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July 29, 2014

Ryan Wulff
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The Honorable Sally Jewell
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1849 C Street, N.W.
Washington, D.C. 20240

The Honorable John Laird
Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Comments on Bay Delta Conservation Plan
Implementing Agreement and Draft EIR/EIS

Ladies and Gentlemen:

I. Introduction:

By this letter, the San Joaquin River Exchange Contractors comment upon and object to the Draft Environmental Impact Report / Environmental Impact Statement (DEIR/EIS) and the draft Bay Delta Conservation Plan (BDCP). While the flaws in the BDCP and DEIR/EIS are numerous, this comment letter focuses on the most glaring: (1) the lack of assured funding for the BDCP and specifically for its Habitat Conservation Plan (HCP) and (2) the plan's failure to consider levee maintenance integral to the project. The San Joaquin River Exchange Contractors believe that compliance with NEPA, CEQA and the requirements of Federal Endangered Species Act (16 USC 1530 et seq) including the requirements of a valid HCP plan can only be accomplished if the proponents of this

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project prior to attempting to circulate and receive final comments upon the environmental examination implement and demonstrate their funding plan is feasible. Such a plan would assure that either the bond funds specified to be used for environmental mitigation have been placed upon statewide or local ballots for voter approval and approved in advance of the certification of the project so that the project and alternatives are accurately described or if the environmental mitigation and levee repair obligations are not to be funded by state voter approved bonds and repaid from state general funds, an alternative funding plan is shown to be feasible. Recirculation when the Project is accurately described and funding is approved by the voters will remedy these fundamental flaws.

The comments to this document will no doubt demonstrate by citation to judicial precedent, that there are many ways to say the obvious: CEQA, NEPA and the principles of Habitat Conservation Plans do not permit a project to be put forward which is not financially feasible, and depends on measures and mitigation devices which are not actually available. The NEPA, CEQA and HCP require facts, available and feasible mitigation and other measures and without those "facts" the project description is so uncertain as to not allow analysis of the impacts and alternatives. If the voters of the State do not authorize the funding of the environmental mitigation and use of existing authorized public debt, the repayment obligations can be assigned to specific parties benefitting from the project if it is feasible for them to bear those costs or the project must not be certified as correctly and accurately described. The idea of putting an approved environmental project on the shelf and awaiting a physical catastrophe in the Delta to fund the environmental mitigation contemplated is simply not in accordance with law.

II. The HCP May Not Rely on Speculative and Uncertain Funding Sources

The BDCP and its Habitat Conservation Plan (HCP) rely on many speculative and uncertain funding sources. The Federal Endangered Species Act only allows an incidental take permit to be issued if "the applicant will ensure that adequate funding for the [habitat conservation] plan will be provided." 16 U.S.C. § 1539(a)(2)(b)(iii) (emphasis added). This requires that the funding source not be speculative or uncertain. See e.g., *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1282 (reliance on speculation as to funding from third parties is arbitrary and capricious); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987) (action agency cannot "insure" project will not jeopardize species based on promise of future mitigation measures). To approve an HCP whose funding is not ensured because it

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is speculative or uncertain is arbitrary and capricious. See *Southwest Ctr. for Biological Diversity v. Barbel*, 470 F. Supp. 2d 1118, 1156-57; *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1282 (reliance on speculation as to funding from third parties is arbitrary and capricious). The California ESA similarly requires that funding for mitigation measures be "ensured." Cal. Fish & Game Code § 2081(b)(2), (4). The California Environmental Quality Act also requires that mitigation measures be feasible and "actually be implemented as a condition of development." 83 Cal. App. 4th 1252, 1260-61 (citing CEQA §§ 21002.1, 21081(b); CEQA Guidelines, § 15091(b)). The BDCP relies upon speculative and uncertain funding sources for implementing the required mitigation measures, including bonds that have yet to be proposed, let alone approved by voters; grant money that has not been rewarded or earmarked, from programs that aren't guaranteed to last the life of the BDCP; and speculative contributions from project contractors who have not made funding commitments.

