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

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June 4, 2013

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Addresses and additional Addressees at end of letter

Re: COMMENT LETTER/Fundamental BDCP Process Violations of ESA, NEPA and the Clean Water Act

Dear Federal Agencies, Officers, and Staff Members:

INTRODUCTION

Extinction is forever. Consequently, the Endangered Species Act (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); *see also, Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation,* 426 F.3d 1082, 1084-5 (9th Cir. 2005).

This is a comment letter to alert you to foundational violations of law and fundamental analytical deficiencies in the Bay Delta Conservation Plan (BDCP) process being carried out by the federal Bureau of Reclamation and California Department of Water Resources (DWR). Our concern is with the proposed Delta Water Tunnels and the devastating impact the diversions of freshwater for the Tunnels would have on the Delta, the Sacramento River watershed, and endangered fish species which are in catastrophic decline in Northern California. As recently

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explained 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). USFWS, National Marine Fisheries Service (NMFS), Environmental Protection Agency (EPA) and California Department of Fish and Wildlife (DFW) have submitted insightful and scientifically sound comments (also known as the "Red Flag" comments) on the Administrative Drafts of the BDCP. Your legitimate concerns have not been addressed by the BDCP lead agencies and have jeopardized your ability to complete your ESA obligations. The laws being violated or to be violated by the ongoing BDCP process include the ESA and National Environmental Policy Act (NEPA). The purpose of this letter is to summarize several of the most profound illegalities and deficiencies for you. We urge you to refrain from providing your stamp of approval on the BDCP and to keep pushing for an endangered species-centered approach towards Delta governance.

The Tunnels, both of which would be 40 feet in diameter and 35 miles long, would have the capacity to take 15,000 cubic feet per second (cfs) (though only three intakes with a total capacity of 9000 cfs are now planned at the start it would be easy to add two additional intakes down the road to achieve the total capacity of 15,000 cfs.). It is time for some common sense. It is hard to imagine that the exporters would pay the additional billions of dollars to construct the 15000 cfs Tunnels capacity ***unless*** the true plan and project is to operate at that level. That is an enormous quantity of fresh water approximately equal to the entire average summer flow of the Sacramento River at the location of the proposed new North intakes. Consequently, massive quantities of freshwater would be taken out of the Sacramento River upstream from the Delta near Clarksburg for the benefit of subsidized agricultural water interests south of the Delta.

The "take" of endangered species, which is prohibited by the ESA, includes "harm" as action constituting a "take." 16 U.S.C. § 1532(19). "Harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or shelter." 50 C.F.R. § 17.3 (USFWS ESA Regulations). The NMFS ESA Regulations add "spawning, rearing, migrating" to the means by which habitat modification or degradation kills or injures wildlife. 50 C.F.R. § 222.102.

In addition to prohibiting federal agency actions unless determined not likely to jeopardize the continued existence of any endangered species, Section 7 of the ESA ***also*** prohibits actions unless determined to not likely "*result in the destruction or adverse modification of [critical] habitat of such species. . . .*" 16 U.S.C. § 1536 (a)(2). (Emphasis added). "Actions" include "actions directly or indirectly causing modification to the land, *water*, or air." 50 C.F.R. 402.02 (Emphasis added).

The massive diversions of freshwater for the Delta Water Tunnels would result in the destruction or adverse modification of critical habitat-- the freshwater-- for several endangered fish species including: winter-run Chinook salmon, 50 C.F.R. § 226.204; Central Valley Spring-run Chinook salmon, 50 C.F.R. §§ 226. 211(a)(6), and 226.211(k)(5); and Central Valley steelhead 50 C.F.R. § 226.211(a)(7), and § 226.211(l)(5). The critical habitat areas designated for these species include the precise reaches of the Delta, the Sacramento River, and certain sloughs

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including Elkhorn, Georgianna, Miners, Steamboat, and Sutter sloughs that would be deprived of freshwater by reason of diversion upstream from the Delta for the Delta Water Tunnels.

