TO DISCLOSE NECESSARY WATER TRANSFERS

A) SUMMARY

Omitted from the BDCP, but documented elsewhere, is the intent to add 1.3 million acre feet of "new" Delta outflow water, which would be made possible by mining the declining groundwater aquifers of the Northern Sacramento Valley's Colusa groundwater subbasin. The environmental and economic implications are great, yet they have not been analyzed anywhere in documentation associated with the BDCP, as required by CEQA and NEPA.

B) BACKGROUND

The BDCP's success in achieving its conservation measures relies on adequate water flowing through the Delta. In order to achieve this, Plan proponents have advocated for increased water transfers north of the Delta that will meet the flow requirements of the BDCP, to be sold to buyers south of the Delta. The specific increased exportation of water from the Delta is left out of BDCP documents that have been released for public review, yet referenced repeatedly by the proponent agencies in documents obtained through PRA and FOIA requests. (See E-mail from Lety Belin; e-mail from David Beard; KCWA, Voluntary Water Acquisition Program; Supplemental Water Purchase Concept; all on file with author).

The internal planning process for the BDCP discusses purchasing additional water supplies, referencing the water as "enhanced environmental flows," and the money used to buy the water as a "supplemental adaptive management fund." (E-mail from David Beard, KCWA, to

Urban Bakersfield Committee, Oct. 23, 2013, on file with author; Draft Implementing Agreement, 10.3.7.3.2, 37). These euphemisms refer to the BDCP proponents' plan to purchase up to 1.3 million acre feet (maf) of water, which will be transferred through the Delta and make up for the decreased flows of the Sacramento River that are a result of the new intake diversions. (E-mail from Lety Belin, Senior Counsel to the Deputy Secretary at Department of the Interior, Feb. 25, 2012, on file with author). The funding for these transfers will come from private water agencies as well as state and federal governments. (E-mail from David Beard, KCWA to Urban Bakersfield Committee, Oct. 23, 2013, on file with author). Correspondence between the Department of the Interior, DWR, and CDFW dating back to 2012 indicates that the BDCP proponents expect the extra water will be paid for by the public through the state water bond, now slated for the 2014 ballot. The contractors receiving the water would then expect to be able to turn around and sell the water for a profit. (E-mail from David Beard, KCWA, to Urban Bakersfield Committee, Oct. 23, 2013, on file with author).

The water transfers would be completed through surface water purchases from water rights holders north of the Delta. The surface water must then be supplemented through groundwater substitutions or fallowing. The groundwater pumping will impact the Sacramento Valley Aquifers, the Sacramento River, the surrounding area, and several species of waterfowl, yet these specific transfers and their resulting actions have not been identified in the BDCP documents.

These water transfers are necessary to the BDCP to meet certain flow requirements. The EIR acknowledges that "demands for supplemental water supplies...will increase." BDCP Plan, Ch. 5, Water Supply, p. 5-61. The desire for an extra 1.3 maf, the ongoing water bond fight in the Capitol, in which Plan proponents are attempting to secure language ensuring funding for these transfers, and the inclusion of phrases like "supplemental adaptive management fund" in BDCP documents are all further evidence that Plan proponents recognize they will need this extra water for the BDCP to succeed. (Email from Lety Belin, on file with author; (IA, 10.3.7.3.2, 37; Governor's Office Water Bond, 10, 79736 (a)(1); Supplemental Water Purchase Concept). However, no further discussion of the location, duration, or impacts of these transfers are included in any BDCP documents.

C) NEGATIVE ENVIRONMENTAL EFFECTS

1) Sacramento Valley Aquifer Impacts

The Sacramento Valley Hydrologic system provides a vast amount of water throughout the Delta and California. Groundwater contributes to about 31% of total water supply, but that percentage can jump substantially in drought years like the one California is experiencing now, when surface water availability is drastically reduced. (DWR 2005, Megdal et al. 2009). The groundwater levels in the Sacramento River Hydrologic Region have been dropping recently, with 30-foot declines seen in the northwestern portion of the Sacramento Valley Groundwater Basin. (California Water Plan Update, *Sac. River Hydrologic Region Summary*, SR-1). There are already groundwater pumping effects being felt across the Sacramento Valley. Land subsidence associated with groundwater withdrawal in the Sacramento River region has been documented in the southern portion of the Sacramento Valley, and as groundwater levels decline, the potential for land subsidence increases. (California Water Plan Update, *Sac. River Hydrologic Region Summary*, SR-13).

Scientific modeling experiments have shown that large-scale pumping for water transfers in the Sacramento Valley can negatively affect water table elevations over a large area, including drawdowns and the inability of the aquifer to rebound back to pre-pumping conditions. (Kyle Morgado, *Effects of Groundwater Pumping for Water Transfers*, p. 79). The Colusa Subbasin, located in the Glenn Colusa Irrigation District, has been highlighted in a DWR report as the source of increased groundwater pumping to satisfy replacing surface water transfers. (DWR, *CASGEM Groundwater Basin Prioritization*, Table A-4). However, the subbasin is already experiencing severely declining groundwater levels along the west side of Glenn County, and moderately declining groundwater levels in the Capay area. (DWR, *CASGEM Groundwater Basin Prioritization*, Table A-4). Pumping more water from an area that is already experiencing lower groundwater levels will further reduce water availability and the aquifer's capacity to recharge.

2) Sacramento River Impacts

The BDCP Parties request a fifty-year permit. Fifty years of pumping up to 1.3 maf of groundwater to replace surface water transfers will impact the Sacramento River. The

Sacramento River is considered a flow-through system, meaning pumped groundwater not consumptively used returns to the river. (NCWA, *Water Conservation and Efficiency in the Sacramento Valley*, p. 2). However, increases in groundwater extraction can reduce or even reverse groundwater seepage from aquifers to the Sacramento River, leading to lower Sacramento River flows. (Karin Hoover, *Aquifer Performance Testing Concerns*, p. 3). This would directly affect the BDCP's outflow scenarios, which contemplate high diversions of river flows. Lower flows would negatively impact protected fish species that require certain flow levels to maintain their populations. Reverse flows from the Sacramento River into groundwater aquifers could even end up being pumped into domestic wells. (Karin Hoover, *Aquifer Performance Testing Concerns*, p. 3).

3) Distorted Implementation with BDCP

These water transfers are not mentioned or described in any environmental document included in the BDCP; however, it is clear that Plan proponents realize they need the transfers to implement the BDCP. Although the transfers are not described throughout the BDCP, the funding and necessity of the transfers is made clear through the emails obtained through FOIA/PRA requests, as well as the Implementation Agreement, which references a “supplemental adaptive management fund.” (IA, 10.3.7.3.2, 37). Plans for this ‘supplemental’ fund are written broadly in order to be used for other projects, such as funding a portion of the water transfer cost. Plan proponents are willing to ensure they will have adequate funding for these water transfers, yet have not disclosed the breadth of these water transfers, nor the likely effects of groundwater pumping.

Currently, the amount of water proposed to be transferred is 1.3 million acre feet- however, this amount could easily be expanded by decision-making parties in the BDCP. The approval of the BDCP would allow the authorized parties to not only pump up to 1.3 maf of substitute groundwater from the Sacramento Valley aquifers for the next 50 years, but to also possibly increase their level of pumping if more water is needed. The specifics of these water transfers, as well as the resulting impacts, need to be disclosed in the appropriate BDCP documents.

4) Negative Third Party Impacts

With up to 1.3 maf of surface water being transferred and decreasing groundwater levels, it is possible that some proportion of the water transfers might be effectuated through fallowing. The flooded conditions of rice fields that are beneficial to farmers are also necessary to many species of waterfowl. Around 7 million birds use the Pacific Flyway, which encompasses the Sacramento Valley. (*CH2M HILL Report for NCWA*, 2011 p. 8). Rice acreage provides about 60% of all food for wintering waterfowl in the Sacramento Valley, and supports 230 species, of which 31 are considered species of special concern by the conservation community. (*CH2M HILL Report for NCWA*, 2011 p. 8). Fallowing more rice acreage will only result in reduced habitat and food availability for these migratory waterfowl. Fallowing more land can also lead to economic and employment impacts associated with the local agriculture industry. This past year, rice farmers have had to fallow 100,000 acres, almost 20% of last year's rice acreage, to deal with the drought. (Edward Ortiz, *Drought's Latest Effect?*, Sacramento Bee 2014). It is foolish to think California will not experience another drought cycle like the one we are experiencing now; and as the water transfers take 1.3 maf every year, the reduced water supply could result in much heavier economic costs to local business and employment.

Those who aren't party to these new water transfers will likely also feel a negative economic impact. With more water being pumped and moved south of the Delta, there will be less available for those who rely on individual wells and groundwater pumping for their water supply. Several towns and small cities are entirely dependent upon groundwater for drinking water; these areas could be negatively impacted with groundwater substitution pumping up to 1.3 maf from the aquifers. Non-contracting parties who may be affected by groundwater depletion need to have a say into the management process, since these water transfers will almost certainly limit the amount of groundwater they are able to pump themselves.

D) LEGAL IMPLICATIONS

1) Violations of CEQA and NEPA

These water transfers and their effects have not been evaluated or in the Draft BDCP. The failure to discuss these transfers violates the California Environmental Quality Act (CEQA) and the National Environmental Protection Act (NEPA). Proponents violated CEQA by failing to

provide a full description of the project, impermissibly piecemealing the project, and failing to adequately describe the project's impacts. Furthermore, the failure to adequately describe the project and its impacts violate NEPA.

2) NEPA

As federal law, NEPA requires an environmental impact statement of all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). Courts have defined the term "federal action" broadly to include not only projects directly carried out by federal agencies, but state and local programs funded by federal assistance and private development authorized by federal permits as well.

(a) Violation of Adequate Project Description

In order to satisfy NEPA, an agency needs to properly and thoroughly evaluate the environmental impacts of a proposed project. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.* 42 F.3d 517, 527 (9th Cir. 1994). An EIS must "properly define" the project in order to alert the public of the agency's intentions and give the public enough information to foster intelligent public participation. 40 C.F.R. § 1502.4(a); *State of Cal. v. Block*, 690 F.2d 753, 772 (9th Cir. 1982). Furthermore, "to prevail on a claim that [a federal agency] violated its statutory duty to prepare an EIS, a plaintiff need not show that significant effects will in fact occur;" it is enough to raise substantial questions whether significant effects on the environment may occur. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1997).

Here, the nondisclosure of the water transfers represents a violation of NEPA because these transfers and the subsequent groundwater substitutions/fallowing will have environmental impacts that have not been evaluated or disclosed to the public. The federal agencies failed to adequately identify and evaluate significant adverse impacts of the water transfers in the DEIS. The project has not been properly defined; therefore the public has not been alerted to the agency's true intentions, and public participation has suffered as a result. The water transfers are necessary to the BDCP's success on providing adequate flows through the Delta, and the effects of these transfers need to be described in adequate detail in order to be evaluated properly.

Potential impact include subsidence and lowered water tables as a result of the groundwater substitutions or fallowing that will likely take place.

(b) Failure to Adequately Describe Impacts

Under NEPA, an EIS must include information on the affected environment, as well as “every significant aspect of the environmental impact of a proposed action.” *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1109 (2008). The federal agency must analyze foreseeable environmental impacts, including the direct and indirect effects of the project and their significance. 43 C.F.R. § 1502.16; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). The evaluation of impacts must use high quality information and accurate scientific analysis. 40 C.F.R. 1500.1(b).

Plan proponents violated NEPA by failing to adequately disclose impacts to the Sacramento Valley area. No information on the water transfers has been included in their DEIS, and the direct and indirect effects on the environment have also not been disclosed or analyzed. Surface water that is sold south of the Delta will have several consequences in the Sacramento Valley region because the water will have to be substituted by either increased groundwater pumping or fallowing. This will have direct consequences on the surrounding water aquifers, the Sacramento River, and several species of birds and fish. The groundwater substitutions or fallowing will also have economic impacts on local towns and agriculture. These actions are all foreseeable as it is evident Plan proponents need this water for the BDCP to work properly. However, none of this has been analyzed or included in the Draft Environmental Impact Statement, which represents a violation of NEPA’s requirements to adequately describe the foreseeable impacts.

3) CEQA

CEQA applies to most public agency decisions to carry out, authorize, or approve projects that could have adverse effects on the environment. The term ‘project’ refers to the “whole of an action, which has a potential for resulting in...a reasonably foreseeable indirect physical change in the environment.” CEQA Guidelines § 15378(a). Case law has resulted in the definition of “project” receiving broad interpretation in order to maximize environmental

protection. *McQueen v. Bd. of Directors of the Mid-Peninsula Reg'l Open Space Dist.*, 202 Cal.App.3d 1136, 1143 (1988). Before making a decision, CEQA requires the agencies to consider all relevant information and avoid or reduce significant environmental impacts when feasible. Pub. Resources Code § 21000. The agency's decision must then be supported by "substantial evidence," defined as "relevant, reasonable information and inferences that a fair argument can be made to support a conclusion." CEQA Guidelines § 15384(a).

(a) Faulty Project Description

CEQA requires the project description to include the precise location and boundaries of the proposed project, as well as a statement of objectives and a general description of the proposed project's technical, economic, and environmental characteristics. CEQA Guidelines § 15124(a-c). Describing the entire scope of the project is necessary for accurate and informative public evaluation and input, which has been held to be a vital part of satisfying CEQA. *City of Santee v. Cnty. of San Diego*, 214 Cal.App.3d 1438, 1454 (1989). The public review process is distorted and fails to inform public decision-makers without an accurate project description. *Cnty. of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 192-93 (1977). The failure to include relevant information, including an accurate project description by the agency is prejudicial error if it "precludes informed decision-making and informed public participation. *Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal.App.4th 899, 925 (2012).

The BDCP's DEIR needs to include these water transfers in their analysis; the failure to do so is a violation of CEQA's requirements to adequately describe the project. These water transfers will take place in the Sacramento Valley, and the groundwater transfers will take place in the Sacramento Valley Hydrologic Region; neither area has been included in the BDCP description. The Draft BDCP & DEIR/DEIS fail to provide a sufficient EIR project description because the project's location and boundaries do not encompass the proposed transfer areas, nor the aquifers where groundwater will be pumped from. The failure to include these water transfers and groundwater substitutions in any documents results in a violation of CEQA's requirements to provide an accurate and complete description. Furthermore, this error by the agency is prejudicial because it has prevented informed public participation by hiding important details about the BDCP's intent to increase water transfers and groundwater substitution or fallowing in

the Sacramento Valley. Public participation and comment is essential to informed decision-making, and the BDCP has violated CEQA by failing to include these water transfers in public documents. As a matter of law, the DEIR's failure to adequately describe the project violates CEQA's procedures by preventing the public's ability to meaningfully consider or comment on these potential adverse impacts.

(b) Improper Piecemealing/Segmentation of the Project

CEQA prohibits piecemealing projects into smaller pieces, in which it may be easier to find there is no significant environmental effect. *El Dorado Cnty. Taxpayers for Quality Growth v. Cnty. of El Dorado*, 122 Cal.App.4th 1591, 1599 (2004). Piecemealing impermissibly results in a curtailed project description, which allows the EIR to misstate the cumulative impacts “by separately focusing on isolated parts of the whole.” *San Joaquin Raptor/Wildlife Rescue Center v. Cnty. of Stanislaus*, 27 Cal.App.4th 713, 729-30 (1994). Project descriptions must include integral parts of the project; otherwise their omission would result in important ramifications remaining hidden from public review. *Santiago Water Dist. v. Cnty. of Orange*, 118 Cal.App.3d 818, 830 (1981).

Additionally, future phases or consequences of a project need to be assessed in the initial DEIR if: “(1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project of its environmental effects.” *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.*, 47 Cal. 3d 376, 396 (1988). However, plans that do not contemplate additional parts of the project need not disclose possible future developments. *Rio Vista Farm Bureau Ctr. v. Cnty. of Solano*, 5 Cal.App.4th 351, 371 (1992).

Here, the BDCP documents do not include information and analysis of these water transfers in any of their documents. This violates the piecemealing prohibition of CEQA because the proponents have avoided reviewing the environmental effects of these transfers. These water transfers will have significant environmental impacts on the Sacramento Valley Hydrologic region, yet nothing has been disclosed. The cursory attention paid to environmental impacts relating to water transfers in Chapter 30 of the DEIR does not actually discuss the specific water transfers that are being proposed to maintain adequate flows through the Delta. Draft EIR,

30.3.6, 117. These specific water transfers have been left out of all BDCP environmental documents. Plan proponents' decision to defer any evaluation of the possible impacts of these water transfers until after project approval is piecemealing, and constitutes a procedural violation of CEQA.

Furthermore, this is not a “tiering” situating where future project EIRs would be appropriate. The water transfers satisfy both prongs of the *Laurel Heights* test: they are reasonably foreseeable consequence of the BDCP because Plan proponents know they will need additional water to satisfy flow requirements, and these transfers will likely change the initial project's environmental effects. The need for these additional transfers is recognized in the Implementing Agreement's Supplemental Adaptive Management Fund, where parties “anticipate that such funds could be used to acquire water to supplement flows.” (IA, 10.3.7.3.2, 37. When “additional outflow [is] determined to be necessary,” the fund can be used to buy “supplemental water” from “voluntary sellers.” (IA, 10.3.7.3.2, 37. This language represents an admission that additional water will be needed to meet outflow requirements under the BDCP. These transfers are not merely possible future developments, they are a contemplated and necessary part of the BDCP. Furthermore, the transfers will also expand the scope of the initial project's environmental effects because the groundwater substitutions and fallowing will have different impacts than what the BDCP has chosen to disclose.

(c) Failure to Adequately Describe Impacts

An agency must prepare an EIR that provides enough environmental analysis to give decision-makers with sufficient information to adequately consider environmental impacts of a proposed project in order to satisfy CEQA. *Cnty. of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 192093 (1977). CEQA requires EIRs to identify a project's significant effects on the environment, identify alternatives, and indicate the manner in which those effects can be mitigated or avoided. Pub. Resources Code § 21002.1. CEQA Guidelines require “direct and indirect significant effects of the project on the environment” to be “clearly identified and described, giving due consideration to both the short-term and long-term effects. This includes the significant “irreversible environmental changes which would be caused by the proposed project should it be implemented.” CEQA Guidelines, § 15126.2 (a) & (c).