State-issued general obligation bonds are heavily relied upon for BDCP funding. See BDCP at 8-67 to 8-69. The plan assumes that it will receive \$1.514 billion from what has turned out to be a highly contentious and uncertain water bond that will be included on the 2014 ballot, followed by an even larger amount (\$2.25 billion) in a yet to be proposed (let alone approved) water bond at some point in the future. See BDCP at 8-84 to 8-85. There is absolutely no certainty that this \$3.8 billion will ever be approved by voters. Indeed, the value of the 2014 water bond, its contents, and its chances for approval are currently a subject of great debate: Legislators have been proposing all manner of modifications to the 2014 water bond and many stakeholders have been demanding that the bond be "tunnel neutral" – that is, that the water bond not directly provide any funds for EIR/EIS twin tunnel planing, design or environment mitigation related to the BDCP. And, even if a bond is approved by voters, it would still be subject to bond validation challenges. Reliance on the approval of a contentious proposal by the voting public is far from the assurance of funding required by statute. The plan also makes many unrealistic assumptions about the availability of various grant funds, and the likelihood that they will be awarded to support the BDCP. See BDCP at 8-86 to 8-118. The document indicates that the plan or certain components "may be eligible" for certain grant monies. See, e.g., BDCP at 8-87, 8-89. In some cases, the plan acknowledges that the grant funds are already exhausted, but still assumes that they will be (or have been) directed toward components of the BDCP. See, e.g., 8-87. In other cases, the plan assumes that grant programs will continue for the entire duration of the 50-year project implementation period, and that the BDCP will receive significant grants each year, even though there is no guarantee that the grant programs will continue for the life of the project, let alone

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make consist awards to the project. See, e.g., BDCP at 8-92 (\$90 million over 50 years, based on seven years of past grants); 8-93 to 8-94 (\$100 million over 50 years, from a program that must be reauthorized every three years); 8-94 to 8-96 (\$100 million over 50 years from a program "likely to have some funding available," relying on part on "new sources"). And in other cases, the projected proportion of grant monies directed to the BDCP appears unrealistic compared to past practice. See, e.g., BDCP at 8-101 (in 2012, a program made IS grants totaling \$3 million; the BDCP assumes it will receive \$2 million per year from this program for the entire 50-year permit term. These optimistic assumptions only mask the reality: The funding sources for the BDCP are speculative and uncertain, and adequate funding is not "ensured."

Finally, the plan assumes that contractors of the State Water Project (SWP) and the Central Valley Project (CVP) will fund huge portions of the HCP, but there is scant assurance that they will actually do so. The BDCP indicates that SWP and CVP contractors will fund 100% of Conservation Measure 1. BDCP at 8-77, 9-74. However, the proportions that SWP Contractors and CVP Contractors will contribute has not been determined. BDCP at 8-70. The CVP contractors' participation is not assured at all-the plan only "anticipate[s]" participation from CVP contractors. BDCP at 8-73. The plan presumes that all of the SWP and CVP project water purchasing Contractors will agree to fund Conservation Measure 1 because that measure, standing apart from the other BDCP costs, "may" create economic benefits greater than the initial investment. BDCP at 8-80 to 8-82. The document asserts that the plan is "affordable" because the plan's annual costs are "small in relation to" the gross annual income of individuals living in counties that would benefit from the plan. BDCP at 8-81. It is far from assured that the Contractors' contributions, which are "essential" to the plan, will materialize as suggested in the planning document. BDCP at 8-82.

III. The Environmental Documents Ignore Maintenance Costs for a Major Project Component: Delta Levees

According to the planning documents, approximately half of all water exported to the south of the Delta would continue to flow through the Delta, and only half would flow through the new tunnels. Because half of the project water will flow through the Delta, Delta levees must be kept maintained and repaired in order to meet salinity requirements and maintain water quality at the south of Delta pumps. Levee failure in the Delta is a looming concern, and is one of the main justifications for the BDCP. Project proponents argue that if the levees failed in an earthquake, the north of Delta tunnel intakes are necessary to maintain a supply of fresh water to the south. e.g., BDCP at 6-34. However, the plan only provides maintenance funding for about 10% of Delta levees-those related

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to the HCP. BDCP at 4-27 to 4-28. Even though the other levees are necessary for the conveyance of about half the project water to the south Delta, their upkeep is not accounted for. The plan would leave maintenance and repair of this integral project component to local agencies and landowners. BDCP p. 6-35, theorizes that in the case of levee failures appropriate local agencies (i.e. reclamation districts) will provide for reclamation, repair of the islands and removal of flooding conditions. However, a large part of the land protected by these levees will have become owned by DWR the project proponent and how DWR would pay its share of rebuilding levees is not specified. The plan pays so little attention to the hundreds of miles of levees necessary for the operation of the BDCP that they were omitted from the DEIR/EIS project description. DEIR/EIS 3-64 to 3-69. The project description is, therefore, flawed because it fails to include this major component of the project. BDCP proponents cannot avoid responsibility for integral levee maintenance and repair by simply limiting the project description. *Rural Land Owners Association v. Lodi City Council*, 143 Cal. App. 3d 1013, 1025 (1983) or speculating that there will be sufficient funding for DWR to pay its share of the levee repair and rebuilding costs. A plan that proposes one half of the water exported pass through tunnels and one half be reliant upon levees has to candidly describe how the whole project is feasible, will work and if it does not have economic feasibility simply conclude by accurately describing the alternatives and their impacts. Here, the project description in removing the financial support for levee maintenance through public ownership of presently productive Delta lands and removing the economic support represented by the twin tunnel alternative conveyance must to accurately describe the project explain the likelihood of which levees will not be repaired and reclaimed and the effect upon the environment from the absence of those resources to locally support a functioning levee system.