The National Marine Fisheries Service (NMFS) recently reiterated its previous "Red Flag" comment that the Delta 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). That is just one of many critical issues that have been flagged by NMFS and USFWS as to how the Delta Water Tunnels would threaten endangered fish species. Given that the BDCP's adverse modification to critical habitat will jeopardize the continued existence of various endangered and threatened species and the lack of effective mitigation or alternatives analysis for such adverse modification, the BDCP cannot serve as the legitimate basis for any Section 7 analysis or Section 10 permits. Moreover, the BDCP process is unlawfully preceding rather than following the setting of new flow objectives under the Clean Water Act (CWA) and public trust doctrine, which all responsible agencies admit are essential to informing planning decisions for the Delta and the watershed.

THE BDCP IS NOT A LEGITIMATE HCP AND THE BDCP PROCESS VIOLATES THE ESA BY ATTEMPTING TO SUPPLANT ESA SECTION 7 REQUIREMENTS WITH LONG-TERM REGULATORY ASSURANCES

The BDCP is not a legitimate Habitat Conservation Plan (HCP) because it does not actually ensure the continued existence of the relevant endangered species. 50 C.F.R. § 17. The ESA only allows for incidental take when the overall purpose of the authorized action is to "enhance the propagation or survival of the affected species." 15 U.S.C. § 1539 (a)(1)(A). The BDCP will not enhance the propagation or survival of threatened Delta species. The purpose of the BDCP is to ignore the dire Delta ecosystem challenges by building around it rather than improve it. This is a rerun of the old "peripheral canal" that was blocked in June 1982 by a referendum vote of about 63% to 37%. The only difference now is that the exporters and the State claim they want to do this for the fish in spite of overwhelming evidence that the tunnels will destroy fish populations.

This entire process has up until recently been predicated on the untenable claim that taking more freshwater away from the Sacramento River upstream from the Delta and thus reducing flows would somehow be good for the endangered species of fish. We did not see any compelling evidence to support this unlikely conclusion. Now the process is predicated on the new claim that in the words of Jerry Meral, California Deputy Resources Secretary and lead State Official for the BDCP, "BDCP is not about, and has never been about saving the Delta. The Delta cannot be saved." (Sacramento Bee, p. A3, April 30, 2013). That statement is fully consistent with the April 11, 2013 response by the California Resources Agency to the reiterated Red Flag comment of the NMFS about the "potential extirpation of mainstem Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit" referred to above. The Resources Agency response basically writes off the salmon, pointing fingers at other conditions-- "climate change is going to cause challenging conditions for winter-run that BDCP alone cannot address." (Resources Agency response, April 11, 2013). If the State has determined that the Delta ecosystem cannot be saved and this assumption pervades the BDCP

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analysis, the plausibility that the BDCP can constitute an adequate HCP has been seriously undermined.

The State appears to have convinced itself that the future extirpation of the salmon is inevitable and blames other contributing, cumulative problems such as climate change. Fish and wildlife agencies cannot, however, merely resolve that the Delta ecosystem is ill-fated and throw up their hands; rather, they must implement feasible, effective mitigation measures and alternatives. The ESA does not allow such easy avoidance of its mandates. "[A]n agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action, that deepens the jeopardy by causing additional harm." *National Wildlife Federation v. National Marine Fisheries Service,* 524 F.3d 917, 930 (9th Cir. 2007). Given that the BDCP is intended to serve as the basis for the issuance of Incidental Take Permits, the fish and wildlife agencies must demonstrate additional, more rigorous analysis in fulfilling their ESA duties.[1]