Plan proponents have failed to disclose these water transfers to the public, thereby avoiding all required discussion of the environmental impacts. These water transfers will have to be supplemented through groundwater substitutions, fallowing, or a combination of both. These actions will have impacts on the surrounding Sacramento Valley Hydrologic region, such as land subsidence, lower water table levels, and decreased water availability. The Sacramento River could also be negatively impacted, which would have multiple effects on surrounding bird and fish species. Fallowing too will have negative environmental impacts on the habitat and food availability for several protected species in the Sacramento Valley area. However, none of these impacts have been disclosed to the public in the BDCP environmental review documents, much less adequately described. This is another violation of CEQA's requirements.

E) CONCLUSION

It is clear that the BDCP proponents need these water transfers to go through the Delta to satisfy flow requirements. Without these transfers providing water passing through the Delta as it is sold down south, the whole idea put forth by the BDCP of maintaining Delta flow would fail. The necessity of these water transfers is evidenced by the ongoing water bond fight, in which Plan proponents are making sure enough money is secured in the language of the water bond to facilitate these transfers, and the inclusion of phrases like "supplemental adaptive management fund" in BDCP documents. (IA, 10.3.7.3.2, 37.

The BDCP proponents have strategized to put forth a "conservation plan" which actually will give them the ability to sell 1.3 maf of surface water from the Sacramento Valley and transfer it south of the Delta to water contractors, who can then sell the water for a profit. The water loss in the Sacramento Valley area will then be substituted through extra groundwater pumping and/or fallowing. Meanwhile, none of the various impacts and concerns have been studied, much less made public knowledge. There are several significant possible impacts that need to be analyzed and evaluated before the BDCP is pushed through and parties are allowed to pump even more water from an area that is already experiencing declining groundwater levels. None of the possible effects outlined above from this proposed water transfer have been studied, or if they have, have not been released to the public.

This represents a violation of CEQA and NEPA. Both require an adequate description of the project to be implemented, as well as a full disclosure of the impacts. The BDCP has not given a full description of their project because they have not included the water transfers, and the likely groundwater substitutions/fallowing, in the project description. Similarly, they have not disclosed all the environmental impacts that will result from these water transfers. There are severe consequences that have not been disclosed or described, which represents a violation of CEQA and NEPA.

The Sacramento Valley Hydrologic Region represents a vast resource for water, but the transfers being put forth in secret do not show a dedication to sustainable and reasonable management of the groundwater. Allowing the transfers to go forward could result in the decimation of groundwater levels that would have long-lasting negative impacts. This water grab is an underhanded attempt by BDCP proponents to take even more water than what is listed in the BDCP documents, and there needs to be a careful evaluation and assessment of the region before the BDCP becomes a reality for California for the next 50 years.

IV)THE DRAFT EIS/EIR IS SO DEFICIENT THAT IT PRECLUDES MEANINGFUL ANALYSIS

The Draft EIS/EIR cannot pass muster under NEPA or ESA because it does not have adequate information to contribute to a “meaningful analysis.” NEPA requires that “Impacts shall be discussed in proportion to their significance.” 40 C.F.R. § 1502.2(b). NEPA specifically includes 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 as factors in evaluating significance.” 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 that the Water Tunnels would not be a permissible under the ESA 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.

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 significant uncertainty about whether the BDCP Water Tunnels project is permissible under the ESA. This 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,” 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. 40 C.F.R. § 1502.9(a).

A) THE DRAFT EIS/EIR PRECLUDES MEANINGFUL ANALYSIS BECAUSE OF THE ABSENCE OF ESSENTIAL WATER QUALITY AND QUANTITY INFORMATION

The Draft EIS/EIR lacks required water quantity and water quality analyses. As set forth above in the “Alternatives” section of these comments, the BDCP process fails to base the preferred alternative on the SWRCB flow recommendations made pursuant to the Delta Reform Act, nor does it 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 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. As is virtually always the case in the BDCP process, the cart has been placed before the horse. SWRCB flow determinations, water quantity and quality analysis, and public trust determinations must precede, not follow, BDCP decision-making.

Consequently, the BDCP process has failed to conduct the water supply availability analysis, quantification, and analysis of the environmental impacts required under the 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.4th 412, 429, 430, 434, 440-441 (2007). Again, basic analyses essential to determine whether the BDCP Water Tunnels, DWR’s preferred project, is even feasible will be absent. 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).

B) THE ABSENCE OF OTHER ESSENTIAL INFORMATION

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, the lack of a cost-benefit study 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 missing 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 inadequately analyzing effects upstream, the BDCP process is also lacking 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.”⁶ Indeed, by reducing outflows from the Delta, the BDCP Water Tunnels would thereby reduce inflows into the Bay.

To sum it all up, there are more unanswered than answered questions about DWR’s preferred project, the Water Tunnels.

C) ABSENCE OF AN ACCURATE PROJECT DESCRIPTION

There is a fundamental BDCP inaccuracy that was accepted at face value in the July 18, 2013 Release for federal agency comments that is profound. 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).

⁶ (*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 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 have an internal diameter of 40 feet and an external diameter of 44 feet.

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 CEQA and the accurate project description required by NEPA and 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. This violation is explained in more detail in our comment letter of August 13, 2013. (January 14, 2014 FOR comment letter, Attachment 2).

VIOLATIONS OF THE ESA

D) VIOLATION OF SECTION 7 OF THE ENDANGERED SPECIES ACT

The Sacramento River creates habitat for dozens of endangered and threatened species. Five of these species include 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*. 50 C.F.R. § 17.11. Realizing the reliance these fish have on the Sacramento River, USFWS and NMFS designated the Delta and the lower stretch of the Sacramento River as critical habitat for each species.⁷ USFWS and NMFS designate habitats as critical when they contain the primary

⁷ 50 C.F.R. § 226.204 (Sacramento River Winter-Run Chinook Salmon), 50 C.F.R. § 226.211(k)(5)(i) (Central Valley Spring-Run Chinook Salmon), 50 C.F.R. § 226.211(l)(5) (Central Valley Steelhead), 50 C.F.R. § 226.219(a)(3) (Southern DPS of NA Green Sturgeon), and 50 C.F.R. § 17.95–e–Fishes–Part 2 (Delta Smelt).

constituent elements (PCEs) needed for a species to survive and recover. 50 C.F.R. § 424.12(b). PCEs of the Delta and Sacramento River include “physical habitat, water, river flow, and salinity concentrations” (59 FR 65256) and “water quality and quantity” (70 FR 52488). *River flow* includes the magnitude, frequency, and duration of flow; *water quality* includes temperature and salinity. (74 FR 52300).

The Endangered Species Act (ESA) commands federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat” 16 U.S.C. § 1536(a)(2). Because the BDCP will affect listed species and designated critical habitat, NMFS and USFWS must issue BiOps determining whether the BDCP will jeopardize a listed species or destroy or adversely modify designated critical habitat. 50 C.F.R. § 402.14(a). To make these determinations, NMFS and USFWS must “evaluate the current status of the listed species or critical habitat,” “the effects of the action,” and “cumulative effects on the listed species or critical habitat.” 50 C.F.R. § 402.14(g)(2)-(3).

A) CURRENT STATUS OF LISTED SPECIES AND CRITICAL HABITAT

Although USFWS and NMFS designated the Delta and lower portions of the Sacramento River as critical habitat, dams and diversions have degraded many of the habitats’ PCEs. As a result of these degradations, the five listed fish species struggle to survive in the critical habitat designated for their survival and recovery. The BDCP identifies degradations of the critical habitat which each species encounters in the Delta and Sacramento River. These modifications include physical habitat loss and increased water temperature, which continue to worsen as the climate changes.

1) Physical Habitat Loss

The Sacramento River was once rich with spawning, rearing, and staging habitat for Delta species. The unimpaired Sacramento River flow inundated key spawning habitat and floodplains, providing access to productive ecosystems of abundant food sources for growing fish. Today, levees and dams prevent flooding and restrict flows, resulting in lower water levels and significantly less inundated habitat. As reported by the BDCP, “[a]ccess to much of the

historical upstream spawning habitat for winter-run Chinook salmon has been eliminated or degraded by artificial structures (e.g., dams and weirs) associated with water storage and conveyance, flood control, and diversions and exports” (Plan, 2A.3-9). These developments have had a disastrous effect on the Winter-Run Chinook Salmon. “. . . Shasta Dam reduced the winter-run Chinook salmon ESU from four independent populations to just one.” (Plan, 2A.3-9). Habitat modification has had similar impacts on the other listed species. For example, “[m]ost historical adult staging/holding and spawning habitat for Central Valley steelhead is no longer accessible to upstream migrating steelhead.” (Plan, 2A.6-9). The Delta Smelt’s habitat may be reduced “because of land reclamation, channelization, and ripping of historical intertidal and shallow subtidal wetlands,” but “[t]he extent to which such habitat loss may be limiting the population is unknown.” (Plan, 2A.1-11). Dams render 44.2% of Green Sturgeon spawning habitat inaccessible. (Plan, 2A.8-7).

These five endangered and threatened species of fish rely heavily on the Sacramento River to provide irreplaceable habitat for spawning, rearing, and adult staging. Development and diversions have caused sharp declines in populations, demonstrating that these fish adapt poorly, if at all, to interference with their habitat. The remaining habitat must be preserved and expanded in order to support Delta species’ survival and recovery.

2) Increased Water Temperature

Historically, the cool Sacramento River water provided the needed temperatures for coldwater fish species migrating from the Pacific Ocean. Cool precipitation and snowmelt maintained the river’s lower temperatures despite warm ambient conditions. Today, Sacramento River temperatures rise above suitable levels. The Draft Recovery Plan for Central Valley Salmonids identifies elevated water temperatures as a cause of habitat decline. (Pg. 3). The BDCP admits that “[e]xposure to seasonally elevated water temperatures may occur as a result of reductions in flow, as a result of upstream reservoir operations” (Plan, 2A.3-17). Dams and reservoirs restrict the natural flow of the Sacramento River, resulting in weakened flows downstream of the dam. With less water flowing in the river, the ambient conditions have a larger impact on the lower volume of water, causing it to warm faster. In addition to reservoir

operations, diversions also weaken river flow and contribute to warming the remaining river water.

The increasing water temperatures have adversely impacted critical habitat in the Delta and the species that rely on it. “Spring-run and winter-run Chinook salmon are highly vulnerable to increased temperatures upstream of the Delta.” Draft BDCP, (5.A.2.0-2). “Increasing temperatures will result in less spawning habitat for anadromous fish.” (Plan, 5.A.2.0-2). “Higher water temperatures can lead to physiological stress, reduced growth rates, prespawning mortality, reduced spawning success, and increased mortality of salmon [and steelhead].” (Plan, 2A.3-17; 2A.6-13) (internal citations omitted). The Green Sturgeon also struggles with increasing temperature. “The Feather River is likely to have supported significant spawning habitat for the green sturgeon population in the Central Valley before dam construction.” (Plan, 2A.8-6).

Today:

[w]ater temperatures in the Feather River may be inadequate for spawning and egg incubation as the result of releases of warmed water from Thermalito Afterbay. Warmed water may be one reason why neither green nor white sturgeon are [sic] found in the river during low-flow years. It is not expected that water temperatures will become more favorable in the near future and this temperature problem will continue to be a factor affecting habitat value for green sturgeon

Draft BDCP, (2A.8-9 – 8.10) (internal citations omitted). The Delta Smelt “are sensitive to exposure to elevated water temperatures, and high temperatures are known to reduce delta smelt survival and interfere with spawning.” (Plan, 2A.1-12). The Delta Smelt is considered to be the most vulnerable of these species to increasing temperatures. (Plan, 5.A.2.0-2). Whereas the other four species will return to the cool waters of the Pacific Ocean, the Delta Smelt lives in the Delta exclusively and cannot escape its rising temperatures. Conditions in the Delta continue to decline for coldwater species. As temperatures rise, the suitability of the critical habitat plummets, threatening Delta species’ survival and recovery.

3) Climate Change

Climate change will intensify deterioration of critical habitat and expose fish species to higher temperatures in the Delta. As stated in the BDCP, “[d]ue to climate change, some areas in northern California may experience more rainfall, but California generally will be 15 to 35% drier by 2100.” (Plan, 2.C-7). “Simulated projections indicate decline in precipitation for the Sacramento region for the rest of the 21st Century, especially the latter half of the century.” (Plan, 2.C-7). Snowmelt is also a major source of water for the Sacramento River. Reduced snowmelt necessarily results in lower water levels and reduced flow in the Sacramento River. According to predictions in the BDCP, “[s]nowpack volumes are expected to decline 25% by 2050.” (Plan, 2.C-10). The resulting lower flows in the Sacramento River will affect, not only the river itself, but also the Bay Delta which relies on Sacramento River flows. As sea level rises, water from the Pacific Ocean and San Francisco Bay will push further into the Delta, increasing salinity level and drastically impacting water quality.

Maintaining healthy X2⁸ locations will require increasingly stronger Delta outflows. According to the BDCP:

[f]or the existing salinity conditions, the X2 will move downstream about 1 km for each 10% increase in Delta outflow. Therefore, to move the X2 positions downstream 2 km would likely require about 20% more outflow. For existing conditions, an outflow of about 7,100 cfs is required to maintain X2 at Collinsville (km 81); the required Delta outflow for the projected LLT sea level rise of 45 cm likely would require about 8,520 cfs (1.2 x 7,100 cfs). An outflow of about 11,400 cfs is required to maintain X2 at Chipps Island (km 75); the required Delta outflow for the projected LLT sea level rise of 45 cm likely would require about 13,680 cfs (1.2 x 11,400 cfs).

(Plan, 5.A.2-91). The Delta Smelt relies almost exclusively on the inner Delta as its primary habitat. Encroaching seawater will impact the water quality of the Delta. It remains unclear whether the Delta Smelt could tolerate higher salinity levels in the Delta.

Climate change will worsen habitat loss and already-increasing water temperatures. With less precipitation and snowmelt, water levels in the Sacramento River will continue to decline. As water levels decline, less habitat will remain inundated and accessible to fish. Also, the water temperatures will rise faster, especially with the warming ambient conditions. Without adequate

⁸ “X2 is the distance, expressed in kilometers from the Golden Gate Bridge, at which channel-bottom water salinity (isohaline) is 2 ppt.” (Plan, 5.A.2-91).

preservation and restoration measures for Delta critical habitat, these fish face dim prospects for survival and recovery.

B) THE EFFECTS OF THE ACTION

“When considering the designation of critical habitat, [USFWS and NMFS] shall focus on the principal biological or physical *constituent elements* within the defined area that are essential to the conservation of the species.” 50 C.F.R. § 424.12(b) (italics added). USFWS and NMFS must determine and list the primary constituent elements with the critical habitat description. 50 C.F.R. § 424.12(b). PCEs “are essential to the conservation of a given species and [] may require special management considerations or protection.” 50 C.F.R. § 424.12(b). Without these PCEs, there would be no reason to designate habitat as critical. Accordingly, when considering the effects of a proposed action on critical habitat, NMFS and USFWS must evaluate the proposed project’s effects on critical habitat PCEs. Concerning the BDCP, NMFS and USFWS must evaluate the BDCP’s potential impacts on PCEs in the Delta and Sacramento River: physical habitat, water temperature, river flow, and salinity.

1) Physical Habitat and Water Temperature

(a) CM1 Effects on Physical Habitat and Water Temperature

“The primary purpose of *Conservation Measure 1 Water Facilities and Operation* is to construct and operate a facility that improves conditions for covered species and natural communities in the Delta while improving water supply.” (Plan, 3.4-1). Great tension exists between these goals. The more water left in the river for fish necessarily means a lower diversion; conversely, a greater diversion will result in less water kept in the river for biological goals. The BDCP claims to attempt to balance these goals with decision trees, which establish minimum flow criteria for the Sacramento River. Under these criteria, BDCP claims the proposed north Delta intake facility will only be permitted to divert water when the Sacramento River flow exceeds 5,000-7,000 cfs (depending on the month). (Plan, 3.4-20).

These minimum flow levels of 5,000 and 7,000 cfs are dangerously low. According to the United States Geological Survey, the average Sacramento River flow at Freeport, California in

October is 12,200 cfs.⁹ This means that operating at the constant low level pumping during October, which has a minimum flow requirement of 7,000 cfs, will, on average, decrease the Sacramento River's flow by 4,200 cfs. This represents a flow reduction of 34%, which will necessarily result in lower water levels, further deteriorating the PCEs of physical habitat and water temperature. With lower water levels, the Sacramento River will inundate less land, denying listed species access to physical habitat. Moreover, the lower water levels will expose listed species to higher temperatures. CM1 operations will worsen declining PCEs in the Delta and Sacramento River.

(b) CM2 Effects on Physical Habitat and Water Temperature

CM2: *Yolo Bypass Fisheries Enhancement Plan* includes plans to restore and enhance the Yolo Bypass as habitat for covered species. The Yolo Bypass is a floodplain along the Sacramento River, west of the City of Sacramento. In the unusual circumstances when Sacramento River flows exceed 55,000 cfs, water spills over the Fremont Weir and into the Yolo Bypass before reaching and flooding the City of Sacramento. The goal of CM2 is restoration of high quality habitat for fish species struggling in the Sacramento River. (Plan, 3.4-41). When inundated, floodplains often demonstrate a significant increase in biomass. (Plan, 3.4-41). Increases in production of phytoplankton and dipteran larvae provide abundant food sources for juvenile fish. (Plan, 3.4-41). The Knaggs Ranch Experimental Agricultural Floodplain Pilot Study 2011-2012 Year One Overview reports "remarkable growth rates" for salmon reared in the Yolo Bypass. (Pg. 10).

Yolo Bypass inundation results from significant flood events, not typical overtopping events at Fremont Weir. (Plan, 3.4-44). Conditional on these flood events, Yolo Bypass inundation is too infrequent to consistently support salmonid development. To take advantage of the productive floodplain habitat, CM2 includes plans to modify Fremont Weir to allow flooding at flows lower than 55,000 cfs, the current threshold for Yolo Bypass flooding. (Plan, 3.4-53). The modified weir would allow flows of 1,000 cfs to 6,000 cfs into the Yolo Bypass at a lower Sacramento River flow (25,000 cfs rather than 55,000 cfs under existing conditions).

