



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

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Addresses and additional Addressees at end of letter

Re: COMMENT LETTER/Supplementing our June 4, August 13, and September 25, 2013 Comment Letters on Fundamental BDCP process Violations of ESA, NEPA and the Clean Water Act

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

This letter follows up our earlier comment letters to you of June 4, August 13, and September 25, 2013 (all posted on the Bay Delta Conservation Plan website) and our meeting with your representatives in Sacramento on November 7, 2013. We deeply appreciate the scientifically sound and insightful Red Flag and Administrative Draft comments made during the Bay Delta Conservation Plan (BDCP) process by the staff of the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), Bureau of Reclamation (Reclamation), and the Environmental Protection Agency (EPA). We appreciate the candor

reflected in previous staff written comments made despite the pressure to approve the Water Tunnels desired by the exporters regardless of the consequences.

As a result of the discussion at our meeting, it is now confirmed that the factual matters set forth in our September 25, 2013 comment letter are correct. *First*, it is correct that the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. Likewise, it is correct that the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA. *Second*, it is confirmed that 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 each of these five listed endangered and threatened fish species. *Third*, it is confirmed that no Biological Assessment (BA) has been prepared and issued by the federal Bureau of Reclamation with respect to the BDCP Water Tunnels project. *Fourth*, it is confirmed that no final or even draft Biological Opinion (BO) has been prepared by NMFS or USFWS with respect to the impacts of the operation of the BDCP Water Tunnels on the five listed species of fish or their critical habitats.

In a nutshell, commencing the public review period on a Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) in the absence of the Biological Assessments and Biological Opinions will violate the ESA requirement that each federal agency review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat, and enter into formal consultation if that is the case. 50 C.F.R. § 402.14(a). Such premature review will also violate the National Environmental Policy Act (NEPA) requirement that agencies prepare a draft EIS “concurrently with and integrated with environmental impact analyses and related surveys and studies required” by the ESA. 40 C.F.R. § 1502.25(a). Yet this premature and unlawful draft EIS/EIR public review process—confronting the public with biased advocacy documents depriving the public of the essential ESA required analyses prepared by the federal agencies—is exactly what is now intended with a planned release date for the draft EIS/EIR of December 13, 2013. Further, diversions of large quantities of water from the Sacramento River will certainly impair the critical habitat areas mentioned above to the extent that they will adversely modify critical habitat in violation of Section 7 of the ESA.

This year, NMFS reiterated its previous “Red Flag” comment that the Water Tunnels threaten the “potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit. . . .” (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013). In comments on the Administrative Drafts, the EPA explained that “many of these 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 Scientific Uncertainty, Federal agency Release, July 18, 2013). Even the BDCP Administrative Drafts prepared by the project proponents’ consultants admit that the operation of the Water Tunnels would have adverse

effects on the designated critical habitats for each of the five listed fish species. (BDCP Appendix 5.1, March 2013, Winter-Run Chinook Salmon p. 5.1-21; Spring-Run Chinook Salmon p. 5.1-29; Steelhead p. 5.1-, 37; Green Sturgeon p. 5.1-40; and Delta Smelt p. 5.1-12). ***The public will have what it does not need:*** unsupported advocacy from the consultants speculating that the adverse effects will be offset. ***The public will not have what it does need:*** the federal agency Biological Assessments and Biological Opinions required by the ESA.

Despite the fact that extinction is forever and that the ESA obligates federal agencies “to afford first priority to the declared national policy of saving endangered species,” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978), Reclamation, NMFS and USFWS are joining with the California Department of Water Resources (DWR) in allowing the release of a draft EIS/EIR for a 120 day public comment period commencing December 13, 2013. However, the public draft EIS/EIR will be “so inadequate as to preclude meaningful analysis,” requiring circulation of a revised draft down the road pursuant to the command of NEPA Regulation 40 C.F.R. § 1502.9(a). (All Regulation citations will be to the NEPA Regulations at 40 C.F.R. § 1500.1 et seq. unless otherwise indicated). We urge your agencies to take this last opportunity to withhold your approval of these documents until the ESA required analysis has been conducted.

THE DRAFT EIS/EIR ALTERNATIVE ANALYSIS WILL BE INADEQUATE UNLESS IT INCLUDES A TRUE ANALYSIS OF AN ALTERNATIVE THAT DOES NOT INCLUDE NEW CONVEYANCE

“[T]he alternatives analysis section is the ‘heart of the environmental impact statement.’” 40 C.F.R. § 1502.14. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). The purpose of the EIS process is to allow the public to weigh in on which feasible alternative is best for the environment and to afford the decision-makers the ability to make an informed choice among alternatives. Instead, this Draft EIS/EIR process avoids furnishing critical information required by the ESA: the Biological Assessments from Reclamation and the Biological Opinions, or at least Draft Biological Opinions, from NMFS and USFWS.