ESA Section 7 consultation procedures are mandatory because the Bureau of Reclamation is a federal agency taking action with respect to the Delta Water Tunnels. The USFWS and NMFS must issue a Biological Opinion finding that the HCP does not jeopardize the continued existence of any endangered or threatened species. The BDCP process, however, is founded on the unlawful mixing, piecemealing, segmenting of the mandatory Section 7 consultation process with and from other Authorized Entities such as Westlands Water District ESA Section 10 processes. (Plan, 1-1). Other Authorized Entities such as Westlands are CVP water contractors through Reclamation. Because the areas that will be affected by the BDCP involve designated critical habitat for several species, the Services must not only reach a "no jeopardy" conclusion, but must also find that the action does not adversely modify these critical habitat areas. "[I]f the areas . . . [are] designated as critical habitat, any future section 7 consultation would be required to also determine whether the proposed action would destroy or adversely modify the critical habitat, *an inquiry that is broader than the jeopardy analysis*." *Center for Biological Diversity v. Bureau of Land Management* , 422, F.Supp.2d 1115, 1144-45 (N.D. Cal. 2006) (emphasis added). Removing freshwater deliveries from critical habitat areas and replacing it with dubious mitigation measures elsewhere will surely not satisfy ESA's mandates to refrain from adversely modifying critical habitat and avoiding jeopardy to the continued existence of endangered species.

In Chapter 6, NMFS and USFWS would tie their ESA Section 7 hands behind their backs for fifty years by way of Regulatory Assurances including the "No Surprises rule" for the water contractors. (Plan, 6-28, 29). The problem is that the BDCP does not contain convincing evidence that it will actually recover the species at issue and there are no guaranteed protective actions if species populations begin to crash. This approach lacks legal validity given that the BDCP will ensure the demise of the Delta ecosystem without anyone taking accountability.

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[1] "On the basis of the BDCP, USFWS and NMFS are expected to issue Section 10 permits. An integrated biological opinion (BiOp) on coordinated long-term operation of the CVP and SWP will be completed, and will incorporate the conservation strategy as part of its proposed action." (Administrative Draft BDCP, p. 1-7 (March 2013).

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This adulterated Section 7 consultation process, discussed below, coupled with a Section 10 "Habitat Conservation Plan" long-term Regulatory Assurances and the "No Surprises rule" for the exporters would be carried out in the face of declining water quality and declining populations of endangered fish species and admitted adverse impacts and scientific uncertainty with respect to taking additional massive quantities of freshwater out of critical habitat upstream from the Delta. Yet, the BDCP will free the contractors from any obligation to provide adequate water for fish, even if the BDCP fails to achieve recovery goals. This action would be astonishing in its scope and its trampling on the fundamental ESA federal agency obligation "to afford first priority to the declared national policy of saving endangered species." *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). This action if carried out would be so contrary to the language and purpose of the ESA as to raise the appearance of impropriety.

A function of ESA Section 10 HCP's is to allow private property owners to make economically viable use of their lands avoiding "Regulatory Takings" issues under the Fifth Amendment of the Constitution. Those issues could arise if such use would be prevented because of prohibitions against adversely affecting critical habitat for endangered species on the land owners' property. No such issues are present here. The contractors do not own the water in the Sacramento River and the Delta. The water is a public resource. Even the permits for use of the water are held by the Federal and State governments— not the contractors.

The contractors also have little to do with the HCP's mitigation funding; thus, the proposed mitigation is largely untied to the Delta Water Tunnels. According to the Plan, "Funding from a variety of state and federal sources will be available to pay for the majority of the conservation measures that will provide the substantial public benefits of the BDCP." (Plan, 1-2). The public— meaning the taxpayers— would pay for the conservation measures as well as for mitigating all effects resulting from the new upstream Delta Water Tunnels conveyance with the exception of the project footprint itself. More importantly, there is no convincing evidence that the proposed conservation measures will actually protect and restore endangered fish species. It is well-understood that healthy ecosystems require healthy river flows.[2] Given this premise, habitat restoration on the ground is not a substitute for taking away crucial freshwater habitat. Consequently, there is no nexus between either the fish or the contractors and the BDCP mitigation and conservation measures.

Given all of these circumstances, the mixing and segmenting of the mandatory Reclamation ESA Section 7 consultation process with and from the ESA Section 10 Regulatory Assurances for the contractors would violate the ESA. Regulatory Assurances and the "No Surprises Rule" have no place here, most notably because the decline of Delta fish species is not an "unforeseen circumstance,"[3] -- it is all but assured with the passage of the BDCP. Likewise, the Delta Water tunnels have no place in an HCP. The Tunnels need to be removed from the HCP. Your agencies can approve the BDCP if you find that it "will not appreciably reduce the

[2] California Water Solutions Now, "A Report From Member Organizations of the Environmental Water Caucus," Third Edition, 2011.
[3] 50 C.F.R. § 17.