9

http://nwis.waterdata.usgs.gov/nwis/monthly/?referred_module=sw&site_no=11447650&por_11447650_2=2209860,00060,2,1948-10,2010-03&format=html_table&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list

(Plan, 5C.A-72). The target diversion range for the Yolo Bypass is 3,000 to 6,000 cfs of Sacramento River water. (Plan, 5C.A-58).

Even if the virtually always dry Yolo Bypass could serve as a fish habitat, the Sacramento River flow will rarely be high enough to inundate the Yolo Bypass while satisfying the biological needs and diversions of the Sacramento River. Diverting up to 6,000 cfs into the Yolo Bypass could result in as much as 3 feet of reduction in river stage in the Sacramento, although understanding of how notch flows would affect river stage is incomplete. (Plan, 5C.5.4-6). This would radically worsen the deterioration of physical habit and water temperature PCEs. The Sacramento River currently lacks adequate water levels needed to provide access to physical habitat and preserve cool river temperatures. A reduction of as much as three feet in river stage would provide less access to habitat and increase water temperatures, further diminishing the conservation value of the habitat.

Additionally, the restored Yolo Bypass will serve as poor habitat for adult and juvenile fish. The Preliminary Report on the Experimental Agricultural Floodplain Habitat Investigation at Knaggs Ranch on Yolo Bypass states that when “flood waters leave main river channels to flow over adjacent floodplains, they slow, spread out, and warm” (Pg. 4) (internal citation omitted). Warm water temperatures and low water levels are the same conditions deteriorating PCEs in the Sacramento River and Delta. Further, species which enter the Yolo Bypass would endure increased losses due to stranding. (Plan, 3-3, 3-6, 4-5). Instead of improving habitat conditions, CM2 will intensify the decline of physical habitat and water temperature conditions.

2) River Flow

The State Water and Central Valley Projects (SWP/CVP) divert so much water from the south Delta that they reverse Delta flows. Instead of flowing to the Bay, some Delta channels flow toward the Clifton Court Forebay. In addition to confusing migratory fish following attraction flows and olfactory cues (Plan, 5.5.3-2, 4-20, 3-32), these reverse flows capture fish, especially juveniles and smaller species, and entrain them in the SWP/CVP intake facilities. According to the Draft BDCP, north Delta intake facilities are expected to result in “substantial reductions in entrainment and associated adverse effects associated with operation of the south Delta intakes.” (Plan, 3.4-7).

However, implementation of USFWS and NMFS BiOps has already mitigated SWP/CVP entrainment. According to the BDCP, “[i]mplementation of south Delta export pumping restrictions under the USFWS (2008a) BiOp has considerably limited the entrainment loss of adult delta smelt.” (Plan, 5.5.1-27) (internal citations omitted). Entrainment poses an even lower threat to the anadromous species. The BDCP cites entrainment losses of the Sacramento River Winter-Run Chinook Salmon population at .1% in 2007 and 5% in 2001. (Plan, 5.5.3-15). Similarly, “entrainment is not thought to be a major stressor” to Green Sturgeon. (Plan, 5.5.8-14). Entrainment is not as problematic as it was prior to 2008. The 2008 USFWS BiOp and 2009 NMFS BiOp limit pumping in the south Delta, minimizing entrainment and associated impacts on listed species. (EIR/EIS, 11-162-63).

These facts undermine the proposed benefit of reducing entrainment. As admitted in the Draft BDCP, entrainment is no longer a serious threat to listed species due to USFWS and NMFS BiOps. Thus, the room for improvement with dual conveyance operation appears minimal at best. In fact, constructing and operating north Delta intake facilities may expose listed species to increased entrainment risks in the Sacramento River. According to the Delta Science Independent Review Panel, “the validity of the primary assumption that there will be no entrainment of fish at the north Delta diversion (NDD) should be evaluated. In reality, there will be some fish lost at the transfer point” (BDCP Effects Analysis Review, Phase 3, Pg. 37-38). Nonetheless, the Draft BDCP fails to assess the likely entrainment and impingement impacts caused by North Delta diversions.

CM2 is meant to mitigate of impacts caused by CM1 by providing an alternative migration route in the Yolo Bypass, allowing smolt to avoid entrainment or impingement associated with the north Delta intake pumps. (Plan, 5.F-16). According to the BDCP, few juvenile fish would migrate through the Yolo Bypass to the Delta. “Of the Sacramento Basin population of Chinook salmon smolts that reach the Delta, an estimated 3 to 10% (depending on the run) would migrate via the Yolo Bypass” (Plan, 5.F-iii). This demonstrates that very few fish would reap the benefits of having access to the Yolo Bypass. Instead, most of the fish, adult or juvenile, would have to migrate through the Sacramento River and survive radically worsened conditions for the benefit of a small population of juveniles.

3) Salinity

The Sacramento River minimum flow requirements under CM1 will interfere with Delta outflow requirements. Under State Water Resources Control Board Decision 1641 (D-1641), diversions may not shift X2 “east of Chipps Island (75 river kilometers upstream of the Golden Gate Bridge) during the months of February through May” or “east of Collinsville (81 kilometers upstream of the Golden Gate Bridge) during the months of January, June, July, and August.” (D-1641, Pg. 150). As cited above, a Delta outflow of 11,400 cfs is required to maintain X2 at km 75 under current conditions. Once sea level rises by the predicted 45 cm, maintaining X2 at km 75 will require a Delta outflow of 13,680 cfs.

For April, the BDCP minimum flow bypass is 5,000 cfs. The San Joaquin River outflow into the Delta is, on average, 7,100 cfs during April.¹⁰ This means that the combined flow of the Sacramento and San Joaquin Rivers, ignoring evaporation and seepage, will be, on average, 12,100 cfs. By the LLT of the project, this Delta outflow of 12,100 cfs would fail to reach the necessary 13,680 cfs required to maintain X2 at km 75 by 1,580 cfs. To make matters worse, by the LLT of the project, precipitation and river flows will be drastically lower, and the Delta outflow would probably face a deficit much higher than 1,580 cfs.

Consequently, the increased diversions and inadequate bypass flow requirements will ensure that there is insufficient Delta outflow to preserve water quality in the Delta. Without sufficient Delta outflow, saltwater will intrude and increase salinity levels in the bays and Delta. The increased salinity will impair the water quality PCE. The Delta Smelt has adapted to a range of salinity which reflects seasonal change. (59 FR 65256). Salmonids rely on specific salinity levels to transition between freshwater and saltwater environments. (70 FR 52488). The proposed BDCP operations threaten the sensitive ecological balance in the Delta and bays, relied on by listed species. It remains unclear whether Delta species could adapt to disturbed salinity levels in the Bay Delta.

C) CUMULATIVE EFFECTS

1) Adverse Modification of Critical Habitat

¹⁰ <http://wdr.water.usgs.gov/wy2011/pdfs/11303500.2011.pdf>

ESA regulations direct the consulting fish and wildlife agency to “[f]ormulate its biological opinion as to 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). Joint NMFS and USFWS regulations define *destruction or adverse modification* to mean “a direct or indirect alteration . . . adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” 50 C.F.R. § 402.02.¹¹¹² Accordingly, NMFS and USFWS BiOps must determine whether the BDCP will cumulatively, adversely modify the physical or biological features, or PCEs, of the Sacramento River and Delta.

Consider the implementation of CMs 1 and 2. If the government implements CM1 at capacity diverting 6,000-15,000 cfs from the Sacramento River while implementing CM2 at capacity, diverting 6,000 cfs from the Sacramento River, a range of 12,000 to 21,000 cfs will be diverted from the Sacramento. Such a massive diversion would drastically worsen declining PCE values in the river. Water levels would plummet, inundating less land, increasing water temperatures, and allowing saltwater intrusion. As discussed above, the restored Yolo Bypass under CM2 would include the same inadequate conditions causing species to decline in the Sacramento River. Although CM2 is meant to mitigate the effects of CM1, CM2 would intensify the adverse effects of CM1. Attempts to restore habitat with insufficient water quantity will spread thin an already-limited resource, leaving these listed species with inadequate habitat. Diverting up to 6,000 cfs from the Sacramento while operating the proposed intake facility will ensure that neither the Sacramento nor the Yolo Bypass maintains the PCEs needed to support the survival and recovery of listed species.

Reduced pumping in the south Delta could decrease entrainment and associated effects of pumping, but the NMFS and USFWS BiOps have already minimized entrainment and associated effects. Moreover, maintaining natural flows in the south Delta does nothing to improve conditions in the Sacramento River, which will sustain the largest impacts of the project. Instead,

¹¹ The Ninth Circuit invalidated part of the agencies’ definition of “destruction or adverse modification”. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070-71 (9th Cir. 2004). However, the court did not review or invalidate the definition cited above.

¹² NMFS and USFWS have proposed joint regulations re-defining “destruction or adverse modification” which retain focus on “physical and biological features”. *See* 70 FR 27060.

the dual conveyance system will interfere with Sacramento River flow, creating more entrainment and impingement impacts in the Sacramento.

These BDCP operations will invariably result in the adverse modification of Delta and Sacramento River PCEs. Physical habitat will be lost due to diversions causing lower water levels; water temperature will increase, creating harsher conditions for struggling species; and salinity levels in the Delta will rise as Delta outflow decreases. The loss of these PCEs would drastically diminish the conservation value of the Sacramento River and Delta. The Sacramento River and Delta would cease to provide the irreplaceable habitat that NMFS and USFWS sought to protect. Accordingly, implementation of the BDCP would adversely modify designated critical habitat, in violation of Section 7 of the Endangered Species Act.

2) Arbitrary and Capricious Authorization of Incidental Take

Under the Administrative Procedure Act, courts reviewing agency decisions shall “hold unlawful and set aside agency actions, findings, and conclusions found to be . . . *arbitrary, capricious*, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706 (emphasis added). “A Biological Opinion is arbitrary and capricious if it fails to consider the relevant factors and articulate a rational connection between the facts found and the choice made.” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1121 (9th Cir. 2012) (internal quotations omitted). In this case, the BDCP BiOps must articulate a rational connection between the project’s cumulative impacts and the decision of whether the BDCP will adversely modify critical habitat. However, due to the pervasive uncertainty in the Draft BDCP CMs, there is insufficient science to support the conclusion that the BDCP would not adversely modify critical habitat. Concluding that there would be no adverse modification of critical habitat based on the Draft BDCP and EIR/EIS would be arbitrary and capricious.

The Delta Science Program Independent Review Panel (DSPIRP) and the Delta Independent Science Board (DISB) Draft BDCP and EIR/EIS reviews highlight the unsupported conclusion that the CMs will benefit covered species. According to the DSPIRP, “many of the critical justifications behind the supposed benefits of the conservation measures are highly uncertain.” (BDCP Effects Analysis Review, Phase 3, Pg. 17). “Approximately 72% of the

objectives for covered fish could not be fully evaluated at this time due to insufficient information.” (BDCP Effects Analysis Review, Phase 3, Pg. 21). According to the DISB:

the analysis regarding habitat restoration assumes there will be increases in phytoplankton production and that these increases will be transferred up the food web to covered species. This largely ignores an equally likely result that the added biomass of phytoplankton will be consumed by [invasive] clams, which have had substantial effects on phytoplankton abundance and species composition throughout the Delta.

(Review of the Draft BDCP EIR/EIS and Draft BDCP, Pg. B-39). The BDCP assumes that restored habitat will benefit covered species, not invasive species which threaten covered species. “Some of these other species, such as nonnative predators and invasive clams, may also benefit from these expanded habitats. Benefits for the other species may dampen any benefits of the habitat restoration for covered species.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, Pg. B-41).

Further, it is unclear which habitats the BDCP would restore. As stated by the DISB, the “priority of habitats to be restored is not indicated, so it is not clear if the most critical habitats will be first on the list.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, Pg. B-39). In *Gifford Pinchot*, the Ninth Circuit held that mitigation efforts outside critical habitat cannot offset adverse effects to designated critical habitat. 378 F.3d at 1076 (9th Cir. 2004). Without detailed descriptions of the proposed restoration measures, it is impossible to ensure that the BDCP would restore critical habitat instead of habitats with low conservation values.

As a result of this pervasive uncertainty, there is insufficient evidence to support a conclusion that the cumulative BDCP effects will not adversely modify critical habitat. Accordingly, any finding that the BDCP would not adversely modify critical habitat will be arbitrary and capricious. The ESA commands NMFS and USFWS to “*insure* that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . .” 16 U.S.C. § 1536(a)(2) (emphasis added). An arbitrary and capricious finding that the BDCP would not adversely modify critical habitat will fail to *insure* the protection of critical habitat, violating the commands of the ESA.

D) CONCLUSION

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* face declining conditions throughout the Sacramento River and Delta. Dams and diversions have caused low flows, warming temperatures, increases in salinity, and reversed river flows, devastating the health of the Delta ecosystem. Nevertheless, the Draft BDCP includes measures to increase Sacramento River diversions, which will worsen these conditions and adversely modify the critical habitat that endangered and threatened Delta species rely on for survival and recovery. To comply with the commands of the ESA, NMFS and USFWS must reject the requests for authorized incidental take of listed species under the BDCP.

II) THE BDCP DOES NOT MEET THE REQUIREMENTS FOR AN INCIDENTAL TAKE PERMIT UNDER ESA SECTION 10.

The Endangered Species Act prohibits the taking of any federally designated endangered species. 16 U.S.C. § 1538 (West 2014). A take is defined as to “harass, harm, pursue, hunt, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1538(a)(1) (West 2014). Any significant habitat modification or degradation that impairs breeding, feeding, or sheltering is also considered harm in terms of ESA. 50 C.F.R. § 17.3 (West 2014).

ESA Section 10 allows exceptions to the prohibition on takings through acquiring an incidental take permit. 16 U.S.C.A. § 1539 (West 2014). In applying for a take permit, the applicant must develop a habitat conservation plan that specifies “what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.” 16 U.S.C.A. § 1539(2)(A)(iii) (West 2014).

If the habitat conservation plan meets the ESA section 10 requirements, then the Secretary must then assess the permit application to determine with an incidental take permit is appropriate. *See* 16 U.S.C.A. § 1539(a)(2)(B). The Secretary may issue a permit only if they determine that:

(ii) “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking”;

(iii) “the applicant will ensure that adequate funding for the plan will be provided”;

(iv) “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”; and

(v) the other measures required under subparagraph (A)(iv) will be met.

16 U.S.C.A. § 1539(2)(B)(i-v) (West 2014).

The permit must “contain such terms and conditions as the secretary deems necessary or appropriate to carry out the purposes of this paragraph, including... such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.” *Id.* If a permittee is not complying with the terms and conditions of the permit, the Secretary will revoke the permit. 16 U.S.C. § 1539(a)(2)(C).

In addition to the permitting laws under ESA, NMFS and FWS regulate incidental take permits through regulations. Under NMFS regulations, the Secretary must also consider:

(i) “the status of the affected species or stocks”;

(ii) “the potential severity of direct, indirect, and cumulative impacts on the species or stocks and habitat as a result the proposed activity”; and

(iv) “the use of the best available technology for minimizing or mitigating impacts”.

50 C.F.R. § 222.307 (c)(1)(i-v) (West 2014).

The Secretary must also ensure that the permit is consistent with ESA Section 7. See 16 U.S.C.A §1536(a)(2) (West 2014).

A) THE BDCP’S ITP WOULD BE ISSUED ARBITRARILY AND CAPRICIOUSLY IF GRANTED.

If either FWS or NMFS issued an ITP, the permit would be issued arbitrarily and capriciously. Administrative agencies must consider the relevant factors and articulate a rational connection between the facts found and the choices made. *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). The Administrative Procedure Act (APA) makes unlawful any agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C.A. § 706(2)(A) (West 2014). A decision is arbitrary and capricious if the agency relied on factors congress did not intend it to consider, filed to consider an important aspect of the problem, offered an explanation that runs counter to

the evidence, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto., Ins. Co.*, 463 U.S. 29, 43 (1989).

Here, the agencies would issue permits arbitrarily and capriciously if they issued permits pursuant to the plans outlined in the BDCP. To issue permits under joint regulations the agencies would have to ignore that the BDCP: (1) has not adequately addressed alternatives, (2) has not reduced by the maximum extent practicable; (3) has not provided adequate funding; and (4) has appreciably reduced the likelihood of the species' survival in the wild. 16 U.S.C.A. § 1539(2)(A-B) (West 2014). To issue a permit under NMFS regulations, the agency would have to ignore that the BDCP: (1) threatens direct, indirect, and cumulative impacts on the species or stocks and habitat; and (2) does not use the best available technology for minimizing and mitigating impacts. 50 C.F.R. § 222.307 (c)(1)(i-v) (West 2014).

B) THE BDCP HAS NOT ADEQUATELY ASSESSED ALTERNATIVES TO TAKE TO WARRANT AN ITP.

Take alternatives are required by ESA when applying for an ITP. 16 U.S.C.A. § 1539(2)(A) (West 2014). The take alternatives are designed to provide different levels of incidental take from the original plan. *See* Draft BDCP, 9-1. They “differ primarily in the location and scale of water conveyance facilities and operations.” Draft BDCP, 9-13. Nonetheless, the take alternatives are almost entirely the same project.

The Draft BDCP offers nine take alternatives lettered A through I. The take alternatives vary in their method of conveyance, operational criteria, average annual water deliveries, and conservation components. Draft BDCP, 9-14 – 9-16. Development of alternatives “focused on the identification of alternatives that reduced the scope and intensity of potential environmental effects, including adverse effects on covered fish and wildlife specie.” Draft BDCP, 9-8. But, the BDCP concedes that “each take alternative would involve the construction of new conveyance facilities,” while some of the take alternatives would only change a single conservation measure. Draft BDCP, 9-13. Furthermore, every single proposed take alternative, except one, would result in a range of 4.17-5.59 MAF in water deliveries a year. The only alternative that provides a lesser amount is take alternative E, which offers a 3.4 MAF in deliveries. The BDCP itself

estimates 4.71-5.59 MAF in annual deliveries. Alternative E is the only take alternative that makes a real attempt at reducing the annual deliveries of the project. Draft BDCP 9 – 14-16.