IV. NMFS and USFWS cannot make the determinations to support an HCP which provides sufficient relief from the Federal Endangered Species Act. The Federal Government role and the financing uncertainty are fatal flaws.

In addition to the requirement that financing must be assured in order for mitigation and protection measures to be considered (*National Wildlife Federation v National Marine Fisheries Service*) D.Or 2003254 F.Supp. 2d 1196,1205, funding cannot be adequate if it simply speculates that actions of others will provide the funding or mitigation measures in the future. *Southwest Center for Biological Diversity v Bartel*, 470 F. Supp 2d (SD. Cal 2006) at 1118). San Diego HCP plan rejected because no reliable funding to acquire land for a preserve. Promises to cause bond funding in future inadequate) the Endangered Species Act itself requires that incidental take permits not be

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granted unless the financially feasible mitigation measures are assured. 16 USC Section 1539(a)(2)(B)iv requires that funding of those mitigation or environmental protection measures be assured as a condition of incidental take authority. Here, the CVP and Federal Government are not committed to a particular percentage of the project or environmental mitigation cost and no mechanism for funding that contribution is provided in the document. If the federal government is to appropriate funds and pay toward the costs of the project, the specific percentage and mechanism for payment must be described. Otherwise, the project takes on the image of a shell game in which the project plan is kept alive so that when and if an emergency condition arises, it can be pulled from the shelf and cited as finished even if the conditions described are never really assured to exist.

IV. Modeling of water operations must be accurate. It need not be perfect but errors which result in an improper project description must be corrected and the impacts of those changes quantified.

As the MBK Report describes, the modeling utilized understates the export of water by the CVP and SWP by approximately 210,000 acre feet per year and incorrectly models the allocation between the pumping at the head of the twin tunnels and the pumping amounts at the South Delta pumps dependent on levee integrity. MBK Report p. 6 and 7. This error potentially understates the effect on delta salinity and flows near the South pumping diversions. the Modeling failure to set forth exactly what alternatives and changes in the Coordinated Operating Agreement between the CVP and SWP project operations would accompany the BDCP also leaves the Project improperly described in terms of its potential environmental impacts.

V. Adaptive Management, Deferred Implementation, Decision Trees are not a substitute for or satisfaction of NEPA, CEQA and HCP requirements.

A project description must be "accurate, stable and finite" (Concerned Citizens of Costa Mesa 42 Cal 3d at p. 938) However, here the BDCP pp 3.6-22 and 25 makes clear that the Adaptive Management Team will change conservation measures or objectives as tools and resources are available. The Decision Tree is to determine delta outflow in the fall and spring yet, there is no decision or standards set forth as alternatives to judge whether SWP and CVP operations will be feasible. The decisions will be made apparently

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only after the construction and operation of the tunnels begins BDCP p 3.4-25 and EIS p 3-207 and 30-208. The operations of Shasta Dam, Folsom and Oroville as a result of the Project alternatives are not examined or their effects quantified because the project description simply assumes it is sufficient under the law to not ask for and obtain those requirements before drafting the EIR/EIS. Like funding, if there is a defined project, whether that plan's financial underpinnings are feasible and its water outflow underpinnings are feasible must be included in the EIR/EIS and HCP. The financing by current CVP and SWP purchased water contractors may have little water to purchase and thus be unable to support this project. A proper project description requires specific operational criteria to confirm financial feasibility before the payment of environmental mitigation in excess of conservation measures is assumable. The water operations anticipated must be first presented to the voters and the SWRCB to have a defined and specific project and to understand its environmental impacts and alternatives.

VI. Conclusion.

Many major funding sources that the project proponents rely upon are speculative, uncertain, or illusory. The project failed to identify funding for maintenance and repair of a necessary project component-the Delta levees-because it failed to even acknowledge that they are an integral piece of the plan. The mitigation and underlying flow and modeling of flows are so uncertain as to prevent a meaningful project description and consideration of impacts. This EIR/EIS is improper and inadequate and the HCP and the BDCP and its supporting documents must be disapproved due to these egregious errors. Recirculation is required when the voters have approved funding for the environmental improvements planned and the water operations are approved by the SWRCB as feasible.

Trying to put a project on the shelf on the basis of these documents as completing the EIR/EIS and HCP process so that it can be ignited and everyone will know what to do or forget to do as money gets short when there is a physical failure in the Delta is worse than a lack of preparation because it will give the impression of consideration of alternatives and impacts and cut off real examination of alternatives. If logic does not call for rejection of such a device, the law will.

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Very truly yours,

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By: 

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