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likelihood of the survival and recovery of the species in the wild." 16 U.S.C.A. § 1539. (a)(2)(B)(iv). There is simply no evidence in the BDCP to support such a conclusion.

THE BDCP PROCESS VIOLATES THE ESA BY SUBSTITUTING ADVOCACY FOR REASONED ENVIRONMENTAL EVALUATIONS AND BY POSTPONING THE ESA SECTION 7 CONSULTATION PROCESS UNTIL AFTER THE BDCP DECISION IS MADE TO CONSTRUCT THE DELTA WATER TUNNELS

The Supreme Court has explained that "The obvious purpose of the requirement [in ESA § 7(a)(2)] that each agency 'use the best scientific and commercial evidence available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear,* 520 U.S. 154, 176 (1997). The BDCP advocacy documents are riddled with speculation and surmise.

The basic legal problem that the NMFS and USFWS face in attempting to review the BDCP Plan administrative draft documents is that the cart has unlawfully been placed before the horse. The Plan recites that it will "provide the basis for a biological assessment (BA) that supports new ESA Section 7 consultations between the U.S. Department of the Interior, Bureau of Reclamation (Reclamation), USFWS and NMFS. The parties seeking take authorizations pursuant to the BDCP and the associated biological assessments are referred to as the *Authorized Entities.*" In addition to including seven federal and state water contractors such as Westlands Water District the authorized entities also include the Bureau of Reclamation and DWR.

The consultations need to go before not after the BDCP process. The ESA Section 7(a)(2) prohibitions against jeopardy of continued existence of any endangered species and against "destruction or adverse modification of habitat of such species" is effectuated by consultation and assistance by the NMFS and USFWS with the subject federal action agency. 16 U.S.C. § 1536(a)(2). Here, the federal action agency is Reclamation. Additionally, in fulfilling the requirements of Section 7(a)(2) "each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Biological assessments are required under 16 U.S.C. § 1536(c)(1). It is improper to rely entirely on the BDCP documents to fulfill your discrete and independent obligations to conduct a Biological Assessment, a Section 7 consultation, a Biological Opinion (including a Reasonable Prudent Alternatives Analysis), and an HCP.

The joint NMFS and USFWS Regulations provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R.§ 402.03. "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)(first emphasis added, second emphasis in opinion), *cert. den.,* 133 S.Ct. 1579 (2013), quoting 50 C.F.R. 402.14(a). The term "agency action" under the ESA is to be construed broadly. *Karuk Tribe,* 681 F.3d at 1021. "Agency Action" includes programmatic plans. *Pacific Rivers v. Thomas,* 30 F.3d 1050, 1053-4 (9th Cir. 1994); *Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 623 F.Supp.2d 1044, 1052, 1054 (N.D. Cal. 2009). In addition to consultation and preparation of a biological assessment, formal consultation including preparation of a Biological Opinion beyond that contained in the BDCP are plainly required here.

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The starting point for analysis under the ESA formal consultation process is data and information supplied by the federal agency followed by NMFS and USFWS evaluations of the status of listed species and critical habitat and the effects of the action and cumulative effects on the listed species and the critical habitat. 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).

In this setting of taking away massive quantities of freshwater from the critical habitat for the fish coupled with cumulative effects ranging from rising sea levels to changes in upstream reservoir operations to reducing flushing of the Delta, the Delta Water Tunnels would be the final nail in the coffin for endangered species of fish ranging all the way from where the Delta meets the Bay, upstream through the Sacramento River and sloughs to the Shasta, Trinity, Oroville, and Folsom reservoirs. This extinction crisis cries out for additional ESA Section 7 consultations, biological assessment, formal consultation and the Biological Opinions that go beyond the information provided in the BDCP.