The BDCP lists differences between the take alternatives such as: location and type of primary conveyance facilities; number of pumping plants; water facility components; number of forebays; and more. Draft BDCP 9-14. These differences, however, are focused on water conveyance methods, not methods to avoid the taking of species.

Almost ironically, the Conceptual Engineering Report (CER) did propose changes that would affect the amount of incidental take by the project, but these changes were not implemented in any of the BDCP take alternatives. The CER suggests “constructing a new fish screening facility on [a] realigned section of Victoria Canal, and closing the existing inlet gate structure to CCF at the southwest corner to prevent fish from entering the forebay” because over “80% of juvenile salmonids and juvenile/adult smelt entering CCF do not survive.” BDCP CER 20-1. There is a clear problem here since the mortality rate in forebays is so high, and the BDCP’s own CER suggested an alternative that would result in reduced take, yet the BDCP failed to consider anything like this in the final take alternatives.

The CER also suggests closing the existing inlet structure located at the southeast corner of CCF. BDCP CER 20-2. The existing inlet would be close to allowing only a single inlet through the Victoria Canal. *Id.* The CER states that this would prevent any new fish from entering CCF following this improvement, but again, the BDCP take alternatives fail to consider anything close to this idea that would significantly reduce take. Draft BDCP Chapter 9.

The CER enters into a length discussion of twelve different kinds of intakes, yet the BDCP take alternatives make no mention of different kinds of intake, they only vary in their location and number. BDCP CER B 2–1-19; Draft BDCP 9–14-16. The BDCP assumes that only its selected intakes are worth consideration as alternatives, even though the CER concedes that other possibilities do exist.

The BDCP implicitly concedes that the take alternatives are incomplete by proposing more effective alternatives to take in the CER. There are many other approaches the BDCP

could have taken in proposing alternatives, but includes projects that were essentially identical to the original plan.

C) THE BDCP HAS NOT MINIMIZED AND MITIGATED THE DAMAGES TO THE MAXIMUM EXTENT PRACTICABLE, AND PROVIDES TOO NARROW A RANGE OF ALTERNATIVES TO ADEQUATELY MITIGATE DAMAGES.

ESA requires the secretaries to consider whether the take has been reduced by the maximum extend practicable. 16 U.S.C. § 1539(2)(A) (West 2014). The BDCP fails to do so for two reasons. First, as shown above, the CER had already suggested practicable methods that would have significantly reduced take, which the BDCP outright ignores in the take alternatives discussion. Secondly, the BDCP's rejection of its narrowly selected alternatives take the decision making process away from the secretary and places it in the hands of the BDCP.

In *Gerber v. Norton*, the Fish and Wildlife service, the court held that the government did not minimize the impacts of the taking "to the maximum extent possible," pursuant to 16 U.S.C. § 1539(a)(2)(B). 294 F.3d 173, 184 (D.C. Cir. 2002).

When an agency is required to make a finding as a prerequisite to an action, it must do so. *Sugar Cane Growers Coop.*, 289 F.3d at 97. Furthermore, an agency may not delegate the responsibility to the regulated party. *Gerber*, 294 F.3d at 184.

Here, the BDCP has not minimized or mitigated damages to the maximum extent practicable, as discussed in the above section. The BDCP's lack of adequate alternatives shows that the BDCP has failed to meet the minimum criteria necessary for the alternatives to count.

Furthermore, it is the Secretary's decision, and not the applicant's, to determine whether the applicant has satisfied the issuance criterion. *Gerber*, 294 F.3d at 185. Therefore, before issuing a permit, the Secretary must independently find that there are no viable alternatives to the development plan. *Id.* at 185. If the agency suggests a modification of the existing plan or proposes a modification to the existing plan, the result is an implicit rejection of the proposal. See *id.*

The BDCP outlines five questions that were asked regarding the take alternatives in determining whether they were chosen or not:

1. “Does the take alternative reduce take of covered species?”
 2. “Does the take alternative increase conservation benefit to covered species?”
 3. “Is the take alternative consistent with the BDCP overall goal to provide “a comprehensive conservation strategy for the Sacramento-San Joaquin River Delta designed to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework?”
 4. “Is the take alternative practicable in terms of costs, logistics, and technical feasibility?”
 5. “Are there additional significant unavoidable adverse effects to other resources?”
- Draft BDCP 9-35.

These questions leave the secretary to think that there are no viable alternatives outside of those suggested by the BDCP. But, these questions are insufficient by themselves to determine whether the alternatives are adequate. One fundamental question that the BDCP does not ask in its assessment of is: Are there any plans we did not consider? Or, are these alternatives too similar? The answer to both is, yes. The CER presented multiple options that would have been much more effective in reducing the amount of take over the primary plan. The CER proposes: constructing a new fish screening facility on a realigned section of Victoria Canal, and closing the existing inlet gate structure to CCF at the southwest corner to prevent fish from entering the forebay; and suggests closing the existing inlet structure located at the southeast corner of CCF. BDCP CER 20-1. The BDCP take alternatives also fail to consider using any different intakes, or low flow fish screen as methods of reducing take. BDCP CER 2–1-19.

The proposed alternatives are alternative methods of conveyance. Their purpose is not to reduce the amount of species taken, but the method through which water is delivered. The amount of take associated with these alternatives is just coincidental, and the marginal differences between the projects shows this.

D) THE BDCP HAS NOT ENSURED ADEQUATE FUNDING AS REQUIRED BY ESA SECTION 10.

ESA states that there must be adequate funding prior to issuance of an ITP. However, the BDCP does not have adequate funding to meet this requirement. The BDCP refers to the implementation agreement for assurances of adequate funding, but the implementation

agreement clearly falls short of the mark for adequate funding as discussed in “Funding Assurances,” page 117 of this document.

E) THE TAKING WILL APPRECIABLY REDUCE THE LIKELIHOOD OF THE SURVIVAL AND RECOVERY OF CRITICALLY ENDANGERED SPECIES IN THE WILD.

ESA states that the taking cannot appreciably reduce the likelihood of the survival and recovery of the critically endangered species in the wild, but the BDCP clearly does so. “Violations of the ESA,” page 67 of this document addresses why the taking will appreciably reduce the likelihood of survival and recovery in the wild.

F) THE POTENTIAL SEVERITY OF DIRECT, INDIRECT, AND CUMULATIVE IMPACTS ON THE SPECIES OR STOCKS AND HABITAT AS A RESULT THE PROPOSED ACTIVITY ARE TOO GREAT FOR NMFS TO GRANT AN ITP.

The NMFS secretary must consider cumulative impacts on the species and stocks prior to issuing an ITP. 50 C.F.R. § 222.307 (c)(1) (West 2014). The severity of cumulative impacts has not been properly addressed by the BDCP. For additional discussion on cumulative impact please see “Cumulative Effects,” page 77.

G) THE BDCP DOES NOT USE THE BEST AVAILABLE TECHNOLOGY FOR MINIMIZING AND MITIGATING IMPACTS.

The secretary of NMFS must consider whether the best available technology for minimizing and mitigating impacts has been used. 50 C.F.R. § 222.307 (c)(1)(iv) (West 2014). Here, the BDCP concedes through its own CER that it has not used best available technology to reduce take. The CER lists multiple alternative methods that would be much more effective as reducing take than the current proposed alternatives, but the BDCP does not consider any of these, ignoring technology that the CER already conceded was available.

The CER suggests multiple alternatives including: “constructing a new fish screening facility on [a] realigned section of Victoria Canal, and closing the existing inlet gate structure to CCF at the southwest corner to prevent fish from entering the forebay”; and closing the existing inlet structure located at the southeast corner of CCF. BDCP CER 20-2. The existing inlet would be close to allowing only a single inlet through the Victoria Canal. *Id.* The BDCP take alternatives fail to consider anything close to this idea that would significantly reduce take, and

instead tried to alter the amount of take through changing the locations of intake, the number of pumping plants, etc. Draft BDCP 9-14.

The CER also discusses twelve different kinds of intakes, yet the BDCP take alternatives make no mention of different kinds of intake, they only vary in their location and number. BDCP CER B 2–1-19; Draft BDCP 9–14-16. The BDCP failed to use technology that its own CER had suggested would be effective at reducing the amount of take from the Delta. Given the presented facts, the secretary would be unable to grant a Section 10 permit under NMFS regulations.

H) CONCLUSION

For the foregoing reasons, if a Section 10 permit were issued pursuant to the BDCP, it would be in violation of the law. The legally required elements that the secretaries must consider prior to issuing a section 10 permit make it essentially impossible to determine whether something is new or used.

III) ILLEGAL AWARD OF INCIDENTAL TAKE PERMITS AND NO SURPRISES PROTECTION

When state or private parties seek the authorized take of listed species, they must receive incidental take permits from NMFS or USFWS. Section 7. However, federal agencies seeking the authorized take of listed species must obtain an incidental take statement, not permit, from NMFS or USFWS. Section 7. A critical distinction between the two types of authorizations is the “No Surprises” rule. Under the No Surprises rule, once an incidental take permit has been issued and its terms and conditions are being implemented, the federal Fish and Wildlife Agencies will not require additional measures for changed circumstances not provided for in the plan or for unforeseen circumstances. 50 C.F.R. § 222.307(g). Federal agencies, who may receive incidental take statements, not permits, are ineligible for assurances under the No Surprises rule. *Id.*

The U.S. Bureau of Reclamation (Reclamation), which operates the CVP, is seeking incidental take statements for the BDCP from NMFS and USFWS. Reclamation is therefore ineligible for No Surprises rule assurances. CVP water contractors who have entered water contracts with Reclamation seek incidental take permits along with No Surprises rule assurances. (IA, 3). These CVP contractors are parties to the BDCP because they will assist Reclamation in

making changes to CVP operations through implementation of the BDCP. Because the CVP contractors are parties to the BDCP by extension of Reclamation, the CVP contractors are ineligible for any rights or assurances unavailable to Reclamation. In other words, because Reclamation is ineligible for No Surprises rule assurances, their contractors are also ineligible since Reclamation cannot contract for rights and assurances that it does not have. Instead, Reclamation's CVP operations will be limited to the terms and conditions of the BDCP incidental take statement, and the CVP water contracts will be subject to the same limitations. Accordingly, granting No Surprises rule assurances to the CVP contractors would violate the ESA.

IV) UNLAWFUL FAILURE TO RELEASE BIOLOGICAL ASSESSMENT AND BIOLOGICAL OPINION

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 Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013). The Biological Assessments and Biological Opinions are the written documents that federal agencies must prepare during the ESA consultation process. The NEPA Regulations require that "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the . . . Endangered Species Act. . . ." 40 C.F.R. § 1502.25(a). "ESA compliance is not optional," and "an agency may not take actions that will tip a species from a state of precarious survival into a state of likely extinction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929-30 (9th Cir. 2008).

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

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

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

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

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.

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.

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

A) ESA 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.

B) THE BDCP AND THE DRAFT EIR/EIS VIOLATES ESA §10.

The BDCP will undeniably require agency consultation and Incidental Take Permits under §§7 and 10 of the Endangered Species Act (ESA). This comment focuses solely on the §10 process. Existing pumping operations in the Delta require these permits; and the proposed massive additions in infrastructure assure that any new operations will also require the permits. Yet despite the certain need for these permits, the BDCP proponents have not properly engaged in the §10 process. The haphazard and incomplete nature of both the Plan and the accompanying Draft EIR/EIS insures that neither the US Fish & Wildlife Service nor the National Marine Fisheries Service should issue the required ITPs.

Under §10 of the Endangered Species Act, otherwise lawful activities can be granted exceptions that allow for the “taking” of listed species. 16 U.S.C. §1539(a)(1)(B) (West 2014). The exceptions allow for the development of lands that would otherwise be blocked in order to protect species. However, there still exist procedural protections that ensure development does not run rampant over endangered animals. The BDCP proponents have failed in fully complying with these measures.

In order for an ITP to be issued, the applicant must submit a valid conservation plan. 16 U.S.C. §1539(2)(a) (West 2014). In order to be considered valid, the conservation plan must include the projected impacts of anticipated take, minimization steps, alternatives to take, and “such other measures that the Secretary may require.” 16 U.S.C. §1539(2)(a)(i)-(iv) (West 2014). Once the application is submitted, NMFS or USFWS must make findings that “the taking will be

incidental,” the taking will be minimized “to the maximum extent practicable,” that there will be “adequate funding,” and that “the taking will not appreciable reduce the likelihood of the survival and recovery of the species.” 16 U.S.C. §1539(2)(B)(i)-(iv). Only once these primary steps and the accompanying sub-steps have been completed can an ITP be issued.

In addition to these basic requirements, the issuance of an ITP is, in itself, a “Federal action subject to §7 of the ESA.” (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 7-4-7-5 (1996)). As such, there must be a Biological Opinion issued that determines whether the issuance of the ITP will affect the conservation efforts of a listed species. 16 U.S.C. §1536(c). Because the §10 process and the §7 process related to the Bureau of Reclamation require a Biological Opinion, a joint opinion can be issued. (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 3-2 (1996)). Once all of these steps have been completed, NMFS or USFWS can make the required findings, and the FWS and NMFS can make a final decision on the issuance of Incidental Take Permits. Only if all of the application requirements are met and all required findings are issued can an ITP be legally issued. As a Habitat Conservation Plan, the BDCP does not meet the requirements set forth for application package or for NMFS or USFWS to make the required findings.

1) Purposeful Limitation of Take Discussion in the Application for an Incidental Take Permit

The BDCP fails to meet several requirements. Chief among the examples of BDCP failures, again, regards the Delta smelt. In the BDCP, the discussion of the Delta smelt and associated take of the species is extremely limited. The document primarily deals with entrainment of the Delta smelt in the proposed north-of-Delta facilities. (*See* Plan, Ch. 5, 5.2-37—38) (for a table listing biological objectives for the Delta Smelt); (*See generally* Plan, Ch. 5, 5.5-1) (including 5.5.1-1 for a summary of overall effects). Very little unbiased discussion is given to other forms of take, including critical habitat modification. (Plan, 5.5.1-35) (Following discussion of minimal take factors, focusing primarily on entrainment, states, “the BDCP has the potential to reduce take of delta smelt through entrainment... [and] has the potential to great population size.”).

The disproportionate amount of space and discussion given a single issue of take is contradictory to the letter of the law and the intent of the §10 permitting process. The BDCP's focus on entrainment as the primary source of take and as the biggest stressor on the smelt populations amounts to a smokescreen. The optimism regarding the level of entrainment take does nothing to allay concerns regarding the overall health and recovery of the Delta smelt population. It is an effort in deflection. More critically, this type of discussion steers questions away from other forms of take by suggesting, with a sunny thoroughness, that the BDCP has taken a long look at the larger issue of take and species decline. The plan has not taken such a look and the failure to adequately address the issue of take, and minimization measures beyond entrainment screens is a fatal error in the application package under the §10 permit requirements.

2) Inability of the DOI to Make the Required Findings for ITP Issuance

Beyond the failure of the application package, it is impossible for NMFS or USFWS to make all the required findings necessary to issue the ITP. There are significant issues regarding all four of the statutory requirements. The first issue deals with the whether the takings will be incidental to an otherwise lawful activity. When take is confined to entrainment at the pumping facilities, it may be possible for the finding to be made. However, this definition and discussion of take is far too narrow to be appropriately applied when considering the BDCP. The cumulative impacts of entrainment, flow disruption, changes in sediment and turbidity, and overall habitat modification are not sufficiently addressed. The BDCP Water Tunnels will circumvent natural through-Delta flow, further altering an ecosystem completely reshaped by human intervention. (EIR/EIS, 1A-1). This will have a significant impact on the flow, salinity, and overall habitat stability of the Delta smelt. This habitat modification is not incidental to any activity—it is the fundamental activity. In artificially limiting take discussions to entrainment and salvage, the BDCP has not provided enough relevant information for the Department of the Interior to determine if any BDCP activity will result in other forms of take. This deflection away from serious changes in critical stressors on the Delta smelt onto a single issue means that the DOI cannot make an informed finding, and the HCP should not be validated.

3) A Finding of “No Jeopardy”

In addition to other requirements, §10 permits are also governed by the general §7 standards, including the “jeopardy standard.” (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 3-2 (1996)). This means that in order for an ITP to be issued, the take must be incidental AND there must be a “no-jeopardy finding for all affected federally listed species.” (*Id.* at 3-2). The basis for the finding is, of course, the Biological Opinion issued by either the FWS or NMFS. Without a proper Biological Opinion dealing specifically with the BDCP, it should be impossible for the issuing agencies to grant the required ITPs.

Issuance of an Incidental Take Permit (ITP) is required so long as the HCP application meets the requirements set forth in §10 (a)(2)(A) AND that it is determined by the Secretary of the Interior that, amongst other things, “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” (§1539(a)(2)(B)(i-v)). These vital criteria are not met under the BDCP.

There are two primary areas where there are serious questions about the viability of the BDCP as a valid HCP: in ensuring the continued recovery of a listed species, and it taking all active mitigation measures. The reasons behind this failing are intertwined, and primarily have to do with the uncertainties expressed about the Delta smelt (explored in much larger detail above) and flow criteria (for further detail, see comment focusing on §7 deficiencies). As presented, the BDCP has offered only vague hopes regarding the recovery of the Delta smelt, rather than the concrete measures required for a valid HCP. As such, the DOI cannot issue the required findings, and the BDCP should not be issued the requested Incidental Take Permits.

4) The BDCP Adopts a Programmatic Approach Rather than the Appropriate Project Approach to ITP Issuance.

Finally, HCP Guidelines recognize that occasionally a programmatic approach to conservation serves the purposes of development and conservation. However, it also recognizes the limitations, and possibility for abuse, that this type of planning approach offers. In order to limit abuse of the, NMFS warns that programmatic HCPs may only be successful “when the activities being addressed are well-defined, similar in nature, and occur within a described

geographical nature or at similar points in time.” (*Habitat Conservation Planning and Incidental Take Permit Processing*, U.S. Department of the Interior et al., p. 3-39 (1996)).

