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September 25, 2013

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Jerry Meral
Deputy Secretary
California Resources Agency

Addresses and additional Addressees at end of letter

Re: Comment Letter/Supplementing our June 4, 2013 Comment Letter on Fundamental BDCP Process Violations of ESA, NEPA, and the Clean Water Act.

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

This is a comment letter to focus on the adverse modification of critical habitat for five Threatened and Endangered fish species, which would occur under the Bay Delta Conservation Plan (BDCP). This letter supplements our earlier comment letter to you of June 4, 2013. Under the BDCP, vast amounts of water will be diverted from the Sacramento River near Clarksburg, California. The water will be shipped through two tunnels roughly 35 miles south for the Central Valley and State Water Projects. As a result of this massive diversion, countless acre feet of water which would normally flow to the Sacramento-San Joaquin Delta (Delta) will now never reach the Delta. ***The BDCP Delta Water Tunnels project is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify critical habitat for five Endangered and Threatened fish species.***

With respect to the ESA, the water will never reach the designated critical habitat for five Endangered and Threatened fish species: 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.

The Sacramento River Winter-Run Chinook Salmon is listed as an Endangered species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River extending from River Mile 0 near the Delta to River Mile 302, which is far north of the proposed BDCP diversion near Clarksburg. 50 CFR § 226.204. The BDCP identifies reduced habitat due to water storage and water conveyance systems as a stressor and threat to the species. BDCP EIR-EIS Administrative Draft, 11A-47 (March 2013). Nevertheless, the BDCP proposes to divert massive amounts of water from the Winter-Run Chinook Salmon's critical habitat.

The Central Valley Spring-Run Chinook Salmon is listed as a Threatened species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0612, Long -121.7948, near Mile 0, upstream to Elk Slough (38.4140, -121.5212) in Clarksburg, California. 50 CFR § 226.211(k)(5)(i). The BDCP identifies several threats and stressors to the Central Valley Spring-Run Chinook Salmon, which include flow reductions causing increased water temperature and habitat elimination or degradation due to water conveyance systems. BDCP EIR-EIS Administrative Draft, 11A-83, 11A-76 (March 2013). In disregard of these threats and stressors, the BDCP proposes to worsen these effects by diverting water away from the Spring-Run Chinook Salmon's critical habitat.

The Central Valley Steelhead is listed as Threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0653, Long -121.8418, near Mile 0, upstream to Elk Slough in Clarksburg. 50 CFR § 226.211(l)(5). The BDCP states that threats and stressors to the Steelhead include water storage and conveyance systems as well as flow reductions contributing to increased water temperatures. BDCP EIR-EIS Administrative Draft, 11A-129, 11A-133 (March 2013).

The Southern Distinct Population Segment of North American Green Sturgeon is listed as Threatened under the ESA. 50 CFR § 17.11. Critical habitat for this species is designated to include the Sacramento–San Joaquin Delta including all waterways up to the elevation of mean higher high water within the area defined in California Water Code Section 12220. 50 CFR § 226.219(a)(3). The National Marine Fisheries Service's website provides a map displaying Green Sturgeon critical habitat:

<<http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/greensturgeon.pdf>>. The map indicates that the critical habitat includes the Sacramento River from Mile 0 near the Delta to upstream beyond the proposed intake site near Clarksburg. The BDCP identifies increased water temperatures and habitat loss as threats and stressors to the Green Sturgeon. BDCP EIR-EIS Administrative Draft, 11A-162 – 65 (March 2013).

The Delta Smelt is listed as Threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include “all contiguous waters of the legal Delta.” 50 CFR § 17.95–e–Fishes–Part 2. The US Fish and Wildlife Service's website provided a map displaying some of the Delta Smelt's critical habitat:

<http://www.fws.gov/sfbaydelta/maps/delta_smelt_critical_habitat_map.pdf>. The map indicates

that the Delta Smelt's critical habitat includes the Sacramento River near Mile 0 upstream to the proposed BDCP intake site near Clarksburg. The BDCP identifies several threats and stressors to the species, including water exports and increased water temperature. BDCP EIR-EIS Administrative Draft, 11A-8 – 11 (March 2013).

Pursuant to the commands of the ESA, each Federal agency "shall. . . insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." 16 U.S.C. § 1536(a)(2). "Actions" include "actions directly or indirectly causing modification to the land, *water*, or air." 50 C.F.R. § 402.02 (Emphasis added). As listed species, 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 each receive protection under the ESA. Further, their designated critical habitat also receives ESA protection.

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.

"The goal of the ESA is not just to ensure survival but to ensure that the species recover to the point it can be delisted." *Alaska v. Lubchenko*, 723 F.3d 1043, 1054 (9th Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004). "[T]he purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary to the species' survival but also essential for the species' recovery." *Gifford Pinchot*, 378 F.3d 1059, 1070. Moreover, "existing or potential conservation measures outside of the critical habitat cannot properly be a substitute for the maintenance of critical habitat that is required by Section 7 [of the ESA, 16 U.S.C. § 1536]." *Gifford Pinchot*, 378 F.3d 1059, 1076.

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. Please call Robert Wright at (916) 442-3155 x207 if you have any questions.

Sincerely,

/s/ E. Robert Wright
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/s/ Patrick Huber
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