



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

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August 13, 2013

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Jerry Meral
Deputy Secretary
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Addresses and additional Addressees at end of letter

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

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

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

MISLEADING PROJECT DESCRIPTION AND PROJECT SEGMENTATION

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

The EPA recognized that the Tunnels would be part of the problem not the solution. “Compared to the No Action alternative and existing conditions, many of the scenarios of the Preferred Alternative ‘range’ appear to decrease Delta outflow (p. 5-82), despite the fact that several key scientific evaluations by federal and State agencies indicate that more outflow is necessary to protect aquatic resources and fish populations.” (EPA Comments on Administrative Draft EIR/EIS, III. Aquatic Species and the Scientific Uncertainty).

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

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

CEQA Requirements

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

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

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

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

NEPA Requirements

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

ESA Requirements

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

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

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

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

CONCLUSION

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

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

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

Sincerely,

/s/ E. Robert Wright

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/s/ Katy Cotter

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