The larger Delta Plan has previously described the BDCP as a project, rather than a program. (Draft Delta Plan Program EIR, Ch. 23, 23-1). Yet despite this, it again has been structured and described as a programmatic document, rather than as a project document. The exception to this is CM1, which is the only major element given a full project treatment. In deferring or not producing required documents (including the Implementing Agreement and Biological Opinion) to coincide with the release of Draft EIR/EIS, the BDCP has attempted to adopt a programmatic approach. This is incompatible with the HCP guidelines. The project scope, timeframe, and impact are not well defined and therefore fail the HCP guidelines. As such, the plan must be redrafted to reflect the proper approach to ITP processing, and should not be granted permits at this time.

V) IGNORING THE CONCERNS OF THE INDEPENDENT SCIENCE REVIEWS

A) THE FAILURE OF THE DRAFT BDCP AND DRAFT EIR/EIS TO PROVIDE SUFFICIENT SCIENTIFIC DATA & THE NEED FOR AN EXTERNAL CONSULTATION PROCESS.

For the future of the Delta, the California Water Code §85054 defines two coequal goals of providing a more reliable water supply and to protect, restore and enhance the Delta ecosystem. The proposals contained within the Draft Bay Delta Conservation Plan (BDCP) and the companion Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) have failed on this mandate. The Draft BDCP EIR/EIS are akin to someone being wheeled into an ER on a stretcher with a massive bleeding chest wound, being dressed with some loose gauze bandages, given two generic pain relievers, and being discharged. It is fraught with inconsistent, incomplete, uncertain, and inaccurate data. Furthermore, the most alarming issue is that these documented discrepancies are either neglected, ignored, minimized or spun in an attempt to make the Draft BDCP EIR/EIS documents appear to be sufficient enough to forego a formal Biological Assessment/Biological Opinion process as required by Section 7 of Endangered Species Act (ESA, 16 U.S.C § 1536). The glaring omissions and inconsistencies, including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, and lack of a commitment to engage in the Section 7 process have resulted in a set of documents that are not sufficient for informed review by the public and the decisionmakers. Our

concerns are mirrored in the recent independent science reports produced by the Delta Science Program (<http://deltacouncil.ca.gov/science-program/about-science-program>): BDCP Effects Analysis Review Panel Report, issued March, 17, 2014 (Attachment 1 http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Science-Independent-Review-Panel-Report-PHASE-3-FINAL-SUBMISSION-03132014_0.pdf); Delta Interior Flows and Related Stressors Workshop, April 16 and 17, 2014 (Attachment 2 <http://deltacouncil.ca.gov/sites/default/files/documents/files/21-Jonathan-Rosenfield-Impact-of-Altered-In-Delta-Hydrodynamics-an-Overview.pdf>); and the Delta Independent Science Board Review of the Draft EIR/EIS for the Bay Delta Conservation Plan, issued May 15, 2014 (Attachment 3 <http://deltacouncil.ca.gov/sites/default/files/documents/files/Attachment-1-Final-BDCP-comments.pdf>). Furthermore, The recent Ninth Circuit Court of Appeals decision in *San Luis & Delta-Mendota Water Auth. v. Jewell* (*San Luis v. Jewell* No. 11-15871 9th Cir. Mar. 13, 2014) (<http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/13/11-15871.pdf>) discusses the importance of the Biological Opinion and the goals of the ESA. Based upon these scientific reports, related materials, and the Court of Appeals decision, we reiterate the concerns we have voiced and detailed in previously submitted comment letters that it is 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 BDCP 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). The adverse modification of critical habitats for five threatened and endangered fish species that would be caused by the proposed BDCP Water Tunnels is unconscionable. Extinction is forever. The BDCP Water Tunnels would adversely modify designated critical habits and thus promote species extinction and preclude species recovery.

This section of FOR's comment letter focuses on the scientific analyses presented via the aforementioned scientific reports and follows up our earlier comment letters submitted to your attention. Each of our previous comment letters is also 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.

B) SCIENTIFIC REVIEWS & REPORTS: BDCP EFFECTS ANALYSIS INDEPENDENT REVIEW PANEL REPORT (MARCH, 17, 2014)

The Delta Science Program (DSP) convened a seven-member independent scientific panel tasked to review the scientific soundness of the BDCP Effects Analysis. This review, initiated in October of 2011, was conducted over three phases of the Draft BDCP documents in their various incarnations. The third phase was specifically focused on the December 2013 release of the Draft BDCP Chapter 5 Effects Analysis and all of its associated technical appendices. On March 17th, the independent scientific review panel (Panel) issued a very detailed report specifically indicating their concerns, questions, and recommendations regarding the Draft BDCP. Based on the Executive Summary of the report, Chapter 5, in many aspects, was found to be incomplete, inconsistent, highly uncertain, overly optimistic, leaning in favor of beneficial conclusions, and at times, inaccurate (See Attachment 1 Executive Summary).

“...the Panel universally believes that by itself, Chapter 5: Effects Analysis inadequately conveys the fully integrated assessment that is needed to draw conclusions about the Plan, in part because of incomplete information on factors affecting the covered species.”

The Panel also addressed their concerns regarding the fragmented and inaccessible structure of the materials and found the foundation of the BDCP to be “weak in many respects” (Id. at p. 6):

“...the lack of accessibility to information within the chapter or clear reference to supporting details inhibits rather than elucidates comprehension of the findings and thus conveys an unsatisfying “trust us” message.”

The Panel voiced concerns, numerous times throughout the report, regarding the failure to acknowledge the high levels of uncertainty associated with BDCP’s assumptions and predictions (Id. at p. 8). There is a troubling disconnect between the substantive information presented within the chapter and the information presented in the summary pages. Generally, the more beneficial outcomes are used in the conclusions. Often times, the BDCP fails to consider alternate scenarios. The Panel recommended that the Chapter 5 Net Effects Analysis needed greater objectivity:

“Regardless of the degree of uncertainty and the number of linkages without analyses, the conclusion is often overstated as the most beneficial result.”

This criticism is revisited further in the review, specifically in the context of expected goals for covered fish and failure to adequately address levels of uncertainty. Conclusions often overstated potential beneficial effects while neglecting to adequately address lower-end effects (Id. at p. 15). The Panel found critical information gaps and questioned why life cycle models were not developed for the specific purpose of evaluating BDCP effects on each of the covered species. The Panel provided a list of recommendations, including a directive to complete work on biological objectives (Id. at p. 18). What is most disconcerting is that with regard to the endangered and threatened fish populations (e.g. salmonids, delta smelt, and green sturgeon) in the context of habitat restoration, the Panel found that the BDCP continued to overstate beneficial effects (Id. at p. 25). The Panel continued to stress the need for additional information and clarification to address the gaps and uncertainties for the covered fish species. Another glaring concern was the missing, yet critical, information (such as exclusion of some relevant life cycle models). Failure to include this information resulted in the inability to properly address negative net effects on salmonids and steelhead. No justification was provided for the exclusion of this critical information (Id. at p. 31).

The Panel also detailed the inconsistencies and inaccuracies set forth in the technical appendices, such as Appendix 5-F - Biological Stressors on Covered Fish. Specifically, the range estimate in predation effects due to the north Delta diversion “is deceptive and technically incorrect” (Id at p. 68). In the Executive Summary section of the Report, the Panel urges the BDCP to “make a commitment to the fundamental process, and specifically the required monitoring and independent science review, not just the concept of adaptive management” (Id. at p. 9). Unfortunately, it appears that this very detailed Report may be ignored by the BDCP staff. In a letter dated April. 1, 2014, John Laird, Secretary for Natural Resources, acknowledges the Report and commends the panel on their hard work and recognition of the uncertainties in the BDCP, however, he fails to mention or address the numerous and troubling major concerns, inconsistencies, inaccuracies identified by the Panel. Nor does he purport to answer any of the questions presented (<http://deltacouncil.ca.gov/sites/default/files/documents/files/AR-M550U-20140401-141126.pdf>). Furthermore, his letter appears to be dismissive of the Panel’s recommendations as he states:

“We appreciate the recommendations from the panel in this area.

However, we must ultimately draw conclusions and take action based on our

current understanding and interpretation of the best available science notwithstanding the fact that there remains uncertainty”

The Panel provided a plethora of valuable and detailed constructive recommendations and criticisms, designed to improve a severely flawed BDCP. Based on the Panel’s Report, it is clear that an ESA consultation is needed. At our November 7, 2013 meeting with the federal agency BDCP representatives, 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 on the five listed species of threatened/endangered fish or their critical habitats.

As detailed and discussed in our previous comment letters (See FOR letter 1-14-2014), failure to comply with the relevant and required state and federal regulations and guidelines for the Draft BDCP EIR/EIS is a violation of ESA, NEPA and CEQA and an inexcusable disservice to the public as it deprives the public and decision-makers of the needed analyses, therefore, preventing any semblance of a meaningful review.

C) DELTA INTERIOR FLOWS AND RELATED STRESSORS WORKSHOP (APRIL 16 AND 17, 2014)

The Delta Science Program convened an independent panel workshop on Delta interior flows and stressors on April 16th and 17th, 2014 (<http://deltacouncil.ca.gov/science-event/10470>). Although the focus of the workshop was not specifically the draft BDCP EIR/EIS, several of the panelists presented scientific data that was directly relevant for analysis of the draft BDCP EIR/EIS and impacts to covered fish species. Concerns regarding negative impacts due to new conveyances, such as the proposed tunnel under the BDCP, were repeatedly expressed (<http://deltacouncil.ca.gov/delta-science-program-workshop-interior-delta-flows-and-related-stressors-presentations>). Specifically, Bay Institute Conservation Biologist, Jonathan Rosenfeld, Ph.D. presented on the Impact of Altered In-Delta Hydrodynamics. Reduced inflows and increased exports would have a direct negative impact on several threatened and endangered fish species, including but not limited to, direct mortality (“salvage”), pre-screen mortality, altered behavioral cues resulting from altered hydrology increasing in-delta mortality, and low dissolved oxygen levels (See Attachment 2 p. 5). Furthermore, high entrainment losses for Delta smelt would persist under the proposed BDCP (Id. at p. 18). Similar negative impacts are expected for Longfin smelt and Chinook salmon (See <http://deltacouncil.ca.gov/delta-science-program-workshop-interior-delta-flows-and-related-stressors-videos>). Despite the compelling and

disconcerting scientific data presented at this two day workshop, that is clearly relevant for any changes being proposed to the Delta, the BDCP staff has not responded to or addressed these concerns. This reaffirms FOR's concerns regarding the deficiencies in the current Draft BDCP EIR/EIS and the necessity of addressing these alarming issues by properly engaging in the legally required consultation process for obtaining Biological Assessments and Biological Opinions.

D) DELTA INDEPENDENT SCIENCE BOARD REVIEW OF THE DRAFT EIR/EIS FOR THE BAY DELTA CONSERVATION PLAN (MAY 15, 2014)

The Delta Independent Science Board (DISB), pursuant to the Delta Reform Act of 2009 §85320(c), is mandated to review the draft BDCP EIR/EIS. On May 15, 2014, DISB submitted their review focused on analyzing the scientific data and methodologies used in the draft BDCP EIR/EIS and the validity of the conclusions reached as a result of that process. (See Attachment 3, Cover Letter). According to the DISB, the science presented in the draft BDCP EIR/EIS “falls short of what the project requires” and if the issues and concerns, as raised in the detailed review, are not addressed it “may undermine the contributions of BDCP to meeting the co-equal goals for the Delta” (Id.). The DISB listed major concerns and found that several broad areas of the draft BDCP EIR/EIS to be scientifically incomplete or inconsistent (Id. at pgs. 5-9). Some of the major concerns:

Expectations for the effectiveness of conservation actions are too optimistic.

Uncertainties are inconsistently or incompletely addressed.

The potential effects of climate change and sea-level rise are underestimated.

Confounding effects of linkages and interactions among species, landscapes, and the proposed actions themselves are insufficiently considered.

Several important effects are neglected (i.e. exclusion of important geographical areas such as San Pablo Bay and San Francisco Bay, or levee failure and maintenance issues, focusing on potential economic benefits of increased water production for agricultural interests without addressing the environmental impacts on crops and water quality).

Descriptions of the alternative conveyance structures, operations, and environmental impacts do not facilitate informative comparisons.

Although the DISB report had a broader focus, they did also review the Independent Panel's detailed Chapter 5 Effects Analysis report from March 17, 2014 (See Attachment 1 analysis above) and concurred with the major findings (See Attachment 3 p. 9). Both panels shared some of the same concerns regarding failure to adequately convey the sources and effects of

uncertainty in the data, disconnect between the appendices and the substantive chapters, and poor organization without clear and concise summaries (Id at p. 10).

E) URGENT NEED FOR A FORMAL CONSULTATION PROCESS

On May 29th, 2014 the Delta Stewardship Council (DSC) heard presentations on the scientific review reports cited above, in addition to a presentation and report submitted by DSC's independent consultant, ARCADIS (Attachment 4 <http://deltacouncil.ca.gov/docs/council-meeting/2014-05-22/delta-stewardship-council-may-29-30-2014-meeting-agenda-item-9-attach>). Incidentally, the ARCADIS report mirrors some of the same concerns identified in the the other science reports such as uncertainties, overstatement of benefits, overly optimistic timelines and benefits of habitat restoration, as well as failures to address impacts to in-Delta users of the Delta water supplies and concerns regarding levee failures (Id at p. 3). Upon receiving these reports and presentations, Randy Fiorini, DSC Chair, submitted DSC's formal comments to the BDCP staff addressed to Ryan Wulf, including the aforementioned reports on June 24, 2014 (Attachment 5 <http://deltacouncil.ca.gov/sites/default/files/documents/files/BDCP%20Comments%20Cover%20Letter%20and%20Final%20BDCP%20EIR-S%20Comments.pdf>). The DSC stresses the key concerns and issues identified in the reports and submits recommendations to address, among other key issues, the inconsistencies, uncertainties, impacts to water quality, evaluation of alternatives, impacts to aquatic species, preservation of the Delta as a place, and use of realistic timelines for habitat restoration. Despite the alarming concerns identified in the reports cited above and further emphasized in the DSC's formal comment letter, the BDCP staff has not issued any public statement or press release responding to the concerns identified by the DSC. Unfortunately, the Correspondence section of the BDCP website was shut down, effectively depriving the public access to important information that may assist in evaluating the draft BDCP EIR/EIS., so this information would not be posted there. However, the The BDCP staff do continue to post supportive documents and opinion letters on the BDCP's Blog and News sections. These science reports are a necessary and valuable analysis tool and emphasize the many problems and issues that are evident in the draft BDCP EIR/EIS and the need for a proper external consultation process in compliance with state and federal regulations.

The “Your Questions Answered” section of the BDCP website (<http://baydeltaconservationplan.com/AboutBDCP/YourQuestionsAnswered.aspx#PCRR>) purports to answer the question of Whether or not a Biological Opinion is needed for the BDCP:

Is a Biological Opinion required prior to the release of the Draft BDCP?
A biological opinion is not required prior to the release of the Draft BDCP.

For the BDCP, the USFWS and NMFS must conduct an internal ESA section 7 consultation related to their issuances of incidental take statements to DWR for the BDCP. These federal agencies will coordinate the ESA consultation process and other environmental review processes, such as the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA), consistent with federal regulations. In addition, the USFWS and NMFS will consult with the United States Bureau of Reclamation (Reclamation) to complete biological opinions or a joint biological opinion prior to the issuance of any federal incidental take statement or federal action to carry out the BDCP.

No further explanation is provided. Has this process even started? Is there a reason the process is being conducted internally? Are there documents or reports that are being generated from this process? Have the parties involved in this process reviewed and assessed the independent scientific reports? The BDCP staff claims that this is an open planning process and they are committed to sharing the information with the public, however, as we have learned, some important documents, necessary for a meaningful public understanding and review, such as the Implementing Agreement, were not released until May 30, 2014 until the BDCP staff was pressured through a Public Records Act Request. In contrast to the incomplete and/or missing BDCP planning documents, the Lower Colorado Multi-Species Conservation Plan (LCR-MSCP) operates with transparency. Similar to the BDCP, The LCR-MSCP is also a Habitat Conservation Plan which provides ESA coverage for both federal and non-federal activities. Among other things, the planning documents also include a BA, an EIS/EIR, the BiOp, and a Funding and Management Agreement (http://www.lcrmscp.gov/steer_committee/regulatory_compliance.html). There has been no discussion or commitment from the BDCP staff to obtain these documents. Without such a commitment, the BDCP will not have the proper legal framework for compliance and implementation activities. In light of the concerns expressed in the scientific reports, it is imperative for the BDCP to engage in a proper consultation process that is transparent instead of a mystery internal process.

F) CONCLUSION

The numerous independent scientific reports and presentations referenced above clearly identify the deficiencies in the Draft BDCP EIR/EIS. It is incomplete, inconsistent, highly

uncertain and over-exaggerates potential benefits while ignoring the very real detrimental impacts of exports and conveyances to threatened/endangered fish populations. No amount of statistical manipulation can change the fact that pumping more water out of the Delta will cause further damage to the ecosystem. Not only will it negatively impact the ESA covered fish species, but further degradation of the Delta through the draft BDCP EIR/EIS also negatively impacts Delta communities, Delta farmers, Delta fishermen, and Delta recreational opportunities. It cannot guarantee a reliable water supply and it cannot guarantee the survival or recovery of the threatened/endangered species. The draft BDCP EIR/EIS, as it stands, will fail to protect or restore the Delta ecosystem. It will not fulfill the coequal goals of the Delta Reform Act. 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. As stated earlier in this letter, 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 decisionmakers have the opportunity to engage in meaningful analysis of a preferred project alternative and informed comparison with other alternatives.

As detailed in the ESA comments section of this letter, we reiterate that the draft BDCP EIR/EIS 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.

Violations of Freedom of Speech Requirements

I) FAILURE TO POST COMMENTS ON BDCP WEBSITE

This section pertains to the California Resources Agency, California Department of Water Resources (DWR) and the Bureau of Reclamation's recent decision to stop posting public

comment letters and other vital information on their jointly hosted BDCP website (baydeltaconservationplan.com) just after issuance of the public drafts of the BDCP Plan and EIR/EIS on about December 13, 2013.