We urge you to review the “Responsible Exports Plan” proposed by the Environmental Water Caucus (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.¹ 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.

¹ The Responsible Exports Plan can be found on the Friends of the River web site here: <http://www.ewccalifornia.org/reports/responsibleexportsplanmay2013.pdf>

**THE DRAFT EIS/EIR WILL BE SO INADEQUATE AS TO PRECLUDE
MEANINGFUL ANALYSIS BECAUSE OF THE ABSENCE OF ESSENTIAL
INFORMATION REQUIRED BY THE ESA AND NEPA**

The Draft EIS/EIR cannot pass muster under NEPA or ESA because it does not have adequate information to contribute to a “meaningful analysis.”

“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). 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)(emphasis added). “[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. Also, “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. The failure to have the ESA required Biological Opinions analyzing the threatened adverse modification of critical habitats renders the Draft EIS/EIR essentially worthless as an environmental disclosure and informational document.

The ESA Regulations (40 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 California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013). 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.” *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 929-30 (9th Cir. 2008). Consequently, against this threat of extinction, conducting the draft EIS public review and comment stage without Biological Assessments or Biological Opinions leaves the public in the dark and violates both the ESA and NEPA. In the absence of the ESA required analyses, the draft EIS/EIR will be “so inadequate as to preclude meaningful analysis” in violation of NEPA. 40 C.F.R. § 1502.9(a).

**THE IMPACT ANALYSIS OF THE PREFERRED PROJECT—THE BDCP WATER
TUNNELS—IS CURSORY AND INADEQUATE**

NEPA requires that “Impacts shall be discussed in proportion to their significance.” 40 C.F.R. § 1502.2(b). NEPA specifically includes as factors in evaluating significance 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.” 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 in the Draft EIS that, 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, the Water Tunnels would not be a permissible or permissible project under the ESA.

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

**THE DRAFT EIS/EIR WILL BE SO INADEQUATE AS TO PRECLUDE
MEANINGFUL ANALYSIS BECAUSE OF ABSENCE OF ESSENTIAL WATER
QUANTITY AND QUALITY INFORMATION**

Like the absent analyses required by the ESA, the Draft EIS/EIR at this stage will also lack required water quantity and water quality analyses. 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 [California State Water Resources Control 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/deltaflow 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.

Those recommendations have not been the basis for the BDCP Water Tunnels Administrative Drafts and would preclude development of the Water Tunnels making that alternative infeasible pursuant to water quantity and quality considerations.

On the one hand, the BDCP process fails to base the preferred alternative on the SWRCB flow recommendations made pursuant to the Delta Reform Act. On the other hand, the BDCP process does not 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 has 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.

Consequently, the BDCP process has failed to conduct the water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water for the Water Tunnels required under the California Environmental Quality Act (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, as in the case of the absent ESA analyses, basic analyses will be absent essential to determine whether the BDCP Water Tunnels, DWR’s preferred project is even feasible, let alone environmentally acceptable. 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).

THE DRAFT EIS/EIR WILL BE SO INADEQUATE AS TO PRECLUDE MEANINGFUL ANALYSIS BECAUSE OF ABSENCE OF OTHER ESSENTIAL INFORMATION

At our November 7, 2013 meeting it was also confirmed that the Implementing Agreement (IA) will not be released with the draft EIS/EIR. The terms of the IA will be critical to informed public review of the preferred alternative. Consequently, the time for the public review period should not commence to run prior to release of the IA.

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, there is no cost-benefit study including an evaluation of alternatives 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 absent 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 being in the dark upstream, the BDCP process is also in the dark 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.”² Indeed, by reducing outflows from the Delta, the BDCP Water Tunnels would thereby reduce inflows into the Bay.

To sum it all up, the BDCP is at best ready for “scoping”. The public will not have adequate information to understand what this project is or would do to the environment, and the agencies will not have the analysis to support approval of such an expensive and dangerous to fish habitat and population project. There are more unanswered than answered questions about DWR’s preferred project, the Water Tunnels.

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, as well as the other missing analyses set forth above, the planned draft BDCP EIS/EIR will not be sufficient for informed review by the public and the decision-makers. It will be necessary at minimum under

² (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 ESA, NEPA and CEQA for the federal and state agencies to issue and circulate for public review a new draft EIS/EIR based on Biological Assessments and Biological Opinions. 40 C.F.R. § 1502.9(a) (NEPA); 14 Code Cal. Regs. § 15088.5(a)(CEQA). Then, and only then, would the public have the opportunity to engage in meaningful analysis of the preferred project alternative and informed comparison with other alternatives.

Please call Robert Wright, Senior Counsel, Friends of the River, (916) 442-3155x 207 with any questions you may have. Thank you for your anticipated attention to these issues.

Sincerely,

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