To proceed in a manner required by law, Reclamation, NMFS and USFWS need to withdraw from or suspend participation in the BDCP process. The next step would be to carry out the ESA Section 7 process including consultation, biological assessment, formal consultation and a Biological Opinion by NMFS and USFWS. This process should, at the very least, include a new alternatives analysis that analyzes options that would actually help sustain and recover endangered species. Then, and only then, would there be an adequate informational and analytical basis for a BDCP evaluation of which alternative to choose ranging from the Environmental Water Caucus (EWC) and Friends of the River reduced exports and no new conveyance alternative up to the massive 15,000 cfs Delta Water Tunnels alternative. It should be noted that both the EWC and Portfolio alternatives are 21st Century alternatives calling for increased water conservation and recycling to meet future water supply needs. The BDCP process postponing legitimate habitat and endangered species evaluation until after the horse is out of the barn violates both the spirit and the language of the ESA.

BDCP PROCESS VIOLATIONS OF LAW INCLUDE FAILURES TO PERFORM CLEAN WATER ACT AND PUBLIC TRUST DOCTRINE ANALYSIS AND TO SET FLOW OBJECTIVES

The BDCP process is upside down under the Clean Water Act (CWA) and California state law as well as under the ESA. The decision whether to select the Delta Water Tunnels alternative needs to await California State Water Resources Control Board (SWRCB) performance of Clean Water Act and public trust doctrine analysis including the setting of flow objectives necessary to preserve the Delta, the rivers, and the endangered fish species. That needs to be done before, not after, a tragic, foundational decision is made choosing the alternative of developing massive new upstream conveyance—the Delta Water Tunnels. As explained by EPA in its recent 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, pp. 1-2, March 28, 2013)

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The Delta Reform Act requires in pertinent part 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)(emphasis added).

The determination of flow criteria by the SWRCB has ***not*** been done. The federal agencies participate in the SWRCB processes. The SWRCB process is the correct one to set flow objectives as opposed to the BDCP Delta Water Tunnels process. Moreover, SWRCB determined water quality standards are then subject to EPA review for approval or disapproval under section 309 of the Clean Water Act. The BDCP process is simply a DWR effort to make a premature and unlawful decision to develop the massive Delta Water Tunnels before rather than after determining whether updated flow objectives would even allow such quantities of water to be diverted upstream away from the Delta. Selection of the Tunnels alternative is a planning decision. By law, BDCP planning decisions must be informed by SWRCB determinations. The most important BDCP planning decision to ever be made--whether or not to construct new upstream conveyance--cannot be made lawfully until the SWRCB determinations have been made.

Because the BDCP process is trying to push forward with the Delta Water Tunnels before rather than after SWRCB Clean Water Act and public trust doctrine analysis and setting of new, stricter flow objectives, and EPA review thereof, the BDCP process has, consequently, also failed to conduct the water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water required under the California Environmental Quality Act (CEQA) according to 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).

In the absence of completion of SWRCB proceedings and EPA review regarding water availability, public trust doctrine analysis, and determination of new, stricter flow objectives, there is not the informational and scientific basis to sustain selection of the Delta Water Tunnels alternative under NEPA, CEQA or the ESA.

CONCLUSION

The BDCP process is fatally flawed with foundational illegalities that will not be subject to dismissal or evasion by way of responses to comments on a future draft EIS/EIR. In the absence of the required ESA Biological Assessment, Formal Consultations and Biological Opinions and in the absence of completed SWRCB proceedings and EPA review thereof a draft BDCP EIS/EIR would not be sufficient for informed review by the public and the decision-makers. It is time now for the federal agencies to withdraw from the unlawful BDCP process and follow ESA Section 7 and federal Clean Water Act and California CEQA and public trust doctrine procedures.

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Please call Robert Wright, Senior Counsel, Friends of the River, (916) 442-3155 x207 with any questions you may have. We would be happy to meet with you in person to answer questions you may have. Thank you in advance for your anticipated attention to the grave issues raised by this comment letter.

Sincerely,

/s/ E. Robert Wright

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