When our country was formed, people peaceably assembled in order to hear each other's views on matters of public importance. Informed public debate is the hallmark of our democracy. The modern equivalent of the venerable town hall/public park assembly is the public comment process via the Internet on proposed major government actions. Americans have fought wars to retain these freedoms. The BDCP proponent agencies, however, seem intent upon wresting these hard-earned freedoms from the public. These freedoms have been suppressed by these agencies' decision to stop posting critical comment letters on the established project website. If we lived in Communist China, we might expect thoughtful or critical public comment to be suppressed. We do not expect this in the United States of America.

The BDCP Water Tunnels are another effort by the same Governor and others to develop the old peripheral canal project that was defeated by a referendum vote in 1982. The Water Tunnels are one of the most controversial proposed public works projects in California history. There were no public hearings or meetings on the public BDCP Drafts so that the public could hear what others have to say. Instead, there were "open houses" where the public could ask questions of BDCP representatives. These were settings of all-powerful rulers and lowly subjects, not the spirited give and take of American democracy.

A) WEBSITE CHANGE REGARDING POSTING OF COMMENTS

The webpage confirming receipt of BDCP comments advised "Additional information can be found at www.baydeltaconservationplan.com." What can be found on the BDCP website are the 40,000 pages of the consultant prepared Plan and EIR/EIS documents which the federal Bureau of Reclamation, NMFS and United States Fish and Wildlife Service (USFWS), have previously called "advocacy" and/or "biased" documents for the BDCP Water Tunnels project. (Federal Agency Release, Bureau of Reclamation Comments p.1; NMFS Comments p.2; USFWS Comments p.1, July 18, 2013).

What cannot be found on the BDCP website is the January 14, 2014 Friends of the River initial comment letter explaining that the 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.” (p.1). What also cannot be found on the BDCP website is the Responsible Exports Plan alternative submitted by the EWC or the earlier version of that alternative, the Reduced Exports Plan, that was submitted by the EWC as far back as April and December of 2012 and February of 2013. In fact, no comments are included on the BDCP website. FOR has been forced to obtain the comments under the Freedom of Information Act (FOIA). FOR does what the the government of a free country should do: posting all comments regardless of whether FOR agrees or disagrees with the comments. FOR posts the comments at www.friendsoftheriver.org/bdcpcomments.

To explain the change in policy regarding posting of correspondence on the BDCP website, the following language now appears under “Correspondence”: *“In order to maintain the integrity of the formal public review period, incoming correspondence will not be available via the website beginning December 13, 2013 to the close of the public comment period April 14, 2014.”* (See <http://baydeltaconservationplan.com/library/Correspondence.aspx>, emphasis added.)

The obvious purpose of refusing to post comment letters is to hide critical comments from the public. It limits the information available to the public to the pro-BDCP Water Tunnels documents posted in December 2013. This restriction is an unconstitutional and unlawful exercise of viewpoint discrimination by the State agencies, the Resources Agency and DWR, aided and abetted by the participating federal agencies, NMFS which is receiving the comments but not posting them on a website, and USFWS and Reclamation. The First Amendment prohibits viewpoint discrimination. This restriction is also an unlawful denial of public access to the comments prohibited by the California Constitution. Furthermore, the decision to withhold posting of comments is a direct violation of the environmental full disclosure purposes of both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA).

B) THE CLOSING OF THE FORUM TO CRITICAL COMMENT IS CONTRARY TO THE PROMISE OF ENCOURAGING PUBLIC PARTICIPATION

The State claims that “The BDCP encourages public participation.” (BDCP website under “Correspondence”.) Secretary Laird of the California Resources Agency and numerous other state officials have claimed that the BDCP process is open and transparent. Those claims of encouraging public participation and openness are false. By refusing to post critical comment letters, the speech of the commenters is being silenced. The public does not see the other side of the Water Tunnels story.

Meanwhile, the proponent agencies continue to tout the Water Tunnels on the website. (Spanish language posting, January 3, 2014 entitled *Breve Informativo*; English language Overview Presentation posting, January 20, 2014). The project proponents have been free to misrepresent, advocate, speculate and omit unpalatable facts from the website while silencing responsive correction.

Instead of encouraging public participation, the agencies are doing everything in their power to discriminate against and exclude views opposing the Water Tunnels from the public website forum they have created. This is part of a pattern of suppression of free speech that was displayed in the summer of 2013 when Caltrans employees trespassed on private property in the Delta to remove signs carrying the message “Save the Delta! Stop the Tunnels!” That thuggery by the State only stopped after it was brought to widespread public attention by media coverage and rallies protesting the sign removals.

Claiming that taking more water away from the fish will be good for the fish, that taking more freshwater away from the Delta will be good for the Delta and that a water grab for the benefit of the exporters is really a conservation plan is false propaganda intended to deceive and confuse the public. This pattern and practice of viewpoint discrimination by the BDCP proponent agencies is the strongest self-indictment that could be made of the environmental destruction and economic waste threatened by the Water Tunnels project. The government would not be trying to suppress the speech of project opponents if it actually believed its own claims about the asserted benefits of the project.

C) THE VIEWPOINT DISCRIMINATION ON THE BDCP WEBSITE VIOLATES THE FIRST AMENDMENT

The First Amendment of the United States Constitution provides in pertinent part that there shall be no law “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Similarly, the California Constitution commands that “A law may not restrain or abridge liberty of speech or press” and the people have the right to “assemble freely to consult for the common good.” Cal. Const., Art. 1, § 2(a); § 3(a). “In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speaker, a single viewpoint, or a single subject. When speaker and subject are similarly situated, the state may not pick and choose.” *Perry Educ. Ass’n v. Perry Local Education Ass’n*, 460 U.S. 37, 55 (1983). “Any access barrier must be reasonable and viewpoint neutral [citations].” *Christian Legal Soc. Chapter of the University of Cal., Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2984 (2010). “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. [Citation.] Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationality for the restriction.” *Rosenberger v Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995).

Under the current regime, only those viewpoints that the government chooses will be posted on the BDCP website. For example, the website continues to include blogs purporting to debunk alleged “Myths” about the BDCP, and other materials written to promote BDCP and discount public concerns. (See, e.g., http://baydeltaconservationplan.com/news/blog/14-01-10/Correcting_Stubborn_Myths_Part_II.aspx.) This blog suggests that a comment on the blog may be provided by clicking on a link. (“Click here to contact us with your questions or comments about the BDCP Blog.”) Yet that link is the same link to the email address for submitting formal public comments on the Plan and EIR/EIS (BDCP.comments@noaa.gov). As explained clearly on the BDCP website, such comments will not be posted. The exclusion of critical comments from the BDCP website at the same time as the government agency proponents continue to post materials that promote their viewpoint that BDCP is a worthwhile

project violates the First Amendment prohibition of viewpoint discrimination in forums created by the government.

D) THE DENIAL OF THE RIGHT OF ACCESS TO CRITICAL COMMENTS VIOLATES THE CALIFORNIA CONSTITUTION

The California Constitution provides in pertinent part that “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” Cal. Const. Art. 1, § 3(b)(1). Moreover, any authority “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” Cal. Const. Art. 1, § 3(b)(2).

“Given the strong public policy of the people’s right to information concerning the people’s business (Gov.Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. 1, § 3, subd. (b)(2), all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary.” *Sierra Club v. Superior Court*, 57 Cal.4th 157, 166 (2013) (internal quotation marks deleted).

The complexity of the BDCP and the volume of documents being circulated for public review to explain that complexity make review challenging even for professionals. For an average member of the public, the job is almost impossible. The public’s ability to be informed regarding this project is facilitated by having access to comments being made by others during the review process, including non-profit environmental groups and other public agencies. The refusal to publish comment letters on the website as they come in denies the public the right of access to the comments in violation of the California Constitution.

E) THE EXCLUSION OF ENVIRONMENTAL INFORMATION CONTRARY TO THE OPINIONS OF THE PROJECT PROPONENTS VIOLATES NEPA AND CEQA

NEPA and CEQA are both “environmental full disclosure laws.” *Silva v. Lynn*, 482 F2d 1282, 1284 (1st Cir. 1973); *Cmtys. for a Better Env’t v. City of Richmond*, 184 Cal.App.4th 70, 88 (2010). Both laws require that an agency “use its best efforts to find out all that it reasonably can” about the subject project and its environmental impacts. *Barnes v. U.S. Dept. of Transp.* 655

F.3d 1124, 1136 (9th Cir. 2011); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 412, 428 (2007).

Interfering with review by members of the public of comments made by other members of the public is environmental concealment, not disclosure, and is calculated to prevent the public from finding out all that it reasonably can about the subject project and its impacts.

CEQA provides that “notwithstanding any other provision of law” the record of proceedings “shall include, but is not limited to,” written documents submitted by any person relevant to findings and all written correspondence submitted to the respondent public agency with respect to compliance with CEQA or the project. Public Resources Code § 21167.6(e)(3), (7). The NEPA Regulations require that federal agencies make comments received under NEPA available to the public pursuant to the provisions of the Freedom of Information Act and that they shall be provided without charge to the extent practicable. 40 C.F.R. § 1506.6(f).

The CEQA Regulations provide that:

Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency’s activities. *Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency.*

14 Code Cal. Regs § 15201(emphasis added).

Instead, the BDCP proponent agencies have selectively published information favorable to the project on their website while concealing what they consider to be unfavorable information. Making the comments available only *after* the comment period has closed makes a mockery of the promise of a fair, transparent and open process. Members of the public will have no opportunity to learn information provided by those with concerns about the BDCP in time to help them develop their own timely comments, including suggested alternatives to the project. The exclusion of comments from the website violates the environmental full disclosure purposes of both NEPA and CEQA, and the CEQA regulation requiring the posting of environmental information on the agency’s website.

F) COMMENT CONCEALMENT CONCLUSION

The exclusion of public comments from the BDCP website violates the First Amendment, California Constitution, NEPA and CEQA. This violation can only be remedied by the BDCP agencies posting all comments on the BDCP website and then providing a new public review and comment period on the Draft EIR/EIS, Plan, and Implementing Agreement so that the public can see the information and contentions about the problems that would be created by new upstream conveyance.

DEFECTS IN THE IMPLEMENTING AGREEMENT

I) THE IMPLEMENTING AGREEMENT IS UNLAWFUL

“The overall goal of the BDCP is to restore and protect ecosystem health, water supply, and water quality within a stable regulatory framework.” (IA “IA”, 3, also 14 (all cites to page number). Also, the Plan claims it “Provides for the conservation and management of Covered Species within the Plan Area through the preservation, restoration, and enhancement of aquatic, riparian and associated terrestrial natural communities and ecosystems that support these Covered Species and through other conservation actions.” (IA 3).

Contrary to the assertion that “Reclamation has incorporated the BDCP into a biological assessment to support a Section 7 consultation for reclamation’s actions within the Plan Area and the resulting Integrated Biological Opinion” (IA 3-4), Reclamation has not prepared a biological assessment and the Integrated Biological Opinion has not been prepared. The IA refers to a “subsequent Integrated Biological Opinion.” (IA 22). Under a heading entitled “Role of Bureau of Reclamation in the BDCP” admissions are made that: “Federal agencies, such as Reclamation, comply with the ESA through the Section 7 consultation process and not through the Section 10 HCP permitting process. Given the scale of Reclamation’s CVP operations and the degree to which these operations are coordinated with the SWP, BDCP has been designed to address both SWP and CVP operations in the Delta. Reclamation will enter into a Memorandum, or similar agreement, with the Parties that sets out Reclamation’s roles and responsibilities pursuant to the BDCP and establishes processes to ensure that Reclamation’s actions are implemented in a manner consistent with the Plan.” (IA 15). This puts the cart before the horse. Since the Plan is to

govern Reclamation actions, ESA § 7 consultation needs to come before, not after, preparation of the Plan.

The false assertion is made that “DWR and the participating SWP/CVP Contractors are agreeing to substantial commitments of water, land, other natural resources, financial resources, human resources and other assets to provide for the conservation and management of the Covered Species, their habitats and other natural communities, in exchange for the Fish and Wildlife Agencies providing take authorizations, and the Assurances.” (IA 4). In fact, no commitments are made at all.

The inaccurate finding by the California Department of Fish and Wildlife (CDFW) that the BDCP satisfies the requirements of the Sacramento-San Joaquin Delta Reform Act of 2009 including Water Code § 85320 is included. (IA 14). Also included is the assertion that the BDCP EIR provides “a comprehensive review and analysis” of “A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan. . . and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.” (IA 14). In fact, none of that has been done.

The IA takes away what the BDCP may appear to give in terms of conservation of Covered Species. “[I]n the event of a direct conflict between the terms of this Agreement and the BDCP, the terms of this Agreement shall control.” (IA 15).

USFWS and NMFS give away their authority to carry out a future Integrated Biological Opinion/conference opinion to protect Covered Species that become listed in the future in advance. “...USFWS and NMFS will not request, impose, recommend, or require mitigation, conservation, compensation, enhancement, or other protection for such Covered Species, beyond that expressly provided in this Agreement.” (IA 19).

In the face of declining fish populations, admitted uncertainties and adverse effects, as well as implicit denial of the undeniable fact that reducing flows is bad, not good, for the fish, the IA parties “agree” that “Through the implementation of the Plan, including adjustments made

through the adaptive management process, Permittees will satisfy their obligation to achieve the biological goals and objectives.” (IA 24). The all-knowing prophets then give away all powers and obligations to continue protecting the fish. “Unless otherwise specified in the Plan or this Agreement, failure to achieve a biological goal (s) and/or objective(s) shall not be a basis for a determination by the Fish and Wildlife Agencies of non-compliance with the Plan or for the suspension or revocation of the Permits, provided the Permittees are properly implementing the BDCP and are in compliance with this Agreement and the terms and conditions of the Permits.” (IA 24). This is so even though “The Parties agree that a key area of scientific uncertainty concerns the volume of Delta outflow that is necessary to advance the biological goals and objectives for both Delta smelt and longfin smelt.” (IA 25). The Parties also admit “that other covered fish species, including salmonids and sturgeon, are affected by outflow.” (IA 26). The decision tree process and adaptive management process are declared to be the answer to the uncertainties. (IA 25).

The IA admits the obvious that “Ecological conditions in the Delta are likely to change as a result of future events and circumstances that may occur during the course of the implementation of the BDCP.” (IA 44).

In spite of the declining fish populations and repeated references to possible future extinctions as a result of changing conditions in the Effects Analysis (Chapter 5) of the BDCP Plan, the IA helps carry out the future extinctions by providing regulatory assurances including: “That is, if unforeseen circumstances occur that adversely affect species covered by an HCP or an HCCP, the Fish and Wildlife Agencies will not require of the permit holder any additional land, water, or financial compensation nor impose additional restrictions on use of land, water, or other natural resources without their consent.” (IA 48).

“Pursuant to the No Surprises Rule. . . and provided that the BDCP is being implemented consistent with the terms of this Agreement, the Plan, and the Federal Permits, the USFWS and NMFS shall not require the Permittees to provide additional land, water, or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level provided for under the BDCP, this Agreement and the Federal Permits with respect to Covered Activities without the consent of the Permittees.” (IA 50). Even

though the No Surprises Rule does not apply to federal agencies, USFWS and NMFS report to limit Reclamation's ongoing responsibilities under §7 of the ESA to the maximum extent allowed by law. (IA 50, 51).

Moreover, "Under the ESA regulations and this Agreement, if unforeseen circumstances arise during the life of the BDCP, USFWS and/or NMFS may not require the commitment of additional land or financial compensation, or additional restrictions on the use of land, water, or other natural resources other than those agreed to in the Plan." (IA 51).

CDFW similarly gives away its powers and responsibilities for the 50 year term of the permit. (IA 52, 53).

Though the IA purports to recognize the applicability of ESA § 7 to possible future actions, it provides "unless otherwise required by law or regulation, USFWS and NMFS will not require through the Section 7 consultation additional land, water or other natural resources, or financial compensation or additional restrictions on the use of land, water, or other natural resources for Covered Activities and Associated Federal Actions beyond the measures provided for under the BDCP, the Implementing Agreement, the Permits, and the Integrated Biological Opinion." (IA 74, 75). Even for biological opinions issued in connection with projects that are independent of the Covered Activities and Associated Federal Actions, "USFWS and NMFS agree to make every effort to avoid rendering opinions or taking actions that would cause additional restrictions on the use of land, money, or water for the Authorized Entities with respect to their obligations under the BDCP or this Agreement." (IA 75). "If critical habitat is designated within the BDCP Plan Area subsequent to issuance of the permits, no compensation, mitigation, or minimization measures will be required of the Permittees as a result of the designation." (IA 76).

The Parties "acknowledge that ESA recovery plans have no effect on the implementation of the BDCP" and that "With respect to any recovery plan applicable to any Covered Species within the Plan Area that is developed after the approval of the BDCP the parties agree that: Recovery plans cannot require any additional land or financial compensation or otherwise diminish the take authorization for Covered Species granted to the Authorized Entities pursuant to the Federal Permits or the Integrated Biological Opinion." (IA 77).

II) VIOLATIONS OF ESA IN THE DRAFT IMPLEMENTING AGREEMENT

A) BRIEF SUMMARY

The Draft IA violates the provision of ESA which requires a conservation plan to describe certain steps of a conservation plan in order to be issued an incidental take statement. The Draft IA does not detail the steps that will be taken to monitor, minimize, or mitigate impacts, nor ensure funding for the implementation of such steps. Many details and decisions are avoided and left to the Adaptive Management Program, which itself suffers from generalized assertions that provide no real guidance. Once again, the Draft IA is an incomplete document that does not provide the necessary guidance to implement the BDCP.

B) LEGAL BACKGROUND

An IA is needed for ESA compliance; the ESA requires a permit for the incidental take of a species to include “a conservation plan, based on the best scientific and commercial data available” which details “the steps that will be taken to monitor, minimize, and mitigate such impacts, and the funding available to implement such measures.” 40 C.F.R. § 222.307(b)(5)(iii). The Draft IA covers the implementation of the conservation plan, and therefore needs to detail the monitoring, mitigation steps as well as the funding for implementation of these steps.

C) DISCUSSION

1) Monitoring and Minimizing Impacts

The Draft IA relies heavily on the Adaptive Management Team to provide the necessary steps for monitoring impacts on Covered Species. The Draft IA has provisions stating the “Covered Activities relat[ing] to the development and operation of water conveyance infrastructure” will include “monitoring of Covered Species.” (IA, 9.2, 21). The Adaptive Management Team is the primary group responsible for the biological monitoring program, which is supposed to help determine whether “conditions warrant a change to a Conservation Measure or a biological objective.” (IA, 10.3.2.1, 29; 10.3.4, 31.) The “effects monitoring will provide the basis for evaluating the impacts of Covered Activities, Associated Federal Actions, and Conservation Measures on Covered Species, including the amount of take of Covered Species...” (IA, 10.4.1, 39) (internal quotations omitted).

However, “metrics and protocols” for monitoring will only be developed after the BDCP has been approved and begun implementation. (IA, 10.4.1, 39.) An “Annual Monitoring and Research Plan” is to be prepared every year to identify “the type, scope, nature and timing of the proposed monitoring” as well as the “rationale and need for such activities,” but the Permit Oversight Group determines whether to adopt the monitoring plan or not. (IA, 10.4.3, 39).

The provisions included in the IA are broad and provide no real guidance on the steps for monitoring covered species. Furthermore, the fact that protocols for monitoring do not have to be developed before the Plan is authorized means that Plan proponents are trying to pass the BDCP without ever having to detail the steps they will take to monitor the impacted species. This is violation of ESA’s requirements, as the Draft IA must detail the steps it will take to monitor the impact on Covered Species.

Less attention is paid to minimizing impacts on Covered Species. The Conservation Strategy of the Draft IA states the BDCP includes “biological goals and objectives and conservation actions that appropriately minimize and mitigate the potential effects of Covered Activities and Associated Federal Covered Species.” (IA, 10.0, 23). Later, the Draft IA states “if critical habitat is designated within the BDCP Plan area subsequent to issuance of the permits, no...minimization measures will be required of the Permittees,” allowing the Permittees to avoid minimizing impacts on covered species on certain habitat. (IA, 20.1.6, 76).

Overall, the Draft IA provides very little detail on the steps that will be taken to monitor and minimize impacts on Covered Species, as is required by the ESA. The monitoring and minimization of impacts of Covered Species is left largely to the Adaptive Management program. However, there is no real guidance on what the Adaptive Management Program will involve. The Draft IA provides too little detail on the Adaptive Management Program’s monitoring and minimizing to satisfy the ESA.

2) Mitigation of Impacts

The IA states the Plan “includes measures to...mitigate to the maximum extent practicable the effects on the Covered Species.” (IA, 2.1.8, 3). Most of the language describing mitigation of impacts comes from the section on ‘Conservation Strategy,’ which consists of “(1)

biological goals and objectives; (2) Conservation Measures; (3) adaptive management; and (4) monitoring.” (IA, 3.17, 6). However, the Conservation Strategy chapter merely serves to provide assurances that the Conservation Measures will mitigate impacts to Covered Species without going into any detail about the Conservation Measures. After stating the Conservation Measures “have been developed in accordance with the principles of conservation” and “are expected to be sufficient to achieve the biological goals and objectives,” the Draft IA does not detail the steps the Conservation Measures will take, and instead says the Conservation Measures are described in Chapter 3.4 of the BDCP. (IA, 10.2, 24). Furthermore, the Draft IA tries to qualify the assurances of mitigation by stating the “Parties agree that a key area of scientific uncertainty” exists over the conditions “necessary to advance the biological goals and objectives.”

The Draft IA puts forth the concept that the Conservation Measures are adequate to ensure mitigation of impacts on Covered Species; however, outside science reviews of these assertions have cast doubt on the Conservation Measure’s capability. The Delta Independent Science Board’s (DISB) review of the BDCP listed the ‘effectiveness of conservation actions’ as “too optimistic;” stating the Conservation Measures represented “an implausible standard of perfect for such a complex problem.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, p. 5). Furthermore, the DISB found “few of the many uncertainties in DEIR/DEIS are acknowledged in conclusions about impacts and mitigation actions.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, Appendix A). Overall, the DISB found “far greater uncertainty about the mitigation,” concluding that questions surrounding mitigation success were “not adequately addressed,” and “simply referring to adaptive management as a way to deal with such uncertainties is not sufficient.” (Review of the Draft BDCP EIR/EIS and Draft BDCP, p. B-52). The Delta Science Program Independent Review Panel (DSPIRP) found similar inadequacies, concluding “many of the critical justifications behind the supposed benefits of the conservation measures are highly uncertain,” and stated “the default burden to ensure Covered Species benefit, if not recovery, rests on adaptive management.” (BDCP Effect Analysis Review, Phase 3, p. 17).

The DISB and DSPIRP both found the BDCP’s detail and assurances of Conservation Measures’ success wanting, and realized much is left to the adequacy of the adaptive management program. Adaptive management specifics have been left to the IA, yet the Draft IA

contains very little detail on how the Adaptive Management Program will be carried out, as described earlier in this comment. Troublingly, the Adaptive Management Team is allowed to change or even eliminate biological goals and conservation measures. (IA, 10.31, 29). This, along with the fact neither the Draft IA nor the corresponding chapters in the DEIR/DEIS specify mitigation steps to reduce impact, presents a violation of ESA's mandates to detail the steps taken to mitigate impacts on Covered Species.

3) Funding Assurances

The Draft IA asserts that the Parties do not have to guarantee funding "be secured at the time of permit issuance," and instead lowers its assurances to "reasonably certain to occur during the course of Plan implementation," which is over the term of 50 years. (IA, 13.0, 45). The Draft IA provides no certain areas of funding, instead relying on "historically...reliable means" from which "funding will likely be drawn. (*Id.*). However, the Draft IA asserts that the BDCP "is designed to demonstrate that...funding will be adequate for such purposes and will be forthcoming." (IA, 13.2, 47). Unfortunately, there are no guarantees that the funding is certain, much less adequate.

The funding for ensuring steps to reduce impact on Covered Species is inadequately represented throughout the Draft IA. The purpose of an IA is to provide some certainty of the mechanics of a conservation plan. Here, the Draft IA provides no certainty of funding for the BDCP. The Parties have violated the ESA by failing to ensure funding for monitoring, minimizing, and mitigating impacts on Covered Species.

D) CONCLUSION

The ESA requires the conservation plan to detail the steps for monitoring, minimizing, and mitigating the impacts on Covered Species, as well as provide for the funding to carry out those goals. 40 C.F.R. § 222.307(b)(5)(iii). As a guide to the implementation of the BDCP, the IA needs to provide detail on these provisions. However, the Draft IA does not provide detail on monitoring, minimizing or mitigating impacts. Instead, it provides general statements and removes the detail to chapters of the DEIR/EIS. Independent science reviews of the relevant chapters of the DEIR/EIS have shown the conservation steps to be inadequate, overly optimistic,

and unrealistic. This is a violation of the ESA’s mandate to provide detailed steps of the monitoring, minimizing, and mitigation of impact on the Covered Species. The funding provisions are also inadequate; the Draft IA even states funding is not assured at this time, and only provides it become “reasonably certain” after the BDCP has already been agreed to and implemented. The Draft IA has violated the ESA by failing to provide the necessary detail regarding the implementation of the conservation plan.

III) VIOLATIONS OF NCCPA IN THE DRAFT IMPLEMENTING AGREEMENT

A) BRIEF SUMMARY

The Draft IA violates several provisions of the Natural Community Conservation Planning Act (NCCPA) and presents an incomplete picture. Instead of providing the necessary framework for understanding how the BDCP will be implemented, the Draft IA provides little specificity, defers necessary findings for a later date, and includes provisions that insulate Permittees from necessary oversight. These violations are most frequently seen in the provisions dealing with funding, specifying conservation and habitat measures, and the suspension/revocation process.

B) LEGAL BACKGROUND

The purpose of the NCCPA is to “sustain and restore those species and their habitat...that are necessary to maintain the continued viability of those biological communities impacted by human changes to the landscape.” Cal. Fish & G. Code, § 2801(i). The Act outlines the specific findings and standards required to satisfy NCCPA, including a provision requiring an Implementation Agreement (IA), which contains several additional requirements that must be fulfilled. Cal. Fish & G Code § 2820(b).

The NCCPA requires the IA to provide details about the BDCP and its environmental consequences specified in nine different provisions, including conservation implementation, suspension/revocation of the Incidental Take Permit (ITP), funding, and modifying the IA. Cal. Fish & G Code § 2820(b)(1-9). The Draft IA violates all four categories and is impermissibly defective.

C) DISCUSSION

1) Violation of Conservation Provisions of the NCCPA

The NCCPA requires an IA to include provisions “defining species coverage, including any conditions of coverage.” Cal. Fish & G. Code § 2820(b)(1). The Draft IA does nothing more than provide overbroad and vague assurances without specifying definite actions to ensure that species will be adequately covered. For instance, the Draft IA states the “BDCP and this Agreement provide a comprehensive, habitat-based approach to the protection of Covered Species by focusing on the land and water necessary to provide for the long-term conservation and management of the Covered Species.” (IA, 20.1.6, 76). Instead of fulfilling the NCCPA’s requirement to define the conditions of species coverage, the Draft IA makes oblique references to “actions associated with restoration” and “desired biological outcomes.” (IA, 9.2, 21 and 10.1, 23). Section 9.2, titled ‘Covered Actions’ would be an ideal place to specify coverage; however, it merely mentions “activities related to the development and operation of water conveyance infrastructure.” (IA, 9.2, 21). The only ‘specifics’ provided are the “development and operation of new Delta conveyance facilities...to transport and deliver water to State Water Project and Central Valley Project.” (IA, 9.2, 21).

These provisions violate the NCCPA in two ways: first, they divide the complete definition of species coverage among multiple documents in the BDCP, but the NCCPA requires the IA itself to define and include conditions of species coverage. Second, the Draft IA is too vague to satisfy the condition of “defining species coverage” at all. For example, the Draft IA itself does not even include a list of covered species; ‘Exhibit A’ is titled “List of Covered Species” in the Table of Contents, but is not actually included in the document. (IA, vi).

The Draft IA states that species coverage will be adequately defined once the public comment period is over. (IA, 4.2, 12). This is a failure to provide a meaningful review opportunity. Defining species coverage after the public comment period has ended undermines the purpose of public review.

(a) Habitat Reserves and Conservation of Covered Species

The NCCPA next requires the IA to include provisions for establishing “long-term protection of any habitat reserve” or other measures to provide “equivalent conservation of covered species.” Cal. Fish & G. Code § 2820(b)(2). The Draft IA specifies reserve system lands are to be permanently protected by fee title or conservation easement. (IA, 11.4.1, 42). This is provided for in the Draft IA by the development of conservation easement templates by the Authorized Entities, a group made up of “the Director of DWR, the Regional Director for Reclamation, a representative of the SWP contractors and a representative of the CVP contractors.” (IA, 15.3.1, 58). The original templates are subject to approval by the Fish and Wildlife Agencies, who can then designate templates to be amended without further approval of the Agencies. (IA, 11.4.1, 42). Essentially, the Authorized Entities will have the power to change certain designated habitat templates without any oversight. This violates the NCCPA’s requirements to ensure long-term protection of habitat reserves because the Authorized Entities will be able to remove certain habitat protections, with no oversight from the fish and wildlife agencies. The assurance that habitats will be maintained is eliminated by giving the Authorized Entities this level of control.

(b) Four-Year Lapse until Management

There is a four year gap from the acquisition of land for habitat reserves until these lands actually have to start being managed to help conserve species. (IA, 11.4.2.1, 43). Four years is an unacceptable time frame to wait until conservation measures are implemented, as that would allow land to continue being used with no active conservation methods taking place. This could result in further deterioration of the Covered Species. Also, changes to these management plans can be made internally by the Implementation Office (IO), with no oversight by fish and wildlife agencies. (IA, 11.4.2.1, 43). This provision would allow the IO to be able to change the habitat conservation plans without any oversight from fish and wildlife agencies.

Furthermore, the specifics of the management and “general enhancement” techniques to be used are omitted from the IA and instead included in the Conservation Measure 11 in Chapter 3 of the BDCP. (IA, 11.4.2, 43). This is another example of the unacceptable way the BDCP is piecemealing information between multiple documents. In order to ensure conservation and

long-term protection of habitat and covered species, the IA itself must include the specifics and techniques the BDCP proposes. Instead, details are left out of the IA and put in another BDCP document. This violates the NCCPA's requirements for the IA to establish and ensure conservation measures.

(c) Funding of Habitat Reserves

The funding provisions for the habitat reserves state that the IO must ensure that “non-wasting endowments” or a “substantial equivalent” is established. (IA, 11.4.1, 43). Once the Authorized Entities have secured enough funding to satisfy “certain conservation obligations” under the Plan and it is approved by the fish and wildlife agencies, additional funds cannot be required from the Authorized Entities. (IA § 11.4.1, 43). No funding for long-term management is specified, and the “certain conservation obligations” that must be met are not defined or detailed what is required to satisfy them. The Draft IA provisions fail to clarify Permittees' commitments and therefore violate the NCCPA's requirements to ensure funding. This does not ensure funding for long-term habitat protection, which violates the NCCPA and could lead to more money being required from taxpayers.

(d) Rough Proportionality on Habitat/Covered Species and Conservation Measures

An IA must include provisions specifying what the CDFW must do “if the plan participant fails to maintain rough proportionality between impacts on habitat or covered species and conservation measures.” Cal. Fish & G. Code § 2820(b)(3)(B). The Draft IA states that if the Conservation Measures are implemented according to the implementation schedule and procedure set out in Chapter 6 of the BDCP, the CDFW is required to find that rough proportionality is satisfied. (IA, 11.1.1, 40). This is an underhanded way of forcing the CDFW to find that rough proportionality is maintained unless there is an explicit discrepancy with the implementation schedule. This presents a two-fold violation: it is another example of piecemealing necessary information in the Draft IA and Chapter 6 of the BDCP; and since the implementing schedule is likely written in vague terms, there will be no way to ever find a failure to maintain rough proportionality. For instance, Chapter 6 of the BDCP lists the implementation schedule of the Conservation Measures in several tables. Draft BDCP, 6-3, 6-4, 6-4, 6-5. The explanations often give “expected” timelines, and goals when facilities “will likely

be completed.” Draft BDCP, 6-3, 6-4. These are vague terms, and it would be nearly impossible for the CDFW to find an explicit discrepancy.

This renders the fish and wildlife agencies’ job in determining rough proportionality useless and gives the Permittees the power to implement their best interests without being held accountable to maintain rough proportionality. There is no real oversight by parties outside of the BDCP to help hold the Authorized Entities accountable. This violates Section 2820(b)(3)(B) of the NCCPA because the CDFW must be able to take action if it finds a lack of rough proportionality, but the provision of the Draft IA completely wipes out this ability.

An IA must also “identify the conservation measures, including assembly of reserves where appropriate” as well as the “monitoring and management activities that will be carried out in rough proportion to the impact on habitat or covered species.” Cal. Fish & G. Code §2820(b)(9). The measurements that will be used to determine rough proportionality is maintained must also be included. Cal. Fish & G. Code §2820(b)(9). Conservation measures are never specifically described in the Draft IA. Section 10.2 states that the measures have been developed in “accordance with the principles of conservation biology and address...ecological processes, environmental gradients, biological diversity, and regional aquatic and terrestrial linkages.” (IA, 10.2, 24). The section then goes on to say that the conservation measures are described not in the Draft IA but in Chapter 3.4 of the BDCP. This violates the NCCPA’s requirement to identify in the IA the conservation measures that will be used.

Section 10 is labeled Conservation Strategy, and states the Strategy has been designed to achieve the BDCP’s goals of “restoring and protecting ecosystem health, water supply, and water quality in the Delta within a stable regulatory framework.” (IA, 10, 23). The Conservation Strategy states that biological goals and objectives reflect the expected ecological outcomes of the BDCP and its intended functions, but does not specify what these biological goals and objectives actually are. (*Id.*). Instead, they are left out and put in Chapter 3 of the BDCP. This violates the basic requirement of the NCCPA to actually identify the conservation measures and the Draft IA avoids describing the conservation measures throughout the entire document.

As mentioned above, the Draft IA states that if the conservation measures are implemented in accordance with the implementation schedule that is set out in Chapter 6 of the

Plan, the CDFW must find that there is rough proportionality as required by the NCCPA. (IA, 11, 40). As well as setting a pre-determined standard for the CDFW, the Draft IA also fails to satisfy the last clause of §2820(b)(9) to include measurements to determine whether rough proportionality is occurring. Stating that the CDFW must find rough proportionality is occurring does not equal including the measurements the agencies plan to use in the BDCP, and is a violation of the NCCPA's requirements.

(e) Adaptive Management

A key aspect of conservation implementation is the role of the adaptive management program, and the IA is required to contain provisions "ensuring implementation of the...adaptive management program." Cal. Fish & G. Code § 2820(b)(5). While the Draft IA discusses adaptive management, the provisions lack detail and certainty. (IA, 10.3 – 10.3.7.3, 29-38). The Draft IA discusses "new information and insight gained" to develop "alternative strategies," as well as affording the Plan "the flexibility to allow changes to be made to Conservation Measures." (IA, 10.3.1, 29). The language is broad and over-generalized. This lets the Adaptive Management Team make decisions "including the addition to or elimination of" the Conservation Measures and biological objectives without any oversight by the Fish and Wildlife Agencies. (IA, 10.3.1, 29). This assigns a huge amount of power to the Adaptive Management Team and will allow the Team to subvert the Conservation Measures and biological objectives if they do not appear to be in the Authorized Entities' best interests.

2) Violations of Suspension & Revocation Provisions of the NCCPA

The NCCPA requires specific terms and conditions to be included in the IA, which if violated, result in the suspension or revocation of the permit, in whole or in part. Cal. Fish & G. Code § 2820(b)(3). If certain provisions are violated, they invoke the overall suspension/revocation process outlined in the Draft IA. (IA, 22.4, 82).

(a) Suspension/Revocation Process

The Draft IA's suspension/revocation process itself is problematic. The process is invoked anytime the CDFW determines the Permittees have "failed to fulfill their obligations under the BDCP, this Agreement, or the State Permit." (IA, 22.4, 82. If the CDFW finds

circumstances to warrant suspension or revocation, it must follow a review process which is invoked by a Permittee and set forth in an entirely different section of the IA. The decisions reached at the end of the review process are non-binding, but getting a decision could take over six months from the time the CDFW determines the permit should be revoked. (IA, 115.8.2, 67). The process allows the Permittees to continue their unlawful actions as long as possible. Even more troublesome is the fact that the Draft IA states the review schedule can be adjusted “as necessary,” seemingly giving anyone the power to adjust the schedule to delay the revocation process even further. (IA, 15.8.2, 67). This would allow the Permittees to delay the suspension or revocation of their State permit even when the regulatory agency has determined there is cause to suspend or revoke the permit.

A separate process is invoked if the CDFW finds the continued take of the species would lead to jeopardizing the continued existence of the species. The CDFW is given the power under the NCCPA to suspend or revoke any permit if it finds the take of the species is jeopardizing its survival. Cal Fish & G. Code § 2823. However, in the Draft IA, the CDFW cannot suspend the permit until there has been a 45-day remedial period, meaning that the Permittees can keep taking the covered species for over a month before a suspension of the Permit would even go into effect. (IA, 22.6, 83). Then, revocation cannot happen until the non-binding review process from Section 15.8.2 is exhausted. (IA, 22.6, 83). This means even if the CDFW believes the continued take of a species will jeopardize its existence, it cannot suspend the permit for over a month and then cannot revoke the permit for over six months after that. This could be disastrous for the survival of several Covered Species’ and exemplifies another BDCP deficiency in satisfying NCCPA’s procedural requirements.

3) Violations of Funding Provisions of the NCCPA

(a) Adequate Funding for Conservation Actions

The Draft IA violates the NCCPA’s requirements to ensure adequate funding for conservation measures. An IA must include “mechanisms to ensure there is adequate funding to carry out the conservation actions identified in the plan.” Cal. Fish & G. Code § 2820(b)(8). The Draft IA contains different language, stating that all that is needed is to “establish that such funding is reasonably certain to occur during the course of Plan implementation.” (IA, 13.0, 45.

The Draft IA only references “various sources from which funding will likely be drawn,” and does not even list the possible sources. (IA, 13.0, 45). It states the Permittees only agree to ensure the funds to “carry out their obligations under the BDCP.” There are no assurances that funding will be adequate, just types of funding that are “typical” to these projects and “historically...reliable.” (IA, 13.0, 45). This is a clear violation of the NCCPA’s requirements to ensure funding. The Draft IA fails this provision by omitting any certainty of funding, which serves to highlight the many weaknesses of the Draft IA.

(b) Suspension/Revocation for Lack of Funding

There are terms and conditions listed in Section 2820(b)(3) of the NCCPA for which the violation of results in suspension or revocation of the permit. Cal. Fish & G. Code § 2820(b)(3). The first states the IA must contain provisions specifying the actions the department must take if the plan participant fails to provide adequate funding. Cal. Fish & G. Code § 2820(b)(3)(A). The Draft IA has a provision allowing the CDFW to suspend or revoke the State Permit if it determines the Authorized Entities are not providing adequate funding, pursuant to the review process earlier outlined. (IA, 13.2, 47). The CDFW must find that a funding shortfall exists AND that the shortfall either prevents specific actions from being implemented in a timely manner, as set out in Chapter 6, or that it prevents specific actions from being fully implemented, as described in the BDCP. (*Id.*). However, a Fish and Wildlife Agency is prohibited from suspending or revoking a permit if the funding shortfall is determined “likely to have no more than a minimal effect on the capacity of the Plan to advance the biological goals and objectives.” (*Id.*). It is not stated outright who determines whether or not the shortfall is likely to have a minimal effect on the capacity of the Plan. This is a very vague sentence put in at the end of the section that could be used to get out of providing less funding originally promised. This violates the NCCPA because it takes away the CDFW’s power to suspend or revoke a permit if there is a lack of funding.

4) Violations of Modification Provisions of the NCCPA

The NCCPA requires an IA to set out “procedures for amendment of the plan and the implementation agreement.” Cal. Fish & G. Code § 2820(b)(4). Section 23 of the Draft IA allows for administrative changes, minor modification, and formal amendments to the BDCP.

(IA, 23, 84). Administrative changes that do not substantively change the purpose, intent, or terms of the Plan or IA can be made without modifying or amending the Plan or the IA. These administrative actions can include changing the representatives of member entities of the Stakeholder Council, the only area where Delta counties and communities have any representation. (*Id.*). This provision is harmful because it allows changing the Stakeholder Council, which is the only area where Delta communities have some sort of input in the BDCP's decision-making process. This could be used to get rid of members who do not subscribe to the Authorized Entities' viewpoints.

Minor modifications are allowed as well, but are not supposed to involve changes that adversely affect Covered Species, the level of take, or obligations of the Authorized Entities. Minor modifications can include adjusting the conservation measures or biological objectives through the adaptive management program, transferring natural community acreage among the Conservation Zones, and transferring acreage between Resource Opportunity Areas. (IA, 23.2, 85). The Authorized Entities must agree to any proposed modification; if they cannot agree, the proposal is then processed as a formal amendment to the Plan. There is an ambiguity in the last paragraph of the minor modification section, which states that the Authorized Entities do not have to approve minor modifications that involve changes to the conservation measures or biological objectives *that are adopted through the adaptive management process*. (IA, 23.2, 86) (emphasis added). This could be used to pass dangerous changes to the Conservation Measures without the approval of the Fish and Wildlife Agencies. The adaptive management process allows the Authorized Entities to develop "alternative strategies" if "new information" pertaining to the Conservation Measures is discovered. (IA, 10.3.1, 29). If alternative strategies can include modifications to Conservation Measures, the Authorizes Entities are granted the power to change the Conservation Measures, which could potentially be very harmful to continued coverage of species.

5) Inconsistent Amendments or Plan/Project Adoption

A provision specifying actions to be taken if there is an amendment or adoption of a plan or project "that is inconsistent with the objectives and requirements of the approved plan" must also be included in the IA. Cal. Fish & G. Code § 2820(b)(3)(C). The Draft IA contains a clause

that almost exactly mirrors this requirement, stating the CDFW can suspend or revoke the State Permit if the Permittees adopt, amend, or approve a plan or project that is *substantially* inconsistent with the approved Plan and without the concurrence of the CDFW. (IA, 9.5, 22) (emphasis added). The Draft IA attempts to raise the threshold required by the NCCPA to “substantially inconsistent,” which is more difficult to meet. If the CDFW believes that a plan or project has been approved, adopted, or amended in a manner that is substantially inconsistent with the requirements of the BDCP, the CDFW meets with the Permittees and then provides written notice to the Permittees. (IA, 9.5, 22). Increasing the requirement that the CDFW must meet before suspension/revocation can be triggered represents an attempt by the BDCP to further ensure there will be plenty of leeway before the Fish and Wildlife Agencies can take any real action. This is a violation of the NCCPA because it adds an additional requirement that is not included in the statute itself.

D) CONCLUSION

The Draft IA violates NCCPA provisions and avoids other provisions detailing descriptions of funding, conservation measures, and plan oversight. This results in a generalized and piecemealed document that provides very little guidance and subverts the requirements of the NCCPA. Specifically, there needs to be more detail and assurances when guaranteeing funding for the BDCP, and more detailed descriptions of how the IA will ensure conservation and habitat protection. Also, there are troubling issues throughout the IA that allow changes to the IA or aspects of the Plan with no oversight by the fish and wildlife agencies, a tactic that could be used to avoid the BDCP’s conservation mandate. Overall, the Draft IA is an incomplete and incorrect representation of what the NCCPA requires.

The IA becomes an especially dangerous document when one considers the Adaptive Management program put forth in the IA. While adaptive management in theory seems workable, in practice it allows for decisions to be made on the go without any real oversight or checks from fish and wildlife agencies. This, along with the regulatory assurances that guarantee water delivery south of the Delta and the “No Surprises” rule, allow for a lot of power to be locked into the Implementing Agreement. (IA, 14.1, 45). The IA surrenders the fate of the listed fish species to the exporters. The BDCP agencies cannot do that. Beyond that, there must be a

new BDCP Draft EIR/EIS, Plan and IA with a new public comment period on the Drafts before such an astonishing degree of agency authority is given away. The new Drafts must include a range of reasonable alternatives and alternatives to take reducing exports. Moreover, ESA Biological Assessments and formal consultations including preparation of Biological Opinions are required before, not after such giveaways.

This looks like a massive scandal in the works. The offices of Inspector General of the involved federal agencies must be involved now and given the opportunity to review the BDCP Plan and IA before, not after, adoption of the BDCP and the IA guarantees the unlawful extinctions of the listed fish species. Whether the consultants or the exporters like it or not, the ESA and NEPA are the law of the land.

ADAPTIVE MANAGEMENT AND THE DECISION TREE FAIL TO CURE THE INFORMATION DEFICIENCIES IN THE DRAFT PLAN, EIR/EIS AND IMPLEMENTING AGREEMENT

Over and over 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. Neither device cures the informational and analytical deficiencies in the BDCP documents under NEPA, CEQA, or the ESA.

Under NEPA, the regulations specify when the required environmental assessment must happen. 40 C.F.R. §1501.2 states in part:

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall: . . . (b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

40 C.F.R. §1501.2.

In *Sierra Club v. Babbitt*, Plaintiffs challenged a reconstruction project by the National Parks Service (NPS) regarding Highway 140 from Yosemite. 69 F.Supp.2d 1202, 1211 (E.D. Cal. 1999). They sought to enjoin Defendants from taking any steps towards the continuation of the El Portal Road reconstruction project until NPS provides necessary consideration of *all significant environmental effects* in compliance with NEPA, WSRA, NPOA, and the APA. *Id.* Their main cause of action focused on

declaring that the EA, FONSI, and the BA for the project were not in compliance with NEPA regulations 40 C.F.R. §§1500-1517.7. *Id.*

Plaintiffs contended that Defendants failed to adequately define the Project. *Id.* at 1214. Plaintiffs claimed that the “design/build” method of construction used on the Project caused an inadequate description of the Project and prevented a sufficiently detailed analysis of both environmental values and effects of the project by NEPA.

The court held that the draft EA spoke in generalities and contained few details of what would actually be done on the Project, thus making it impossible to relate project elements to project impacts. *Id.* Lacking was sufficient detail to understand the nature, extent and location of rock removal, tree removal, vegetation removal, rebuilding of guard walls, and construction of fills into the Merced River or riparian corridor. *Id.* The court found the “design/build” to violate NEPA in that Defendants failed to comply with the requirement in 40 C.F.R. §1501.2(b), that each agency shall “[i]dentify environmental effects and values in adequate detail so they can be compared to economic and technical analyses.” *Id.* at 1218. Also, insufficient detail was provided to allow the public a meaningful opportunity to comment on the Project during the planning stages along with the existence of insufficient detail for Defendants’ own experts to express an informed opinion and for Defendants to make an informed decision. *Id.*

Adaptive management and a decision tree cannot be a substitution for the regulatory requirements of NEPA and CEQA. Promises to plan, collaborate, or manage toward compliance should environmental conditions degrade below the substantive management criterion are insufficient to survive judicial review. *Natural Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322, 387 (E.D. Cal. 2007) (“the absence of any definite, certain, or enforceable criteria or standards make its [adaptive management] use arbitrary and capricious under the totality of the circumstances”). In the case cited, the court faulted the protocol for failing to assure that the result of the process would be some kind of action taken to secure the continued existence of the smelt. *Natural Res. Def. Council*, 506 F.Supp.2d at 352.

A promise to adaptively manage problems does not fulfill the NEPA requirement that agencies take a “hard look” at the impacts of their action. For instance, *High Sierra Hikers Ass’n v. Weingardt*, overturned a Forest Service decision to liberalize the rules limiting campfires in high country parts of a wilderness area. 521 F.Supp.2d 1065, 1090-91 (N.D. Cal. 2007) The court ruled that the agency could not rely on adaptive management to overcome an inadequate response to the problems raised in the record.

Under CEQA the EIR’s purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. *Napa Citizens for Honest Gov’t v.*

Napa Cnty. Bd. of Supervisors, 91 Cal.App.4th 342, 355 (2001). The Public Resource Code has defined “Environment” to mean the physical conditions that exist within the area that will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, and objects of historic or aesthetic significance. Pub. Res. Code §21060.5. Also, “Significant effect on the environment” is defined to mean a substantial, or potentially substantial, adverse change in the environment. Pub. Res. Code § 21068; *See Cmtys. for a Better Env’t v. Cal. Res. Agency*, 103 Cal.App.4th 98, 110 (2002)(invalidating CEQA guideline that set regulatory standards to determine whether project could have significant environmental effect). Thus, the EIR protects not only the environment but also informed self-government. *Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara Cnty.*, 52 Cal.3d 553, 563-564 (1990).

A project’s environmental analysis is inadequate if it does not take into account the full range of “feasible” significant environmental effects. *See Napa Citizens for Honest Gov’t v. Napa Cnty. Bd. of Supervisors*, 91 Cal.App.4th 342, 381 (2001) (finding that because sources for water and resources for wastewater treatment identified in the EIR were uncertain, the EIR should have identified alternative sources and environmental consequences of tapping them; the EIR should have also discussed possible impacts the proposed project would have on steelhead trout, which had been identified as endangered species within the project area).

“When the informational requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by law’ and has therefore abused its discretion. *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 87 Cal.App.4th 99, 118 (2001).

The BDCP Draft Plan and Draft EIR/EIS violate the informational requirements of NEPA, CEQA and the ESA. Adaptive management and the decision tree do not cure the violations. The BDCP agencies must prepare a new Draft Plan, Draft EIR/EIS, and Draft Implementing Agreement and afford a new public review period based on sufficient environmental impact disclosure and analysis rather than deferring that to adaptive management and a decision tree that would follow project approval.

CONCLUSION

Approval of the BDCP and finalization of the Draft EIR/EIS would violate NEPA, CEQA, ESA, NCCPA, the First Amendment, and the California Constitution. Under NEPA and CEQA, the EIR/EIS fails to discuss an adequate range of alternatives, provide adequate scientific support for its conclusions, and analyze significant impacts of the project. Under the ESA, the Draft BDCP and EIR/EIS indicate that operation of any of the alternatives would adversely

modify designated critical habitat, threatening the survival and recovery of listed species. As a conservation plan, the Draft BDCP fails to comply with ESA Section 10 and the NCCPA. Lastly, the removal of public comments on the BDCP website violated the First Amendment and California Constitution.

In California, we struggle to provide freshwater for our state's competing interests, which include wildlife conservation, agricultural production, and municipal water supply. The Sacramento-San Joaquin River Delta, a globally significant ecosystem, is in dire need of protection. The BDCP will continue to mismanage and further strain our limited resources. However, we still have time to develop a sustainable system of water management that will fulfill everyone's legitimate needs. Friends of the River urges you to go back to the drawing board and invite all interested parties to participate in the development of an improved water management system. If you have any questions about the points raised in this comment letter, please contact Robert Wright at (916) 442-3155 x207 or BWright@FriendsoftheRiver.org.

Sincerely,

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Senior Counsel

/s/ Patrick Huber
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Summer Law Clerk

/s/ Ara Karamian,
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/s/ Daniel Quinley
Summer Law Clerk

/s/ Rachel Miller
Summer Law Clerk

List of Attachments

1. Lety Belin, Personal Correspondence email, Feb 25, 2014. On file with author
2. David Beard, Personal Correspondence email, October 23, 2013. On file with author
3. Sacramento River Hydrologic Region Summary, California Water Plan Update 2013—Governor’s Draft (edited), *available at* http://www.waterplan.water.ca.gov/docs/cwpu2013/2014-rdt/1Vol2_SacramentoRiverRR_GovernorsDraft_Final_MT_FG_v2.pdf
4. Kyle Morgado, *Effects of Groundwater Pumping for Water Transfers on Groundwater Elevations in the Sacramento Valley and Modeling Stream/Aquifer Interactions Compared to Analytical Solutions* 79 (CSU Chico, 2012), *available at* <https://csuchico-dspace.calstate.edu/bitstream/handle/10211.4/600/4%2023%202013%20Kyle%20Morgado.pdf?sequence=1>
5. Table A4. Draft CASGEM Groundwater Basin Prioritization: Sorted by Basin Number, *California Groundwater Elevation and Monitoring Basin Prioritization Process*, Department of Water Resources, Draft December, 2013
6. California Dep’t of Water Resources, *Sacramento River Basinwide Water Management Plan*, Groundwater Hydrology 50 (2003) *available at* http://www.water.ca.gov/pubs/groundwater/sacramento_river_basinwide_water_management_plan/sacbasmgmtplan.pdf
7. CH2M HILL, Davids Engineering, & MBK Engineering, *Efficient Water Management for Regional Sustainability in the Sacramento Valley*, prepared for the Northern California Water Association 8 (2011), *available at* <http://www.norcalwater.org/wp-content/uploads/2012/01/Technicalreport-jul2011.pdf>
8. Delta Independent Science Board, *BDCP Analysis Review Panel Report*, issued March 17, 2014, *available at* http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Science-Independent-Review-Panel-Report-PHASE-3-FINAL-SUBMISSION-03132014_0.pdf
9. Delta Independent Science Board, *Delta Interior Flows and Related Stressors Workshop*, April 16-17, 2014, *available at* <http://deltacouncil.ca.gov/sites/default/files/documents/files/21-Jonathan-Rosenfield-Impact-of-Altered-In-Delta-Hydrodynamics-an-Overview.pdf>
10. Delta Independent Science Board, Review of the Draft EIR/EIS for the Bay Delta Conservation Plan, issued May 15, 2014, *available at* <http://deltacouncil.ca.gov/sites/default/files/documents/files/Attachment-1-Final-BDCP-comments.pdf>
11. Delta Stewardship Council Meeting, *ARCADIS’ Report on How the BDCP Addresses the Delta Reform Act’s Goals and Objectives*, May 29-30, 2014, *available at* <http://deltacouncil.ca.gov/docs/council-meeting/2014-05-22/delta-stewardship-council-may-29-30-2014-meeting-agenda-item-9-attach>
12. Delta Stewardship Council, *BDCP Comments*, June 24, 2014, *available at* <http://deltacouncil.ca.gov/sites/default/files/documents/files/BDCP%20Comments%20Cover%20Letter%20and%20Final%20BDCP%20EIR-S%20Comments.pdf>